ARGENTINA
The Full Stop and Due Obedience Laws and International Law

1. Introduction

Amnesty International has repeatedly expressed its 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 '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23,521, the Due Obedience Law, which had been approved by the Argentinian Congress in 1986 and 1987 respectively, were repealed in March 1998.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 at the *Juzgado Nacional en lo Criminal y Correccional Federal Nº4*, Fourth National Court for Criminal and Correctional Matters, on 6 March 2001 with regard to case 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 and 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 and a decision is expected shortly.

Other Argentinian 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 [were] 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 known as the "Margarita Belén massacre" in which 22 political prisoners were killed in December 1976 in the locality of Margarita Belén in the province of el Chaco.

Amnesty International works 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 the decisions reached by several other Argentinian courts which have ruled on the subject since then have signalled the direction in which the Argentinian 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.

International law considers torture, summary, extrajudicial and arbitrary executions and disappearances, among others, to be 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

Seven years of severe repression, starting with the *coup d'état* on 24 March 1976, left thousands of victims of human rights violations in its wake in Argentina. The use of torture, extrajudicial executions and "disappearances" were examples of just how the military junta intended to carry out its aim of eliminating subversion however and wherever it appeared. "Task forces", 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" reached monstrous proportions.

However, despite the fear and the curbs on the press, the scale of "disappearances" in Argentina gradually became known by groups of families brought together out of 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 the 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 persisted in 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 Junta, 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 disappearance, torture and extrajudicial execution.

Civilian Government

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, which was published in November 1984, recorded 8,960 cases of disappearance but pointed out that the true figure could be even higher. It listed 340 secret detention centres in Argentina and concluded that the armed forces had violated human rights in an organized fashion by making use of 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 the 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 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 called the years lived under the *de facto* government "State terrorism".[4]In 1983, the military government passed an amnesty law[5] to

[1] *Nunca Más* (Never Again) A Report by Argentina's National Commission on Disappeared. Faber and Faber Limited, in association with Index on Censorship. 1986.

[2] Ibid., p.479.

[3] Ibid., p.480.

[4] Amnesty International, Argentina: The Military Juntas and Human Rights, AI Index: AMR 13/04/87.

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

ensure that they would not be punished for their crimes. However, when institutional government was restored later that year, the measure was set aside 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 opened against other members of the military.

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

Argentinian 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. Legal action 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 Argentinian armed forces were presented.

In 1996 the Italian and Spanish courts started legal action 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 200 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 to proceed 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 which are taking place in other countries in connection with the ‘disappearances’ which took place under military rule. In December 2000, an Italian court sentenced seven former officers of the Argentinian army to prison sentences ranging from 24 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 Argentinian officers passed in December 2000.

4. Rulings by the Argentinian courts

Cases involving the abduction and concealment of minors and the changing of their identities are exempt from the Full Stop and Due Obedience Laws and presidential pardons. About 200 cases of the 'disappearance' of minors at the hands of the security forces were recorded in Argentina under military rule. In 1997 in Buenos Aires a federal judge 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 brought to trial or that, under the statute of limitations, the time limit for prosecuting the offence had expired. This decision by the Federal Chamber set an important precedent in that it deemed the kidnapping of minors to be an ongoing offence and ruled that the statute of limitations did not apply as long as the fate of the victim remained unknown. The Chamber also endorsed 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 law.

In November of the same year, within the framework of a friendly settlement facilitated 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 Argentinian 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, the legal ruling by Argentinian judge Gabriel Cavallo found the Full Stop and Due Obedience Laws to be unconstitutional and null and void. It was issued in response to a lawsuit brought in October 2000 by the Argentinian non-governmental organization *Centro de Estudios Legales y Sociales (CELS)*, Centre for Legal and Social Studies, in the case of the disappearance of José Liborio Poblete Roa, his wife Gertrudis Marta Hlaczik and their daughter Claudia Victoria, which took place in 1978. Claudia Victoria Poblete was located but her parents remain 'disappeared'. This ruling was unanimously confirmed in November 2001 by Court II of the *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires*, National Chamber of Appeal for Federal Criminal and Correctional Matters for Buenos Aires, which based its decision on, among others, 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 judges from Court II stressed that in its jurisprudence the Supreme Court already recognized that international law took precedence over all domestic legislation. In their ruling, they stated that, within the current context of the development of constitutional human rights law, "invalidating laws 23,492 and 23,521 and declaring them to be unconstitutional is not a choice. It is an obligation".

On 14 August 2002, in resolution 586/02P, in the context of a case entitled "*Ministerio Público Fiscal* (Public Prosecutor's Office) - filing of a complaint", File No. 311/02, lodged with 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 offence of unlawful imprisonment, doubly aggravated by the fact that it involved violence and threats, in

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6 Law 23,492 of Full Stop: Article 1. [The time period for bringing] Criminal action with regard to any person for their alleged involvement in any capacity in the offences referred to in Art.10 of law 23,049, who is not a fugitive, has not been declared to have absconded and who has not been summoned to make a statement in answer to charges by a competent court, shall expire within sixty days from the date of enactment of this law. The same conditions apply to criminal action brought 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 of Due Obedience: Article 1. Unless evidence has been admitted to the contrary, it is presumed that those who at the time the act was committed held the position of commanding officers, subordinate officers, non-commissioned officers and members of the rank and file of the Armed Forces, security forces, police force and prison force are not punishable for the offences referred to in article 10 point 1 of law number 23,049 on the grounds that they were acting by virtue of due obedience. The same presumption shall apply to superior officers who did not hold the position of commander-in-chief, area head, sub-area head or head of a security, police or prison force unless it has been legally determined within 30 days of the enactment of this law that they had decision-making powers or were involved in the drawing up of orders.
In such cases the persons mentioned shall automatically be deemed to have acted in a state of coercion under the subordination of the superior authority and in compliance with orders, without the power or possibility of inspecting, opposing or resisting them in so far as their timeliness or legitimacy were concerned.

Article 3. This law shall be applied as a matter of course. Within five (5) days of its entry into force, in all pending cases, whatever procedural stage they may have reached, the court before which they have been filed without taking any further action shall issue, with regard to the personnel referred to in art. 1, first paragraph, the ruling referred to in article 252 bis of the Code of Military Justice or, as appropriate, shall cancel any summons for them to make a statement in answer to charges.

Silence by the court during the time period specified for implementing the provisions of the second paragraph of article 1 shall produce the effects envisaged in the preceding paragraph with the implication of *res judicata*.
If in the proceedings in question the rank or post held at the time of the events by the person summoned to make a statement has not been determined, the time period shall run from the date of presentation of the certificate or report issued by the competent authority making the determination.

Article 4. Subject to the provisions of law number 23,492 in proceedings with regard to which the time limit stipulated in article 1 of the first paragraph of the said law has not expired, no steps shall be taken to summon the persons mentioned in art. 1 of this law to make a statement in response to charges.

serial combination with an offence of aggravated torture, allegedly 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”. Under point 7.4) of his ruling, Judge Bonadio stipulated 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 seized institutional power between 24 March 1976 and 10 December 1983 […]" and added "… 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 ruled: "Given what has been demonstrated, there can be no doubt about 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 for 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 as well as invalid and upheld “the lack of constitutionality 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 “[t]hese laws leave the deaths of thousands of Argentinian citizens and foreigners over a specific period of time - from 1976 to 1983 - without any punishment whatsoever and for that period only, establish, as a consequence, 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 abnormal inequality to be enshrined in law". Judge Skidelsky's judgment relates to proceedings concerning the enforced disappearance of persons, torture and aggravated murder 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 by referring to the provisions of domestic criminal law but also in the light of the human rights treaties that have been ratified by Argentina".

The Attorney-General, Nicolás Becerra, has also taken a position on the issue by confirming rulings made by federal judges with regard to the invalidity and lack of constitutionality of the Full Stop and Due Obedience Laws. In a decision dated 29 August 2002 addressed to the Supreme Court of Justice, the Attorney-General stated his agreement with the judgment delivered by Judge Gabriel Cavallo in which the two laws were declared to be null and void and unconstitutional. In his decision, the Attorney-General found it necessary "to stress 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 legislative authority but on all the State authorities and therefore also obliges the Public Prosecutor's Office and the Judiciary not to ratify the actions of other authorities who may be infringing them".

On the same date, in the case entitled "Astiz Alfredo and others for *delitos de acción pública* (offences for which a public prosecution can be brought)" related to the enforced disappearance of Corrado Higinio Gómez in January 1977, the Attorney-General also issued a second decision for the Supreme Court of Justice against the Full Stop and Due Obedience Laws. In this particular case, the disappearance is being investigated as well as allegations that, within that context, various offences relating to questions of inheritance that were prejudicial to the victim and his family were committed. One of the points made by the Attorney-General in this decision was that "[t]he offence of unlawful imprisonment falls into the category of ongoing offence, the particular nature of which is that perpetration does not end once the offence has been executed but carries on over time […] in such a way that the ongoing offence goes on being perpetrated until the illegal situation has come to an end".

5. The Argentinian State

The vast majority of human rights violations which took place in Argentina under military rule between 1976 and 1983 and resulted 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 liberty.

Under international law the Argentinian 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 its international obligations by taking steps to abrogate these two laws and ensure that they no longer 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 Argentinian justice system must open investigations and criminal proceedings for the gross human rights violations committed under military rule in order to ensure that those responsible for gross violations such as torture, disappearance and extrajudicial execution do not benefit from impunity.

6. THE INCOMPATIBILITY OF THE FULL STOP AND DUE OBEDIENCE LAWS WITH INTERNATIONAL LAW

Below Amnesty International will develop some aspects of international law that demonstrate that Laws Nº 23,492 ("Full Stop Law") and Nº 23,521 ("Due Obedience Law") are incompatible with Argentina's international obligations with regard to bringing to justice and punishing those responsible for gross violations of human rights. This chapter addresses the

State's obligations with regard to human rights (Point II), its obligation to bring to justice and punish the perpetrators of gross human rights violations (Point III), the incompatibility of amnesties for human rights violators with international law (Point IV), the principle of *pacta sunt servanda* (Point V) and the question of non-enforcement of amnesty laws by domestic courts (Point VI).

Before entering into the issues, it is worth remembering that Argentina ratified the International Covenant on Civil and Political Rights in 1986[7] and the American Convention on Human Rights in 1984[8]. Furthermore, Argentina 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. is relevant to point out that Argentina is a State party to the Vienna Convention on the Law of Treaties and that article 75 (22) of the Argentinian Constitution also states that treaties are hierarchically superior to laws. Similarly, according to 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.

It is also relevant, for the purposes of this brief, to be clear about the scope of the notion of "gross violations of human rights". Under international law, torture, summary, extra-legal and arbitrary executions and forced disappearances, among others, are deemed to be gross violations of human rights. The United Nations General Assembly has on many occasions stated that extrajudicial, summary and 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 protection bodies is in agreement on this issue. The United Nations Human Rights Committee has repeatedly taken the view

[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.

[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 or degrading treatment or punishment", adopted on 22 February 2001. For many decades now, numerous United Nations bodies have been taking the same position. For example, with regard to torture, the Subcommission on the Prevention of Discrimination and Protection of Minorities in Resolution 7 (XXVII) of 20 August 1974.

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

that torture, extrajudicial execution and forced disappearance, among others, are gross violations of human rights.[11] Furthermore, the Inter-American Court of Human Rights ruled that the following constituted gross human rights violations:

> "[acts] such as torture, summary, extra-legal or arbitrary executions and forced disappearances, all of which are prohibited since they contravene non-derogable rights recognized by International Human Rights Law".[12]

The Special Rapporteur on 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 work on the draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law[13]. Law doctrine is also in agreement with this view, even when the notions of "blatant" or "flagrant" are used without distinction as synonyms for "gross" or "grave". For example, in the conclusions of the "Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for the 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".[14]

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[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, par. 9, dated 3 August 1994.

[12] Inter-American Court of Human Rights, Decision dated 14 March 2001, in the *Case of Barrios Altos (Chumbipuma Aguirre and others v. Perú)*, paragraph 41 [Spanish original, free translation].

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

[14] Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for the Victims of Gross Violation of Human Rights and Fundamental Freedoms, held at the Netherland Institute of Human Rights - Studieren Informatiecentrum menserecten (SIM), Seminar on the Right to Restitution, Compensation and Rehabilitation for the Victims of Gross Violation of Human Rights and Fundamental Freedoms, University of Limburg, Masstricht, special SIM publication, Nº 12, p.17.

II. The State's duty to guarantee

International Human Rights Law imposes two broad types of obligation on the State: firstly, the duty to refrain from violating human rights and, secondly, the duty to guarantee respect for such rights. The first is made up of a set of obligations which are directly related to the duty of the State to refrain - whether by act or omission - from violating human rights, which also means ensuring that, by taking the necessary measures, such rights can be actively enjoyed. The second, on the other hand, refers to the State's obligations to prevent violations, investigate them, bring to justice and punish their perpetrators and provide reparation for the damage they cause. 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 law doctrine have developed the concept of the duty to guarantee which they see as the core notion on which the State's legal position with regard to human rights is based.

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, among others. Various declaratory texts, such 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, also refer to this duty.[15]

When analyzing article 1 (1) of the American Convention on Human Rights, the Inter-American Court of Human Rights recalled that the States parties have contracted the general obligation to protect, respect and guarantee each one of the rights contained in the American Convention and that therefore:

> "the States must prevent, investigate and punish any violation 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. [...and] 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." [16]

[15] United Nations General Assembly, Resolution 44/162 of 15 December 1989.

[16] Inter-American Court of Human Rights, *Judgment of 29 July 1988, Velázquez Rodríguez Case,* in Series C: Decisions and Judgments, Nº 4, paragraphs 166 and 174.

The Inter-American Commission on Human Rights has deemed the duty to guarantee to be an essential element of human rights protection:

> "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, form 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."[17]

The notion of the duty to guarantee has been incorporated into United Nations missions as an essential referent for their human rights monitoring work in different countries of 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... consist[ing] 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."[18]

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 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. For example, the United

[17] Report № 1/96, Case 10,559, *Chumbivilcas* (Peru), 1 March 1996.

[18] 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]

Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions explained it as follows:

> "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."[19]

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"[20]. 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 Inter-American Commission on Human Rights has stated on many occasions that the granting of compensation to victims and their relatives and the establishment of "Truth Commissions" do not in any way relieve the State of its obligation to bring those responsible for human rights violations to justice and to ensure that they are punished[21]. In the case of Chile, the Inter-American Commission on Human Rights expressly considered that: The Government's recognition of responsibility, its partial investigation of the facts and its 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."[22]

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[19] Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, United Nations document E/CN.4/1994/7, paragraphs 688 and 711.

[20] 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 <u>*La aplicación de los tratados de derechos humanos por los tribunales locales*</u> <u>[The application of human rights treaties by local courts]</u>, CELS, compiled by Martín Abregú - Christian Courtis, Editores del Puerto s.r.l., Buenos Aires, 1997, p.526. [Spanish original, free translation]

[21] 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, paragraph 52.

[22] Inter-American Commission on Human Rights, Report Nº 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 77. See also 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 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.

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 concerning the most serious violations and in promoting national reconciliation, the institution of this type of commission:

> "[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 (Article 1.1 of the American Convention), all within the overriding need to combat impunity"[23]

The obligation on the State to guarantee victims of human rights violations the right to an effective remedy also 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 said the following:

"[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 <u>be assumed by the State as its own legal duty, not as a step taken by private interests</u> 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."[24]

III. The obligation to bring to justice and 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, is supported in law in article 2 of the International Covenant on Civil and Political Rights as well as in article 1 of the American Convention on Human Rights. Where torture is concerned, it is upheld 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 the case 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

[23] 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.

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

Inter-American Convention on Forced Disappearance of Persons. The United Nations General Assembly, upon reaffirming that forced disappearance is a violation of international law, recalled that it is a crime which must be punishable under criminal law[25].

The Inter-American Court of Human Rights has pointed out that, in light of its obligations under 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."[26]

In several of its judgments, the Inter-American Court of Human Rights has pointed out that the 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[27]. 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 his 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

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[25] General Assembly Resolution 49/193, adopted on 23 December 1994. See also resolutions 51/94 of 12 December 1996 and 53/150 of 9 December 1998 which make the same point.

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

[27] Inter-American Court of Human Rights, *Velázquez Rodríguez Case, Compensatory Damages, Judgment of 21 July 1989 (Art. 63.1 American Convention on Human Rights),* Series C: Decisions and Judgments Nº 7, paragraphs 32 and 34; *Godínez Cruz Case, Compensatory Damages, Judgment of 21 July 1989, (Art. 63.1 American Convention on Human Rights)* in Series C: Decisions and Judgments Nº 8, paragraphs 30 and 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 (Art. 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 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.

> prompt recourse, so that, *inter alia,* those responsible for human rights violations may be prosecuted."[28]

Failure to meet this obligation amounts to a denial of justice and, therefore, to impunity, meaning "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of [the] rights"[29]. For this reason, the Inter-American Court of Human Rights has recalled that:

> [...] the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic repetition of human rights violations, and total defencelessness of victims and their relatives."[30]
> [and that] "The State has a duty to avoid and combat impunity."[31]

The Inter-American Court of Human Rights has indicated that if a victim of human rights violations chooses not to accept any compensation that may be due to him, the State is not relieved of its obligation to investigate the facts and to bring to justice and punish the perpetrators. The Inter-American Court of Human Rights considered that:

> "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."[32]

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

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[28] Inter-American Court of Human Rights, *Nicholas Blake Case, Reparation Judgment of 22 January 1999,* Series C: Decisions and Judgments Nº 48, paragraphs 61 and 63. [Spanish original, free translation]

[29] Inter-American Court of Human Rights, *Case of Paniagua Morales et al., Judgment of 8 March 1998,* Series C: Decisions and Judgments Nº 37, paragraph 173.

[30] Ibid, paragraph 173.

[31] Inter-American Court of Human Rights, *Nicholas Blake Case, Reparations Judgment of 22 January 1999,* Series C: Decisions and Judgments Nº 48, paragraph 64. [Spanish original, free translation]

[32] Inter-American Court of Human Rights, *Garrido and Baigorria Case, Reparations Judgment of 27 August 1998*, paragraph 72, in the Annual Report of the Inter-American Court of Human Rights - 1998, OEA/Ser.L/V/II/43. Doc. 11, p.317.

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 [of human rights violations]... This international obligation of the state cannot be renounced".[33]

The obligation to bring to justice and punish those responsible for human rights violations also exists in the International Covenant on Civil and Political Rights. In this connection, the Human Rights Committee has pointed out 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."[34]

There is undoubtedly an obligation to bring to justice those responsible for gross violations of human rights in a court of law and to punish them. It is laid down 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. It is an obligation which is not only treaty-based. This was recognized by the Committee against Torture when considering cases of torture committed before the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had entered into force. The Committee against Torture pointed out that the obligation to punish those responsible for acts of torture was already a requirement before the Convention took effect because "there existed a general rule of international law which should oblige all States to take effective measures [...] to punish acts of torture"[35]. The Committee against Torture based its view on the "principles of the

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[33] 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.

[34] Decision dated 13 November 1995, Communication Nº 563/1993, *Case of Nydia Erika Bautista* (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8.6. See also the Decision dated 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 8.8.

[35] United Nations Committee against Torture, Decision concerning communications 1/1988, 2/1988 and 3/1988 (Argentina), 23 November 1989, paragraph 7.2, in United Nations document General Assembly, Official Reports, Forty-fifth Session, Supplement Nº 44 (A/45/44), 1990.

judgment of the Nuremberg International Tribunal" and the right not to be tortured contained in the Universal Declaration of Human Rights.

It is through the action of the courts that the obligation to prosecute and punish the perpetrators of human rights violations is carried out. The courts must also guarantee victims of human rights violations and their relatives the rights to a fair trial and an effective remedy as well as ensure that judicial guarantees are accorded to those facing prosecution. While fulfilling this dual function, 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). Within this legal framework, the responsibility for fulfilling the obligations to prosecute and punish and to guarantee the rights to a fair trial and an effective remedy fall on 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 (Art. 1).
>
> "According to this principle, the absence of an effective remedy to 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."[36]

[36] 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.

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 supported in treaty-based standards as well as by the fact that human rights are by their very nature capable of being the subject of action by the courts. Any right which, when violated, cannot be prosecuted by the courts is an imperfect right. Human rights, on the contrary, are basic rights and it is therefore not possible for a legal system which is specifically based on such rights not to envisage that they be addressed by the courts. Given this, it is inconceivable for judicial protection not to be provided since, if there were none, the very notion of legal order would be destroyed. This is precisely what the United Nations Expert on the Right to Restitution, Compensation and Rehabilitation said on the matter:

> "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".[37]

The question of State responsibility arises not only when, through the behaviour 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 decision delivered by Professor Max Huber on 1 May 1925 concerning British claims for damages caused to British subjects in the Spanish part of Morocco. In his decision, Professor Max Huber recalled that, under international law:

> "State responsibility can arise [...] as a result of insufficient vigilance in preventing damaging acts as well as through insufficient diligence in criminally prosecuting the offenders. [...] 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."[38]

So, as indicated by the United Nations Observer Mission in El Salvador (ONUSAL), failure to exercise this duty to guarantee is not limited to the preventative aspects:

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[37] United Nations document E/CN.4/Sub.2/1992/8, paragraph 5.5. [Spanish original, free translation]

[38] *Recueil de sentences arbitrales* [Reports of International Arbitral Awards], United Nations, Vol. II, pp. 645 and 646 [French original, free translation]

"State responsibility arises not only from insufficient vigilance in preventing damaging acts but also from insufficient diligence in criminally prosecuting those responsible and in applying the required civil penalties."[39]

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 said the following 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.[40]

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

A. General considerations

Amnesties and other 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. On the one hand, such amnesties are incompatible with the obligation to investigate, bring to justice and punish those responsible for gross human rights violations. On the other hand, they are also 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.

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, which was 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."[41]

The United Nations Human Rights Committee addressed the issue very early on when in 1978 an amnesty was decreed by the government of General Augusto Pinochet Ugarte.[42] The

[39] ONUSAL, doc. cit., paragraph 29. [Spanish original, free translation]

[40] Inter-American Court of Human Rights, *Velázquez Rodríguez Case, Judgment of 29 July 1988*, Series C: Decisions and Judgments, Nº 4, paragraph 176.

[41] World Conference on Human Rights - The Vienna Declaration and Programme of Action, June 1993, United Nations Document DPI/1394-39399-August 1993-20M, Section II, paragraph 60.

Human Rights Committee questioned the validity of applying the measure to perpetrators of gross violations of human rights, especially disappearance.[43] The Sub-Commission for the Prevention of Discrimination and the Protection of Minorities also addressed the issue. In 1981, it called on States to refrain from passing laws such as amnesties to prevent the investigation of forced disappearances.[44]

The Human Rights Committee, in General Comment Nº 20 on article 7 of the International Covenant on Civil and Political Rights, 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."[45]

The Human Rights Committee has repeatedly reaffirmed this jurisprudence 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 was of the view that:

> "The Amnesty Decree Law, under which persons who committed offences between 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."[46]

In its "Concluding Observations" to France in May 1997, the Human Rights Committee concluded that:

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[42] Decree Law Nº 2191 of 18 April 1978.

[43] Report of the Human Rights Committee, United Nations document, Supplement Nº 40 (A/34/40), 1979, para. 81.

[44] Resolution 15 (XXXIV) of 1981.

[45] 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), appendix VI.A.

[46] United Nations document CCPR/C/79/Add.104, paragraph 7.

"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."[47]

The Human Rights Committee has made similar statements with regard to the amnesty laws passed in Lebanon[48], El Salvador[49], Haiti[50], Peru[51], Uruguay[52] and Yemen[53]. 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, both of which are in breach of State obligations under the International Covenant on Civil and Political Rights. In all the cases mentioned above, the Human Rights Committee considered that such 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 from the Republic of Croatia which specifically excludes "war crimes" from its scope without defining what they might be, the Human Rights Committee expressed the 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 for granting impunity to persons accused of serious human rights violations.[54]

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[47] United Nations document CCPR/C/79/Add.80, paragraph 13.

[48] United Nations document CCPR/C/79/Add.78, paragraph 12.

[49] United Nations document CCPR/C/79/Add.34, paragraph 7.

[50] United Nations document A/50/40, paragraphs 224-241.

[51] Concluding Observations of 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.

[52] 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 the decision of 9 August 1994 in the case of Hugo Rodríguez (Uruguay), Communication No. 322/1988, CCPR/C/51/D/322/1988, paragraph 12.4.

[53] United Nations document A/50/40, paragraphs 242-265.

[54] Concluding Observations of the Human Rights Committee: Republic of Croatia, 4 April 2001, United Nations document, CCPR/CO/71/HRV, paragraph 11.

Addressing the issue of the incompatibility of amnesty laws with the American Convention on Human Rights, the Inter-American Court of Human Rights was of the opinion that:

> "it is unacceptable to use amnesty provisions, statutes of limitations or measures designed to remove criminal liability as a means of preventing the investigation and punishment of those responsible for gross violations of human rights such as torture, summary, extra-legal or arbitrary executions and disappearances, all of which are prohibited as breaches of non-derogable rights recognized under International Human Rights Law."[55]

In the same judgment, the Inter-American Court of Human Rights pointed out that:

> "in light of the general obligations enshrined in articles 1.1 and 2 of the American Convention, States parties have a duty to take all kinds of measures to ensure that no one is removed from judicial protection or prevented from exercising their right to a simple and effective remedy, in accordance with articles 8 and 25 of the Convention. It is for that reason that States parties to the Convention who adopt laws which have such an effect, such as self-amnesty laws, are in breach of articles 8 and 25 in conjunction with articles 1.1 and 2 of the Convention. Self-amnesty laws leave victims defenceless and perpetuate impunity and are therefore clearly incompatible with the letter and spirit of the American Convention. These kinds of laws prevent identification of the individuals responsible for human rights violations because they block investigation and access to justice and prevent the victims and their relatives from knowing the truth and receiving appropriate reparation."[56]

The Inter-American Commission on Human Rights has also repeatedly concluded 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 punishment of the offenders."[57]

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[55] Inter-American Court of Human Rights, Judgment of 14 March 2001, *Case of Barrios Altos (Chumbipuma Aguirre and others vs. Peru)*, paragraph 41. [Spanish original, free translation]

[56] Ibid, paragraph 41. [Spanish original, free translation.]

[57] Inter-American Commission on Human Rights, Report N° 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 50. See also: Report N° 34/96, Cases 11,228, 11,229, 11,231 y 11,282 (Chile), 15 October 1996, paragraph 50; Report N° 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,

In general, the Inter-American Commission on Human Rights has taken the view that "such laws remove the most effective measure for enforcing human rights, i.e., the prosecution and punishment of the violators."[58] The Inter-American Commission on Human Rights has repeatedly taken the position that the amnesty laws from Chile[59], El Salvador[60], Peru[61] and Uruguay[62] 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).

B. Amnesties and internal armed conflict

Article 6(5) of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) allows, upon cessation of hostilities, for a broad amnesty to be granted to "persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained". Nevertheless, that type of amnesty does not apply to grave breaches of international humanitarian law such as arbitrary killings, torture and disappearances. The following is the official interpretation given to the scope of article 6(5) by the International Committee of the Red Cross:

Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 October 1992; and Report N° 29 (Uruguay), 1992.

[58] 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.

[59] Inter-American Commission on Human Rights, Report N° 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 105; Report N° 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 104; Report N° 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.

[60] 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 N° 37/00, Case 11,481, *Monsignor Oscar Arnulfo Romero and 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.

[61] Inter-American Commission on Human Rights, Report N° 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 N° 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.

[62] Inter-American Commission on Human Rights , Report N° 29/92, Cases 10,029, 10,036, 10,145, 10,305, 10,372, 10,373, 10,374 and 10,375 (Uruguay), 2 October 1992.

> "The *travaux préparatoires* of 6 (5) indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities. It does not aim at an amnesty for those having violated international humanitarian law."[63]

Both the Inter-American Commission of Human Rights[64] and the United Nations Human Rights Committee have used the same interpretation. For example, in the case of the amnesty granted to civilian and military personnel for human rights violations committed against civilians during the civil war in the Lebanon, the Human Rights Committee stated the view 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."[65]

C. The Argentinian Amnesty Laws

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 concluded 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 No. 23,521 (the Due Obedience Law) and Law No. 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."[66]

The Human Rights Committee expressed concern, *inter alia*, because:

> "amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been

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[63] Letter dated 1995 from the International Committee of the Red Cross to the Prosecutor of the Criminal Court for the Former Yugoslavia. This interpretation was repeated in another communication from the International Committee of the Red Cross dated 15 April 1997.

[64] Inter-American Commission on Human Rights, Report Nº 1/99, Case 10,480, *Lucio Parada Cea and others* (El Salvador), 27 January 1999, paragraph 115.

[65] United Nations document CCPR/C/79/Add.78, paragraph 12.

[66] Concluding Observations of the Human Rights Committee: Argentina, 5 April 1995, United Nations document CCPR/C/79/Add.46; A/50/40, paragraph 146

> 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."[67]

In its "Concluding Observations" dated November 2000, the Human Rights Committee reminded the Argentinian State 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."[68]

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]".[69]

Having examined Laws Nº 23,492 and 23,521 and Decree Nº 1002/89, the Inter-American Commission on Human Rights concluded that they are incompatible with the obligations of the Argentinian State under the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.[70] 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"[71], took the view that, since Laws Nº 23,492 and Nº 23,521 and Decree Nº 1002/89 prevented the exercise of the right to be heard by an independent and impartial tribunal, the Argentinian State had, by sanctioning and applying such laws, "failed in its obligation to guarantee the rights" protected under article 8 (1) of the American Convention on Human Rights. The Inter-American Commission on Human Rights also deemed that Laws Nº 23,492 and Nº 23,521 and Decree Nº 1002/89 constituted a

[67] Ibidem, paragraph 153.

[68] Concluding Observations of the Human Rights Committee: Argentina, 3 November 2000, United Nations document CCPR/CO/70/ARG, paragraph 9.

[69] Committee against Torture, Communications Nº 1/1988, 2/1988 and 3/1988, Argentina, decision dated 23 November 1989, paragraph 9.

[70] 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.

[71] Ibid, paragraph 34.

violation of the obligation to guarantee the right to judicial protection contained in article 25 of the American Convention on Human Rights.[72] Furthermore, continuing along the same lines and bearing in mind the obligation of the Argentinian 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 laws and the Decree, Argentina has failed to comply with its duty under Article 1.1".[73] Taking these things into consideration and bearing in mind that the sanctioning of the two Laws and the Decree had 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 N 23,492 and N 23,521 and Decree N 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."[74]

V. *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 of international law 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 change the way in which they do so. This is a general principle of the law of nations which is recognized in international jurisprudence[75]. International jurisprudence has also repeatedly stated that, in keeping this principle, judgments rendered by

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[72] Ibid, paragraph 39.

[73] Ibid, paragraph 41.

[74] Ibid, paragraph 1 of the findings.

[75] Permanent Court of International Justice, Advisory Opinion of 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, N° 44; Permanent Court of International Justice, Advisory Opinion of 31 July 1930, *Question des communautés greco-bulgares* [Greco-Bulgarian "Communities"], Recueil des arrêts et ordonnances, Série A, N° 17; Permanent Court of International Justice, Advisory Opinion of 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]; Permanent Court of International Justice, Judgment of 6 April 1955, *Notteböhm (2e. Phase) (Lichtenstein/Guatemala)* and Decision by S.A Bunch, *Montijo(Colombia v. United States of America)*, 26 July 1875.

domestic courts cannot be put forward as a justification for not abiding by international obligations.[76] 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 and 27.

International Human Rights Law is no stranger to the *pacta sunt servanda* principle and its corollary as has been reiterated 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 nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions".[77]

The Inter-American Court of Human Rights has also indicated that:

> "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."[78]

[76] Permanent Court of International Justice, Sentence N° 7, 25 May 1923, *Haute Silésie polonaise* [Polish Upper Silesia], in Recueil des arrêts et ordonnances, série A, N° 7; and Sentence N° 13, *Usine de Chorzow (Allemagne / Pologne)* [Chorzow Factory, Germany/Poland], 13 September 1928, in Recueil des arrêts et ordonnances, série A, N° 17.

[77] Inter-American Court of Human Rights, International Responsibility for the Promulgation and Enforcement of Laws which violate the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of 9 December 1994, Series A, No. 14, paragraph 35.

[78] 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, Series A: Judgments and Opinions, No. 13, paragraph 26.

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."[79]

On the subject 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 to justify not fulfilling 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."[80]

The same point was reiterated by the Human Rights Committee in its "Concluding Observations" to Peru in 1996. Having concluded that the amnesty laws (Decree-Laws Nº 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."[81]

The Inter-American Commission on Human Rights also reiterated this principle when it concluded that the amnesty promulgated by the government of General Augusto Pinochet Ugarte (Decree Law Nº 2191) was incompatible with Chile's obligations under the American Convention on Human Rights:

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[79] Advisory Opinion OC-14/94, Op. Cit., paragraph 50.

[80] *Loayza Tamayo Case, Reparations Judgment, 27 November 1998,* paragraph 168, in the Annual Report of the Inter-American Court of Human Rights 1998, OAS/SER.L/V/III.43, Doc. 11, p. 487.

[81] United Nations document CCPR/C/79/Add.67, paragraph 10. [Spanish original, free translation]

"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."[82]

VI. Non-enforcement of amnesty laws by domestic courts

A. General considerations

The question of State responsibility arises from the moment any State organ is in breach of an international obligation, whether it be by act or omission. This is a principle of international customary law[83] 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 compliance with the mandate given to it by the United Nations General Assembly to codify the principles of international law governing State responsibility[84]. 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."[85]

International Human Rights Law is no stranger to this principle which has been reaffirmed by the Inter-American Court of Human Rights[86], the European Court of Human Rights[87] and the

[82] 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.

[83] Roberto Ago, Third Report on State Responsibility, in Yearbook of the International Law Commission, 1971, Vol. II, Part I, pp.253-254.

[84] United Nations General Assembly Resolution 799 (VIII), 7 December 1953.

[85] 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.

[86] See, among others, Inter-American Court of Human Rights, *Judgment of 29 July 1988, Velázquez Rodríguez case*, Series C: Decisions and Judgments Nº 4, paragraph 151.

[87] See, for example, the following Judgments: *Tomasi v. France,* 27 August 1992, and *Fr. Lombardo v. Italy*, 26 November 1992.

European Commission of Human Rights[88]. 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 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."[89]

The courts must discharge the international State obligations which are incumbent upon them within their jurisdiction. As far as the subject matter of this brief is concerned, 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 it be by act or omission, would constitute a denial of justice and a violation of international State obligations and thus give rise to international State responsibility.

When a domestic court enforces an amnesty law which is incompatible with international State obligations and in breach of internationally-protected human rights, it constitutes a breach of international State 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."[90]

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[88] See, for example, European Commission of Human Rights, Case of *Ireland v. the United Kingdom*, Yearbook of the European Convention on Human Rights, Vol. 11, Part 1, p.11.

[89] Inter-American Commission on Human Rights, Report Nº 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 84.

[90] Inter-American Commission on Human Rights, Report N° 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 106; Report N° 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 105; and Report N° 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.

> "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."[91]

Similarly, the Inter-American Commission on Human Rights concluded, with regard to another Chilean case, 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 Inter-American Commission on Human Rights 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."[92]

B *Res judicata* and amnesties

A sentence or any other type of ruling rendered by a domestic court which is in breach, by act or omission, of international State obligations or in violation of 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 wielded 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 true that it is a rule which should be addressed from the perspective of substance, that is to say, in the light of the international standards relating to 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 that have been conducted by a competent, independent and impartial tribunal and in which the judicial guarantees and rights due to the defendants, as well as to the victims and any of their relatives involved in the case, have been

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[91] Inter-American Commission on Human Rights, Report N° 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 107. See also Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 106; and Report N° 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.

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

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 question of whether or not the *res judicata* can be disregarded 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 that the human rights involved in due process should be protected also applies to the right to an effective remedy which should be made available to anyone whose fundamental rights have been violated. This is how the Inter-American Court of Human Rights has interpreted it:

> "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 (Art. 1) ...
>
> According to this principle, the absence of an effective remedy to 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."[93]

[93] 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 5. See also *Cases of Velásquez Rodríguez, Fairén Garbi and Solís Corrales and Godínez Cruz, Preliminary Objections*, Judgments of 26 June 1987, paragraphs 90, 90 and 92.

On this issue of the close subordinate relationship between the *res judicata* rule and the due process principle, the Inter-American Court of Human Rights took the view that:

> "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."[94]

Similarly, German J. Bidart Campos has made the point that:

> "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 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*."[95]

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[94] Inter-American Court of Human Rights, *Judgment of 30 May 1999, Case of Castillo Petruzzi and others v. Peru,* paragraphs 218 and 219. [Spanish original, free translation.]

[95] German J. Bidart Campos, Tratado elemental de derecho constitucional argentino, Tomo I El derecho constitucional de la libertad [Basic Treatise on Argentinian Constitutional Law, Volume I The Constitutional Right to Liberty], Ediciones EDIAR, Buenos Aires 1992, p.468. [Spanish original, free translation]

In the light of comparative law and the way the law has evolved, current trial doctrine is of the view that the *res judicata* rule should be addressed from a teleological point of view.[96]

The Inter-American Court of Human Rights has taken the position that the *res judicata* is no longer valid if the court judgment in question 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 to be invalid "because it is incompatible with the American Convention on Human Rights" and ordered the Peruvian authorities to ensure that a new trial in which due process of law was fully observed took place.[97]

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*]"[98], stated 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."[99]

It should be noted that this ruling by the Inter-American Commission on Human Rights was set aside in a judgment rendered by the Supreme Court of Justice of Argentina on 14 September 1987.[100]

For its part, the Human Rights Committee has concluded that a person who has been convicted following a trial which is incompatible with basic judicial guarantees should be

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[96] 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.

[97] Inter-American Court of Human Rights, Judgment of 30 May 1999, Case of Castillo Petruzzi and others v. Peru, finding 13. [Spanish original, free translation.]

[98] Inter-American Commission on Human Rights, Resolution Nº 15/87, Case 9635 (Argentina), 30 June 1987, Annual Report of the Inter-American Commission on Human Rights, 1986-1987, OEA/Ser.L/V/II.71, Doc. 9 rev. 1, p.53.

[99] Ibid., paragraph 15 of the Considerings, p.65.

[100] Supreme Court of Justice of the Nation, Judgment of 14 September 1987, case against Osvaldo Antonio López.

given a fresh trial offering all the guarantees required by article 14 of the International Covenant on Civil and Political Rights or, if that is not possible, released.[101]

It is important to point out that this phenomenon has been addressed within the realm of international criminal law. The United Nations International Law Commission pointed out that "international law did not make it an obligation for States to recognize a criminal judgement handed down in a foreign State"[102]. 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"[103], 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 taken up 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 states that:

> "No person who has been tried by another court for conduct also proscribed under articles 6, 7 or 8 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."[104]

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[101] Human Rights Committee, decision dated 6 November 1997, Communication Nº 577/1994, *Polay Campos* (Peru), United Nations document CCPR/C/61/D/577/1994.

[102] International Law Commission, Report of the International Law Commission on the Work carried out during its 48th Session - 6 May to 26 July 1996, United Nations document Supplement No. 10 (A/51/10), p.72.

[103] Ibidem.

[104] Rome Statute of the International Criminal Court, United Nations document A/CONF.183/9, p.19.

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 cited by the State in this legal context as a means of evading, or absolving itself from, its international obligation to bring to justice and punish the perpetrators of grave human rights violations in good faith.

Amnesties and criminal law

The principle that criminal law should not be applied retroactively is an essential safeguard of international law and is a consequence of the legality of crimes principle (*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 are 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 stipulates 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".

The aforegoing means that, even when, at the time it was committed, an act was not considered to be a crime under national legislation, 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 in national legislation 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 deemed to be a crime under international law.

Torture and forced disappearance are international crimes. The systematic or widespread practice of, among others, extrajudicial execution, torture, forced disappearance, and politically-motivated persecution also constitute specific international crimes, that is to say, 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 are referring.

If the acts in question were considered to be criminal offences under national or international law when they were committed, then the principle of non-retroactive application is not affected when an amnesty law - which is incompatible with international State obligations - is repealed or set aside and the perpetrators have been prosecuted and punished. The Inter-American Commission on Human Rights made its position on this topic clear in a decision it made in connection with the Chilean amnesty law. In the course of the international hearing, the Chilean State 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 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."[105]

Consequently, the Inter-American Commission on Human Rights recommended that the Chilean authorities should:

> "adapt its 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."[106]

In a case where a court had applied the Peruvian amnesty laws, the Inter-American Court of Human Rights, without entering into the question of retroactive application, took the view that:

> "given the clear incompatibility between the self-amnesty laws and the American Convention on Human Rights, the said laws are null and void and cannot go on being used as a means of preventing investigation of the facts [...] or the identification and punishment of those responsible or so that they can have the same or similar effect on other cases in which rights enshrined in the Convention are violated in Peru".[107]

[105] Inter-American Commission on Human Rights, Report Nº 133/99, Case 11,725, *Carmelo Soria Espinoza* (Chile), 19 November 1999, paragraph 76.

[106] Ibid, paragraph 3 of the recommendations.

[107] Inter-American Court of Human Rights, Judgment of 14 March 2001, *Case of Barrios*

Consequently, 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."[108]

In such a legal context, the fact that perpetrators of gross violations of human rights - such as torture, forced disappearances and extrajudicial executions - committed while the military were in power were prosecuted and punished and later amnestied for those crimes by virtue of laws which are incompatible with Argentina's international obligations does not infringe the principle that criminal law cannot be applied retroactively because those acts were deemed to be crimes under both Argentinian criminal law and international law. It is worth remembering what the Human Rights Committee said 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."[109]

VII. Conclusions

The Argentinian 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 Nº 23,492 - "The Full Stop Law" - and Law Nº 23,521 - "The Due Obedience Law" - are in breach of the international obligations incumbent on the Argentinian State, in particular, its obligations to investigate the gross violations of human rights committed under military rule and to bring to justice and punish those responsible for such acts.

Law Nº 23,492 - "The Full Stop Law" - and Law Nº 23,521 - "The Due Obedience Law" - are in breach of the international obligation incumbent on the Argentinian State to guarantee victims of gross human rights violations and their relatives the right to an effective remedy.

The court judgments rendered as a result of enforcing Laws Nº 23,492 and Nº 23,521 and which led to impunity for the perpetrators of gross violations of human rights have no basis in

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Altos (Chumbipuma Aguirre and others vs. Peru), paragraph 44. [Spanish original, free translation.]

[108] Ibid, paragraph 5 of the recommendations. [Spanish original, free translation.]

[109] Concluding Observations of the Human Rights Committee: Argentina. O3/11/2000. CCPR/CO/70/ARG, par. 9.

law and cannot be cited in order to prevent such people from being brought to justice and punished.
Insofar as the repeal of the Full Stop and Due Obedience Laws under Law Nº 24,954 of 1998 has been interpreted as not rendering either of them null and void, it is inconsistent with the international obligations incumbent on the Argentinian State. The Argentinian State must bring its legislation into line with its international obligations by proceeding to set aside Laws Nº 23,492 and Nº 23,521 and declaring them to be null and void.

The Argentinian 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 Nº 23,492, Nº 23,521 and Nº 24,954, or court judgments rendered as a result of enforcing such amnesty measures in order not to comply with its international obligations to investigate, prosecute and punish the perpetrators of gross violations of human rights committed while the military were in power.

The organs of the Argentinian judiciary have a duty to carry out, within their realm of jurisdiction, the international obligations to investigate, bring to justice and punish the perpetrators of gross violations of human rights committed while the military were in power. Consequently, courts should not only refrain from enforcing amnesty laws which are incompatible with international State obligations and in breach of internationally-protected human rights but should also declare them to be completely null and void and take steps to investigate, bring to justice and punish the perpetrators of gross violations of human rights.