ARGENTINA
Legal Memorandum
The Full Stop and Due Obedience Laws

SUBMITTED BY AMNESTY INTERNATIONAL AND
THE INTERNATIONAL COMMISSION OF JURISTS

CONTENTS

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Chapter I

1. Introduction

Amnesty International and the International Commission of Jurists have repeatedly expressed their concern about the incompatibility of Argentina's Full Stop Law, Law No. 23,492 of 12 December 1986, and Due Obedience Law, Law No. 23,521 of 4 June 1987, with international law and, in particular, with Argentina's obligation to bring to justice and punish the perpetrators of gross violations of human rights. Until now these laws have been used to obstruct the investigation of thousands of cases of forced disappearance, torture and extrajudicial execution committed between 1976 and 1983 when the military governments were in power.

Law No. 23,492, the Full Stop Law, and Law No. 23,521, the Due Obedience Law, which had been approved by the Argentine Congress in 1986 and 1987 respectively, were repealed in March 1998. However, their repeal was interpreted as not having retrospective effect and cases of human rights violations committed under the military governments therefore continued to be covered by them. Nevertheless, in a judgment handed down by the *Juzgado Nacional en lo Criminal y Correccional Federal No.4,* National Court No. 4 for Federal Criminal and Correctional Matters, on 6 March 2001 in Case No. 8686/2000 entitled "Simón, Julio, Del Cerro, Juan - abduction of 10-year-old juveniles", Federal Judge Gabriel Cavallo declared the Full Stop and Due Obedience Laws to be unconstitutional, null and void. This ruling was confirmed by Court II of the *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires,* National Chamber of Appeals for Criminal and Correctional Matters for Buenos Aires. The judgment handed down by Judge Gabriel Cavallo has been before the Supreme Court of Justice since June 2002.

Other Argentine courts have also taken the view that these laws are null and void. For example, in September 2002, in case No. 6,869/98 entitled "Scagliusi, Claudio Gustavo and others - unlawful imprisonment", Federal Judge Claudio Bonadio ruled that "the so-called full stop and due obedience laws are null and void on the grounds that, as well as being contrary to the national constitution, they are also contrary to the law of nations". In addition, in March 2003, Federal Judge Carlos Skidelsky declared these same laws to be null and void in the case of the so-called "Margarita Belén massacre" of December 1976, in which 22 political prisoners were killed in the town of Margarita Belén in the province of El Chaco.

Amnesty International and the International Commission of Jurists work for full respect for human rights, observance of international human rights law and the eradication of impunity for violations of fundamental rights. The judgment handed down by Judge Gabriel Cavallo, the first in which such laws were declared null and void, and decisions reached by several other Argentine courts which have ruled on the subject since then, have signalled the direction in which the Argentine justice system must go if it is to ensure that the State complies with its international human rights obligations and its obligation to bring to justice and punish those responsible for gross human rights violations.

Under international law, crimes such as torture, summary, extrajudicial and arbitrary executions, and enforced disappearances are gross violations of human rights that cannot be subject to any type of measure that would impede investigation and prevent those responsible from being punished. The United Nations General Assembly has repeatedly stated that extrajudicial, summary and arbitrary executions and torture constitute gross violations of human rights. The Declaration on the Protection of All Persons from Enforced Disappearance reiterates that enforced disappearance is a grave violation of human rights.

2. General Background

Military Governments

The seven years of severe repression that followed the *coup d'état* of 24 March 1976 left thousands of victims of human rights violations in its wake in Argentina. The use of torture, extrajudicial executions and disappearances provided examples of just how the military junta intended to carry out its aim of eliminating subversion in any possible way. "Task groups" made up of individuals from all branches of the armed forces were set up to capture and question all known members, sympathizers and associates of "subversive organizations", as well as their relatives or anyone else who might be opposed to the government. Congress was dissolved, the state of siege which had been imposed by the previous government was extended, judicial guarantees were abandoned, kidnapping took the place of formal arrest and the number of "disappeared" persons reached monstrous proportions.

However, despite the climate of fear and the curbs on the press, the scale of disappearances in Argentina gradually became known to groups of families brought together by desperation and an absence of official information. By 1978 individual and collective petitions were still being rejected by the courts and the Supreme Court of Justice. In that same year details of 2,500 cases of disappearance were published. As time went by, new evidence came to light: released prisoners made statements about secret detention centres and unmarked graves were discovered in cemeteries throughout Argentina. Several governments were persistently asking questions about what had happened to citizens of their countries who had disappeared in Argentina. Faced with national and international outrage, the government admitted that "excesses" had occurred but said that the actions of members of the armed forces in the "war against subversion" had been carried out in the line of duty.

"We waged this war with our doctrine in our hands, with the written orders of each high command," General Santiago Omar Riveros told the *Junta Interamericana de Defensa,* Inter-American Defence Board] on 24 January 1980[1]. This "war" which the Argentine Armed Forces were waging against the Argentine population generated unparalleled violence and an atmosphere of terror. The machinery of state was used to commit crimes against the population: military barracks and establishments belonging to the security forces became centres of enforced disappearance, torture and extrajudicial execution.

Civilian Governments

At the end of October 1983 the state of siege was lifted and free elections were held. The civilian government of President Raúl Alfonsín took office on 10 December 1983 and the *Comisión Nacional sobre la Desaparición de Personas (CONADEP),* the National Commission on the Disappearance of Persons, was set up, under Decree 187 of 15 December 1983, to "clarify the tragic events in which thousands of people disappeared".

The CONADEP report, *Nunca Más,* Never Again, was published in November 1984 and recorded 8,960 cases of disappearance, while pointing out that the true figure could be even higher. It listed 340 secret kidnap centres in Argentina and concluded that the armed forces had violated human rights in an organized fashion by making use of the state machinery. It rejected assertions that torture and disappearance were excesses that occurred only rarely. CONADEP concluded that the human rights violations perpetrated by the military government, such as disappearances and torture, were brought about as a result of the widespread use of a method of repression which was set in motion by the Argentine Armed Forces who had "absolute control of the resources of the state."[2]

CONADEP reported that "among the victims are thousands who never had any links with such [subversive] activity but were nevertheless subjected to horrific torture because they opposed the military dictatorship, took part in union or student activities, were well-known intellectuals who questioned state terrorism, or simply because they were relatives, friends, or names included in the address book of someone considered subversive".[3] The Prosecutor who conducted the case against the commanders of the Military Juntas, Dr. Julio Strassera, concluded at the end of the trial that the acts carried out by the Argentine Armed Forces should be classified as crimes against humanity and described the years of *de facto* rule as "State terrorism".[4]

In December 2003 Rodolfo Mattarollo, Cabinet Secretary to the Department of Human Rights, reported to the United Nations High Commissioner for Human Rights quoting a new figure of

[1] Nunca Más - Informe de la Comisión Nacional sobre la Desaparición de Personas [Never Again - A Report by Argentina's National Commission on the Disappearance of Persons], Editorial Universitaria de Buenos Aires, Argentina, 1984, p. 8.
[2] Ibid., p. 479.
[3] Ibid., p. 480.
[4] Amnesty International, Argentina: The Military Juntas and Human Rights, AI Index: AMR 13/04/87.

13,000 disappeared persons. This figure resulted from additional reports of disappearances received from victims' relatives.

In 1983 the military government passed an amnesty law[5] to ensure that they would not be punished for their crimes. However, when institutional government was restored later that year the law was abrogated and the commanders of the military juntas which had ruled Argentina during the period of *de facto* rule, as well as other members of the military who were responsible for human rights violations, were ordered to be brought to trial. Nine military commanders were prosecuted. It was a remarkable trial in which proof of the human rights violations committed under military rule was put forward in evidence by the prosecution. After a complicated appeals process, five commanders were sentenced to imprisonment in 1985. Prosecutions were also brought against other members of the military.

The need for Argentine society to see justice done was frustrated when the Government of President Raúl Alfonsín enacted the Full Stop and Due Obedience Laws in 1986 and 1987 respectively. In 1989 and 1990 the Government of President Carlos Menem granted pardons to members of the military implicated in human rights violations.

Argentine society had certainly not turned its back on truth and justice. Proof that the search for truth and justice continued was evidenced by the great efforts made to keep criminal prosecutions open, clarify the fate and whereabouts of the disappeared and bring to justice those responsible for human rights violations.

3. Judicial actions in other countries

Judicial investigations and proceedings related to human rights violations committed under military rule were started in several countries including Italy, Spain, Germany and Mexico, and requests for the extradition of former members of the Argentine armed forces were presented.

In 1996 the Italian and Spanish courts started legal proceedings in connection with cases of Italian and Spanish nationals who had disappeared in Argentina. Over 100 members of the Argentine security forces, including former members of the military juntas, were summoned by a judge at the *Audiencia Nacional de España,* National Court of Spain, to testify in the cases of 300 Spanish citizens who had disappeared in Argentina between 1976 and 1983. Relatives of the victims, as well as the victims of human rights violations themselves, gave evidence before the court.

In the same year, an Italian judge ordered investigations into the cases of over 70 Italians and Argentinians of Italian origin who had disappeared in Argentina while the military were in power. Amnesty International has repeatedly asked the Argentine authorities to cooperate with the judicial proceedings taking place in other countries in connection with the disappearances that occurred under military rule. In December 2000, an Italian court sentenced seven former officers of the Argentine army to prison sentences ranging from 24

[5] Law 22,924 of 22 September 1983.

years to life imprisonment. The trial, which took place in Rome *in absentia,* related to the kidnapping and murder of seven Italian citizens and the kidnapping of the son of one of the seven in Argentina during the period of military rule. On 17 March 2003 the Court of Appeals in Rome upheld the prison sentences of the seven former Argentine officers passed in December 2000.

In June 2003 the Mexican Supreme Court confirmed the extradition to Spain of Ricardo Miguel Cavallo, a former captain in the Argentine navy accused of committing gross human rights violations at the Navy Mechanical School (ESMA) in Buenos Aires. Ricardo Miguel Cavallo was extradited to face charges of genocide and terrorism. Ever since Cavallo's arrest in Mexico in 2000, the Spanish authorities had been requesting his extradition to stand trial in relation to his alleged participation in the grave violations of human rights committed in Argentina under the military governments of 1976-1983. The decision of the Mexican Supreme Court did not, however, grant extradition to face charges of torture as the Spanish authorities had been requesting, on the ground that under Mexican law the statute of limitations for torture had expired. Amnesty International, while recognizing the importance of the ruling, stressed that the widespread and systematic use of torture that was occurring in Argentina under the military governments is a crime against humanity and is not therefore subject to any statute of limitations under international law.

In December 2003 the state prosecuting authority in Nuremberg issued an international arrest warrant against former Argentine president Jorge Videla and two other officers, Carlos Guillermo Suárez Mason and Emilio Massera, for the disappearance and murder of two German citizens, Klaus Zieschank and Elisabeth Kasemann, between 1976 and 1977. The Nuremberg prosecuting authority is currently investigating ten cases of disappearance in Argentina at the request of relatives of victims of German nationality or German origin.

4. Judicial, presidential and legislative actions in Argentina

Cases involving the abduction and concealment of children and the changing of their identities are not covered by the Full Stop and Due Obedience Laws or the presidential pardons. Some 200 cases of disappearances of minors at the hands of the security forces during the period of military rule have been recorded in Argentina. In 1997 a federal judge in Buenos Aires began an investigation into "disappeared" children who had been kidnapped by the security forces together with their parents or who had been born in captivity.

In September 1999 the Federal Chamber confirmed the pre-trial detention of Jorge Rafael Videla, the former commander-in-chief of the army and president of the military junta from 1976 until 1981, and Emilio Massera, a former admiral and member of the first military junta. It rejected the argument that their case had already been tried and that, under the statute of limitations legislation, the time limit for prosecuting the offence had expired. This decision of the Federal Chamber set an important precedent in that it deemed the kidnapping of minors to be a continuing offence and ruled that the statute of limitations did not apply as long as the fate of the victim remained unknown. The Chamber also upheld international law by determining that enforced disappearance is a crime against humanity and therefore falls

within the scope of Article 118 of the Constitution which stipulates that crimes against humanity must be tried in accordance with international criminal law.

In November the same year, as part of an amicable settlement sponsored by the Inter-American Commission on Human Rights of the Organization of American States (OAS) in **the case of Carmen Lapacó** whose daughter had "disappeared" in 1977, the Argentine Government accepted and guaranteed that the statute of limitations should not apply to the right to the truth. It committed itself to introducing legislation which would allow the national courts to defend that right.

In March 2001, in a judgment given by Argentine judge Gabriel Cavallo, the Full Stop and Due Obedience Laws were found to be unconstitutional, null and void. The judgment was given in a criminal complaint brought in October 2000 by the Argentine non-governmental organization *Centro de Estudios Legales y Sociales (CELS),* Centre for Legal and Social Studies, in relation to the enforced disappearance of José Liborio Poblete Roa, his wife Gertrudis Marta Hlaczik and their daughter Claudia Victoria, which took place in 1978. Claudia Victoria Poblete has been traced but her parents are still missing. The judgment was unanimously upheld in November 2001 by Court II of the *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires,* National Appeals Chamber for Federal Criminal and Correctional Matters for Buenos Aires, which based its decision on such treaties as the American Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The three Court II judges stressed that in previous decisions the Supreme Court had already recognized that international law took precedence over all domestic legislation. In their ruling they stated that, in the current environment of a developing constitutional law of human rights, "invalidating Laws 23,492 and 23,521 and declaring them to be unconstitutional is not an option. It is an obligation".

On 14 August 2002 judgment No. 586/02P, in proceedings entitled "Public Prosecutor's Office - filing of complaint, Case No. 311/02" conducted at the Office for Criminal Matters at Federal Court No. 1 in Santa Fe, Federal Judge Reinaldo Rubén Rodríguez declared article 1 of the Full Stop Law and articles 1, 3 and 4 of the Due Obedience Law to be invalid and unconstitutional[6]. The case related to an alleged offence of unlawful imprisonment, doubly

[6] Law 23,492 ("Full Stop Law"): Article 1. The right to bring a criminal action shall cease with respect to any person alleged to have participated in any capacity in the offences referred to in article 10 of Law 23,049, who is not a fugitive, has not been declared to be in default, or on whom a summons to make a statement has not been ordered to be served by a competent court within sixty days of the date of enactment of this law. The same conditions shall apply to any right of criminal action against any person who may have committed offences connected with the use of violent forms of political action prior to 10 December 1983.

Law 23,521 ("Due Obedience" Law): Article 1. Unless evidence to the contrary has been admitted, it is presumed that those who at the time the act was committed held the position of senior officers, junior officers, non-commissioned officers and members of the rank and file of the Armed Forces, security forces, police and prison staff are not punishable for the offences referred to in article 10 point 1 of Law No. 23,049 on the ground that they were acting out of due obedience. The same presumption shall apply to senior officers who did not hold the position of commander-in-chief, area commander, sub-area commander or head of a security or police force or prison staff unless it has been judicially determined within 30 days of the enactment of this law that they had

aggravated by being accompanied by violence and threats, in combination with an offence of aggravated torture, committed under military rule in the province of Santa Fe.

In a ruling dated September 2002, Federal Judge Claudio Bonadio declared the Full Stop and Due Obedience Laws to be null and void in case No. 6,869/98 entitled "Scagliusi, Claudio Gustavo and others - unlawful imprisonment". In point 7.4 of his ruling, Judge Bonadio established that "the acts which are the subject of the proceedings in this case took place within the framework of a systematic plan of unlawful repression ordered and organized [by] the authorities of the military government that usurped institutional power between 24 March 1976 and 10 December 1983 […]" and that "these acts can [be] classed as crimes against humanity, given that there is abundant evidence in the case of the use of kidnapping, torture, enforced disappearance and murder, etc., [and that these were] carried out in a systematic and planned manner […]". Referring to the Full Stop and Due Obedience Laws, he concluded that: "In view of the foregoing, there can be no doubt as to which laws take precedence in this case and I am therefore obliged to declare the so-called 'full stop' and 'due obedience' laws to be null and void in being not only contrary to the National Constitution but also to the law of nations."

In March 2003, Federal Judge Carlos Skidelsky declared article 1 of Law 23,492 and articles 1, 3 and 4 of Law 23,521 to be unconstitutional and irrevocably null and void and that they were invalid, affirming "the unconstitutionality of Laws No. 23,492 and 23,521 and the invalidity of their application in the present case". In his ruling, Judge Skidelsky stated that "these laws mean that the deaths of thousands of Argentine citizens and foreigners over a specific period of time (1976 to 1983), and for that period only, will go completely unpunished and, as a consequence, create a special category of people who have no right to the protection of that most sacred of possessions, human life. In other words, they allow a perverse inequality to be enshrined in law." Judge Skidelsky's judgment relates to proceedings concerning the enforced disappearance of persons, torture and aggravated murder

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authority to take decisions or were involved in the drawing up of orders. In such cases the aforesaid persons shall automatically be deemed to have acted under a state of coercion in a position of subordination to higher authority and to be following orders without any power or capacity to review, oppose or resist them on grounds of timeliness or legitimacy.

Article 3. This law shall apply as a matter of course. Within five (5) days of its entry into force, in all proceedings in which judgment is pending, whatever procedural stage they have reached, the court in which they are taking place shall take no further action and shall, with regard to the personnel referred to in article 1, first paragraph, make an order under article 252 bis of the Code of Military Justice or, if applicable, cancel any summons for such person to make a statement.

The absence of any pronouncement by the court within the said five-day period or the period specified in the second paragraph of article 1 shall have the effects set out in the previous paragraph, with the force of *res judicata*. If in any proceedings the rank or status held at the time of the events by the person summoned to make a statement has not been established, the said period shall begin to run on the date on which a certificate or statement attesting to such rank or status is issued by a competent authority.

Article 4. Without prejudice to any provisions of Law No. 23,492, in any proceedings with respect to which the time limit specified in article 1 of the first paragraph of the said Law has not expired, no action shall be taken to summon any person mentioned in art. 1 of the present Law to make a statement.

in the case known as the "Margarita Belén massacre" which took place in December 1976 in the locality of Margarita Belén in the province of el Chaco. In his ruling Judge Skidelsky also stated that domestic courts must ensure that international standards on human rights protection that are binding on Argentina are implemented throughout the country. The judge pointed out that the case in question must be examined "not only on the basis of domestic criminal law but also in the light of the human rights treaties that have been ratified by Argentina."

The Attorney-General of the Nation, Nicolás Becerra, has also made pronouncements confirming rulings of federal judges with regard to the invalid and unconstitutional nature of the Full Stop and Due Obedience Laws. In an opinion of 29 August 2002 addressed to the Supreme Court of Justice, the Attorney-General stated his agreement with the judgment of Judge Gabriel Cavallo declaring both laws to be null, void and unconstitutional. In the opinion, the Attorney-General felt the need to emphasize that "the duty not to impede the investigation and punishment of gross human rights violations, like all obligations derived from international treaties and other sources of international law, is incumbent not only on the Legislature but on all branches of government and therefore requires that the Public Prosecutor's Office and the Judiciary do not validate actions taken by other branches of government who are infringing them."

On 29 August 2002, in proceedings entitled "Astiz Alfredo and others, for *delitos de acción pública* (offences for which a public prosecution can be brought)" arising from the enforced disappearance of Conrado Higinio Gómez in January 1977, the Attorney-General addressed another opinion to the Supreme Court of Justice in relation to the Full Stop and Due Obedience Laws. This case was concerned both with the disappearance itself and also with a number of related acts of wrongdoing in connection with property that were prejudicial to the victim and his family. One of the points made by the Attorney-General in the opinion was that "the offence of unlawful imprisonment falls within the category of continuing offences, the particular nature of which is that perpetration does not end once the offence has been carried into effect but continues over time […] in such a way that the continuing offence goes on being perpetrated until the illegal situation has come to an end."

In July 2003 the President of the Republic, Néstor Kirchner, revoked Decree No. 1581-01 which had been passed by former President Fernando de la Rúa in December 2001, prohibiting extraditions requested by judges in other countries of persons allegedly implicated in human rights violations committed during the period of military government.

In August 2003 the Full Stop and Due Obedience Laws were annulled by the Argentine Senate; the annulment was confirmed later that month by the Chamber of Deputies. The final decision on whether or not these laws are constitutional has to be taken by the Supreme Court. This decision will remain pending until a ruling has been delivered by the *Cámara de Casación Penal,* Court of Criminal Cassation, to which the Supreme Court had submitted a position paper on the unconstitutional nature of these laws.

5. The Argentine State

The vast majority of human rights violations which took place in Argentina during the period of military rule between 1976 and 1983, resulting in the torture and extrajudicial execution of thousands of people and the "disappearance" of thousands more, have gone unpunished. Most "disappearances" in Argentina have still not been clarified, the fate of the victims has not been determined and the perpetrators remain at large.

Under international law the Argentine State is not permitted to invoke provisions of domestic law in order to avoid complying with its international obligations, but must bring its legislation into line with those obligations by repealing such provisions and ensuring that they cease to have any legal effect.

The Full Stop and Due Obedience Laws are incompatible with Argentina's international obligations to investigate, bring to justice and punish the perpetrators of such violations. Amnesty International believes that the Argentine courts must open investigations and institute criminal proceedings to try the human rights violations committed under military rule in order to ensure that those responsible for gross violations such as torture, enforced disappearance and extrajudicial execution do not benefit from impunity.

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Chapter II

I. Introduction

Amnesty International and the International Commission of Jurists have the honour to submit the following legal memorandum on the incompatibility of the Argentine Republic's Laws 23,492 and 23,521 with international law and particularly with Argentina's international obligation to bring to justice and punish those responsible for gross violations of human rights.

The Argentine Republic, it should be remembered, ratified the International Covenant on Civil and Political Rights in 1986[7] and the American Convention on Human Rights in 1984.[8] It ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1986, the Inter-American Convention to Prevent and Punish Torture in 1989 and the Inter-American Convention on Forced Disappearance of Persons in 1996. Argentina is also a State party to the Vienna Convention on the Law of Treaties and article 75 (22) of the Argentine Constitution states that "treaties are hierarchically superior to laws". Moreover, under the same article, the Universal Declaration of Human Rights, the American Declaration on the Rights and Duties of Man, the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment all "have constitutional rank".

Under international law such acts as torture, summary, extra-legal and arbitrary executions, and enforced disappearance are deemed to be gross violations of human rights. The United Nations General Assembly has stated on many occasions that extrajudicial, summary and

[7] See United Nations document E/CN.4/2000/89

[8] See Documentos Básicos en materia de Derechos Humanos en el Sistema Interamericano, [Basic Documents on Human Rights within the Inter-American System], Organization of American States, San José, Costa Rica, 1997, p. 49 onwards.

arbitrary executions and torture constitute flagrant human rights violations.[9] The Declaration on the Protection of All Persons from Enforced Disappearance reiterates that forced disappearance is a grave violation of human rights.[10] The jurisprudence developed by international human rights organizations is in agreement on this issue. The United Nations Human Rights Committee has repeatedly taken the view that offences such as torture, extrajudicial execution and enforced disappearance are gross violations of human rights.[11] The Special Rapporteur to the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Theo van Boven, has expressed the same view in his draft basic principles and guidelines on the right to redress of victims of gross violations of human rights and humanitarian law.[12] Learned legal opinion is also in agreement with this view, although it employs the terms "blatant" or "flagrant" indiscriminately as synonyms for "gross" or "grave". For example, in the conclusions of the Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violation of Human Rights and Fundamental Freedoms, held in 1992, it was stated that "the notion of gross violations of human rights and fundamental freedoms includes at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention, and systematic discrimination."[13]

One element in the characterization of a violation as "gross" is the fact that the human rights to which it relates are inalienable. The Inter-American Court of Human Rights has, in fact, asserted that the following constitute gross human rights violations: "[acts] such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."[14] In its General Comment No. 29, the UN Human Rights Committee has said that "States parties may in no circumstances invoke article 4 of the Covenant, International Covenant of Civil and Political Rights, as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental

[9] See, for example, Resolutions No. 53/147 on "Extrajudicial, summary or arbitrary executions" adopted on 9 December 1998 and No. 55/89 on "Torture and other cruel, inhuman and degrading treatment or punishment", adopted on 22 February 2001. For decades now, many United Nations bodies have been taking the same position, for example, in Resolution 7 (XXVII) of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of 20 August 1974.

[10] Article 1(1) of the Declaration on the Protection of All Persons against Enforced Disappearance.

[11] See, for example, the decision dated 29 March 1982 in Communication No. 30/1978 in the case of *Bleier Lewhoff and Valiño de Bleier v. Uruguay*; the decision dated 31 March 1982 in Communication No. 45/1979, in the case of *Pedro Pablo Carmargo v. Colombia*; and Concluding Observations - Burundi in United Nations document CCPR/C/79/Add.41, paragraph 9, 3 August 1994.

[12] See United Nations documents E/CN.4/1997/104, E/CN.4/Sub.2/1996/17 and E/CN.4/Sub.2/1993/8.

[13] Netherlands Institute of Human Rights - Studie-en Informatiecentrum Menserecten (SIM), Seminar on the Right to Restitution, Compensation and Rehabilitation for victims of Gross Violation of Human Rights and Fundamental Freedoms, University of Limburg, Maastricht, special SIM publication No. 12, p. 17

[14] Inter-American Court of Human Rights, judgment dated 14 March 2001 in the "Barrios Altos" case (*Chumbipuna Aguirre and others v. Peru*), paragraph 41.

principles of fair trial, including the presumption of innocence."[15] In its Comment the Committee goes on to assert the prohibition, whatever the circumstances, on such acts as abduction or unacknowledged detention, deportation or forcible transfer of population, except as permitted under international law, and the advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.[16] Consequently, to the extent that they apply to non-derogable human rights, such acts constitute gross violations of human rights and should therefore be punishable as criminal offences.

II. The State's duty to guarantee

International Human Rights Law imposes two broad categories of obligations on the State: first, the duty to refrain from violating human rights; and second, the duty to guarantee respect for such rights. The first category comprises those obligations which are directly related to the duty of the State to refrain - whether by act or omission - from violating human rights, which means, *inter alia*, ensuring that suitable measures are taken to ensure that such rights can be freely enjoyed. The second category refers to the State's obligations to prevent and investigate violations, bring to justice and punish the perpetrators and provide reparations for loss and damage caused. Legally speaking, the State is therefore the guarantor of human rights and, as such, assumes basic obligations with regard to the protection and safeguarding of such rights. It is on this basis that jurisprudence and learned legal opinion have developed the concept of the duty to guarantee which they see as the core notion underlying the State's legal position with regard to human rights.

The basis in law for this duty to guarantee is to be found both in international customary law and in international treaty-based law. The duty to guarantee is expressly enshrined in several human rights treaties: the American Convention on Human Rights (article 1.1), the Inter-American Convention on Forced Disappearance of Persons (article 1), the Inter-American Convention to Prevent and Punish Torture (article 1), the International Covenant on Civil and Political Rights (article 2) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and others besides. The duty to guarantee is also affirmed in such declaratory texts as the Declaration on the Protection of All Persons from Enforced Disappearance, and the Principles for the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.[17]

In its analysis of article 1 (1) of the American Convention on Human Rights, the Inter-American Court of Human Rights recalled that States parties have assumed a general obligation to protect, respect and guarantee each of the rights contained in the American Convention and that, therefore, "the States must prevent, investigate and punish any violation

[15] General Comment No. 29, "States of Emergency (Article 4)", adopted at the 1950th meeting on 24 July 2001, paragraph 11.
[16] Ibid., paragraph 13 (b), (d) and (e).
[17] United Nations General Assembly, Resolution 44/162 of 15 December 1989.

of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation [...] The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[18]

The Inter-American Commission on Human Rights has deemed the duty to guarantee to be an essential element in the protection of human rights: "In other words, the States have a duty to respect and to guarantee the fundamental rights. These duties of the States, to respect and to guarantee, are the cornerstone of the international protection system since they comprise the States' international commitment to limit the exercise of their power, and even of their sovereignty, vis-à-vis the fundamental rights and freedoms of the individual. The duty to respect entails that the States must ensure the effectiveness of all the rights contained in the Convention by means of a legal, political and institutional system appropriate for such purposes. The duty to guarantee, for its part, entails that the States must ensure the effectiveness of the fundamental rights by ensuring that the specific legal means of protection are adequate either for preventing violations or else for re-establishing said rights and for compensating victims or their families in cases of abuse or misuse of power. These obligations of the States are related to the duty to adopt such domestic legislative provisions as may be necessary to ensure exercise of the rights specified in the Convention (Article 2). As a corollary to these provisions, there is the duty to prevent violations and the duty to investigate any that occur since both are obligations involving the responsibility of the States."[19]

The notion of the duty to guarantee has been incorporated by United Nations missions as an essential referent for their human rights monitoring work in countries all over the world. For example, the United Nations Observer Mission in El Salvador (ONUSAL) summarized the duty to guarantee as a set of "obligations to guarantee or protect human rights... [consisting] of the duty to prevent conduct that is against the law and, should it occur, to investigate it, bring to justice and punish those responsible and compensate the victims."[20]

The jurisprudence developed by international human rights tribunals as well as by quasi-jurisdictional human rights bodies such as the United Nations Human Rights Committee and the Inter-American Commission of Human Rights sees this duty to guarantee as consisting of five basic obligations which the State must honour: the obligation to investigate, the obligation to bring to justice and punish those responsible, the obligation to provide an effective remedy for the victims of human rights violations; the obligation to provide fair and

[18] Inter-American Court of Human Rights, Judgment of 29 July 1988*, Velásquez Rodríguez case,* Series C: Decisions and Judgments, No. 4, paragraph 166 and 174.
[19] Report No. 1/96, Case 10,559, *Chumbivilcas* (Peru), 1 March 1996.
[20] United Nations Observer Mission in El Salvador, ONUSAL, Report of 19 February 1992, United Nations document A/46/876 S/23580, paragraph 28. [Spanish original, free translation]

adequate reparation to the victims and their relatives, and the obligation to establish the truth about what happened.

These obligations, which make up the duty to guarantee, are by their very nature complementary and are not alternatives or substitutes for each other. This has been clearly stated by, for example, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions as "the recognition of the right of victims or their families to receive adequate compensation is both a recognition of the State's responsibility for the acts of its organs and an expression of respect for the human being. Granting compensation presupposes compliance with the obligation to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation."[21]

The obligations that make up the duty to guarantee are clearly interdependent. For example, the obligation to bring to justice and punish those responsible for human rights violations is closely related to that of investigating the facts. Nevertheless, "it is not possible for the State to choose which of these obligations it should fulfil."[22] Although they can be fulfilled separately, this does not mean that the State is not obliged to fulfil each and every one of them. The separate and independent character of each obligation that makes up the duty to guarantee has been reaffirmed repeatedly by the Inter-American Court of Human Rights. The Court has pointed out that a waiver by a victim of human rights violations of his entitlement to compensation does not mean that the State is released from its obligation to investigate the case and to try and punish the culprits. In the Court's view, "even though the aggrieved party may pardon the author of the violation of his human rights, the State is nonetheless obliged to sanction said author […] The State's obligation to investigate the facts and punish those responsible does not erase the consequences of the unlawful act in the affected person. Instead, the purpose of that obligation is that every State party ensure, within its legal system, the rights and freedoms recognized in the Convention."[23]

The Inter-American Commission on Human Rights has stated on repeated occasions that neither the granting of compensation to victims and their relatives, nor the establishment of "Truth Commissions", in any way relieves the State of its obligation to bring those responsible for human rights violations to justice and to ensure that they are punished[24]. In relation to Chile, the Inter-American Commission on Human Rights specifically stated that "the Government's recognition of responsibility, its partial investigation of the facts and its

[21] Special Rapporteur on extrajudicial, summary or arbitrary executions, United Nations document E/CN.4/1994/7, paragraphs 688 and 711.

[22] Méndez, Juan, Derecho a la Verdad frente a las graves violaciones a los derechos humanos [The right to know the truth about gross human rights violations], in La aplicación de los tratados de derechos humanos por los tribunales locales [The application of human rights treaties by local courts], CELS, compiled by Martín Abregú - Christian Courtis, Editores del Puerto s.r.l., Buenos Aires, 1997, p. 526. [Spanish original, free translation]

[23] Inter-American Court of Human Rights, Judgment of 27 August 1988. *Garrido and Baigorria case (Compensation)*, paragraph 72.

[24] Inter-American Commission on Human Rights, Report No. 28/92, Cases 10, 147, 10,181 and 10,240, 10.262, 10.309 y 10.311 (Argentina), 2 October 1992, paragraph 52.

subsequent payment of compensation are not enough, in themselves, to fulfil its obligations under the Convention. According to the provisions of Article 1.1, the State has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and ensuring adequate reparations for the victims.[25] In the case of El Salvador, the Inter-American Commission on Human Rights pointed out that, despite the important role played by the Truth Commission in establishing the facts surrounding the most serious violations and in promoting national reconciliation, a commission of this type "[cannot] be accepted as a substitute for the State's obligation, which cannot be delegated, to investigate violations committed within its jurisdiction, and to identify those responsible, punish them, and ensure adequate compensation for the victim […] all within the overriding need to combat impunity."[26]

Moreover, the obligation of the State to guarantee victims of human rights violations the right to an effective remedy exists independently of the obligation to investigate, bring to justice and punish the perpetrators of such violations. With regard to the obligation to investigate, the Inter-American Court of Human Rights declared that "[the obligation to investigate] must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."[27] The Court has also established that "All the States party to the American Convention have the duty to investigate human rights violations and to punish the perpetrators and accessories after the fact in said violations. And any person who considers himself or herself to be a victim of such violations has the right to resort to the system of justice to attain compliance with this duty by the State, for his or her benefit and that of society as a whole."[28]

III. The obligation to provide effective remedies

The right to an effective remedy is embodied in numerous international human rights instruments. On a universal level, these include article 8 of the Universal Declaration of

[25] Inter-American Commission on Human Rights, Report No. 36/96, Case 10,843 (Chile), 15 October, paragraph 77. See also Inter-American Commission on Human Rights, Report 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 76, and Report No. 25/98, Cases 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile), 7 April 1998, paragraph 50.

[26] Inter-American Commission on Human Rights, Report No. 136/99, Case 10,488, *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, paragraph 230.

[27] Inter-American Court of Human Rights, *Velásquez Rodríguez Case, Judgment of 29 July 1988*, in Series C: Decisions and Judgments, No. 4, paragraph 177 ; *Godínez Cruz Case, Judgment of 20 January 1989*, in Series C: Decisions and Judgments, No. 5, paragraph 188 (underlining added); and *Caballero Delgado and Santana Case*, Judgment of 8 December 1995, in Series C: Decisions and Judgments, No. 22, paragraph 58.

[28] Judgment of 29 August 2002, *Caracazo vs. Venezuela Case*. See also the Court's judgment of 27 February 2002 in the *Trujillo Oroza Case* (Reparations), paragraph 99.

Human Rights; article 2 of the International Covenant on Civil and Political Rights; article 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. The right to an effective remedy is also stated in the Declaration on the Protection of all Persons from Forced Disappearance (articles 9 and 13) and the Principles for the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (principles 4 and 16). At the regional level, noteworthy provisions include article 13 of the European Convention on Human Rights; article 47 of the Charter of Fundamental Rights of the European Union; article XVIII of the American Declaration of the Rights and Duties of Man; articles 24 and 25 of the American Convention on Human Rights; article X of the Inter-American Convention on Forced Disappearance of Persons; article 8 of the Inter-American Convention to Prevent and Punish Torture; articles 3 and 7 of the African Charter on Human and Peoples' Rights; and article 9 of the Arab Charter of Human Rights.

Any violation of a human right renders a State liable to provide and guarantee an effective remedy. Under the International Covenant on Civil and Political Rights (article 2.3), and the European Convention of Human Rights (article 13), whether the remedy is of a judicial or an administrative character or otherwise depends on the nature of the right that has been violated and the degree to which the remedy is effective. Under the American Convention on Human Rights (article 25) and the African Charter of Human and Peoples' Rights (article 7.1), in the event of a violation of fundamental rights the remedy must be judicial in character. The Charter of Fundamental Rights of the European Union makes reference to the right to an effective remedy before a tribunal for violations of rights and freedoms guaranteed by the law of the Union (article 47). The Court of Justice of the European Communities ruled that the ability of any person whose rights have been infringed to pursue their claims by judicial process "is the expression of a general principle of law which is based on the common constitutional traditions of the member States."[29]

In spite of these varying requirements under international legal instruments concerning gross human rights violations, which imply the existence of a criminal offence, it is universally held in jurisprudence that an effective remedy must be of a judicial nature. The Human Rights Committee, for example, has taken the view that "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant [on Civil and Political Rights], in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life."[30] In cases involving extrajudicial executions, enforced disappearances or torture, remedies must be essentially judicial.[31] For its part, the European Court of Human

[29] Decision of 15 May 1986, *the Johnston case*, No. 222/84, cited in Guy Braibant, La Charte des droits fondamentaux de l'Union européenne, Éditions du Seuil, Paris, 2001, p. 236 (French original, free translation).

[30] Decision of 13 November 1995, Communication No. 563/1993, *Nydia Erika Bautista case* (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8.2. See also Decision of 29 July 1997, Communication No. 612/1995, *case of José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.2.

[31] On this point, see the Decision on admissibility of 13 October 2000, Communication No. 778/1997, *Coronel et*

Rights has ruled that "the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the effective identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure."[32]

The Inter-American Court of Human Rights has ruled that the right to an effective remedy and to the protection of the courts "incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights […] States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8.1), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdictions."[33] The Inter-American Court went on to express the following view: "According to this principle, the absence of an effective remedy to violations of the rights recognized by the [American] Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy."[34] The Inter-American Court has further established that "all States party to the American Convention have the duty to investigate human rights violations and to punish the perpetrators and accessories after the fact in said violations. And any person who considers himself or herself to be a victim of such violations has the right to resort to the system of justice to attain compliance with this duty by the State, for his or her benefit and that of society as a whole."[35]

The Human Rights Committee has stressed that the obligation to provide remedies for each violation of a provision of the Covenant, as required by article 2.3 of the Covenant, "constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the

al., (Colombia), United Nations document CCPR/C/70/D/778/1997, paragraph 6.4.

[32] European Court of Human Rights, Judgment (Preliminary Objection) dated 18 December 1996 in the case of *Aksoy vs. Turkey* cited in Conseil de l'Europe, Vade-mecum de la Convention Européenne des Droits de l'Homme, Editios du Conseil de l'Europe, Strasbourg, 1999, 2nd. edition, p. 134.

[33] Advisory Opinion OC-9/87 of 6 October 1987, Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights), Series A, Judgments and Opinions No. 9 (1987) paragraph 24.

[34] Ibidem.

[35] Judgment of 29 August 2002 in the case of *El Caracazo v. Venezuela*. See also the Court's Judgment of 27 February 2002 in the *Trujillo Oroza Case (Reparations)*, paragraph 99.

exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3 of the Covenant to provide a remedy that is effective."[36] The Committee goes on to state that "it is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights […]."[37] The Inter-American Court of Human Rights has likewise declared that judicial remedies for the protection of human rights are not subject to derogation.[38]

In cases involving gross violations of human rights, the right to an effective remedy clearly depends on the ability to have access to a court. Given the criminal nature of such violations, the right of access to a court must fall within the scope of criminal law. The jurisprudence of international human rights bodies is unanimous in its view that where gross human rights violations are concerned, only recourse to a criminal court satisfy the conditions for the remedy to be effective. According to learned legal opinion, violations of absolute human rights require that a special Right to Justice be instituted.[39]

IV. The obligation to bring to justice and to punish

A. General considerations

The obligation to bring to justice and punish the perpetrators of gross violations of human rights, as an expression of the duty to guarantee, derives legal force from both article 2 of the International Covenant on Civil and Political Rights and article 1 of the American Convention on Human Rights. In cases of torture, it is embodied in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (articles 4, 5 and 7) and the Inter-American Convention to Prevent and Punish Torture (articles 1 and 6). In cases of forced disappearance, the obligation to bring to justice and punish those responsible for this grave violation of human rights has its basis in articles I and IV of the Inter-American

[36] General Comment No. 29, Doc. Cit., paragraph 14.
[37] Ibid., paragraph 15.
[38] Advisory opinion OC- 9/87, Doc. Cit.
[39] Abellán Honrubia, Victoria, "Impunidad de violación de los derechos humanos fundamentales en América Latina: Aspectos jurídicos internacionales" [Impunity and violations of fundamental human rights in Latin America], in Jornadas iberoamericanas de la Asociación española de profesores de derecho internacional and relaciones internacionales - La Escuela de Salamanca and el Derecho Internacional en América, del pasado al futuro, University of Salamanca, Salamanca, 1993; Mattarollo, Rodolfo, "La problemática de la impunidad" [The problem of impunity], in Cuadernos Centroamericanos de Derechos Humanos, No. 2, Ed. Codehuca, San José, Costa Rica, 1991; Méndez, Juan, Accountability for Past Abuses", in Human Rights Quarterly, Volume 19, No. 2, 1997; Senese, Salvatore, "Pouvoir judiciaire, droit à la justice et impunité" in Impunity, Impunidad, Impunité, ed. Lidlip, Geneva, 1993; Valiña, Liliana, "Droits intangibles dans le cadre du système interamericain des droits de l'homme", in Droits intangibles et états d'exception [Inalienable rights and states of exception], Ed. Bruylant, Brussels, 1996.

Convention on Forced Disappearance of Persons. The United Nations General Assembly, in reaffirming that forced disappearance is a violation of international law, emphasized that it is a crime which must be punishable under criminal law[40].

The Inter-American Court of Human Rights has pointed out that, in light of the obligations of States party to the American Convention on Human Rights, "the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[41]

In several of its judgments the Inter-American Court of Human Rights has pointed out that States Parties to the American Convention on Human Rights have an international obligation to bring to justice and punish those responsible for human rights violations[42]. This obligation is directly related to the right of every person to be heard by a competent, independent and impartial tribunal for the determination of their rights, as well as to the right to an effective remedy, both of which are enshrined in articles 8 and 25 of the American Convention on Human Rights. As pointed out by the Inter-American Court of Human Rights: "The American Convention guarantees everyone the right to recourse to a competent court for the determination of his rights and States have a duty to prevent human rights violations, investigate them and identify and punish those responsible for carrying them out or covering them up. [...] Article 8.1 of the American Convention, which is closely related to Article 25 in conjunction with Article 1(1) of the same Convention, obliges the State to guarantee every individual access to simple and prompt recourse, so that, *inter alia,* those responsible for human rights violations may be prosecuted."[43]

The Inter-American Court has affirmed that "[…] punishing those responsible is an obligation incumbent upon the State whenever there has been a violation of human rights, an obligation that must be discharged seriously and not as a mere formality."[44] The Court has also

[40] Resolution 49/193 of the General Assembly adopted on 23 December 1994. On this point, see Resolutions 51/94 of 12 December 1996, 53/150 of 9 December 1998

[41] Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of 29 July 1988, Series C: Decisions and Judgments, No. 4, paragraph 174 and *Godínez Cruz Case*, Judgment of 20 January 1989, Series C: Decisions and Judgments, No. 5, paragraph 184

[42] Inter-American Court of Human Rights: *Velásquez Rodríguez, Compensatory Damages* (Art. 63.1 American Convention on Human Rights), Series C: Decisions and Judgments, No. 7, paragraphs 32 & 34; *Godínez Cruz Case, Compensatory Damages* (Art. 63.1 American Convention on Human Rights), Judgment of 21 July 1989, Series C: Decisions and Judgments, No. 8, paragraphs 30 & 3; *Caballero Delgado and Santana Case*, Judgment of 8 December 1995, Series C: Decisions and Judgments, No. 22, paragraph 69 and Finding 5; *El Amparo Case, Reparations* (Article 63.1 American Convention on Human Rights), Judgment of 14 September 1996, Series C: Decisions and Judgments, No. 28, paragraph 61 and Finding 4; *Castillo Páez Case*, Judgment of 3 November 1997, Series C: Decisions and Judgments, No. 34, paragraph 90; *Suárez Rosero Case*, Judgment of 12 November 1997, Series C: Decisions and Judgments, No. 35, paragraph 107 and Finding 6; and *Nicholas Blake Case*, Judgment of 24 January 1998, Series C: Decisions and Judgments No. 36, paragraph 97.

[43] Inter-American Court of Human Rights, *Nicholas Blake Case, Reparations*, Judgment of 22 January 1999, Series C; Decisions and Judgments, paragraphs 61 and 63.

[44] *El Amparo Case, Reparations*, Doc. Cit., paragraph 61. See also *Blake Case, Reparations*, Doc. Cit., paragraph

expressed the view that "the State must ensure that domestic proceedings directed toward […] punishment of those responsible for the facts […] have the desired effects and, specifically, not resort to measures such as amnesty, extinguishment and measures designed to eliminate responsibility."[45]

The Inter-American Commission on Human Rights has pointed out that this obligation to bring to justice and punish the perpetrators of human rights violations cannot be delegated or renounced. In its Report on the Situation of Human Rights in Peru, the Inter-American Commission on Human Rights stated that: "the State is under the obligation of investigating and punishing the perpetrators […] This international obligation of the State cannot be renounced."[46]

The obligation to bring to justice and punish those responsible for human rights violations also arises under the International Covenant on Civil and Political Rights. Specifically, the Human Rights Committee asserts that: "the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified."[47]

There can thus be no doubt as to the obligation to bring to justice those responsible for gross violations of human rights, in a court of law, and to punish them. It is established not only in the International Covenant on Civil and Political Rights, the American Convention on Human Rights and other human rights treaties but also in other international instruments which are declaratory in nature. Both the Declaration on the Protection of All Persons from Enforced Disappearance and the Principles for the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions refer to such an obligation.

This obligation does not arise only from treaties but has been recognized for a long time. It was established early on in International Law, and one of the first precedents of international jurisprudence was an Arbitral Award by Professor Max Huber of 1 May 1925 in relation to British claims for damages caused to British subjects in Spanish Morocco. In his Arbitral Award Professor Huber made the point that in International Law "it is generally recognized that repression of crime is not only a legal obligation incumbent on the competent authorities but also [...] an international duty incumbent on the State."[48] The Committee against Torture, when considering cases of torture committed before the entry into force of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pointed

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[45] Judgment of 29 August 2002, *El Caracazo vs. Venezuela Case (Reparations)*, paragraph 119.

[46] Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paragraph 230.

[47] Decision of 13 November 1995, Communication No. 563/1993, *Nydia Erika Bautista Case*, (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8.6. See also the Decision of 29 July 1997, Communication No. 612/1995, *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.8.

[48] Recueil de sentences arbitrales, Nations Unies, Vol. II, p. 645 and 646 (French original, free translation).

out that the obligation to punish those responsible for acts of torture was already in existence before the Convention came into effect because "there was a general rule of international law which should oblige all States to take effective measures [...] to punish acts of torture."[49] The Committee against Torture based its view on the "principles of the judgment of the Nuremberg International Tribunal and the right not to be tortured contained in the Universal Declaration of Human Rights."

A number of Resolutions of the General Assembly of the United Nations on extrajudicial executions and enforced disappearance may be cited, in which reference is made to the obligation under discussion. For example, in reaffirming that enforced disappearance is a violation of international law, the General Assembly emphasized that this is a crime which should be punishable under the criminal law.[50] In its Resolution 55/111 of 4 December 2001, the General Assembly reiterated "the obligation of all Governments to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, while ensuring the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity, to prevent the recurrence of such executions."[51]

The obligation to prosecute and punish the perpetrators of human rights violations is realized through the action of the courts. The courts must guarantee to victims of human rights violations and their relatives the right to a fair trial and to an effective remedy, as well as ensure that judicial guarantees are accorded to those facing prosecution. In fulfilling this dual role the courts must abide by the relevant provisions of the International Covenant on Civil and Political Rights (articles 2 and 14) and the American Convention on Human Rights (articles 1, 8 and 25). Under this legal system, the obligation to prosecute and punish and to guarantee the right to a fair trial and an effective remedy requires an independent and impartial tribunal. The Inter-American Court of Human Rights has pointed out that:

"Article 25(1) incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights. As the Court has already pointed out, according to the Convention: ... States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdictions […] According to this principle, the absence of an effective remedy to violations

[49] United Nations Committee against Torture, Decision relative to Communications 1/1988, 2/1988 and 3/1988 (Argentina), 23 November 1989, paragraph 7.2, in United Nations document "General Assembly, Official Reports, 45th session, Supplement No. 44" (A/45/44), 1990

[50] Resolution 49/193 of the General Assembly adopted on 23 December 1994. See also Resolutions 51/94 of 12 December 1996 and 53/150 of 9 December 1998.

[51] Resolution 55/111, "Extrajudicial, summary or arbitrary executions", adopted by the General Assembly on 4 December 2001, paragraph 6.

of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective." [52]

B. The consequences of failing to bring to justice and punish

The inherent link between the right to a fair trial and the obligation to impart justice is obvious. The duty of the State to impart justice is based on treaties, but also on the fact that human rights are a natural area for investigation by the courts. Any right which, when violated, cannot be prosecuted by the courts is an imperfect right. Human rights, however, are basic rights and it is therefore not possible for a legal system, of which those rights form the very basis, not to consider them as suitable subject-matter for the courts. This being so, not to afford judicial protection to those rights would be inconceivable since, if this protection were lacking, the very notion of law and order would be destroyed. To quote the United Nations Expert on the Right to Restitution, Compensation and Rehabilitation: "It is difficult to imagine a justice system which protects the rights of the victims while at the same time remaining indifferent and inactive with regard to the flagrant crimes committed by those who have violated such rights."[53].

The question of State responsibility arises not only when, through the conduct of its agents, the State infringes a right but also when it fails to take appropriate action to investigate the facts, prosecute and punish those responsible and provide compensation, or when it interferes with the work of the courts. Therefore, when a State is in breach of, or fails to exercise, its duty to guarantee, it becomes internationally responsible. This principle was established early on in international law and one of the earliest existing precedents on the matter in jurisprudence is the Arbitral Award of Professor Max Huber of 1 May 1925 concerning British claims for damages caused to British subjects in Spanish Morocco. In his decision, Professor Max Huber recalled that, under international law: "State responsibility can arise [...] from a lack of vigilance in preventing injurious acts as well as from a lack of diligence in criminally prosecuting the offenders."[54]

The failure to exercise this duty to guarantee, then, is not limited to preventive aspects; as was pointed out by the United Nations Observer Mission in El Salvador (ONUSAL): "State responsibility arises not only from a lack of vigilance in preventing injurious acts but also

[52] Advisory Opinion OC-9/87 6 October 1987, "Judicial Guarantees in States of Emergency" (Arts. 27.2, 25 and 8 American Convention on Human Rights), Series A: Judgments and Opinions, No. 9, paragraph 24.
[53] United Nations document E/CN.4/Sub.2/1992/8, paragraph 5.5.
[54] Recueil de sentences arbitrales, Nations Unies, Vol. II, p. 645-646 (Free translation of French original).

from a lack of diligence in criminally prosecuting those responsible and in applying the required civil penalties."[55]

The non-fulfilment of the obligation to bring to justice, try and punish the perpetrators of gross human rights violations results in denial of justice and, hence, impunity, understood here to mean "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of rights." [56] According to the Inter-American Court of Human Rights, "the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defencelessness of victims and their relatives."[57] The Court has moreover declared that "the State has the duty to prevent and combat impunity."[58]

By allowing impunity for human rights violations to continue, the State is in breach of its international obligations and is internationally responsible. The Inter-American Court of Human Rights has the following to say on the subject: "If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction."[59] The Human Rights Committee, too, has held that: "Impunity for violation of human rights is incompatible with the State party's obligation under article 2, paragraph 3, of the Covenant."[60]

V. The incompatibility of amnesties with the obligation to bring to justice and punish

A. General considerations

Amnesties and similar measures which prevent the perpetrators of gross human rights violations from being brought before the courts, tried and sentenced are incompatible with State obligations under International Human Rights Law. First, such amnesties are incompatible with the obligation to investigate, bring to justice and punish those responsible for gross human rights violations. Second, they are incompatible with the State obligation to guarantee the right of all persons to an effective remedy and to be heard by an independent and impartial tribunal for the determination of their rights.

[55] ONUSAL, doc. cit., paragraph 29.
[56] Inter-American Court of Human Rights, *Paniagua Morales and others*, Judgment of 8 March 1998, Series C: Decisions and Judgments, No. 37, paragraph 173.
[57] Ibid., paragraph 173.
[58] Inter-American Court of Human Rights, *Nicholas Blake Case*, Judgment on Reparations, 22 January 1999, Series C: Decisions and Judgments, paragraph 64.
[59] Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of 29 July 1988, in Series C: Decisions and Judgments, No. 4, paragraph 176.
[60] "Concluding Observations of the Human Rights Committee: Lesotho", United Nations document CCPR/C/79/Add.106, 8 April 1999, paragraph 17.

The incompatibility of amnesty laws with the obligation to investigate, bring to justice and punish those responsible for gross human rights violations was implicitly recognized by the World Conference on Human Rights, held in Vienna in June 1993 under the auspices of the United Nations. The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights contains the following clause: "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law."[61]

The granting of amnesties and similar measures to persons responsible for gross human rights violations is expressly prohibited by a number of international instruments. These include the Declaration on the Protection of All Persons from Enforced Disappearance adopted in 1992 by the General Assembly of the United Nations. Article 18 (1) of the Declaration requires that "Persons who have or are alleged to have committed offences [of enforced disappearance] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction." Similarly, the United Nations Principles for the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions provide that "in no circumstance, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions."[62] It is worth adding that ever since 1981 the United Nations Sub-Commission for the Prevention of Discrimination and the Protection of Minorities has been calling on States to refrain from passing laws such as amnesties to prevent the investigation of serious human rights violations.[63]

The United Nations Organization has rejected the use of amnesties, pardons and the like as part of a return to normality following armed conflict or a transition to democracy, where they result in gross human rights violations and international crimes going unpunished. Noteworthy in this context is the position taken by the Secretary General of the United Nations on the Sierra Leone Peace Agreement signed in Lomé on 7 July 1999, reiterating that amnesty and pardon measures were not applicable to "international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law".[64] The Secretary General warned those guilty of such crimes that their actions were not covered by the amnesty under the peace agreement and that they would be held accountable for them.[65] On his instructions, the Special Representative for Sierra Leone, in putting his signature to the Agreement, added a reservation to the effect that the United Nations considered that the amnesty provisions of the Agreement would not apply to international crimes of genocide, crimes against humanity, war crimes and other serious

[61] World Conference on Human Rights - Vienna Declaration and Programme of Action, June 1993, United Nations document DPI/1394-48164-October 1993-/M, Section II , paragraph 60, p. 65.
[62] Principle No. 19.
[63] See, for example, Resolution 15 (XXXIV), 1981.
[64] "Seventh Report of the Secretary General of the United Nations on the Observer Mission in Sierra Leone", United Nations document S/1999/836, 30 July 1999, paragraph 7.
[65] "Report of the High Commissioner for Human Rights pursuant to Commission on Human Rights resolution 2000/24 – Situation of Human Rights in Sierra Leone", United Nations document E/CN.4/2001/35, 1 February 2001, paragraph 6.

violations of international humanitarian law. The Secretary General's position on Kosovo is also of significance. In his 1999 Report to the General Assembly, the Secretary General recalled that it was vital to bring to justice those responsible for grave human rights violations and international crimes to discourage the commission of further crimes and to raise hopes of peace in Kosovo. The Secretary General said that "any appearance of impunity for the perpetrators could become a real obstacle to the process of finding a peaceful solution to the conflict through negotiation."[66] A similar position was taken in the 1999 resolution of the United Nations General Assembly on Haiti, which had enacted an amnesty law for members of the *de facto* regime. In its resolution, the General Assembly reaffirmed "the importance, for combating impunity and for the realization of a genuine and effective process of transition and national reconciliation, of the investigations undertaken by the National Commission for Truth and Justice, and once again calls upon the Government of Haiti to institute legal proceedings against the perpetrators of human rights violations […]."[67]

A number of countries have incorporated into their domestic law, in some cases as part of their constitution, clauses prohibiting the granting of amnesties or pardons for grave human rights violations. The political constitutions of Ethiopia, Ecuador and Venezuela are examples of this. Article 28 of Ethiopia's 1994 Constitution rules out amnesties and pardons for the perpetrators of crimes against humanity, genocide, extrajudicial executions, torture and enforced disappearance. Under Article 23 (2) of the Constitution of Ecuador, adopted in 1998, "the prosecution and punishment of genocide, torture, enforced disappearance of persons, kidnapping and homicide, whether for political reasons or for reasons of conscience, is not be subject to any time limit. Amnesties or pardons cannot be granted for these offences. In such cases, the duty to obey orders from higher authority is not a mitigating factor." (Original in Spanish, Amnesty International's translation) Article 29 of the Constitution of the Bolivarian Republic of Venezuela provides that "legal proceedings to punish crimes against humanity, serious violations of human rights and war crimes are not subject to any statute of limitations. Violations of human rights and crimes against humanity will be investigated and tried by the ordinary courts. Such crimes are excluded from any benefits arising from impunity, including pardons and amnesties."

Other countries which have incorporated violations of human rights as offences under their national law have enacted legislation to ensure that those responsible for such illegal acts cannot benefit from amnesties or similar arrangements. In Colombia, for example, Law No. 589 of 7 July 2000, which specifically establishes genocide, torture, enforced disappearance and enforced displacement of population as criminal offences, provides that "offences under this law shall not be made subject to any amnesty or pardon" (article 14). Venezuela's Law partially amending the Penal Code (2000)[68] makes enforced disappearance a criminal offence and provides that no amnesty or pardon may be granted to the perpetrators (article 181-A). Some countries which have issued amnesties in the wake of armed conflicts have excluded

[66] "Report of the Secretary General pursuant to Resolutions 1160(1998), 1199(1998) and 1203(1998) of the Security Council", United Nations document S/1999/99, 29 January 1999, paragraph 32.
[67] Resolution 54/187, "Situation of Human Rights in Haiti", 17 December 1999, paragraph 8.
[68] Official Gazette No. 5,494 (extra), 20 October 2000.

gross human rights violations and international crimes from the scope of those amnesties. In Guatemala, for example, the Law of National Reconciliation of 1996 provides that no amnesty may be granted and there can be no statute of limitations for crimes of genocide, torture or enforced disappearance or for crimes which under international treaties are not subject to a statute of limitations. The Amnesty Law of the Côte d'Ivoire, Law No. 2003-309 of August 2003, is a more recent example. Article 4 of this law expressly excludes from its scope all "offences constituting gross violations of human rights and international humanitarian law."

B. The jurisprudence of international tribunals and other bodies

The Court of First Instance of the International Criminal Tribunal for the former Yugoslavia, in its judgment on the case of *Prosecutor v. Anto Furundzija,* said the following: "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-legitimize any legislative, administrative or judicial act authorizing 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 authorizing or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition."[69]

The issue was addressed by the United Nations Human Rights Committee at an early stage, after an amnesty was decreed by the regime of General Augusto Pinochet Ugarte in 1978.[70] The Committee questioned the validity of applying the amnesty to any person responsible for gross violations of human rights, particularly enforced disappearance.[71]

In its General Comment No. 20 on article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee concluded that: "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."[72]

The Human Rights Committee has repeatedly reaffirmed this precedent when examining amnesties passed by States parties to the International Covenant on Civil and Political Rights. In its Concluding Observations to Chile in 1999, the Human Rights Committee expressed the view that: "The Amnesty Decree Law, under which persons who committed offences between

[69] Judgment of 10 December 1998 in *Prosecutor v. Anto Furundzija* Case No. IT-95-17/1-T 10, paragraph 155
[70] Decree-Law No. 2191, 18 April 1978.
[71] United Nations document Supplement No. 40 (A/34/40), 1979, paragraph 81.
[72] "General Comment No. 20 (44) on article 7, 44th session of the Human Rights Committee (1992)" in Official Documents of the General Assembly, forty-seventh session, Supplement No. 40 (A/47/40), Annex VI.A

11 September 1973 and 10 March 1978 are granted amnesty, prevents the State party from complying with its obligations under article 2, paragraph 3 to ensure an effective remedy to anyone whose rights and freedoms under the Covenant have been violated."[73]

In its "Concluding Observations" to France in May 1997, the Human Rights Committee concluded that "the Amnesty Acts of November 1988 and January 1990 for New Caledonia are incompatible with the obligation of France to investigate alleged violations of human rights."[74]

In its examination of the amnesty law passed by Senegal, the Human Rights Committee expressed its view that "amnesty should not be used as a means to ensure the impunity of State officials responsible for violations of human rights and that all such violations, especially torture, extra-judicial executions and ill-treatment of detainees, should be investigated and those responsible for them tried and punished."[75]

In its "Concluding Observations" to El Salvador, the Human Rights Committee expressed its "concern at the General Amnesty (Consolidation of the Peace) Law of 1993 and the application of that Law to serious human rights violations, including those considered and established by the Truth Commission. […] the Committee considers that the Law infringes the right to an effective remedy set forth in article 2 of the Covenant, since it prevents the investigation and punishment of all those responsible for human rights violations and the granting of compensation to the victims."[76] The Committee went on to recommend that the Salvadorian authorities "amend [the Law] to make it fully compatible with the Covenant. The State Party should respect and guarantee the application of the rights enshrined in the Covenant."[77]

In its "Concluding Observations" to the Republic of the Congo, the Human Rights Committee was of the opinion that "an amnesty for the crimes committed during the periods of civil war may also lead to a form of impunity that would be incompatible with the Covenant. It considers that the texts which grant amnesty to persons who have committed serious crimes make it impossible to ensure respect for the obligations undertaken by the Republic of the Congo under the Covenant, especially under article 2, paragraph 3, which requires that any person whose rights or freedoms recognized by the Covenant are violated shall have an effective remedy. The Committee reiterates the view, expressed in its General Comment 20, that amnesty laws are generally incompatible with the duty of States parties to investigate such acts, to guarantee freedom from such acts within their jurisdiction and to ensure that they do not occur in the future. The State party should ensure that these most serious human rights

[73] United Nations document CCPR/C/79/Add.104, paragraph 7.
[74] United Nations document CCPR/C/79/Add.80, paragraph 13.
[75] "Human Rights Committee, "Comments on Senegal", United Nations document CCPR/C/79/Add.10, 28 December 1992, paragraph 5.
[76] "Concluding Observations of the Human Rights Committee: El Salvador", United Nations document CCPR/CO/78/SLV, 22 August 2003, paragraph 6
[77] Ibidem.

violations are investigated, that those responsible are brought to justice and that adequate compensation is provided to the victims or their families."[78]

In its "Concluding Observations" on Niger, the Human Rights Committee recommended to the State Party that "investigations should be conducted into the cases of extrajudicial executions which were carried out in the context of the disturbances in 1991 and 1992 in the North of the country and of the torture and maltreatment of persons deprived of their freedom. The Committee considers that the agents of the State responsible for such human rights violations should be tried and punished. They should in no case enjoy immunity, *inter alia*, through an amnesty law, and the victims or their relatives should receive compensation."[79]

The Human Rights Committee has also examined the amnesty laws passed in Lebanon[80], El Salvador[81], Haiti[82], Peru[83], Uruguay[84] and Yemen[85]. It has stressed that these types of amnesty help to create a climate of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for human rights and the rule of law, creating situations which are contrary to the obligations of States under the International Covenant on Civil and Political Rights. In all the cases mentioned above, the Human Rights Committee felt that the amnesty laws were incompatible with the obligation on States parties to guarantee an effective remedy for victims of human rights violations, which is protected under article 2 of the International Covenant on Civil and Political Rights.

When examining the 1996 Amnesty Law passed by the Republic of Croatia, which specifically excludes war crimes from its scope without defining what they might be, the Human Rights Committee expressed concern that there was a danger that the law could be interpreted in such as way as to grant impunity to persons accused of serious human rights violations. The Committee recommended that steps be taken by the Croatian authorities to ensure that the amnesty law was not applied or utilized to grant impunity to persons accused of serious human rights violations.[86]

The Human Rights Committee has identified the absence of laws granting amnesty to the perpetrators of human rights violations, and amending the constitution to prohibit the passing

[78] "Concluding Observations on the second periodic report of the Congo: Congo", United Nations document CCPR/C/79/Add.118, 27 March 2000, paragraph 12.
[79] "Human Rights Committee, Comments on Niger", United Nations document CCPR/C/79/Add.17, 29 April 1993, paragraph 7.
[80] United Nations document CCPR/C/79/Add.78, paragraph 12.
[81] United Nations document CCPR/C/79/Add.34, paragraph 7.
[82] United Nations document A/50/40, paragraphs 224 - 241.
[83] "Concluding Observations by the Human Rights Committee: Peru, 1996", United Nations document CCPR/C/79/Add.67, paragraphs 9 and 10; and "Concluding Observations of the Human Rights Committee: Peru", 15 November 2000, United Nations document CCPR/CO/70/PER, paragraph 9.
[84] United Nations documents CCPR/C/79/Add.19 paragraphs 7 and 11; CCPR/C/79/Add.90, Part C. "Principal subjects of concern and recommendations"; and Views of 9 August 1994, *Hugo Rodríguez Case* (Uruguay), Communication No. 322/1988, CCPR/C/51/D/322/1988, paragraph 12.4.
[85] United Nations document A/50/40, paragraphs 242-265.
[86] "Concluding Observations of the Human Rights Committee: Republic of Croatia", 4 April 2001,United Nations document, CCPR/CO/71/HRV, paragraph 11.

of such laws, as positive aspects in ensuring the effectiveness of obligations under the International Covenant. The Committee welcomed the declaration of the Paraguay delegation "according to which the Government will not enact any amnesty law, and that, on the contrary, concrete steps have already or are being taken to make accountable perpetrators of human rights abuses under the past dictatorial regime. It notes in this regard that such laws, where adopted, are preventing appropriate investigation and punishment of perpetrators of past human rights violations, undermine efforts to establish respect for human rights, further contribute to an atmosphere of impunity among perpetrators of human rights violations, and constitute impediments to efforts undertaken to consolidate democracy and promote respect for human rights." [87] Commenting on the new Constitution introduced in Ecuador, the Committee welcomed the information that "article 23 of the Constitution prohibits the enacting of amnesty legislation or granting pardons for human rights violations; that torture, enforced disappearances and extrajudicial executions have no statute of limitation; and that obedience to superior orders cannot be invoked as an extenuating circumstance."[88]

The United Nations Committee against Torture has established that amnesty laws and other similar arrangements which allow those responsible for acts of torture to remain unpunished are contrary to both the spirit and the letter of the Convention against Torture and Other Cruel, Inhuman and Degrading Punishment or Treatment.[89] In its "Concluding Observations" to Senegal, the Committee against Torture voiced its concern at the "discrepancy between international and internal law to justify granting impunity for acts of torture on the basis of the amnesty laws."[90] The Committee recommended to the Senegalese authorities that "article 79 of the Senegalese Constitution, establishing the precedence of international treaty law ratified by Senegal over internal law be implemented unreservedly. The Committee considers the amnesty laws in force in Senegal to be inadequate to ensure proper implementation of certain provisions of the Convention." Additionally, in separate "Concluding observations" to Azerbaijan and the Kyrgyz Republic, the Committee expressed its concern at "the use of amnesty laws that might extend to the crime of torture".[91] The Committee recommended the authorities of both countries that, "in order to ensure that the perpetrators of torture and ill-treatment do not enjoy impunity, the State party ensure the investigation and, where appropriate, the prosecution of all those accused of having committed such acts, and ensure that amnesty laws exclude torture from their reach."[92] In its examination of amnesty laws in

[87] "Concluding Observations of the Human Rights Committee: Paraguay", United Nations document CCPR/C/79/Add.48; A/50/40, 3 October 1995, paragraphs 192-223

[88] "Concluding Observations of the Human Rights Committee: Ecuador", United Nations document CCPR/C/79/Add.92, 18 August 1998, paragraph 7.

[89] United Nations Committee against Torture, Decision relative to Communications 1/1988, 2/1988 and 3/1988 (Argentina), of 23 November 1989, paragraph 7.3, in United Nations document General Assembly, Official Reports, Forty-fifth session, Supplement No. 44 (A/45/44), 1990.

[90] "Concluding Observations of the Committee against Torture: Senegal" United Nations document A/51/44, 9 July 1996, paragraph 102-119.

[91] "Concluding Observations of the Committee against Torture: Azerbaijan", paragraph 68 , and "Concluding Observations of the Committee against Torture : Kyrgyzstan", paragraph 74, in United Nations document A/55/44, 17 November 1999.

[92] Ibid., paragraphs 69 and 75 respectively.

Peru, the Committee expressed its concern at "the use of, in particular, the amnesty laws which preclude prosecution of alleged torturers who must, according to articles 4, 5 and 12 of the Convention, be investigated and prosecuted where appropriate." [93] The Committee recommended the Peruvian authorities to adopt all measures necessary to ensure that "amnesty laws […] exclude torture from their reach"[94]. The Committee has identified the absence of amnesty laws and similar arrangements as a positive aspect in ensuring that States fulfil their obligations under the Convention against Torture and Other Cruel, Inhuman and Degrading Punishment or Treatment. This is stated in its "Concluding Observations" to Paraguay.[95]

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have repeatedly reached the conclusion that amnesties granted to the perpetrators of gross violations of human rights are incompatible with States' obligations under the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The Inter-American Court of Human Rights, in its milestone judgment in the *Barrios Altos* case (Peru), found that "amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."[96] In its judgment the Court emphasized that "in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defencelessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation."[97]

The Inter-American Commission on Human Rights has repeatedly stated that "the application of amnesties renders ineffective and worthless the obligations that States Parties have assumed under Article 1.1 of the Convention, and thus constitute a violation of that article and eliminate the most effective means for protecting such rights, which is to ensure the trial and

[93] "Conclusions and Recommendations of the Committee against Torture: Peru", 15 November 1999, paragraph 59, United Nations document A/55/44.
[94] Ibid., paragraph 61.
[95] "Concluding Observations of the Committee against Torture: Paraguay", 5 May 1997, paragraphs 189-213, United Nations document A/52/44.
[96] Inter-American Court of Human Rights, Judgment of 14 March 2001, *Barrios Altos case (Chumbipuma Aguirre and others v. Peru)*, paragraph 41.
[97] Ibid., paragraph 43.

punishment of the offenders."[98] The Commission has stated elsewhere that "the [amnesty] laws remove the most effective means of ensuring that human rights are upheld, that is, bringing to trial and punishing those responsible."[99] The Inter-American Commission on Human Rights has repeatedly taken the position that the amnesty laws in Chile[100], El Salvador[101], Peru[102] and Uruguay[103] are incompatible with the obligations of those States under the American Declaration on the Rights and Duties of Man (Article XVIII, Right to Justice) and the American Convention on Human Rights (articles 1(1), 2, 8 and 25).

In its examination of amnesty provisions in El Salvador, the Inter-American Commission stated that "whatever need may have arisen out of the peace negotiations or from eminently political considerations […] the very broad scope of the general amnesty law passed by the Legislative Assembly of El Salvador constitutes a violation of the international obligations assumed by the country when it ratified the American Convention on Human Rights in permitting the institution of 'reciprocal amnesty' without any prior acknowledgement of responsibility (despite the recommendations of the Truth Commission); in being applicable to crimes against humanity; and in removing any possibility of obtaining suitable material compensation for the victims.[104] (Original in Spanish, Amnesty International's translation).

[98] Inter-American Commission on Human Rights, Report No. 36/96, Case 10.843 (Chile), 15 October 1996, paragraph 50. See also: Report No. 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 50; Report No. 25/98, Cases 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile), 7 April 1998, paragraph 42; Report No. 136/99, Case 10,488 *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, paragraph 200; Report No. 1/99, Case 10,480 *Lucio Parada Cea and others* (El Salvador), 27 January 1999, paragraph 107; Report No. 26/92, Case 10,287 *Las Hojas massacre* (el Salvador), 24 September 1992, paragraph 6; Report No. 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 October 1992; and Report No. 29 (Uruguay), 1992.

[99] Inter-American Commission on Human Rights, Report No. 136/99, Case 10,488, *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, paragraph 200.

[100] Inter-American Commission on Human Rights, Report No. 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 105; Report No. 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 104; Report No. 25/98, Cases 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile), 7 April 1998, paragraph 101.

[101] Inter-American Commission on Human Rights, Report No. 136/99, Case 10,488, *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999; Report No. 37/00, Case 11,481, *Monseñor Oscar Arnulfo Romero y Galdámez* (El Salvador), 13 April 2000; Report No. 1/99, Case 10,480, *Lucio Parada Cea and others* (El Salvador), 27 January 1999; Report No. 26/92, Case 10,287, *Las Hojas massacre* (El Salvador), 24 September 1992, among others.

[102] Inter-American Commission on Human Rights, Report No. 1/96, Case 10,559, *Chumbivilcas* (Peru), 1 March 1996; Report No. 42/97, Case 10,521, *Angel Escobar Jurador* (Peru), 19 February 1998, paragraphs 32 and 33; Report No. 38/97, Case 10,548, *Hugo Bustos Saavedra* (Peru), 16 October 1997, paragraphs 46 and 47), and Report No. 43/97, Case 10,562, *Hector Pérez Salazar* (Peru), 19 February 1998. See also Report No. 39/97, Case 11,233, *Martín Javier Roca Casas* (Peru), 19 February 1998, paragraph 114 and Report No. 41/97, Case 10,491, *Estiles Ruiz Dávila* (Peru), 19 February 1998.

[103] Inter-American Commission on Human Rights, Report No. 29/92, Cases 10,029, 10,036, 10,145, 10,305, 10,372, 10,373, 10,374 and 10,375 (Uruguay), 2 October 1992.

[104] Case No. 11,138, *Nazario de Jesús Gracias (El Salvador)*, in Report on the Situation of Human Rights in El Salvador, document OEA/Ser.L/V/II.85, Doc. 28 rev., 11 February 1994.

After observing that the amnesty laws in Peru "covered acts of torture, forced disappearances and extrajudicial executions [which] have been considered an affront to the conscience of the hemisphere and are crimes against humanity", the Inter-American Commission recommended that the Peruvian State "repeal the amnesty law (Nº 26,479) and the law on judicial interpretation (Nº 26,492), because they are incompatible with the American Convention, and investigate, try, and punish the State agents accused of human rights violations, especially violations that amount to international crimes."[105]

The Commission has made clear that a popular referendum approving an amnesty measure such as Uruguay's "law annulling the State's claim to punish" (Law No. 15,848) does not correct the illegality of such a measure under international law. In the view of the Commission, under international law "a country cannot by internal legislation evade its international obligations. Therefore, the Commission and the Court are authorized to examine – in light of the Convention – even domestic laws which allegedly abrogate or violate rights and freedoms embodied therein."[106] The Commission noted that the Law "eliminates any judicial possibility of a serious and impartial investigation designed to establish the crimes denounced and to identify their authors, accomplices, and accessories after the fact […] the victims, next-of-kin or parties injured by human rights violations have bee denied their right to legal redress, to an impartial and exhaustive judicial investigation that clarifies the facts, ascertains those responsible and imposes the corresponding criminal punishment."[107] The Commission concluded that Law 15,848 was "incompatible with Article XVIII (Right to a Fair Trial) of the American Declaration of the Rights and Duties of Man, and Articles 1, 8 and 25 of the American Convention on Human Rights."[108]

C. Amnesties and internal armed conflict

Some States have sought to justify amnesties or similar measures for persons responsible for gross human rights violations on the basis of provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). It is indeed the case that Article 6 (5) of Protocol II allows, upon cessation of hostilities, for a broad amnesty to be granted to "persons who have participated in the armed conflict, or to those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." However, this type of amnesty cannot extend to grave breaches of international humanitarian law such as arbitrary killings, torture and enforced disappearances.

Such was the official interpretation given to article 6 (5) by the International Committee of the Red Cross, when it said that: "The *travaux préparatoires* on article 6 (5) indicate that the provision aims at encouraging amnesty […] as a sort of release at the end of hostilities for

[105] Annual Report of the Inter-American Commission on Human Rights - 1996, document OEA/Ser.L/V/II.95, Doc. 7 rev., 14 March 1997, chapter V, section on Peru.
[106] Report No. 29/92, 2 October 1992, Cases 10,029, 10,036, 10,145, 10,305, 10,372, 10,373, 10,374 and 10,375 (Uruguay), paragraph 32.
[107] Ibid., paragraphs 35 and 39.
[108] Ibid., Recommendation No. 1.

persons who were in custody or undergoing punishment for the mere fact of having participated in the hostilities. It does not aim at an amnesty for those having violated international humanitarian law."[109] (Original in Spanish, Amnesty International's translation). This interpretation has been repeated by the United Nations Human Rights Committee and the Inter-American Commission on Human Rights. The Human Rights Committee has said that amnesties granted for acts committed in the course of armed conflicts and constituting gross violations of human rights are not compatible with the obligations imposed by the International Covenant on Civil and Political Rights. This was the view taken by the Committee in relation to El Salvador, the Republic of the Congo, Croatia and Lebanon. In the case of the amnesty issued by Lebanon to civilian and military personnel for violations of the human rights of civilians committed in the course of the civil war, the Committee stated that "such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy."[110] The Inter-American Commission on Human Rights, for its part, dismissed the argument put forward by the Government of El Salvador that the amnesty sanctioned by its Legislative Assembly would be supported by Additional Protocol II to the Geneva Conventions. The Commission went on to assert that "the Protocol cannot be interpreted as covering violations of the fundamental human rights established in the American Convention on Human Rights."[111] (Original in Spanish, Amnesty International's translation).

VI. The amnesty laws in Argentina

The Full Stop (*Punto final*) and Due Obedience (*Obediencia Debida*) Laws have been scrutinized by international human rights bodies. In its Concluding Observations to Argentina in 1995, the Human Rights Committee said that by denying the right to an effective remedy for those who were the victims of human rights during the period of authoritarian government, Law 23,521 (the Due Obedience Law) and Law 23,492 (the Full Stop Law) violated paragraphs 2 and 3 of article 2 and paragraph 5 of article 9 of the International Covenant on Civil and Political Rights, and that therefore "the compromises made by the State party with respect to its authoritarian past, especially the Law of Due Obedience and Law of *Punto Final* and the presidential pardon of top military personnel, are inconsistent with the requirements of the Covenant."[112]

[109] Letter from the International Committee of the Red Cross addressed to the Prosecutor of the Criminal Tribunal for the Former Yugoslavia in 1995. This interpretation was repeated by the International Committee of the Red Cross in another communication dated 15 April 1997.
[110] United Nations document CCPR/C/79/Add.78, paragraph 12.
[111] Case No. 11138, *Nazario de Jesús Gracias* (El Salvador), in "Report on the Situation of Human Rights in El Salvador", document OEA/Ser.L/V/II.85, Doc. 28 rev. 11 February 1994. See also Report No. 1/99, Case 10,480, *Lucio Parada Cea and others* (El Salvador), 27 January 1999, paragraph 115
[112] "Concluding Observations of the Human Rights Committee: Argentina", 5 April 1995, United Nations document CCPR/C/79/Add.46;A/50/40, paragraph 146.

The Human Rights Committee expressed concern that, *inter alia*, "amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children [and] that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces. Respect for human rights may be weakened by impunity for perpetrators of human rights violations."[113]

In its Concluding Observations dated November 2000, the Human Rights Committee reminded the Argentine Government that: "Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice."[114]

The United Nations Committee against Torture took the view that the passing of the Full Stop and Due Obedience Laws by a "democratically elected" government for acts committed under a *de facto* government "is incompatible with the spirit and purpose of the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]."[115] .

Having examined Laws 23,492 and 23,521 and Decree 1002/89, the Inter-American Commission on Human Rights concluded that these laws are incompatible with the obligations of the Argentine State under the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.[116] The Inter-American Commission on Human Rights, recalling that "in systems that allow it – such as Argentina's – the victim of a crime has a fundamental civil right to go to the courts"[117], took the view that, since Laws 23,492 and 23,521 and Decree 1002/89 prevented the exercise of the right to be heard by an independent and impartial tribunal, the Argentine State had, by sanctioning and applying such laws, "failed to comply with its duty to guarantee the rights" protected under article 8.1 of the American Convention on Human Rights. The Inter-American Commission on Human Rights also pointed out that Laws 23,492 and 23,521 and Decree 1002/89 constituted a violation of the obligation to guarantee the right to judicial protection recognized in article 25 of the American Convention on Human Rights.[118] Furthermore, bearing in mind the obligation of the Argentine State to respect and guarantee the rights protected by the American Convention on Human Rights, the Commission was of the opinion that "by its enactment of these two laws and the decree, Argentina has failed to comply with its duty under Article 1.1."[119] On the basis of these considerations, and since the sanctioning of the two Laws and the Decree had

[113] Ibidem.
[114] "Concluding Observations of the Human Rights Committee: Argentina", 3 November 2000, United Nations document CCPR/CO/70/ARG, paragraph 9.
[115] Committee against Torture, Communications Nos. 1/1988, 2/1988 and 3/1988, Argentina, Decision of 23 November 1989, paragraph 9.
[116] Inter-American Commission on Human Rights, Report No. 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 October 1992.
[117] Ibid., paragraph 34.
[118] Ibid., paragraph 39.
[119] Ibid., paragraph 41.

the legal effect of depriving victims of their "right to obtain a judicial investigation in a court of criminal law to determine those responsible for the crimes committed and punish them accordingly", the Inter-American Commission on Human Rights concluded that: "Laws No. 23,492 and No. 23,521 and Decree No. 1002/89 are incompatible with Article XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man and Articles 1, 8 and 15 of the American Convention on Human Rights."[120]

VII. *Pacta sunt servanda*

It is a universally recognized general principle of international law that States must implement treaties and the obligations arising from them in good faith. A corollary of this general principle is that the authorities of a particular country cannot escape their international commitments by arguing that domestic law prevents them from doing so. They cannot cite provisions of their Constitution, laws or regulations in order not to carry out their international obligations or to do so in a different way. This is a general principle of the law of nations which is recognized in international jurisprudence.[121] International jurisprudence has also repeatedly stated that, in keeping with this principle, judgments rendered by domestic courts cannot be put forward as a justification for not abiding by international obligations[122]. The *pacta sunt servanda* principle and its corollary have been refined in articles 26 and 27 of the Vienna Convention on Treaty Rights. Argentina signed the Convention on 23 May 1969 and ratified it on 5 December 1972, without expressing any reservations to articles 26 or 27.

International Human Rights Law is no stranger to the *pacta sunt servanda* principle and its corollary, as has often been confirmed by the Inter-American Court of Human Rights. In its Advisory Opinion on "International Responsibility for the Promulgation and Enforcement of Laws in violation of the American Convention", the Inter-American Court on Human Rights recalled that: "Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify non-fulfilment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of

[120] Ibid., Finding 1.

[121] Permanent Court of International Justice, Advisory Opinion, 4 February 1932, *Traitement des nationaux polonais et autres persones d'origine ou de langue polonaise dans le territoire de Dantzig [Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory]*, Recueil des arrêts et ordonnances, Série A/B, No. 44; Permanent Court of International Justice, Advisory Opinion, 31 July 1930, *Question des communautés greco-bulgares*, [Greco-Bulgarian Communities], Recueil des arrêts et ordonnances, Série A, No. 17; International Court of Justice, Advisory Opinion, 26 April 1988, *Obligation d'arbitrage [Applicability of the Obligation to Arbitrate]*; Judgment of 28 November 1958, *Application de la Convention de 1909 pour régler la tutelle des mineurs (Pays Bas/Suéde) [Application of the 1909 Convention for regulating the guardianship of Minors (Netherlands/Sweden]*; International Court of Justice, Judgment of 6 April 1955, *Notteböhm (2e. Phase) (Lichtenstein/Guatemala)* and Arbitration Decision of S.A. Bunch, Montijo *(Colombia v. United States of America)*, 26 July 1875.

[122] Permanent Court of International Justice, Judgment No. 7, 25 May 1923, *Haute Silésie polonaise [Polish Upper Silesia]*, in Recueil des arrêts et ordonnances, Série A, No. 7; and Judgment No. 13, *Usine de Chorzow (Allemange / Pologne) [Chorzow Factory, Germany/Poland]*, 13 September 1928, in Recueil des arrêts et ordonnances, Série A, No. 17.

International Justice and the International Court of Justice even in cases involving constitutional provisions."[123]

The Inter-American Court of Human Rights has made the following comment: "A State may violate an international treaty and, specifically, the Convention, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2 [of the American Convention on Human Rights]. Likewise, it may adopt provisions which do not conform to its obligations under the Convention. Whether those norms have been adopted in conformity with the internal juridical order makes no difference for these purposes."[124] If a law of a country violates rights which are protected under international treaty and/or obligations arising from it, the State is internationally responsible. The Inter-American Court of Human Rights has reiterated this principle on several occasions and, in particular, in Advisory Opinion No. 14: "The promulgation of a law that manifestly violates the obligations assumed by a State upon ratifying or acceding to the Convention constitutes a violation of that treaty and […] if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the State in question."[125]

On the question of the incompatibility of amnesty laws with the international obligations of States under the American Convention on Human Rights, the Inter-American Court of Human Rights has pointed out that an amnesty law cannot be used as a justification for failing in the duty to investigate and to grant access to justice. With reference to the amnesty law in Peru, the Inter-American Court of Human Rights said: "States [...] may not invoke existing provisions of domestic law, such as the Amnesty Law in this case, to avoid complying with their obligations under international law. In the Court's judgment, the Amnesty Law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru's argument that it cannot comply with the duty to investigate the facts that gave rise to the present case must be rejected."[126]

The same point was made by the Human Rights Committee in its Concluding Observations to Peru in 1996. Having concluded that the amnesty laws (Decree-Laws 26,479 and 26,492) were incompatible with Peru's obligations under the International Covenant on Civil and Political Rights, the Human Rights Committee stressed that "national legislation cannot modify the international obligations contracted by a State party by virtue of the Covenant."[127]

This principle was reiterated by the Inter-American Commission on Human Rights in reaching its conclusion that the amnesty promulgated by the government of General Augusto Pinochet Ugarte (Decree Law 2191) was incompatible with Chile's obligations under the

[123] Inter-American Court of Human Rights, "International Responsibility for the Promulgation and Enforcement of Laws which violate the Convention (Arts. 1 and 2, American Convention on Human Rights)", Advisory Opinion OC-14/94, 9 December 1994, Series A, No. 14, paragraph 35.
[124] Inter-American Court of Human Rights, Advisory Opinion OC-13/93, 16 July 1993, "Certain attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)", in Series A: Judgments and Opinions, No. 13, paragraph 26.
[125] Advisory Opinion OC-14/94, Op. Cit., paragraph 50.
[126] *Loayza Tamayo Case, Reparations,* Judgment of 27 November 1998, paragraph 168, in Inter-American Court of Human Rights Annual Report 1998, OEA/SER.L/V/III.43, Doc. 11, p. 487.
[127] United Nations document CCPR/C/79/Add.67, paragraph 10.

American Convention on Human Rights: "From the standpoint of international law, the Chilean State cannot justify its failure to comply with the Convention by alleging that self-amnesty was decreed by the previous government or that the abstention and omission of the Legislative Power in regard to the rescinding of that Decree Law, or that the acts of the Judiciary which confirm the application of that decree have nothing to do with the position and responsibility of the democratic Government, inasmuch as Article 27 of the Vienna Convention on the Law of Treaties establishes that a State Party shall not invoke the provisions of domestic law as a justification for failure to comply with a treaty."[128]

VIII. Non-enforcement of amnesty laws by domestic courts

A. General considerations

Responsibility is attributable to a State when any organ of that State is in breach of an international obligation, whether by act or omission. This is a principle of international customary law[129], which has been widely recognized in international jurisprudence and which is reflected in the Draft Articles on State Responsibility which the United Nations International Law Commission has been compiling since 1955 in fulfilment of the mandate given to it by the United Nations General Assembly to codify the principles of international law governing State responsibility.[130] Draft article 6 reads as follows: "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or subordinate position in the organization of the State."[131]

International Human Rights Law is no stranger to this principle, as has been reaffirmed by the Inter-American Court of Human Rights,[132] the European Court of Human Rights[133] and the European Commission of Human Rights.[134] The Inter-American Commission on Human Rights, in one of its rulings on the incompatibility of the Chilean amnesty law with the American Convention on Human Rights, pointed out that: "While the Executive, Legislative and Judicial powers may indeed be distinct and independent internally, the three powers of

[128] Inter-American Commission on Human Rights, Report No. 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 84.
[129] Roberto Ago, *Third Report on State Responsibility*, in Yearbook of the International Law Commission, 1971, Vol. II, Part I, p. 253-254.
[130] Resolution 799 (VIII) of the General Assembly United Nations, 7 December 1953.
[131] "Report of the International Law Commission on the work of its 48th session – 6 May to 26 July 1996", United Nations document Supplement No. 10 (A/51/10), p. 6.
[132] See, for example, Inter-American Court of Human Rights, Judgment of 29 July 1988, *Velásquez Rodríguez case*, in Series C: Decisions and Judgments, No. 4, paragraph 151.
[133] See, for example, Judgments in *Tomasi v. France*, 27 August 1992; and *Fr. Lombardo v. Italy*, 26 November 1992.
[134] See, for example, European Commission of Human Rights, *Ireland v. United Kingdom* in Yearbook of the European Convention on Human Rights, Vol. 11, Part I, p. 11.

the State represent a single and indivisible unit which is the State of Chile and which, at the international level, cannot be treated separately, and thus Chile must assume the international responsibility for the acts of its public authorities that violate its international commitments deriving from international treaties."[135]

Courts are obliged to discharge such international obligations of the State as are incumbent upon them within the scope of their jurisdiction. For the purposes of this memorandum, these obligations are: to administer justice in an independent and impartial manner while respecting judicial guarantees; to investigate, prosecute and punish the perpetrators of human rights violations; and to guarantee the right to a fair trial and the right to an effective remedy for the victims of grave human rights violations and their relatives. Any action by the courts which is in breach of this obligation, whether by act or by omission, would constitute a denial of justice and a violation of international obligations of the State, thus making the State responsible internationally.

When a domestic court enforces an amnesty law which is incompatible with the State's international obligations and violates internationally protected human rights, it commits a breach of that State's international obligations. With regard to enforcement of the Chilean amnesty law, Decree-Law No. 2191 of 1978, in cases brought before the domestic courts, the Inter-American Commission on Human Rights concluded: "The judgment of the Supreme Court of Chile, rendered on 28 August 1990, and its confirmation on 28 September of that year, declaring that Decree-law 2191 was constitutional and that its enforcement by the Judiciary was mandatory although the American Convention on Human Rights had already entered into force in Chile, violates the provisions of Articles 1.1 and 2 of that Convention."[136]

And the Commission's report continues by saying that "the judicial rulings of definitive dismissal issued in the criminal charges brought in connection with the detention and disappearance of the 70 persons in whose name the present case was initiated, not only aggravated the situation of impunity, but were also in clear violation of the right to justice pertaining to the families of the victims in seeking to identify the authors of those acts, to establish the corresponding responsibilities and penalties, and to obtain legal satisfaction from them."[137]

In commenting on another Chilean case, the Inter-American Commission on Human Rights concluded that the enforcement of the Chilean amnesty law by the courts was in breach of articles 1, 2.2, 8 and 25 of the American Convention on Human Rights. The Commission

[135] Inter-American Commission on Human Rights, Report No. 36/96, Case 10.843 (Chile), 15 October 1996, paragraph 84.
[136] Inter-American Commission on Human Rights, Report No. 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 106; See also Report No. 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 105; and Report No. 25/98, Cases 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile), 7 April 1998, paragraph 102.
[137] Inter-American Commission on Human Rights, Report No. 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 107. See also Report No. 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 106, and Report No. 25/98, Cases 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile), 7 April 1998, paragraph 103.

stated that "the judicial decisions ruling the dismissal [under the amnesty law] of criminal proceedings initiated concerning the detention, forced disappearance, torture and extrajudicial execution of Carmelo Soria Espinoza, in whose name this case was instigated, not only aggravate the situation of impunity, but also violate the victim's family's right to justice for the purpose of identifying the perpetrators of these crimes, establishing responsibility, imposing the corresponding punishment and providing judicial reparation."[138]

B. *Res judicata* and amnesties

A sentence or any other type of ruling rendered by a domestic court which, by act or by omission, is in breach of the international obligations of the State or violates internationally protected human rights cannot be cited in this legal context. The legal rule known as *res judicata* -'the matter on which a judgment has been given' - cannot therefore be used as an excuse for not complying with an international obligation. Although the *res judicata* rule is a legal safeguard which is closely related to the *non bis in idem* principle, it is also a rule which must be seen from a substantive viewpoint, that is, in the light of the international standards of justice contained in the International Covenant on Civil and Political Rights and the American Convention on Human Rights, rather than merely as a matter of procedure. This means determining whether the court judgment which is deemed to constitute *res judicata* is the result of proceedings conducted by a competent, independent and impartial tribunal, in which the judicial guarantees and rights due to the defendants, as well as to the victims and their successors who are party to the proceedings, have been fully respected. In this sense, the issue of whether or not the ruling in question should stand is subordinate to and conditional upon whether or not standards relating to due process or a fair trial have been satisfactorily observed and met. The applicability of the *res judicata* rule is therefore conditional upon the court judgment in question being the outcome of a trial conducted before an independent, impartial and competent tribunal and of proceedings in which judicial guarantees have been fully observed.

The concept of due process or a fair trial is made up of basic guarantees laid down under international law, and in particular in the Universal Declaration of Human Rights (articles 10 and 11), the American Declaration of the Rights and Duties of Man (articles XVIII, XXV and XXVI), the International Covenant on Civil and Political Rights (article 14) and the American Convention on Human Rights (article 8). The notion of due process as a safeguard of human rights is no less applicable to the right to an effective remedy, which should be available to anyone whose fundamental rights have been violated.

This is the interpretation followed by the Inter-American Court of Human Rights in the following pronouncement: "States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8.1), all in keeping with the general

[138] Inter-American Commission on Human Rights, Report No. 133/99, Case 11,725, *Carmelo Soria Espinoza* (Chile), 19 November 1999, paragraph 155.

obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdictions. According to this principle, the absence of an effective remedy for violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy."[139]

The strict subordination of the *res judicata* rule to the principle of due process was confirmed by the Inter-American Court of Human Rights in taking the following view: "All trials are made up of legal acts which are chronologically, logically and teleologically related. Some support or flow from others but all are directed towards the same supreme end: resolving the dispute by reaching a verdict. Legal proceedings are classed as legal acts and are therefore subject to the rules that determine when such acts should take place and what their outcome should be. Consequently, each act must comply with the regulations which govern its creation and give it legal validity and which have been pre-designed to produce that type of outcome. If that does not happen, the act will be invalid and will not have the desired outcome. The validity of each individual legal act effects the overall validity since each one is supported by the one preceding it and, in its turn, provides support for still others. This sequence of acts culminates in the verdict which settles the dispute and establishes the legal truth and which has the authority of *res judicata*. […] If there are serious irregularities in the acts on which the verdict is based which deprive them of the effectiveness they should have under normal conditions, the sentence will not stand. It will not have had the required support, that is to say, a trial carried out in accordance with the law. It is well known what happens when a re-trial takes place based on proceedings in which certain acts have been declared invalid but which goes on to repeat the same procedures starting with the one in which the violation which led to them being declared invalid was committed. This, in turn, leads to yet another verdict. The validity of the verdict depends on whether the trial was valid."[140]

The same point has been made by German J. Bidart Campos: "According to judicial law derived from the jurisprudence developed by the Court, one of the essential conditions of a fair trial is that it be conducted according to basic and consistent rules so that the verdict

[139] Inter-American Court of Human Rights, "Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)", Advisory Opinion OC-9/87, 6 October 1987, Series A, No. 9, paragraphs 24 and 25. See also *Velásquez Rodríguez, Fairén Garbi and Solís Corrales, and Godínez Cruz, Preliminary Objections*, Judgments of 26 June 1987, paragraphs 90, 90 and 92.

[140] Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi and others v. Peru*, paragraphs 218-219.

reached at the trial is immutable and has the effect of *res judicata*. If due process has not been adhered to, or the proceedings have suffered from malicious or fraudulent intent, the verdict is stripped of the power and effectiveness of *res judicata*."[141] On the basis of comparative law and the way the law has evolved, experts in legal procedure are now of the view that the *res judicata* rule should be addressed from a teleological point of view.[142]

The Inter-American Court of Human Rights has taken the position that *res judicata* is no longer valid where the court judgment is the result of a trial which has violated fundamental judicial guarantees protected under the American Convention on Human Rights. On this basis, the Inter-American Court of Human Rights, in a case in which civilians had been convicted by a military court in Peru, declared the trial invalid on the ground that it was "incompatible with the American Convention on Human Rights" and ordered the Peruvian authorities to ensure that a new trial was held in which due process of law was fully observed.[143]

The Inter-American Commission of Human Rights, in an *obiter dictum* contained in Resolution No. 15/87 (Argentina) regarding "the illegal denial of freedom... [as the result of] a spurious proceeding which ended with an arbitrary decision [with the authority of *res judicata*]"[144], found that "a proceeding presumedly invalidated by serious irregularities [...] for that reason, should be reopened so that the convicted individual would have a procedural opportunity to show his innocence or, otherwise, for his guilt to be established beyond any doubt."[145] Significantly, the court judgment questioned by the Inter-American Commission on Human Rights was subsequently set aside in a judgment rendered by the Supreme Court of Justice of Argentina on 14 September 1987.[146]

For its part, the Human Rights Committee has established that a person who has been convicted following a trial which is incompatible with basic judicial guarantees should be given a fresh trial offering all the guarantees required by article 14 of the International Covenant on Civil and Political Rights, failing which he should be released.[147]

It should be noted that within the sphere of international criminal law the *res judicata* issue has been addressed. The United Nations International Law Commission has pointed out that "international law did not make it an obligation for States to recognize a criminal judgement

[141] German J. Bidart Campos, Tratado elemental de derecho constitucional argentino, Tomo I - El derecho constitucional de la libertad [Basic Treatise on Argentine Constitutional Law, Volume I - The Constitutional Right to Liberty], Ediciones EDIAR, Buenos Aires 1992, p.468. [Spanish original, free translation]
[142] Mauro Cappelletti, Le pouvoir des juges [The Power of Judges], Collection droit public positif, Ed. Economica - Presses Universitaires d'Aix-Marseille, France, 1990, p.128.
[143] Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi and others v. Peru,* Finding 13.
[144] Inter-American Commission on Human Rights, Resolution No. 15/87, Case 9635 (Argentina), 30 June 1987, in "Annual Report of the Inter-American Commission on Human Rights, 1986 – 1987", OEA/Ser.L/V/II.71, Doc. 9 rev. 1, p. 53.
[145] Ibid., "Considering" paragraph 1, p. 65.
[146] Supreme Court of Justice of the Nation, Judgment of 14 September 1987, *case against Osvaldo Antonio López*
[147] Human Rights Committee, Decision of 6 November 1997, Communication No. 577/1994, *Polay Campos* (Peru), United Nations document CCPR/C/61/D/577/1994.

handed down in a foreign State"[148]. However, the Commission, concerned that a person who has been properly tried, found guilty and given a sentence commensurate with the offence should not be punished twice, "thereby exceed[ing] the requirements of justice"[149], has stated that while the validity of the *non bis in idem* principle should be recognized, it should not be seen as an absolute. The Commission took the view that, within the jurisdiction of international criminal law, the *non bis in idem* principle cannot be invoked when the perpetrator of a crime against humanity has not been properly tried or punished for that offence, the proceedings have not been conducted in an independent and impartial manner, or the trial is intended to exonerate the person from international criminal responsibility. This view has been adopted in the Statute of the International Criminal Tribunal for the Former Yugoslavia (article 10), the Statute of the International Criminal Tribunal for Rwanda (article 9) and the Statute of the International Criminal Court (article 20). Paragraph 3 of article 20 of the Statute of the International Criminal Court reads as follows: "No person who has been tried by another court for conduct also proscribed under articles 6, 7 or 8 [genocide, crimes against humanity and war crimes] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."[150]

A judgment rendered by a domestic court which, as a result of enforcing an amnesty law which is incompatible with the international obligations of a State and violates the right of victims to an effective remedy, consolidates the impunity of perpetrators of gross violations of human rights, cannot be relied on by the State in this legal context to evade or release itself from its responsibility for discharging, in good faith, its international obligation to bring to justice and punish the perpetrators of grave human rights violations.

C. Amnesties and the criminal law

The principle that criminal law should not be applied retroactively is an essential safeguard of international law and follows from the principle of the legality of crimes (*nullum crimen sine lege*). The right not to be convicted for acts or omissions which were not offences at the time they were committed is therefore enshrined both in the International Covenant on Civil and Political Rights (article 4) and the American Convention on Human Rights (article 27), and is

[148] International Law Commission, "Report of the International Law Commission on the work of its 48th session - 6 May to 26 July 1996", United Nations document Supplement No. 10 (A/51/10), p. 72.
[149] Ibidem.
[150] "Rome Statute of the International Criminal Court", United Nations document A/CONF.183/9, p. 19.

non-derogable. The European Convention for the Protection of Human Rights and Fundamental Freedoms contains a similar provision (article 15).

But international law is also clear about what types of criminal law can be applied: both national legislation and international law are applicable. Article 15 (1) of the International Covenant on Civil and Political Rights provides that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." Likewise, article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed." Under article 9 of the American Convention on Human Rights, "no one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed."

This means that even when an act was not considered to be a crime under national law at the time it was committed, the perpetrator can be brought to justice and convicted if that act, at the time it was committed, was deemed to be a crime under either treaty-based or international customary law. So, for example, the fact that forced disappearance does not exist as a crime under the national law does not mean that it is not possible to bring to justice and convict the perpetrators of forced disappearances committed when such conduct was already a crime under international law.

Torture and forced disappearance are international crimes. The systematic or widespread practice of extrajudicial execution, torture, forced disappearance, politically-motivated persecution and other such acts are specifically international crimes, that is, crimes against humanity. It is precisely this type of conduct to which article 15 (1) of the International Covenant on Civil and Political Rights, article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 9 of the American Convention on Human Rights apply.

The principle of non-retroactivity is not undermined when an amnesty law – a law incompatible with the State's international obligations – is repealed or annulled and the offenders tried and convicted, provided that their actions were criminal offences under national or international law at the time they were committed. The position of the Inter-American Commission on Human Rights on this matter was made clear in a decision by the Commission on the Chilean amnesty law. In the proceedings the Chilean Government argued that repealing the amnesty Decree Law would not affect those responsible for the violations because of the principle contained in article 9 of the American Convention and article 19.3 of the Chilean Constitution that criminal law cannot be applied retroactively. In response, the Inter-American Commission on Human Rights observed that "the principle of non-retroactive application of the law, under which no one can be convicted retroactively for actions or omissions that were not considered criminal under applicable law at the time they were committed, cannot be invoked with respect to those granted amnesty because at the time the acts in question were committed they were classified and punishable under Chilean law in

force."[151] The Commission, accordingly, recommended that the Chilean authorities should "adapt [Chile's] domestic legislation to reflect the provisions contained in the American Convention on Human Rights in such a way that Decree Law No. 2,191 enacted in 1978 be repealed, in order that human rights violations committed by the *de facto* military government against Carmelo Soria Espinoza may be investigated and punished."[152]

In a case involving an application of the Peruvian amnesty laws by a court in that country, the Inter-American Court of Human Rights, without entering into the question of retroactivity, ruled that: "Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the […] case [...] or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated."[153] Accordingly, the Inter-American Court of Human Rights ordered the Peruvian authorities to "investigate the facts in order to determine who is responsible for the human rights violations [...] and punish those responsible."[154]

This being the legal situation, the principle of non-retroactivity of criminal law is in no way breached by the prosecution and punishment of those persons responsible for gross violations of human rights such as torture, forced disappearances and extrajudicial executions, committed during the period of military rule, after those persons had been granted amnesties for those crimes under laws incompatible with Argentina's international obligations, since their actions were crimes under both the criminal law of Argentina and international law. As was pointed out by the Human Rights Committee in its concluding observations to Argentina in November 2000: "Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice."[155]

IX. Conclusions

The Argentine State has an international obligation to investigate, prosecute and bring to justice the perpetrators of gross violations of human rights – such as torture, forced disappearances and extrajudicial executions – committed while the military government was in power in Argentina.

Law 23,492 (Full Stop Law) and Law 23,521 (Due Obedience Law) are in breach of international obligations of the Argentine State, in particular, its obligation to investigate

[151] Inter-American Commission on Human Rights, Report No.133/99, Case 11,725, *Carmelo Soria Espinoza* (Chile), 19 November 1999, paragraph 76.
[152] Ibid., finding 4.
[153] Inter-American Court of Human Rights, Judgment of 14 March 2001, *Barrios Altos Case (Chumbipuma Aguirre and others v. Peru)*, paragraph 44.
[154] Ibid., finding 5.
[155] "Concluding Observations of the Human Rights Committee: Argentina", 03/11/2000. CCPR/CO/70/ARG, paragraph 9.

gross violations of human rights committed under military rule and to bring to justice and punish those responsible for such acts.

Law 23,492 (Full Stop Law) and Law 23,521 (Due Obedience Law) are in breach of the international obligation of the Argentine State to guarantee victims of gross human rights violations and their relatives the right to an effective remedy.

Court decisions resulting from the application of Laws 23,492 and 23,521, and which led to impunity for the perpetrators of gross violations of human rights, have no basis in law and cannot be invoked to prevent such people from being brought to justice and punished.

While Law 24,954 of 1998 has repealed the Full Stop and Due Obedience Laws, the repeal of these laws has been interpreted as not rendering either of them null and void. This is contrary to Argentina's international obligations. The Argentine State must bring its legislation into line with its international obligations by annulling Laws 23,492 and 23,521 and declaring them to be without legal effect.

The Argentine State, according with the principles of international law and its commitments under the Vienna Convention on Treaty Rights, cannot cite provisions of its domestic legislation such as Laws 23,492, 23,521 and 24,954, or court judgments resulting from the amnesty legislation, in order to leave unfulfilled its international obligations to investigate, prosecute and punish the perpetrators of gross violations of human rights committed during the period of military rule.

The organs of the Argentine judiciary, within the scope of their jurisdiction, have a duty to carry out Argentina's, international obligations to investigate, bring to justice and punish the perpetrators of gross violations of human rights committed during the period of military rule. Accordingly, courts should not only refrain from giving effect to amnesty laws which are incompatible with the State's international obligations and infringe internationally-protected human rights, but should also declare them to be absolutely null and void and take steps to investigate, bring to justice and punish those responsible for these violations.