ISSN 1015-5074

REVISTA IIDH

Enero - Junio 2019

69

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INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS
INSTITUT INTERAMÉRICAIN DES DROITS DE L'HOMME
INSTITUTO INTERAMERICANO DE DIREITOS HUMANOS
INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS

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IIDH

Instituto Interamericano de Derechos Humanos
Institut Interaméricain des Droits de l'Homme
Instituto Interamericano de Direitos Humanos
Inter-American Institute of Human Rights

Revista
341.481
Revista IIDH/Instituto Interamericano de Derechos
Humanos.-Nº1 (Enero/junio 1985)
-San José, C. R.: El Instituto, 1985-
v.; 23 cm.

Semestral

ISSN 1015-5074
1. Derechos humanos-Publicaciones periódicas

Corrección de estilo: José Benjamín Cuéllar M.

Portada, diagramación y artes finales: Marialyna Villafranca Salom

Impresión litográfica: Litografía Versalles

La Revista IIDH acogerá artículos inéditos en el campo de las ciencias jurídicas y sociales, que hagan énfasis en la temática de los derechos humanos. Los artículos deberán dirigirse a: Editores Revista IIDH; Instituto Interamericano de Derechos Humanos; A. P. 10.081-1000 San José, Costa Rica.

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Publicación coordinada por Producción Editorial-Servicios Especiales del IIDH

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Índice

Presentación

El Instituto Interamericano de Derechos Humanos (en adelante "el IIDH") presenta el número 69 de su revista institucional. En esta oportunidad, la edición no se limitó a una sola temática sino que recoge artículos en diversas materias relevantes para la realidad de nuestra región. Adicionalmente, tomando en cuenta las cuestiones de inseguridad y desigualdad que aquejan a varios países dentro de la misma –generadoras de amenazas que han obligado a migrar a cientos de miles de personas– así como los desafíos que esto implica para la garantía de derechos, es que también se han incluido opiniones especializadas en lo relativo a la movilidad humana, los movimientos migratorios, los desplazamientos internos y fronterizos así como de las solicitudes de refugio. Todo ello, en el ámbito de los derechos humanos.

Este número de la Revista también resulta especial, ya que es el primero que se publica bajo la consideración de su recién constituido Consejo Consultivo Editorial (en adelante "el CCE") presidido por don Antônio A. Cançado Trindade y con la participación de Mónica Pinto, Margaret Crahan, Fabián Salvioli y Renato Zerbini, quienes gracias a su trayectoria y relevantes aportes al movimiento regional de derechos humanos favorecerán el fortalecimiento permanente de esta publicación oficial.

En tal sentido, es un gusto para el IIDH presentar los artículos que forman parte de este número e invitar a la comunidad académica a que utilice estos recursos para la promoción y protección de derechos humanos que realicen desde sus propias prácticas y mandatos.

Para empezar, es de gran valía contar en el presente número con dos artículos escritos por miembros del CCE. Al respecto, Antônio A. Cançado –autor de *L'EXPANSION DE LA JURIDICTION ET LA RESPONSABILITÉ INTERNATIONALES ET LA PRIMAUTÉ DU DROIT*– identifica la evolución del derecho internacional contemporáneo y reconoce la necesidad de enfrentar los nuevos desafíos que se plantean; asimismo, aborda la temática de la expansión de la jurisdicción en la búsqueda de la realización de la justicia, la responsabilidad y el Estado de derecho en el ámbito internacional.

Por su parte, Fabián Salvioli –en *La protección de los derechos humanos en la Organización de las Naciones Unidas: historia y actualidad*– nos invita a recorrer la evolución de los derechos humanos motivada por la necesidad de su universalización, desde la preocupación internacional por los crímenes cometidos en la Segunda Guerra Mundial hasta los mecanismos de tutela de derechos humanos vigentes y las problemáticas actuales a las que se han tenido que enfrentar los Estados miembros de la Organización de las Naciones Unidas.

Por otro lado, Goodfred Schwendenwein –autor de *Restricción del derecho a voto de las personas privadas de libertad. Una aproximación socioeconómica*– puntualiza cómo las personas privadas de libertad son invisibilizadas y sus derechos políticos vulnerados bajo el paradigma del castigo del sistema carcelario, al limitárseles en algunos países su derecho al voto. Asimismo, explora las posturas que las naciones podrían adoptar al respecto en congruencia con la democracia y los valores que intentan proteger los derechos humanos.

Raimy Reyes, en *The case of Gelman v. Uruguay: a case of human trafficking,* visibiliza las diversas formas de esclavitud

moderna en contraste con los derechos humanos que intentan prohibirlas. Examina cómo se ha interpretado el artículo 6 de la Convención Americana sobre Derechos Humanos (en adelante "la Convención Americana") en diversos casos; en ese marco, argumenta que los hechos ocurridos en el caso de Gelman contra Uruguay constituyeron trata de personas y explica cómo considera que la Corte Interamericana de Derechos Humanos (en adelante "la Corte IDH") debió haber determinado y declarado la responsabilidad del Estado.

En *El uso de la fuerza en la jurisprudencia de la Corte IDH: retos para una garantía adecuada de los derechos humanos*, Emilio G. Terán Andrade analiza la coerción estatal considerando el rol de las instituciones, el funcionariado y las sentencias que ha emitido la Corte IDH; además, identifica los estándares internacionales y la jurisprudencia regional en torno al uso de la fuerza. Finalmente, realiza un estudio sobre los retos que se han encontrado en el camino para garantizar los derechos humanos –de manera efectiva– cuando se deba emplear la fuerza.

María José Jara Leiva, en *Beneficios penitenciarios a condenados por delitos de lesa humanidad,* analiza su otorgamiento a la luz de los estándares del sistema interamericano de derechos humanos (en adelante "el sistema interamericano"); asimismo, evidencia las tensiones que pueden existir entre la necesidad de otorgar dichos beneficios y el deber estatal de sancionar a los responsables de graves violaciones de derechos humanos. Al respecto, la autora explica la solución que ha entregado la Corte IDH conciliando ambas obligaciones internacionales y buscando que se disminuyan las tensiones surgidas en tal escenario; también, facilitando la labor de los jueces internos al momento de ejercer el control de convencionalidad y ofreciendo una sistematización de los criterios respectivos.

Mariane Monteiro da Costa, en *O Sistema Interamericano de Direitos Humanos e a Paz na América Latina,* plantea cómo este contribuye a la búsqueda y la consolidación de tal aspiración en la subregión. Asociando lo anterior con la Convención Americana, realza la importancia de la participación de los Estados en la protección de los derechos humanos y argumenta cómo el sistema interamericano puede corroborar la paz en la región a partir de dos casos litigados en la Corte IDH.

Pascal Jean-Baptiste, en *La condition juridique de l'individu comme sujet de droit dans le droit interaméricain des droits de l'homm,* analiza diferentes perspectivas de la condición jurídica del individuo como sujeto de derecho en el ámbito interamericano. El estudio avanza desde la concepción de la persona como sujeto del derecho internacional, el derecho interamericano (su normativa y particularidades procedimentales), y las distinciones entre los "sujetos de derechos" y "titulares de derechos". Tras el análisis, se plantean los escenarios y debates que de acuerdo a la concepción de la condición jurídica del individuo que se tenga, podrían permitir –o no– el acceso directo de la persona a la Corte IDH a futuro.

Por otra parte, en el ensayo *Movilidad humana y derecho a la seguridad social: una sinergia urgente y necesaria*, los autores Valentina Lucio Paredes Aulestia y Víctor D. Cabezas Albán abordan los orígenes, el desarrollo, los principios y las principales prestaciones de la seguridad social. A partir de ello, exploran el tratamiento que se le ha dado a esta en los diversos sistemas de derechos humanos. Analizan también los estándares aplicables en el contexto de procesos de movilidad humana y examinan las directrices de los organismos internacionales especializados, así como las experiencias que los países han desarrollado para su garantía. Finalmente, presentan recomendaciones concretas

para que los Estados puedan diseñar políticas públicas sobre la materia en el contexto de procesos de movilidad humana.

Las coautoras María Soledad Figueroa y María José Marcogliese –en *Visas humanitarias. La experiencia del Programa Siria en Argentina*– ante las situaciones de desplazamiento humano forzado, presentan y discuten esta como respuesta para el caso argentino. En ese marco, examinan el desarrollo de la implementación de programas de visas humanitarias en áreas de conflicto armado con la finalidad de favorecer la coordinación y el apoyo entre distintos actores de la sociedad civil, individuos y gobiernos, utilizando como referencia el caso sirio.

En *Protección internacional en zonas de frontera: revisión de políticas estatales a la luz de las decisiones de los sistemas europeo e interamericano de protección de derechos humanos*, César Francisco Gallegos Pazmiño expone los conflictos a los que se enfrentan los Estados cuando por una parte tienen que lidiar con sus compromisos de derecho internacional, a la vez que ejercen soberanía sobre sus fronteras. Al respecto, el autor examina la forma en que los Estados tratan a las y los solicitantes de asilo que buscan ingresar a su jurisdicción territorial, en contraste con la manera cómo deberían tratarlos.

En *Desplazamiento interno, ambiente y derechos humanos en América Latina*, las autoras Fernanda de Salles Cavedon-Capdeville y Erika Pires Ramos junto a Ignacio Odriozola, abordan la temática de la movilidad humana en América Latina que es producto del cambio climático generador de riesgos y desastres naturales. Puntualizan la urgencia de adoptar medidas al respecto, ante la inexistencia actual de instrumentos internacionales o regionales vinculantes que reconozcan y protejan a las personas desplazadas por motivos ambientales.

Finalizo esta presentación agradeciendo a la cooperación noruega que hace posible la producción y difusión de la Revista, al CCE por sus aportes y valoraciones, y a las autoras y los autores por los artículos que elaboraron para esta nueva edición, los que valiosamente contribuyen al debate y a la búsqueda de soluciones en lo relativo a asuntos de actualidad y relevancia en el campo de los derechos humanos.

José Thompson J.
Director Ejecutivo, IIDH

The case of *Gelman v. Uruguay*: a case of human trafficking

*Raimy Reyes**

1. Introduction

The International Labour Organization in 2016 estimated that 40.3 million people were in modern-day slavery, including 24.9 million in forced labour and 15.4 million in forced marriage.[1] The various forms of modern-day slavery, such as forced labour and human trafficking, undeniably constitute an atrocious crime against the individual and are a continuous violation of multiple human rights.

In the Americas, according to figures from the United Nations Office on Drugs and Crime, between 2010 and 2012, children accounted for 30% of identified victims of trafficking, while adults were the remaining 70% of the victims (50% women and 20% men).[2] Today, most of the countries in the region have specific legislation in line with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially

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1 International Labour Organization, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*. Geneva: ILO, 2017. Available at: https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf .

2 United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons 2014*. United Nations publication, Sales No. E.14.V.10, p. 71. Available at: http://www.unodc.org/documents/data-and-analysis/glotip/GLOTIP_2014_full_report.pdf.

Women and Children.[3] Nonetheless, the criminal justice response against human trafficking is less than desired. For example, statistics show that only the United States and Peru reported more than 50 convictions for trafficking in persons per year, while some countries in Central America and in the Caribbean did not report a single conviction.[4]

The prohibition of trafficking in persons and other contemporary forms of slavery is part of customary international law and *jus cogens*.[5] In the Inter-American System of Human Rights (IASHR), Article 6 of the American Convention on Human Rights (ACHR) absolutely prohibits slavery and involuntary servitude in all their forms, as well as trafficking in women and the slave trade. This Convention has been ratified by 23 of the 35 Member States of the Organization of American States.[6]

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3 UNODC, *Global Report on Trafficking in Persons 2014, supra* note 2, p. 75.

4 UNODC, *Global Report on Trafficking in Persons 2014, supra* note 2, p. 77.

5 *See*: 1815 Declaration relative to the Universal Abolition of the Slave Trade; 1904 International Agreement for the Suppression of the White Slave Traffic; 1910 International Convention for the Suppression of the "White Slave Traffic"; 1921 League of Nations International Convention for the Suppression of the Traffic in Women and Children; 1926 League of Nations Slavery Convention; 1933 League of Nations International Convention for the Suppression of the Traffic in Women of Full Age; 1949 United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; and the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children.

6 The 23 OAS Member States that have ratified the American Convention are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay. Trinidad and Tobago and Venezuela also ratified the American Convention but later denounced it, having effect in 1999 and 2013, respectively. *See*: IACHR, Annual Report 2015, *Introduction: Status of Ratification of Inter-American Instruments*, available at: http://www.oas.org/en/iachr/docs/

Although both the Inter-American Court of Human Rights (I/A Court) and the Inter-American Commission on Human Rights (IACHR) have the legal framework to process and decide cases based on a State's failure to respect and guarantee the right of persons within their jurisdiction not to be subject to human trafficking, to date neither has decided a case that declared a violation of Article 6 of the American Convention on that basis. Nonetheless, the System has interpreted the prohibition of slavery, involuntary servitude and human trafficking through its different mechanisms, such as country, thematic and annual reports, advisory opinions and the case and petition system.[7]

For instance, the IACHR has found that trafficking involves violations of other human rights, such as the rights to life, personal integrity, the prohibition against torture and other cruel, inhuman or degrading treatment, liberty and personal security, the protection of honour and dignity, freedom of expression, children's rights, the right of women to a life free of violence, to private property, equality before the law and access to effective justice, and other rights recognized in inter-American instruments. As a result, human trafficking and slavery-like practices represent a violation of a multiple or continuous character, which is maintained until the victim is released.[8]

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annual/2015/TOC.asp.

7 *See*: IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, OEA/Ser.L/V/II. Doc. 58. December 24, 2009; IACHR, *Human Rights of Migrants and others in the Context of Human Mobility in Mexico*. OEA/Ser.L/V/II. Doc. 48/13. December 30, 2013; I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318; I/A Court H.R., *Advisory Opinion OC-21/14: Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21; I/A Court H. R., *Case of Ramírez Escobar et al. v. Guatemala*. Merits, Reparations and Costs. Judgment of March 9, 2018. Series C No. 351.

8 IACHR, *Human rights of migrants (...) Mexico*, supra note 8, paras. 350 and 351.

We will examine here the prohibition of slavery, involuntary servitude and human trafficking in the IASHR. First, we will study the legal framework against human trafficking provided in international and inter-American human rights instruments; second, we will examine how the System has interpreted Article 6 of the American Convention; finally, we will analyse and demonstrate how the facts presented in the case of *Gelman v. Uruguay* constituted human trafficking and how the Inter-American Court should have determined and declared State responsibility.

1. International instruments on the subject of human trafficking

At the international level, multiple instruments have addressed and expressly prohibited trafficking in persons. At the universal, regional and domestic levels, slavery in all its forms is now considered to be contrary to human dignity and its prohibition is customary international law and *jus cogens*. We will first observe how the prohibition of slavery attained such status and then refer to the most relevant international instruments that currently address human trafficking.

a) The prohibition of slavery, involuntary servitude and human trafficking as jus cogens

The *jus cogens* prohibition of slavery and slavery-related practices begins with the 1815 Declaration relative to the Universal Abolition of the Slave Trade,[9] which is the first

9 Declaration of the Eight Courts (Austria, France, Great Britain, Portugal, Prussia, Russia, Spain and Sweden) relative to the Universal Abolition of the Slave Trade,

international instrument to condemn slavery.[10] Slavery was first defined in the Slavery Convention adopted by the League of Nations in 1926, as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[11] It has been estimated that between 1815 and 1957 some 300 international agreements were implemented to suppress slavery, replicating this definition to some extent.[12]

Both the League of Nations and its successor, the United Nations, have actively worked to eliminate slavery and slavery-related practices. As a result, it is now a well-established principle of international law that the "prohibition against slavery and slavery-related practices have achieved the level of customary international law and have attained *jus cogens* status."[13] The

signed at Vienna, 8 February 1815. Available in French at: http://opil.ouplaw.com/view/10.1093/law:oht/law-oht-63-CTS-473.regGroup.1/63_CTS_473_fra.pdf.

10 Office of the United Nations High Commissioner for Human Rights (OHCHR), *Abolishing Slavery and its Contemporary Forms*, HR/PUB/02/4, United Nations, 2002. Available at: http://www.ohchr.org/Documents/Publications/slaveryen.pdf.

11 Slavery Convention. League of Nations, signed at Geneva on 25 September 1926. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx.

12 *See*: 1815 Declaration relative to the Universal Abolition of the Slave Trade; 1904 International Agreement for the Suppression of the White Slave Traffic; 1910 International Convention for the Suppression of the "White Slave Traffic"; 1921 League of Nations International Convention for the Suppression of the Traffic in Women and Children; 1926 League of Nations Slavery Convention; 1933 League of Nations International Convention for the Suppression of the Traffic in Women of Full Age; 1949 United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; OHCHR, *Abolishing Slavery and its Contemporary Forms*, *supra* note 11, para. 5.

13 Human Rights Committee, *General Comment 24 (52), reservations to the ICCPR*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 8; OHCHR, *Abolishing Slavery and its Contemporary Forms*, *supra* note 10, para. 6; Cherif Bassiouni, "*Enslavement as an International Crime*", New York University Journal of International Law and Politics, vol. 23, 1991, p. 445; Yearbook of the International Law Commission 1963, vol. II, United Nations sales publication No. 63.V.2,

International Court of Justice has also identified protection from slavery as one example of the obligation *erga omnes* "in view of the importance of the rights involved."[14]

Among the instruments that prohibit slavery and slavery-related practices are the following: the Universal Declaration of Human Rights (Art. 4); the International Covenant on Civil and Political Rights (Art. 8); the International Covenant on Economic, Social and Cultural Rights (Art. 6); the Rome Statute of the International Criminal Court (Art. 7); and, most recently, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ("Trafficking Protocol"), which typifies one of the most prominent slavery-related practices: human trafficking.

b) *"Trafficking Protocol"*

While a wide variety of international legal instruments contain standards and practical measures to combat slavery and slavery-related practices, the Trafficking Protocol, also known as the "Palermo Protocol," is the universal instrument that addresses issues of human trafficking. The purposes of the Protocol are to prevent and combat trafficking in persons; to protect and assist the victims of such trafficking, with full respect for their human rights, and to promote cooperation among States Parties in order to meet those objectives.[15]

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pp. 198-199; A. Yasmine Rassam, "*Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*", Virginia Journal of International Law, vol. 39, 1999, p. 303.

14 ICJ, *Barcelona Traction, Light and Power Co, Ltd. (Belgium v. Spain*), Judgment of 5 February 1971, p. 32.

15 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially

The Trafficking Protocol, which was adopted on November 15, 2000 during the United Nations General Assembly's fifty-fifth session, entered into force on December 25, 2003. At present, 169 States are party to it.[16] All 35 OAS Member States have ratified the Trafficking Protocol.[17]

The Protocol provides the first clear definition of trafficking in international law.[18] Article 3(a) defines trafficking in persons as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a

Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Adopted by General Assembly resolution 55/25 of 15 November 2000, Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 49 (A/45/49), vol. I, article 2.

16 UN, Databases, Treaty Collection, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en.

17 Antigua and Barbuda (17 Feb 2010), Argentina (19 Nov 2002), Bahamas (26 Sep 2008), Barbados (11 Nov 2014), Belize (26 Sep 2003), Bolivia (18 May 2006), Brazil (29 Jan 2004), Canada (13 May 2002), Chile (29 Nov 2004), Colombia (4 Aug 2004), Costa Rica (9 Sep 2003), Cuba (20 Jun 2013), Dominica (17 May 2013), Dominican Republic (5 Feb 2008), Ecuador (17 Sep 2002), El Salvador (18 Mar 2004), Grenada (21 May 2004), Guatemala (1 Apr 2004), Guyana (14 Sep 2004), Haiti (19 Apr 2011), Honduras (1 Apr 2008), Jamaica (29 Sep 2003), Mexico (4 Mar 2003), Nicaragua (12 Oct 2004), Panama (18 Aug 2004), Paraguay (22 Sep 2004), Peru (23 Jan 2002), Saint Kitts and Nevis (21 May 2004), Saint Lucia (16 Jul 2013), Saint Vincent and the Grenadines (29 Oct 2010), Suriname (25 May 2007), Trinidad and Tobago (6 Nov 2007), United States of America (3 Nov 2005), Uruguay (4 Mar 2005), and Venezuela (13 May 2002).

18 OHCHR, *Abolishing Slavery and its Contemporary Forms*, *supra* note 11, para. 61.

> person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

This definition highlights the three constitutive elements of human trafficking: 1) the act, 2) the means used to commit the act, and 3) the motive:

1) The act: the recruitment, transportation, transfer, harbouring, or receipt of persons;

2) The means: by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and

3) The motive: for the purpose of exploitation.

The Trafficking Protocol also provides that the consent of a victim of trafficking in persons to the intended exploitation set forth in Article 3(a) is irrelevant where any of the means set forth in that article have been used. As for trafficking in children, the Protocol states that the recruitment, transportation, transfer, harbouring, or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons," even if none of the means set forth in Article 3(a) are involved.[19]

19 Trafficking Protocol, *supra* note 16, Article 3.

c) Human trafficking and smuggling of migrants

When dealing with trafficking in persons it is always necessary to address the difference between human trafficking and the smuggling of migrants; the misconception between these two concepts prevents them from being properly identified and thus from combating them properly.

As already explained, trafficking in persons entails the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the use of force, deception, or other means, for the purpose of exploitation. For its part, the Protocol against the Smuggling of Migrants by Land, Sea and Air defines "smuggling of migrants" as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.[20]

Therefore, the smuggling of migrants purely relates to the facilitation of the irregular or illegal entry of a person into a State of which the person is not a national or is authorized to enter, while human trafficking, independent of whether the person enters a State without authorization or not, entails elements of coercion, physical or mental violence, and the person's movement serves to the purpose of exploitation. The smuggling of migrants is a violation of a country's immigration laws, while human trafficking constitutes a multiple and continuous violation of a person's human rights.

It is, therefore, important to note that migrants seeking to enter a country without authorization are particularly vulnerable

20 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Article 3.

to exploitation. It is increasingly common for a person, after receiving the assistance of a smuggler in illegally entering a new country, to be forced into an exploitative relationship, thus becoming a victim of human trafficking.[21] Thus, the fact that a person has entered a country legally or illegally is not relevant to determine his or her condition as victim of trafficking.

2. Article 6 of the American Convention on Human Rights and its application by the Inter-American System

Article 6 of the Convention establishes the right to be free from slavery in the following terms:

> Article 6. Freedom from Slavery
>
> 1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.
>
> 2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner. (…).

As noted, Article 6.1 contains an absolute prohibition of slavery, servitude, trafficking in women and slaves in all its forms.

21 OHCHR, *Abolishing Slavery and its Contemporary Forms*, *supra* note 11, para. 57.

Article 27.2 of the Convention establishes that the prohibition on slavery and servitude is one of those fundamental human rights that cannot be suspended by States in "time of war, public danger, or other emergency that threatens the independence or security of a State Party."[22]

The Inter-American Commission has understood that the provisions of Article 6 of the Convention must be interpreted in relation to the definition of trafficking in persons that appears in Article 3(a) of the Trafficking Protocol.[23] Likewise, the Inter-American Court has noted that, in order to define people trafficking, it is relevant to consult Article 3 of the Trafficking Protocol.[24]

It is important to note that neither the Commission nor the Inter-American Court can declare a direct violation of the Trafficking Protocol, as this instrument does not give them jurisdiction to do so. They are, however, able to make an evolutionary interpretation of the scope of Article 6.1 of the American Convention in line with the Trafficking Protocol.

The Court has indicated that human rights treaties are living instruments whose interpretation must take into consideration changes over time and current conditions. This evolutionary interpretation is consequent with the general rules of interpretation embodied in Article 29 of the American Convention and in those established in the Vienna Convention on the Law of Treaties.[25] In this regard, the Court has affirmed

22 IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco,* supra note 8, para. 55.

23 IACHR, *Human rights of migrants (...) Mexico*, supra note 7*, supra* note 8, para. 349.

24 I/A Court H.R., *Advisory Opinion OC-21/14*, *supra* note 8, footnote 155.

25 I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay.*

that the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty, but also the system of which it is part.[26]

For example, when examining the scope of Article 6.2 of the Convention in the *Case of the Ituango Massacres v. Colombia*, the Court found it useful and appropriate to use international treaties, other than the American Convention, such as the International Labour Organization Convention No. 29 concerning Forced Labour, to interpret its provisions in keeping with the evolution of the Inter-American System, taking into consideration the developments on this issue in international human rights law.[27]

Similarly, in the *Case of Rantsev v. Cyprus and Russia*, the European Court of Human Rights concluded that trafficking itself, within the meaning of Article 3(a) of the Trafficking Protocol and Article 4(a) of the Anti-Trafficking Convention, fell within the scope of Article 4 of the European Convention for the

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Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 117; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No.16, para. 114; *Case of the Indigenous Community Yakye Axa*. Judgment June 17, 2005. Series C No. 125, para. 125; and *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C No. 110, para. 165.

26 I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, supra note 26, para. 126; *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 144; C*ase of the Gómez Paquiyauri Brothers v. Peru*, supra note 26, para. 164; *The right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, supra note 26, para. 113.

27 I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148, para. 157.

Protection of Human Rights and Fundamental Freedoms.[28] Thus, as the Trafficking Protocol is the only international instrument that specifically addresses trafficking in persons, and has been ratified by all 35 OAS member States, there is no doubt that the Trafficking Protocol is the instrument to illustrate the content and scope of Article 6.1 of the American Convention.

The Inter-American System has interpreted the prohibition of slavery, servitude and human trafficking through its different mechanisms, such as country, thematic and annual reports, advisory opinions, and their case and petition system.[29]

a) IACHR, Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco

In 2009, the Inter-American Commission issued a thematic report on the *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco* in which it analyzed the situation of the Guaraní indigenous people in the region known as the Bolivian Chaco, focusing particularly on the situation of Guaraní families subjected to conditions of debt bondage and forced labor. The Commission referred to that phenomenon as "captive communities," as it involved approximately 600 families who

28 Eur.C.H.R., *Case of Rantsev v. Cyprus and Russia*, Application no. 25965/04, Final Judgment of 10 May 210, para. 282.

29 *See*: IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, supra note 8; IACHR, *Human Rights of Migrants (...) Mexico*, supra note 8; I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v. Brazil*, supra note 8; I/A Court H.R., *Advisory Opinion OC-21/14, supra* note 8; I/A Court H.R., *Case of Ramírez Escobar et al. v. Guatemala*, *supra* note 8.

lived in what amounts to contemporary forms of slavery.[30] Before issuing this thematic report, the IACHR had noted this situation in its 2007 country report on Bolivia.[31]

During its June 2008 visit, the Commission found "the existence of debt bondage and forced labor, which are practices that constitute contemporary forms of slavery. Guaraní families and communities clearly are subjected to a labor regime in which they do not have the right to define the conditions of employment, such as the working hours and wages; they work excessive hours for meager pay, in violation of the domestic labor laws; and they live under the threat of violence, which also leads to a situation of fear and absolute dependency on the employer." [32]

The Commission stated that slavery, bondage and forced labor often entail violations of other fundamental human rights under the American Convention and under instruments of the universal system of human rights, such as the right of all persons to liberty, not to be subjected to cruel, inhuman, or degrading treatment, freedom of movement, the right of access to justice, freedom of expression, and freedom of association and identity.[33] It also declared that, as these conditions continue to exist within the Guaraní families and communities, Bolivia is in breach of the American Convention, for they entail a violation on the prohibition of slavery and servitude (Article 6).[34]

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30 IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco,* s*upra* note 8, para. 1.

31 IACHR, *Access to justice and social inclusion: the road towards strengthening democracy in Bolivia, Chapter IV.D: Situation of forced labor, bondage and slavery*. OEA/Ser.L/V/II, doc. 34, 28 June 2007 Available at: http://cidh.org/countryrep/Bolivia2007eng/Bolivia07cap4.eng.htm#D.Situation.

32 IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco,* s*upra* note 8, para. 166.

33 *Ibidem*, para. 58.

34 *Ibidem*, para. 167.

b) IACHR, human rights of migrants and others in the context of human mobility in Mexico

In its 2013 report on *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, the Commission analyzed the various situations that affect the human rights of migrants, asylum seekers, refugees, victims of human trafficking and the internally displaced in Mexico.[35]

During its visit to Mexico, the IACHR delegation received information on how migrants crossing Mexico's southern border include women who have been lured there by deception or false promises of work or marriage and are then forced to work as prostitutes in bordellos, bars, and dumps because they do not have economic resources or are victims of human trafficking.[36] The IACHR Rapporteurship on the Rights of Migrants received information on migrant women whose *coyotes*, *polleros*, or kidnappers sell them to other organized crime groups, which then force the women into prostitution or to work as domestics in safe houses or other places where abducted migrants are held captive.[37] The IACHR delegation also learned of cases of trafficking in male and female children and adolescents for sexual exploitation, including infants.[38]

The Commission noted that migrant women are not the only victims of human trafficking in Mexico. It received information about migrant men forced to work in various capacities for organized crime groups, as gunmen, to murder other migrants, or to move drugs toward the border with the United States.

35 *Ibidem*, para. 2.

36 IACHR, *Human Rights of Migrants (...) in Mexico*, *supra* note 8, para. 138.

37 *Ibidem*, para. 139.

38 *Ibidem*, para. 138.

Likewise, migrant boys and adolescent males are forced to work as lookouts for organized crime groups.[39]

To get at the meaning of human trafficking within the Inter-American System, the Commission looked at the definition set out in the Trafficking Protocol and concluded that the provision in Article 6 of the American Convention must be interpreted in relation to the definition of trafficking in persons that appears in Article 3(a) of the Protocol.[40] The IACHR reiterated that trafficking in persons is a violation of multiple human rights and an offense to the dignity and integrity of its victims and asserted that human trafficking is particularly serious when it is part of a systematic pattern or a practice that is applied or tolerated by the State or its agents.[41]

c) I/A Court H.R., Case of the Hacienda Brasil Verde Workers v. Brazil

On March 6, 2015, the Commission filed an application with the Court in the case of the *Fazenda Brasil Verde Workers,* brought against Brazil. The case concerns forced labour and debt bondage on the *Fazenda Brasil Verde,* located in the northern sector of the State of Pará. The facts of the case are set against a backdrop in which tens of thousands of workers, primarily men of African descent between the ages of 15 and 40, are subjected to slave labour every year, a practice whose roots can be traced to a history of discrimination and exclusion.[42]

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39 *Ibidem*, para. 141.

40 *Ibidem*, paras. 347 and 349.

41 *Ibidem*, para. 351.

42 IACHR, *Fazenda Brasil Verde Workers v. Brazil*, Merits, Case 12.066, Report No. 169/11, November 3, 2011. Date of submission to the Court: March 6, 2015;

This case is of paramount importance as the IACHR singled out the elements that correspond to the contemporary concept of slavery, including debt bondage as a practice analogous to slavery: namely: i) a person pledges to provide his services as security for repayment of a debt but the services are not applied toward repayment of the debt; ii) the time of service is open-ended; iii) the nature of the services are not specified; iv) the person subjected to debt bondage lives on the property where he or she works; v) his or her movements are controlled; vi) measures are taken to prevent his or her escape; vii) methods of psychological control are used; viii) the individual cannot change his or her condition; and ix) he or she is subjected to cruel treatment and abuse.[43]

In the case of the *Fazenda Brasil Verde Workers*, the IACHR found that the owner of the estate and the foremen had used the labourers as if they were their property.[44] It noted that "the facts of this case have constituted slavery -in its contemporary form of debt-bondage and forced labour. The facts indicated that the workers demonstrated the constitutive elements of slavery-related practices, such as the desire of the workers to leave the *fazenda*, the deception on the salary they would receive, the lack of payment or minimum payment, the lack of employment documents, the signing of blank documents, large debts with the owner of the property, the threats received in cases of attempts to escape, the prohibition of leaving the *fazenda* under duress, submission to cruel treatment, among others."[45]

IACHR, Press Release No. 45/15, "IACHR Takes Case Involving Brazil to the Inter-American Court," May 7, 2015. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2015/045.asp.

43 IACHR, *Fazenda Brasil Verde Workers, Brazil, supra* note 43, para. 139.

44 *Ibidem*, para. 140.

45 *Ibidem*, para. 165.

For its part, the Inter-American Court, noting that this was the first contentious case related to Article 6.1, concluded that the workers rescued from the Hacienda Brazil Verde were in a situation of debt bondage and submission to forced labour, which considering that the specific characteristics of the 85 workers rescued on March 15, 2000 exceeded the extremes of debt bondage and forced labour and fell under the definition of slavery established by the Court, in particular the exercise of control as a manifestation of the right to property. In this regard, the Court found that: i) the workers were subject to the effective control of the *gatos*, managers, armed guards of the hacienda, and ultimately of its owner; ii) in such a way that it restricted their individual autonomy and freedom; iii) without their free consent; iv) through the use of threats, physical, and psychological violence, v) to exploit their forced labour under inhuman conditions. Also, the circumstances of the escape of Antônio Francisco da Silva and Gonçalo Luiz Furtado and the risks faced until they denounced what happened to the Federal Police demonstrate: vi) the vulnerability of workers and vii) the environment of coercion existing in said hacienda, which viii) did not allow them to change their situation and recover their freedom.[46] For all the above, the Court concluded that the situation verified in the Hacienda Brazil Verde in March 2000 represented a situation of slavery and declared that Brazil was internationally responsible for the violation of the right not to be subjected to slavery and human trafficking, established in Article 6.1 of the American Convention.

46 I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v. Brazil*, *supra* note 8, para. 304.

d) I/A Court H.R., Advisory Opinion OC-21/14: Rights and guarantees of children in the context of migration and/or in need of international protection

On two occasions the Inter-American Court has interpreted forced or compulsory labour within the scope of Article 6.2 of the American Convention, both in the context of forced labour by military or paramilitary groups when they carried out massacres. These are the *Case of the Río Negro Massacres v. Guatemala* and the *Case of the Ituango Massacres v. Colombia*, in both of which the Court declared a violation of Article 6.2 on the basis of the forced labour to which the victims were subject.[47]

With regards to the interpretation and application of the concept of human trafficking in Article 6.1, the Court has only referred to it in its Advisory Opinion OC-21/14 on the rights and guarantees of children in the context of migration and/or in need of international protection. The Court noted that "in order to define people trafficking it is relevant to consult Article 3 of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children."[48]

The I/A Court highlighted the importance of the determination of whether the child is unaccompanied or separated as this situation exposes children to "various risks that affect their life, survival, and development such as trafficking for purposes of sexual or other exploitation or involvement in criminal activities which could result in harm to the child, or in extreme cases, in

47 *Cf.* I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012. Series C No. 250; I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148.

48 I/A Court H.R., *Advisory Opinion OC-21/14, supra* note 8, para. 90.

death,"[49] especially in those countries or regions where organized crime is present.[50]

The Court recognized that girls may be even more vulnerable to trafficking, especially for purposes of sexual and labor exploitation.[51] For this reason, it stated that it is essential that States adopt all necessary measures to prevent and combat trafficking in persons including, above all, all those measures of investigation, protection of victims, and mass media campaigns.[52]

The Court indicated that States have the obligation to adopt specific border control measures in order to prevent, detect and prosecute any type of trafficking of persons. To this end, they must have available specialized officials responsible for identifying all victims of trafficking in persons, paying special attention to women and/or child victims. The Inter-American Court also noted that in order to ensure adequate treatment of victims or potential victims of child trafficking, States must provide adequate training for those officials who work at the border, especially concerning matters relating to child trafficking, so as to be able to provide children with effective counseling and comprehensive assistance.[53]

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49 Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* UN Doc. CRC/GC/2005/6, 1 September 2005*,* para. 23.

50 I/A Court H.R., *Advisory Opinion OC-21/14, supra* note 8, para. 90.

51 Committee on the Rights of the Child, *General Comment No. 6, supra* note 50*,* para. 50.

52 I/A Court H.R., *Advisory Opinion OC-21/14, supra* note 8, para. 91.

53 *Ibidem,* para. 92.

e) I/A Court H.R., Case of Ramírez Escobar et al. v. Guatemala

According to the Inter-American Court, "from the early 1990s until the end of the first decade of the 2000s, international adoptions represented a very lucrative business in Guatemala."[54] The case of Ramírez Escobar et al. v. Guatemala took place in a context of "serious irregularities in the adoption processes of Guatemalan girls and boys, favored by an institutional weakness of the control bodies and a flexible and inadequate regulation that facilitated the formation of dedicated organized crime networks and structures to the 'lucrative' business of international adoptions."[55]

The case concerns Osmín Tobar Ramírez, aged seven, and JR, her younger sibling of a year and a half, who were separated from their family and interned at the *Los Niños de Guatemala Association* on January 9, 1997 after receiving an anonymous report that the children had been abandoned by their mother, Flor de María Ramírez Escobar. Despite the fact that the family filed several legal actions that were still pending a final decision, the Ramírez children were adopted by two different American families in June 1998.

This case is of paramount importance because, for the first time, the I/A Court recognized that "illegal adoption has been considered a form of exploitation, so that trafficking in persons for adoption purposes would not require a subsequent exploitation of the child, other than the adoption itself," thus the Court considered that "illegal adoption can be one of the purposes of exploitation of trafficking in persons."[56]

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54 I/A Court H. R., *Case of Ramírez Escobar et al. v. Guatemala*, *supra* note 8.Abstract.

55 *Ibidem*.

56 *Ibidem*, para. 314 and 315.

However, the Court held that the previous contextual indications were not sufficient to conclude that the irregular adoptions of the Ramírez children constituted trafficking in persons. The Court stated that it had not been proven that, in the specific case of the Ramírez children, they had been captured, transported, transferred, harboured, or received for the sole purpose of achieving their illegal adoption. Nor was it demonstrated that any of the parties involved in the abandonment or adoption proceedings, be it the judicial authorities, the officials of the Attorney General's Office, the members of the *Los Niños Association* or any other person who participated in any stage of the process, would have obtained economic benefits or some other form of undue retribution. Therefore, the Court concluded that it did not have sufficient elements to determine that Guatemala violated the prohibition of trafficking in persons, contemplated in Article 6.1 of the Convention.[57]

3. The case of *Gelman v. Uruguay*: a case of human trafficking

After seeing how the Inter-American System has interpreted the scope of Article 6.1 of the American Convention, we will now analyse and demonstrate how the facts presented in the case of *Gelman v. Uruguay* constituted human trafficking. Neither the representatives of the victims, nor the Commission, nor the Court, argued or analysed the case from this perspective. We argue that the Inter-American Court should have determined and declared State responsibility under Article 6.1 of the Convention, as demonstrated below.

57 *Ibidem*, para. 314 and 322.

The case of *Gelman v. Uruguay* was presented to the Court on January 21, 2010 by the Inter-American Commission and decided on February 24, 2011.

The facts relate to the forced disappearance of María Claudia García Iruretagoyena de Gelman in late 1976, subsequent to her detention in Buenos Aires, Argentina, during the advanced stages of her pregnancy. She was then transported to Uruguay where she gave birth to her daughter, who was then given to an Uruguayan family; actions which were committed by Uruguayan and Argentine State agents in the context of "*Operation Cóndor.*"[58]

In this case, the Commission and the Court found violations of multiple rights contained in the American Convention, the American Declaration of the Rights and Duties of Man, the Inter-American Convention on Forced Disappearance of Persons, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, to the detriment of Juan Gelman, María Claudia García de Gelman, María Macarena Gelman García, and their next of kin. For the purposes of our analysis, we will only focus on the facts and legal standards that relate to the State's responsibility for the trafficking of María Claudia García de Gelman and her daugther María Macarena Gelman García.

58 I/A Court H.R., *Case Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221, para 2.

a) The facts

The facts of the case occurred in the context of the systematic practice of arbitrary detention, torture, execution and forced disappearances perpetrated by the intelligence and security forces of the Uruguayan dictatorship in collaboration with Argentine authorities in their repression of and fight against individuals who were designated "subversive elements" in the setting of the national security doctrine and the Operation Condor.[59]

The Court noted that, by 1977, collaborative operations were carried out by Paraguay, Argentina and Uruguay. At the end of that year, a second wave of coordinated repression by the armed forces of Argentina and Uruguay took place -operations that were directed, this time around, mostly at leftist groups that had links in both countries- wherein, again, there were transfers of prisoners by military planes of both countries and repeated exchanges of detainees, many of whom still remain disappeared. The clandestine operations often involved the kidnapping and abduction of infants, many of whom were newly-born or born in captivity,[60] who, after their parents were executed, were handed

59 *Cf. Case of Goiburú et al. V. Paraguay***.** *Merits, Reparations and Costs*. Judgment of September 22, 2006. Series C No. 153, paras. 61.5 to 61.8; I/A Court H.R., *Case Gelman v. Uruguay, supra* note 54, para. 44.

60 *Cf.* United Nations, Human Rights Council, Mission to Argentina, A/HRC/10/9/Add.1, January 5, 2009, Report from the Working Group on Forced and Involuntary Disappearances, paragraph 10: "A specific phenomenon that occurred in the country during the military dictatorship from 1976 to 1983 in Argentina was the disappearance of children, and of children born in captivity. Children were abducted, stripped of their identity and taken from their families. There was also a frequent abduction of children by military leaders who brought the children into their family as children*";* Historical Investigation on Disappeared Prisoners, in compliance with Article 4° of Law 15.848, *supra* note 23, Tome I, p. *22*; Oral Tribunal on Federal Criminal Matters no. 6 of the Federal Capital, Buenos Aires, Argentina, Claim no. 1278

over to military or police families.[61]

Argentine jurisprudence has signaled in a number of decisions that, during the self-denominated period of National Reorganization, children were publicly and notoriously abducted from the custody of their parents. Pregnant women detained in this context of counterinsurgency were left alive until they had given birth, their children then abducted, while, in many cases, the children were handed over to families of military and police officers after their parents were disappeared or executed.[62]

captioned "REI, Víctor Enrique s/abduction of minors under ten years of age," available at http://www.derechos.org/nizkor/arg/doc/rei1.html*;* IACHR, Report on the human rights situation in Argentina, OEA/Ser.L/V/II.49, doc. 19, April 11, 1980, Recommendations of the IACHR to the Government of Argentina, I.b); Federal Court No 4, Secretary No 7. Federal Chamber on Criminal and Correctional Matters, Chamber II, Argentina, Claim 17.890 "Del Cerro J. A. s/queja", November 9, 2001, available at http://www.desaparecidos.org/nuncamas/web/investig/menores/fallos2_069.htm; United Nations, Human Rights Commission. Question of human rights of all persons under any form of detention or imprisonment and in particular: a question of disappeared persons whose whereabouts are unknown. Report of the Working Group on Enforced or Involuntary Disappearances of January 22, 1981,E/CN.4/1435, paras.170 and 171.

61 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, paras. 59 and 60.

62 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, para. 61.

It was noted by the Court that the politics of "abduction of minors" took place in the following stages: a) the children were abducted "from their parents when they could be suspected of having ties to subversive or dissident politicians of the de facto regime, pursuant to the intelligence reports, or were abducted during the clandestine detention of their mother"; b) later they were taken to "places situated within the grounds of the armed force, or under their control"; c) the "abducted minors were given to members of the armed or security forces, or to third parties, with the intention that they be remain hidden from their legitimate guardians"; d) "in the framework of the ordered abductions, and with the intention of hindering the reestablishment of the family bond, the civil status of the children was suppressed, registering them as children of those who had them or were hiding them"; and e) "false information was stated in the documents and birth certificates of the minors to accredit their identities."[63]

With regards to this practice, the Inter-American Court concluded that "the results achieved by the illegal kidnapping and abductions, these could correspond a) **to a form of trafficking for the irregular adoption of children**, b) to a form of punishment for their parents or grandparents due to an ideology that opposed the authoritarian regime or, c) a deeper, ideological motivation, in relation to a willingness to forcefully transfer the children of members of opposition groups, in that way avoiding that the families of the disappeared persons could develop "potentially subversive elements."[64]

63 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, para. 62.

64 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, para. 63; IACHR, Annual Report of the Inter-American Commission on Human Rights, OEA / Ser. L/V/II.74, Doc 10 rev. 1, September 16, 1988, Chapter V.

María Claudia García de Gelman[65] was married to Marcelo Ariel Gelman Schubaroff and was 19 years old and in an advanced state of pregnancy (around 7 months) when she was deprived of her liberty. She was detained on August 24, 1976 with her husband, her sister-in-law and a friend, at their home in Buenos Aires, by "Uruguayan and Argentine military commandos." María Claudia García and Marcelo Gelman were transferred to the clandestine detention center known as "Automotives Orletti" in Buenos Aires, where they remained together for some days but were subsequently separated.

María Claudia García was secretly transferred to Montevideo by Uruguayan authorities during the first days of October 1976, in an advanced state of pregnancy, and was placed in the headquarters of the Defense Information Service of Uruguay, located in Montevideo. In late October or early November, she was transferred to the Military Hospital, where she gave birth to a baby girl.

After the birth, mother and daughter were returned to the Defense Information Service of Uruguay and held in a room on the ground floor. María Claudia García's newborn daughter was abducted from her and removed from the clandestine detention center towards the end of December 1976. After the birth of María Macarena Gelman García, María Claudia García was killed.

65 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, paras. 79-90.

On January 14, 1977, María Macarena Gelman García[66] was placed in a basket and left on the doorstep of the family of Uruguayan police officer Ángel Tauriño, in Montevideo, with a note indicating that the baby girl had been born on November 1, 1976 and that her mother could not care for her. Ángel Tauriño and his wife, who had no children, picked up the basket and kept the baby girl. They registered her as their own daughter two years later and baptized her as María Macarena Tauriño Vivian.

b) Identification of the constitutive elements of human trafficking

The manner in which María Claudia García was deprived of her liberty during the advanced stages of her pregnancy, kidnapped in Buenos Aires by Argentine forces and Uruguayan authorities in a context of illegal detentions in clandestine centers, subsequently transported to Montevideo under "Operation Condor" and her baby girl abducted from her and given to members of security forces, constituted a violation of Article 6.1 of the Convention that can be understood from the complex violation of rights that is human trafficking.

As held by the Inter-American Commission[67] and the Court,[68] the provisions in Article 6.1 of the American Convention must be interpreted in relation to the definition of trafficking in persons under Article 3(a) of the Trafficking Protocol. As such, the constitutive elements of human trafficking are: 1) the act of recruitment, transportation, transfer, harbouring, or receipt of persons, 2) the means used to commit the act, by threat or use

66 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, paras. 106-116.

67 IACHR, *Human rights of migrants (...) in Mexico, supra* note 8, para. 349.

68 I/A Court H.R., *Advisory Opinion OC-21/14*, *supra* note 8, footnote 155.

of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability; and 3) the motive, that is the purpose of exploitation.

Both Maria Claudia García and her daughter Maria Macarena Gelman were victims of human trafficking in light of the kidnapping, transference and detention while pregnant of Maria Claudia, and the posterior abduction and irregular adoption of Maria Macarena.

1) The act: transfer of María Claudia and María Macarena

María Claudia was kidnapped in Buenos Aires by Argentine forces as consequence of a police and military intelligence operation, planned and executed in a clandestine manner by the Argentine security forces with the close collaboration of the Uruguayan security forces, consistent with the *modus operandi* of such acts in the context of Operation Condor, on the basis of the "national security doctrine."

As noted by the Court, the transference of María Claudia from Argentina to Uruguay was intended to remove her from the protection of the law in both States, in both her stay in clandestine detention centers and the fact that she was forced to leave her country without any immigration controls, thereby annulling her juridical personality, denying her existence, and leaving her in a sort of legal limbo or situation of legal uncertainty before society and the State.[69]

69 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, para. 93.

As for María Macarena, she was abducted a few days after being born in captivity and subsequently withheld and separated from her mother just a few weeks after being born, her identity suppressed upon being handed over to a family that was not her own. Specifically, in the early childhood years of María Macarena there was an illegal interference by the State by transferring her from her biological family and making it impossible or difficult for her to stay with her family nucleus and to establish a relationship with them.[70]

2) The means: abduction of María Claudia and María Macarena

In both cases, the means used to commit the act of transferring María Claudia and María Macarena was abduction.

The manner in which María Claudia was deprived of her liberty during the advanced stages of her pregnancy, kidnapped in Buenos Aires by Argentine forces and Uruguayan authorities in a context of illegal detentions in clandestine centers, and subsequently transported to Montevideo under the "Operation Condor," demonstrate she was abducted and deprived of liberty by clearly illegal means.

In the case of María Macarena, it is important to note the conclusions of the Commission in a study presented in 1988 about the "situation of minor children of disappeared persons who were separated from their parents and are claimed by members of their legitimate families."[71] The focus of the study was the situation in which children were direct victims and specific "targets" of the

70 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, para. 126.

71 IACHR, *Annual Report of the Inter-American Commission on Human Rights 1988*, *supra* note 65.

repressive action, even though their kidnapping and theft was meant primarily to punish their parents or grandparents. This is the case when minors and infants are kidnapped with their parents, or they are born during the captivity of their mothers.

The Commission explained how the majority of these cases have taken place mostly in Argentina, during the counter-insurgency campaign called the "dirty war," under the military dictatorship that ruled that country between 1976 and 1983. In some cases, the kidnapping of children was done with the complicity of security forces of more than one country, either in the clandestine transportation of children across borders or in the irregular and unlawful protection afforded in other countries to those who took the children away in order to evade justice. In a very high number of cases, children were taken away from their parents to be given in irregular adoption to other families.

María Macarena was one of those children who was abducted by State agents in order to be illegitimately delivered and raised by another family by means of an irregular adoption. In this sense, UNICEF has recognized that irregular intercountry adoption has been noted as an end activity in child trafficking. UNICEF established that young children and babies are said to be trafficked in certain cases of irregular intercountry adoption when national or international norms governing adoption are not respected.[72]

72 United Nations Children's Fund (UNICEF), *Reference Guide on protecting the rights of child victims of trafficking in Europe: Chapter 2 Essential Information about Child Trafficking.* Geneva, 2006. Available at: http://www.unicef.org/ceecis/UNICEF_Child_Trafficking_low.pdf

3) The motive: exploitation of María Claudia and María Macarena

As explained by the Court, the state of the pregnancy of María Claudia when detained constituted a condition of particular vulnerability, reason for which—in her case—there was differential treatment. In Argentina, she had been separated from her husband and later transported to Uruguay. Subsequently, she was retained in a clandestine center of detention and torture where she was given differential treatment in regard to other detainees.

The Court recognized that "**her unlawful detention, her transfer to Uruguay, and her possible enforced disappearance, was for the use of her body in order to give birth, and for her daughter to be breastfeed, who was given to another family after being abducted and her identity substituted for another**. The foregoing is even more serious if one considers, as indicated, that her case took place in a context of disappearances of pregnant women and illegal abductions of children in the framework of Operation Condor."[73] There is no doubt that birth-families are exploited when their children are abducted for someone else's gain.

73 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, para. 97.

Likewise, the abduction of children by State agents in order for them to be illegitimately delivered and raised by another family, modifying their identity and not informing their biological family about their whereabouts, constitutes a complex act that involves a series of illegal actions and violations of rights to conceal the facts and impede the restoration of the relationship of minors and their family members.[74] As stated by the Inter-American Commission, one of the purposes of this deliberate policy is, without a doubt, trafficking in irregular adoptions by taking advantage of the impunity created by the very method of forced disappearance of persons.[75]

In the case of María Macarena, she was born in captivity and physically retained by State agents, without the consent of her parents, in order to be illegitimately delivered and raised by another family, depriving her of her right to a nationality, a name, an identity, and family relationships, among many others.

c) State responsibility

As part of their obligations, States must prevent, investigate and punish all violations of the rights recognized in the Convention and seek, in addition, the reestablishment, if possible, of the violated right and, where necessary, repair the damage caused by the violation of human rights.[76]

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74 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, para. 120.

75 IACHR, *Annual Report of the Inter-American Commission on Human Rights 1988*, *supra* note 65.

76 I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 166; Case of Garibaldi V. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 23, 2009. Series C No. 203, para. 112.

More specifically, the Court has understood that the obligation to investigate cases of violations of the rights to life, personal integrity, personal liberty and the prohibition of slavery, servitude and trafficking in persons arises from the general obligation to guarantee under Article 1.1, together with the substantive right that must be protected or ensured.[77]

The Commission has indicated that trafficking in persons is a violation of multiple human rights and an offense to the dignity and integrity of its victims. It remains a continuing violation until such time as the victim is free. The means through which human trafficking is perpetrated leave the victim utterly defenseless, which leads to other related violations. The IACHR affirmed that human trafficking is particularly serious when it is part of a systematic pattern or a practice that is applied or tolerated by the State or its agents.[78]

The European Court of Human Rights has understood that, in light of the Trafficking Protocol, in order to comply with its obligations States are required to put in place a legislative and administrative framework to prohibit and punish trafficking, highlighting the need for a comprehensive approach to combat trafficking that includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers.[79]

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77 I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 140, para. 142; *Case of Heliodoro Portugal v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 115; and *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 298.

78 IACHR, *Human rights of migrants (...) in Mexico, supra* note 8, para. 351.

79 Eur.C.H.R., *Case of Rantsev v. Cyprus and Russia*, *supra* note 29, para. 285.

The preparation and execution of the arrest and subsequent disappearance of María Claudia García, as well as the abduction and irregular adoption of her daughter María Macarena Gelman, could not have been perpetrated without the knowledge or higher orders of the military, police and intelligence headquarters at the time, or without the collaboration, acquiescence, or tolerance, manifested in various actions, carried out in a coordinated or concatenated manner, by members of the security forces and intelligence services (and even diplomats) of the States involved.[80]

The trafficking of María Claudia García and María Macarena Gelman constitutes, due to the nature of the infringed rights, a violation of *jus cogens*, especially serious because it occurred in the context of a systematic practice of "State-sponsored terrorism" at an inter-state level.[81]

State agents not only grossly failed in their obligation to prevent and protect against violations of the rights of María Claudia García and María Macarena Gelman, enshrined in Articles 6.1 and 1.1 of the American Convention, but also because they used the official investiture and resources provided by the State to commit the violations, thus compromising the State's responsibility.

As with forced disappearance, human trafficking is a serious, multiple and continuous human rights violation that continues until the person is free[82] or the State conducts an effective

80 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, para. 100.

81 See *mutatis mutandi*, on enforced disappearance as *jus cogens*, I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, para. 99.

82 IACHR, *Human rights of migrants (...) in Mexico, supra* note 8, para. 351.

investigation into the trafficking allegations,[83] neither of which was carried out by the State, as concluded by the Court.[84]

Given the facts established in the case, we consider that the Inter-American Court had the elements to find that Uruguay violated, to the detriment of María Claudia García Iruretagoyena de Gelman and María Macarena Gelman García, the right not to be subjected to human trafficking, enshrined in Article 6.1 (Freedom from Slavery) of the Convention, in relation to Article 1.1.

4. Conclusion

The Inter-American System has analysed the prohibition of slavery, servitude and human trafficking enshrined in Article 6 (Freedom from Slavery) of the American Convention, through its different mechanisms, such as country, thematic and annual reports, advisory opinions and the case and petition system.[85] Specifically with regards to human trafficking, the Inter-American Commission and the Court have held that the provision regarding trafficking in persons in Article 6.1 of the American Convention must be interpreted in relation to the definition set forth by Article 3(a) of the Trafficking Protocol.

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83 Eur.C.H.R., *Case of Rantsev v. Cyprus and Russia*, *supra* note 29, para. 300.

84 I/A Court H.R., *Case Gelman v. Uruguay*, *supra* note 59, paras. 241-246.

85 *See*: IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, supra note 8; IACHR, *Human Rights of Migrants (...) in Mexico*, supra note 8; I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v. Brazil*, supra note 8; I/A Court H.R., *Advisory Opinion OC-21/14*, *supra* note 8; I/A Court H.R., *Case of Ramírez Escobar et al. v. Guatemala*, *supra* note 8.

Although the Inter-American System has the legal framework to process and decide cases based on a State's failure to respect and guarantee the right not be subject to human trafficking, it has not yet decided a case declaring the violation of Article 6.1 of the American Convention on that basis

Even while neither the Commission nor the Court has declared it, we analysed and demonstrated how in *Gelman v. Uruguay* both María Claudia García Iruretagoyena de Gelman and her daughter María Macarena Gelman García were victims of human trafficking. The manner in which María Claudia was deprived of her liberty during the advanced stages of her pregnancy, kidnapped in Buenos Aires by Argentine forces and Uruguayan authorities in a context of illegal detentions in clandestine centers, subsequently transported to Montevideo under Operation Condor, and her daughter, María Macarena, abducted from her and given to members of security forces, certainly constituted a violation of Article 6.1 of the Convention that can only be understood from the complex violation of rights that is human trafficking.