SPECIAL COURT FOR SIERRA LEONE

IN THE TRIAL CHAMBER

THE PROSECUTOR

- against -

MORRIS KALLON

SKELETON ARGUMENT ON BEHALF OF THE REDRESS TRUST (REDRESS), THE LAWYERS COMMITTEE FOR HUMAN RIGHTS AND THE INTERNATIONAL COMMISSION OF JURISTS PURSUANT TO RULE 74

1. The importance of the question of the legality of amnesties in international law extends far beyond the boundaries of this individual trial and profoundly touches upon critical legal, social and political issues that face countries such as Sierra Leone in the process of national reconciliation and the restoration and maintenance of peace.

2. In summary it is our submission to the Court that the Defendant's Preliminary Motion (Lome Agreement) should be dismissed. Our submissions are founded upon a number of grounds. We support the Prosecution's analysis of the legality of Article 10 of the Court's Statute but urge this Court to base its judgment on a wider analysis of international law. It is our submission, for the reasons set out below, that the Court should be compelled to find that those who commit crimes against humanity and other serious breaches of international human rights and

humanitarian law must be prosecuted and any application of a pre-trial amnesty would be unlawful.

The Applicants

3. The parties to this *amicus curiae* application have a wealth of experience in helping and representing individuals and communities as they deal with the legacy of a recent history of systemic violence. Although not representing any particular individuals in these proceedings they seek to voice the critiques, concerns and aspirations of the communities of victims upon whose behalf they campaign.

    a. The Redress Trust ('REDRESS') is an international nongovernmental organisation with a mandate to seek justice and redress for victims of torture, and to make accountable all those who perpetrate, aid or abet acts of torture. It has accumulated a wide expertise on the rights of victims of torture and other serious violations of human rights and humanitarian law, and has advocated on behalf of victims from all regions of the world.

    b. The Lawyers Committee for Human Rights ('LCHR') was established in 1978 in New York and since then has worked directly with victims of human rights violations and partner organisations around the world. One of the central tenets of the organisation's mission is to move the notion of international justice for the most serious rights atrocities from an aspiration to a reality. It advocated the creation of the international criminal tribunals for the former Yugoslavia and Rwanda and the International Criminal Court, and continues to work to ensure that those tribunals operate effectively and respect human rights and other international legal standards. Working closely with local partners, the organisation also works to strengthen national justice systems to ensure that war crimes, genocide and crimes against humanity can be investigated and prosecuted at home.

c. The International Commission of Jurists ('ICJ') provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level. The Commission was founded in Berlin in 1952 and its membership is composed of sixty eminent jurists who are representatives of the different legal systems of the world. Based in Geneva, the International Secretariat is responsible for the realisation of the aims and objectives of the Commission. In carrying out its work, the International Secretariat benefits from a network of autonomous national sections and affiliated organisations located in all continents. Awards recognising the ICJ's contributions to the promotion and protection of human rights include the first European Human Rights Prize by the Council of Europe, the Wateler Peace Prize, the Erasmus Prize, and the United Nations Award for Human Rights.

Our Application under Rule 74

4. The Trial Chamber has directed that our application to be heard as *amicus curiae* is to be dealt with by this Court. We do not know if our application for locus is opposed but we are optimistic that all parties to this application would welcome the fullest possible consideration of the important issues that are raised. The ramification of a ruling by an international court on the legality of amnesties will quite patently have a wider impact than simply the effect upon the present parties and it is therefore appropriate that the Court is presented with a wide range of arguments. In such circumstances the Court should only 'shut out' a potential party if there is good reason to do so, for example if a party is plainly irrelevant or is seeking to appear for an ulterior motive. We respectfully ask the Court to grant our application to be heard.

Why This Application is Made

5. No court, least of all a court established with the assistance of the international community through the United Nations, should countenance the recognition of amnesties to those who commit crimes against humanity, genocide, war crimes and other serious violations. Our opposition to the Defendant's motion is not based upon technicalities but rather is founded upon profound legal, political and moral objections to the concept of amnesties for crimes of this nature. In addition to the legal submissions made in this application, we assert that amnesties should be rejected not least because:

   a. *The rule of law* demands that justice be done;

   b. *The rule of law* demands that justice is not only done but is seen to be done. The import of this principle in countries seeking to (re)establish civil society is manifest. The impact of amnesties is such that a man who kills 15,000 escapes justice whilst those who kill one (or even steal a loaf of bread) are punished – this plainly does not engender the respect for the institutions of justice but rather can only foster cynicism and contempt;

   c. *The rights of victims* to an investigation and justice cannot be denied by politicians seeking or granting amnesties whatever their motives. Prosecutions are an essential means of restoring the dignity of those who have suffered and in so doing have the social impact of reducing the risk of resort to personal revenge;

   d. *The requirement to record* in precise detail events such that they cannot be challenged but are left indelibly on the national memory. A criminal court, applying its high standard of proof, is uniquely positioned to provide such a record of the crimes it prosecutes. Justice Robert Jackson's comment that the most important legacy of Nuremberg was the documentation of Nazi atrocities "*with such authenticity and in such detail*

that there can be no responsible denial of these crimes in the future[1]" raises an important requirement in all attempts to account for past atrocities;

e. *The need for reconciliation* is undermined where those most culpable are free to walk unpunished on the same streets as their victims. The sense of outrage and indignation that such a result would engender is obvious – as Professor Bassiouni, Chairman of the UN Investigative Commission for Yugoslavia has stated "*if peace is not intended to be a brief interlude between conflicts*" it must be accompanied by justice.[2]

d. *The need for deterrence* is fatally undermined by the application of amnesties. If those most culpable escape justice then a *carte blanche* is effectively handed to the next generation of killers. As Judge Cassese[3] has noted of Hitler's infamous Armenian reference:

> "*The …unforeseen – result of the impunity of the leaders and organisers of the Armenian genocide is that it gave a nod and a wink to Adolf Hitler and others to pursue the Holocaust some twenty years later. There are many indications that Hitler and his cohorts were fully aware of the Armenian genocide and that they drew from it lessons suitable for emulating the Turkish model of enacting a 'final solution'. Adolf Hitler is reported to have said, when debating whether to proceed with his genocidal policies against the Jews, 'Who, after all, speaks today of the annihilation of the Armenians?'…Thus, the lack of international response to the*

[1] *Report to the President from Justice Robert H Jackson Oct 7 1946,* International Conference on Military Trials: London, 1945. International organization and conference series; II European and British Commonwealth 1, Department of State Publication 3080 (Washington, DC: Government Printing Office, 1949).
[2] M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability.* 59 Law & Contemp. Probs 9, 13 (1996).
[3] *Reflections on International Criminal Justice* Modern Law Review Vol 61, No.1. See also the 1990 report of the UNHCHR's Working Group on Enforced or Involuntary Disappearances (UN Doc. E/C.4/1990/13 at para 344) who noted "*the single most important factor contributing to the phenomenon of disappearances may be that of impunity. The Working Group's experience over the past ten years has confirmed the age-old adage that impunity breeds contempt for law. Perpetrators of human rights violations, whether civilian or military, will become all the more brazen when they are not held to account before a Court of law.*"

Armenian genocide may, in fact, have influenced the development of Nazi ideology."

6. This skeleton argument aims to provide an outline of the submissions that we would wish to elaborate upon in oral submissions to the Court. Our argument falls into 2 main parts:

   A. We examine the legality of the Lome Amnesty in the context of the Special Court and in particular address ourselves to the arguments raised by the parties;

   B. The legality of amnesties in international law in which we submit that the complementary obligations to provide reparation to victims and to prosecute perpetrators is at odds with any notions of impunity.

7. Before entering into these issues, it is worth noting that Sierra Leone is party to the International Covenant on Civil and Political Rights[4] and its Optional Protocol I,[5] and to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[6] Sierra Leone is also party to the 1949 Geneva Conventions[7] and Additional Protocols I and II,[8] and the Rome Statute of the International Criminal Court.[9] Sierra Leone is also party to the African Charter on Human and Peoples' Rights.[10]

[4] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; *entry into force* 23 March 1976. Sierra Leone acceded on 23 November 1996.
[5] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; *entry into force* 23 March 1976. Sierra Leone acceded on 23 Augustus 1996.
[6] Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984; *entry into force* 26 June 1987. Ratified by Sierra Leone on 25 May 2001.
[7] Sierra Leone became a party on 6 October 1965.
[8] Sierra Leone acceded to Protocol I and II on 21 October 1986.
[9] The Rome Statute entered into force on 1 July 2002. Sierra Leone ratified on 15 September 2000.
[10] Sierra Leone ratified on 21 September 1991.

8. It is also relevant, for the purpose of this skeleton argument, to be clear about the scope of the notion of "crimes under international law" or "crimes against international law for which individual criminal responsibility is recognized."[11]

9. The type of conduct that is criminalized under international law concerns serious (grave or gross) violations of human rights and international humanitarian law considered so heinous that they affect "those legal interests in whose preservation humanity has a general interest".[12]

10. The term "crimes under international law" (*delicit jus gentium*) is consistent with the statutes and jurisprudential developments of the Nuremberg Tribunal, both *ad hoc* international criminal tribunals, and the Statute of the International Criminal Court (ICC).[13] As reflected in the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal adopted by the International Law Commission (ILC) in 1950, the first principle underscores that "(a)ny person who commits an act which constitutes a *crime under international law* [emphasis added] is responsible and liable to punishment."[14]

11. Developments post-Nuremberg have confirmed the interconnection between international criminal law and international human rights and humanitarian law. Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968 establishes that "no statutory limitation shall apply to…(b) Crimes against humanity *whether committed in time of war or in time of peace*…".[15] The International Criminal Tribunal for Yugoslavia (ICTY) confirmed in the Tadic decision that crimes

[11] See, e.g., Christian Tomuschat, International Criminal Prosecution: Encyclopedia of Public International Law, International Criminal Prosecution. The Precedent of Nuremberg Confirmed, in The Prosecution of International Crimes (Roger S. Clark & Madeleine Sann eds., 1996); Encyclopedia of Public International Law, 332 (1985).
[12] Encyclopedia of Public International Law, 332 (1985).
[13] Ian Borwnlie, Principles of International Law 565 (5th ed. 1998).
[14] Printed in Yearbook of the International Law Commission, 1950, Vol. II.
[15] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968).

against humanity do not need to be connected to armed conflicts.[16] This principle has also been incorporated into the ICC Statute.[17] In the same way, the Furundzija decision of the ICTY established that the UN Convention against Torture, a human rights convention, applies to cases involving armed conflicts.[18]

A: THE LEGALITY OF THE LOME AMNESTY IN THE CONTEXT OF THE SPECIAL COURT

12. We wish to address the following issues under this heading:

I. The question of whether Sierra Leone has breached its domestic law (the Lome Agreement), does not affect the validity of the agreement establishing the Special Court.

II. In any case, it is submitted that Sierra Leone did not breach the Lome Agreement or any domestic regulation when it signed the Special Court Agreement.

III. The Defendant cannot rely on the Lome Agreement to prevent the exercise of the Special Court's jurisdiction.

I. THE QUESTION OF WHETHER SIERRA LEONE HAS BREACHED ITS DOMESTIC LAW, DOES NOT AFFECT THE VALIDITY OF THE AGREEMENT ESTABLISHING THE SPECIAL COURT

i. The Statute of the Special Court has primacy over the Lome Agreement

[16] *Prosecutor v. Dusko Tadic (Jurisdiction)*, Case No. IT-94-1-AR72, 2 October 1995, para. 141.
[17] Article 7 of the ICC Statute, which defines "crimes against humanity", does not limit such acts to armed conflicts.
[18] IT-95-17/1-T (10 December 1998).

13. We respectfully agree with the arguments set out by the Prosecution Response to the Defence Motion but wish to supplement that analysis with further considerations.

14. It is plain that if the Court were to accede to the Motion the impact would be in essence to undermine the entire legitimacy of the Special Court. It would not only be striking down its own Article but would be rendering ineffective its Article 1 mission to '*prosecute persons who bear greatest responsibility for the serious violations of international humanitarian law and Sierra Leone law.*"

15. We are in agreement with the Prosecution's analysis of the primacy of the Special Court Agreement over domestic law. Article 27 of the Vienna Convention on the Law of Treaties and Article 27(1) of the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, reflecting norms of customary international law,[19] make plain that even if the Lome Amnesty had been breached by the signature of the Agreement establishing the Special Court, domestic law cannot take precedence over treaty law. "*A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty…*"[20]

ii. The Principle Pacta Sunt Servanda

16. It is a universally recognized general principle of international law that parties to a treaty must implement the treaty as well as the obligations arising from it in good faith.[21] A corollary of this general principle of international law is that domestic law, whether provisions of the Constitution, laws or regulations, cannot

[19] As the Prosecution correctly asserts, such provisions reflect norms of customary international law. See Prosecution Response to the First Defense Preliminary Motion (Lome Agreement) paragraph 8. See also footnotes 22 and 23 below and accompanying text.
[20] Article 27(1) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, A/CONF.129/15 (25 ILM 543) of 21 March 1986.
[21] "Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized", Preamble, Vienna Convention on the Law of Treaties; Article 26: *Pacta sunt servanda*, Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

be cited as an excuse in order not to carry out international commitments or to change the way in which to do so. As stated above, this is a general principle of the law of nations which is recognized in international jurisprudence[22] and that has been incorporated in the Vienna Convention on the Law of Treaties.[23] International jurisprudence has also repeatedly stated that, in keeping with this principle, judgments rendered by domestic courts cannot be put forward as a justification for not abiding by international obligations.[24]

iii. Security Council Resolution 1315 specifically provided for the non-applicability of the Lome amnesty to serious violations of international humanitarian law.

17. The provision in Article 10 of the Statute prohibiting the application of the Lome amnesty to serious breaches of international humanitarian law makes the creation of the Special Court consistent with Security Council Resolution 1315.

18. The Security Council—exercising its powers under Chapter VII of the UN Charter—specifically requested the Secretary-General to negotiate an agreement with Sierra Leone to create an independent special court *consistent* with Resolution 1315. The Security Council made clear that the measures requested in Resolution 1315 were aimed at ending "the prevailing situation of impunity"[25] in Sierra Leone, and recalled that the Special Representative of the Secretary-

[22] Permanent Court of International Justice, Advisory Opinion of 4 February 1932 Permanent Court of International Justice, Advisory Opinion of 4 February 1932, *Traitement des nationaux polonais et autres personnes 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, *Questio 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/Suede)*[Application of the 1909 Convention for regulating the guardianship of Minors (Netherlands/Sweden]; Permanent Court of International Justice, Judgment of 6 April 1955, *Notteböm (2e. phase) (Lichtenstein/Guatemala)* and Decision by S.A. Bunch, *Montijo (Colombia v. United States of America),* 26 July 1875.

[23] Art. 27, Vienna Convention on the Law of Treaties, 1969 is identical in substance to Art 27 (1) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, See footnote 20 above.

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

[25] Security Council Resolution 1315 "reaffirming further that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable…and that the international community will exert every effort to bring those responsible to justice…"

General appended to his signature of the Lome Agreement a statement that "the United Nations holds the understanding that the amnesty provision of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law." Additionally, the Special Representative recommended that the subject matter jurisdiction of the Special Court should include crimes against humanity, war crimes and other serious violations of international humanitarian law.[26]

19. The Security Council Resolution requesting the negotiations to establish the Special Court specified that the Statute of the Court should be consistent with the Resolution. Therefore to argue against the non-applicability provision in Article 10 of the Statute would be contrary to the aims of the Security Council and would make the Statute of the Court inconsistent with Resolution 1315.

20. As established by the International Court of Justice, the Security Council is the only organ authorized to take measures under Chapter VII and no court has the power to review its actions.[27] This principle was reiterated by the Trial and Appeals Chambers of the ICTY in the Tadic case.[28] The Special Court would in effect be questioning a measure taken by the Security Council under Chapter VII of the UN Charter if it took it upon itself to review the validity of the exception of the applicability of the Lome Amnesty for serious international crimes that was specifically requested in Resolution 1315.

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[26] See resolution 1315.

[27] In the Lockerbie case, the Court seems to leave the question of the possibility of judicial review open: the question whether the Court has jurisdiction to decide on an *ultra vires* act of the Security Council is at issue, as Acting President Judge Oda stated: 'whether or not the Court has jurisdiction to deal with that question is certainly a different matter. This is confirmed by the dissenting opinion of Judge Bedjaoui: 'it seems that the Court was right not to allow itself to be tempted to pronounce on the validity of the way the Security Council had intended to deal with the case of the international responsibility of a State for terrorist actions, which is wider than the dispute here.' In the Namibia Advisory Opinion, the ICJ stated: Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Reports 16, at para. 89 (Advisory Opinion of 21 June).

[28] Although differently, both chambers rejected the defense argument that the Tribunal is empowered to "judicially review" actions by the Security Council, including its Article 39 determination of "threat to peace." Both affirm also that the establishment of the Tribunal was an appropriate response, taken pursuant to Article 41 of the UN Charter. See: Jose E. Alvarez, Nuremberg Revisited: The *Tadic* Case. In: the European Journal of International Law, available at: http://www.ejil.org/journal/Vol7/No2/art7.html.

II. IN ANY CASE, IT IS SUBMITTED THAT SIERRA LEONE DID NOT BREACH THE LOME AGREEMENT OR ANY DOMESTIC REGULATION WHEN IT SIGNED THE SPECIAL COURT AGREEMENT

i. The amnesty granted cannot be interpreted as covering violations of international human rights and humanitarian law that constitute crimes under international law

21. The amnesty purported to be granted by the Lome Agreement "in respect of anything done by them in pursuit of their *objectives* as members of those organizations"[29] is consistent with the international humanitarian principle that combatants in civil wars should not be penalized simply for having taken part in hostilities.[30] International humanitarian law makes a clear distinction between this principle and the obligation to prosecute those who commit serious breaches of the Conventions.

22. Accordingly, Article 6.5 of the Additional Protocol II of 1977 allows, upon the cessation of hostilities in non-international armed conflict, 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".[31] As asserted by the International Committee of the Red Cross (ICRC), this provision essentially seeks to encourage the release of individuals who might be, or are subject to criminal or other proceedings as a matter of *domestic law* for the fact of having taken part in hostilities.[32]

23. Under international law, crimes against humanity and other serious violations of human rights and humanitarian law that constitute crimes under international law are not “political offenses” for the purposes of prosecution or extradition. The amnesty provision contained in Article 6(5) of the 1977 Protocol II cannot, as

[29] Art IX, Lome Accord.
[30] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, art. 6(5), reprinted in 16 I.L.M. 1442.
[31] Additional Protocol II, Article 6, para. 5.
[32] The ICRC, in the Committee’s interpretive capacity, expressed this view in several correspondences: Letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1995 and to the Department of Law at the University of California of 15 April 1997 (referring to CDDH, Official Records, 1977, Vol. IX, p. 319) (on file with the applicants) .

explained by the ICRC, be read as support to amnesties for war crimes or other offences committed in internal armed conflicts that constitute crimes under international law.[33] As it is clear in the *travaux préparatoires*, the intention of the drafters was to avoid political prosecutions after non-international armed conflicts.[34] Therefore crimes under international law cannot be considered to be committed as part of valid or legitimate "objective" for the purpose of granting an amnesty that will shield the prosecution or extradition of the alleged perpetrators.[35]

24. The Genocide Convention,[36] the Apartheid Convention[37] and the Torture Convention[38] clearly call for the prosecution of these crimes and explicitly establish that such acts cannot be considered political offenses.

25. In the same way, the ICTY and ICTR Statutes provide that states are to surrender an accused person to the jurisdiction of the respective tribunals regardless of 'any legal impediment to the surrender or transfer of the accused to the Tribunal which may exist under the national law or extradition treaties of the state concerned.'[39] To this end, in Prosecutor v Furundzija[40] a Trial Chamber of the ICTY held that amnesties for torture were null and void and cannot be afforded international recognition. It further established that, '…, and [torture] must not be excluded from extradition under any political offence exemption.'[41]

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[33] Letter of the ICRC Legal Division to the ICTY Prosecutor of November 24, 1995 and to the Department of Law at the University of California of April 15, 1997 (referring to CDDH, Official Records, 1977, Vol. IX, p. 319).
[34]For example, the Soviet representative contended that persons guilty of crimes against humanity and genocide should not receive protection, but rather 'rules should be laid down for their punishment.' Also, a group of Socialist bloc states introduced a new paragraph to read: 'None of the provisions of this Protocol may be used to prevent the prosecution and punishment of persons accused of war crimes or crimes against humanity'. Cited in N. Roht-Arriaza (supra note 52), p. 59 fn 7 and 8. These proposals were caught up in other debates and eventually died. Some delegates' contention was that 'provisions of that nature were included in the legislation of all States' (Pakistan) or were 'within the competence of Head of State' Nigeria. Cited in N. Roht-Arriaza (supra note 52), p. 59 fn 9
[35] See section B paragraphs 98-100
[36] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, art. 7.
[37] International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, G.A. Res. 28/3068, 28 UN GAOR Supp. (No. 30) at 75, U.N. Doc. A/RES/3068 (1973), 1015 U.N.T.S. 243, 13 I.L.M. 50 (1974), art. 11.
[38] Articles 7 and 8(4) of the Convention against Torture.
[39] Rule 58 of the ICTY Rules of Procedure and Evidence, adopted 11 February 1994, as amended; Rule 58 of the ICTR Rules of Procedure and Evidence, adopted on 29 June 1995, as amended.
[40] IT-95-17/1-T (10 December 1998).
[41] Ibid, par. 157.

26. The Statute of the International Criminal Court (ICC), dealing only with the most heinous crimes, does not provide for the political offense exception either.[42]

27. The UN Model Treaty on Extradition establishes that states may wish to exempt from the political offence exception any offences where an *aut dedere aut judicare* obligation has been assumed under an international convention, or where the parties have agreed the offence is not political for the purposes of extradition.[43]

28. As was established in re Doherty: "No act [should] be regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct. Surely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political exception…".[44]

29. The UN Secretary-General affirmed that domestic amnesties for crimes under international law are not legally binding at the international level precisely by instructing his Special Representative to sign the Sierra Leone peace agreement "with the explicit provision that the United Nations holds the understanding that the amnesty and pardon in Article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law".[45] This understanding was

[42] Although the Statute provides for complementary jurisdiction and thus gives national courts priority over the jurisdiction of the Court, Article 17 contains an exception where the Court can exercise its jurisdiction if the state having jurisdiction is not willing or is not able to prosecute. See ICC Statute art 17.

[43] Article 3 (a) and accompanying footnote: Some countries may wish to add the following text: 'Reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the Parties have agreed is not an offence of a political character for the purpose of extradition.'

[44] Re Doherty, 599 F. Supp. 270, 274 (S.D.N.Y. 1984). Ahmad v. Wigen, 726 F. Supp. 389, 407 (E.D.N.Y. 1989) (E.D.N.Y.is United States District Court for the Eastern District of New York). On 7 May 1996 the extradition magistrate denied Dr. Abu Marzook's petition and ruled that he was extraditable because there was probable cause to find he committed "crimes against humanity" and therefore he could not invoke the political offense exception.

[45] Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/1999/836, 30 July 1999, para. 7.

further reaffirmed in the Security Council's resolution requesting the Secretary-General to draw up a Statute for the Special Court[46] and with an exception to the amnesty.[47]

ii. The Lome Amnesty, as a domestic amnesty, cannot cover crimes under international law

30. The amnesty that was purportedly granted cannot cover crimes under international law that give rise to universal jurisdiction. As was established by the International Court of Justice in the Yerodia case,[48] international tribunals have jurisdiction over crimes under international law and there are no procedural bars, such as sovereign immunity, that can prevent such international prosecutions. Although the applicability of sovereign immunity for prosecution in "foreign" or "third-country" domestic courts is still uncertain,[49] the Pinochet decision of the Spanish *Audiencia Nacional*, the Ely Ould Dah decision in France and the Cavallo decision of the Supreme Court of Mexico have all confirmed that domestic amnesties covering crimes under international law cannot prevent the investigation and prosecution of these crimes in other states.[50]

31. In this sense, the Presidential prerogative of mercy contained in the Constitution of Sierra Leone is limited to granting pardon for offences committed against the

[46] U.N. Doc. S/RES/1315 (2000), preambular para. 5.
[47] Statute, Article 10, reads: "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution".
[48] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment, Preliminary Objections and Merits, 14 February 2002, para 53.
[49] The ICJ Yerodia decision established that acting heads of state and foreign ministries still benefit from serving immunity in third-county courts, however the judgment was not unanimous and there are still unresolved questions regarding this principle. The Court has left the category open as to which other officials will be afforded such immunity. Idem.
[50] National Court of Spain, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena, Madrid, 5 de noviembre de 1998, available at: http://www.universaljurisdiction.info/index/95083; Case of Ely Ould Dah *Cour de Cassation, Chambre Criminell, Crim. 23 oct. 2002: Bull. crim nº 195,* 23 Oct 2002, available at: http://www.universaljurisdiction.info/index/110287, Case of Ricardo Miguel Cavallo, *Suprema Corte de Justicia de la Nación,*12 Jun 2003. Available at http://www.universaljurisdiction.info/index/Cases/Cases/Spain_-_Cavallo_case_/Case_Doc_Summaries/117738.0.

laws of Sierra Leone, not to crimes that are subject to any other jurisdiction.[51] Accordingly, Article 10 of the Statute provides that the amnesty will not apply to the crimes referred in Articles 2-4 (international crimes), but leaves out the rest of the articles that are crimes under Sierra Leone law. This is consistent with Sierra Leone's conventional and customary obligations to a) prosecute or extradite individuals accused of serious international crimes and to b) afford full reparation to the victims.[52]

III. THE DEFENDANT CANNOT RELY ON THE LOME AGREEMENT TO PREVENT THE EXERCISE OF THE SPECIAL COURT'S JURISDICTION

i. The doctrine of estoppel

32. A discrete issue that may arise is the consideration of the extent to which any Defendant can rely upon a treaty if he subsequently breaks a fundamental term. This issue would only arise if, contrary to all our submissions both above and below, the Court were to find the amnesty applicable in principle.

33. On any analysis a central component of the agreement between the parties at Lome was the RUF's entry into a peaceful transition and it is in this context that the amnesty provision must be analysed.

34. The subsequent restart of hostilities and accompanying crimes by the RUF was an act wholly outside of the terms of the Agreement. Applying not only the common law doctrines of 'estoppel' and 'waiver' but also common sense it becomes very difficult to envisage how a member of the RUF can seek to rely upon the protection clause of Lome. This is a legal concept entrenched not only in the common law of commonwealth countries [See *Chitty on Contracts* 25-01 et seq] but also a firm principle of international treaty law – see Article 60 of the Statute

[51] The Constitution vests the prerogative of mercy in the President, who accordingly has the power "to grant any person convicted of any offence against the laws of Sierra Leone a pardon, either free or subject to lawful conditions." Sierra Leone Const., 63 (1) (a), available at http://www.sierraleone.org/constitution.html.
[52] See Pleading III.

of the International Court of Justice and as expounded in the 'South-West African' case[53] and various academic analyses.[54]

35. As stated above this is however a discrete subsidiary point and we do not urge the Court to adopt this as a sole reason for dismissing the application. We also note that the Court itself will be best placed to assess the particular role played by the Defendant in the atrocities pre or post Lome.

ii. Abuse of process

36. It is respectfully submitted that abuse of process arguments of the sort argued on behalf of the Defendant are without merit because:

    a. It could never have been envisaged that the Lome amnesty would have amounted to an amnesty from prosecution by an international court – indeed at the time the Lome Agreement was signed the international community made this plain through the attachment to the Agreement of a disclaimer by the U.N. Secretary General. This disclaimer is consistent with the increased will and commitment of the international community to prosecute such

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[53] Legal Consequences for states of the continued presence of South Africa in Namibia (South West Africa) Notwithstanding Council Resolution 276 (1970) ICJ Reports (1971) 16 paras 88-94.

[54] Brownlie I (1998) Principles of Public International Law 5th Ed. Oxford: Clarendon Press. p. 622-623; Jennings R & Watts A (1992) Oppenheim's International Law 9th Ed. Vol 1 Parts 2 - Avon: Longman. p. 1300 – 1304; Shaw M ( ) International law 4th Ed.: Cambridge University p. 667-669 and Gardiner (2003) International Law, Pearson Longman / London.

"Article 60 reflects the principle that where a state party to a treaty is in breach of it, other parties are no longer obliged to honour their commitments to the defaulter. This is linked to the established principle in general international law that a state is entitled to take proportionate measures in response to a breach. In the case of treaties involving reciprocal obligations, proportionate measures are readily identifiable. Thus if the breach is of a bilateral treaty, the principle involves simple termination, or suspension in whole or in part." p 96.

"There is an underlying legal principle, shorn of its fancy Latin encapsulation [*Inadimpleti non est adimplendum*: see Rosenne 'Breach of Treaty' (Cambridge: Grotius, 1985)], that a state which is in breach of its obligations is not entitled to expect another to conform to its legal obligations in the same (or equivalent) matter. This applies as a general proposition of international law, though subject to the requirement that any actual measures in response to a breach must be proportionate. This principle has particularly significant application in the field of treaties. Hence in the case of the violation of a treaty containing any practical exchange of rights, particularly those having commercial value, a state which breaches its obligations will almost certainly find itself deprived of the reciprocal advantages which it acquired when entering into the treaty. Legion are the examples which could be given." p. 451.

crimes, including in international mechanisms, as demonstrated by the establishment by the Security Council of the ICTY and ICTR.

b. *R v Townsend* [1997] 2 Cr App R 540 and *AG of Trinidad & Tobago v Phillip* [1995] 1 AC 34 are irrelevant because they did not concern crimes under international law;

c. If the Defendant's line of argument is supported it would lead to the unavoidable conclusion that an amnesty would always be effective because a defendant could rely upon its actual existence as a bar to prosecution on the ground not of legality but abuse of process – this would apply whether or not the amnesty was lawful in domestic or international law. This 'vicious circle' can only be broken by a clear and unequivocal pronouncement that reliance upon an amnesty is not a substantive defence but at most could amount to a factor that mitigates sentence.

37. It is generally recognized that even if 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.[55] In the case at bar, the acts in question constituted crimes under both domestic and international law at the time they are alleged to have been committed, and therefore a later national amnesty can have no effect on the duty to prosecute the Defendant.

38. In a response to Chile, the Inter-American Commission on Human Rights observed that: "the principle of non-retroactivity 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

[55] For example, see the Allied Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, enacted 20 December 1945, 3 Official Gazette Control Council for Germany (1946), 50–5, cited in M Cherif Bassiouni (ed), International Criminal Law (1 st ed, 1987) vol 3, 129. Art II(5) provided that national amnesties for crimes against peace, war crimes, and crimes against humanity could not bar prosecutions by the military tribunals established by the Allies.

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."[56] In the same way, the Argentinean amnesties law have been annulled by the domestic judiciary because they violated international law,[57] and so prosecution raised no due process or principles of legality bars since the defendants could not legitimately expect that their actions were protected.[58]

[56]Inter-American Commission on Human Rights, Report No. 133/99, Case 11, 725.
[57] These and other judicial developments are summarised in Amnesty International, Argentina: The Full Stop and Due Obedience Laws and International Law, AI Index: AMR 13/004/2003
[58]In the Concluding Observations of the Human Rights Committee: Argentina, 3 November 2000, the Committee said: 'Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with the applicability as far back in time as necessary to bring their perpetrators to justice.

B: THE LEGALITY OF AMNESTIES IN INTERNATIONAL LAW

39. In so far as the Lome Amnesty can be read to provide an amnesty for crimes under international law then it is unlawful.

40. It is our submission that states have the obligation to:

    I: Guarantee fundamental human rights; taken with

    II: The obligation to prosecute persons accused of crimes under international law; and

    III: The obligation to provide reparation to victims

    and therefore a general amnesty like that contained in the Lome Agreement is contrary to international law.

41. In this section we explore the extent of these obligations and seek to demonstrate that the application of amnesties would be wholly inconsistent with the letter and spirit of international law.

I. The international obligation to guarantee fundamental human rights.

42. States have two broad obligations under international law: 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 that are directly related to the duty of the state to refrain—whether by acts or omissions—from violating fundamental rights and norms. This also implies that states shall take all necessary measures to guarantee the enjoyment of such rights. Similar obligations are also

extended to non-state actors during armed conflicts through the norms of international humanitarian law.

43. The second refers to the obligations of states to prevent violations, investigate them, bring to justice and punish perpetrators and provide reparation for the damage they caused.

44. The basis for this second duty to guarantee respect for such rights is to be found both in international customary law and international treaty-based law. Indeed the bedrock of all international human rights and humanitarian law instruments since the close of the 2nd World War has been the obligation to guarantee basic rights. Among others, the duty to ensure is expressly provided for in several treaties:

a. Common Article 1 of the 1949 Geneva Conventions provides: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances"

b. Article 2.1 of the International Covenant on Civil and Political Rights provides: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant …"

c. The U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Article 2.1 provides: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

d. Similar provisions are contained in regional human rights treaties such as the African [Banjul] Charter on Human and Peoples' Rights, the Inter-American Convention on Human Rights and the European Convention on Human Rights, and in various declaratory texts.

46. The nature and consequences of this overriding obligation to guarantee rights will vary according to the nature of the different rights. In the context of amnesties, the most important aspects of the obligation are the right to reparation for victims and the obligations to investigate breaches of fundamental rights and to prosecute those suspected of breaching them.

II. The Obligation to prosecute or extradite persons accused of serious crimes under international law

45. It is self–evident that if an obligation exists to prosecute (or extradite) a person suspected of having committed serious crimes under international law, then the application of an amnesty would be an unlawful interference with that duty.

(i) International treaties specifically containing the obligation *aut dedere aut judicare* for crimes under international law

46. The principle *aut dedere aut judicare* (the obligation to either extradite or prosecute) is contained in several multilateral treaties, listed below, that are aimed at securing international cooperation in the suppression of certain kinds of criminal conduct.[59] This principle is well known in international law.[60] It requires a state which has custody of someone who has committed a crime of international concern either to extradite the offender to another state which is prepared to try him or else to take steps to have him prosecuted before its own courts.[61]

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[59] 1 Oppenheim's International Law 953, 971 (9th ed. R. Jennings & A. Watts eds. 1992).
[60] Vattel, in *Le Droit des Gens*, bk.II, ch 6, sec. 76-77 (1758) recognized a duty to extradite those accused of serious crimes; cited in N. Roht-Arriaza, Impuniy and Human Rights in International Law (Oxford, Oxford University Press, 1995), p. 41 footnote. See also H. Grotius, *De Jure Belli et Pa*cis (The Rights of War and Peace), bk.II, ch. XXI, sec. IV, p.347 (W. Whewell trans. and ed., 1853). Section II. ii describes the customary status of this obligation in international law.
[61] M Cherif Bassiouni, *Aut dedere aut judicare*. (Martinus Nijhoff Publishers, Dordrecht, 1995), p. 3.

47. Of direct relevance to the Court is the principle enshrined in Article 7 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which requires a contracting state to 'if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.' Further, it has been expressly recognised, particularly in respect of international courts, that the defence of official capacity shall not be available.[62]

48. The Geneva Conventions obligate state parties "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts…[or] hand such persons over for trial to another High Contracting Party". For these purposes, the Conventions require state parties "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any grave breaches" of the Conventions. The obligations set out in these Conventions are mandatory and are not subject to any form of derogation.[63]

49. Protocol I to the Geneva Conventions specifies that "[in order to] avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity" these persons should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law", and subject to fair trial guarantees.[64]

50. For the reasons set out in detail below it is our submission that the obligations to prosecute (or extradite) in respect of 'grave breaches' in international armed

[62] See, for example, Art. 27 of the Treaty of Versailles; the Charter of the Nuremberg Tribunal; Article 7 of the ICTY Statute; Article 6 of the ICTR Statute; Article VI of the Genocide Convention; Article27 of the ICC Statute.
[63] Article 146 of the Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949, *UNT*S, Vol. 75, p. 287. See also Art. 49 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 Aug. 1949, *UNT*S, Vol. 75, p. 31; Art. 50 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 Aug. 1949, *UNT*S, Vol. 75, p. 85; Art. 129 Convention relative to the Treatment of Prisoners of War, Geneva, 12 Aug. 1949, *UNT*S, Vol. 75, p. 135.
[64] Art. 75 (7) and 75 (3) and (4) Protocol Additional (I) to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, *UNGAO*R, doc. A/32/144, 15 Aug. 1977.

conflicts is also applicable to serious violations of international humanitarian law committed in internal armed conflict. These obligations arise for serious breaches of Article 3 and Protocol II, since they constitute crimes under international law. These obligations are therefore of direct relevance to the application of the Court's Statute.

51. The Statute of the International Criminal Court (ICC), which is based on the principle of complementary between national systems and the ICC, is designed to ensure that states will respect their *aut dedere aut judicare* obligations in respect of the crimes contained in the Statute in order that the crimes within the ICC's jurisdiction will not go unpunished. Article 17 provides that a case that "has been investigated by a State which has jurisdiction over it and the State has decided not to persecute the person concerned" would be inadmissible "*unless the decision resulted from the unwillingness or inability of the State to genuinely prosecute."* Further, the preamble of the Statute affirms 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,' and recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'

52. Sierra Leone, as a party to the above treaties, is well acquainted with the obligation to extradite or prosecute persons accused of serious crimes under international law. Furthermore, Sierra Leone has recognized and accepted this obligation in several additional treaties such as the Hague Convention for the Suppression of Unlawful Seizure of Aircraft[65] and the Montréal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.[66]

[65] Adopted 16 December 1970, 860 UNTS 105, (1971) 10 ILM 134, ratified by Sierra Leone on 13 November 1974.
[66] Adopted 23 September 1971, (1971) 10 ILM 115, ratified by Sierra Leone on 20 September 1979.

53. The Genocide Convention establishes the obligation to *prevent and punish* acts of genocide (emphasis added). Article IV states: "Persons committing genocide or any of the acts enumerated in Article III shall be punished…". Article V calls on the state to "provide effective penalties" for those found guilty of genocide. The principles underlying the Convention are recognised as binding on states even without any conventional obligation.[67]

54. The Convention on the Suppression and Punishment of the Crime of Apartheid[68] specifically requires states to adopt measures to prosecute, bring to trial and punish those persons accused and found guilty of the crime of apartheid.

55. The Inter-American Convention on the Forced Disappearance of Persons also requires states to extradite or prosecute offenders.[69]

56. A series of treaties on slavery and slave-like practices, including forced labour, also require extradition or prosecution of those implicated.[70]

(ii) The obligation aut dedere aut judicare for crimes under international law as a customary rule

57. Treaties may serve as law-making material or sources of customary international law.[71] As explained by Professor Theodor Meron, "the repetition of certain norms

[67] "The principles underlying the Convention are recognised by civilised nations as binding on States even without any conventional obligation". ICJ: Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1950-1951). In 1970, the ICJ reconfirmed this pimple in the Barcelona Traction Case, see footnote 67 Advisory Opinion of 28 May 1951

[68] International Convention on the Suppression and Punishment of the Crime of Apartheid, Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973 entry into force 18 July 1976, Article IV(b) and V.

[69] Inter-American Convention on Forced Disappearance of Persons**,** 33 I.L.M. 1429 (1994), entered into force March 28, 1996, Article IV.

[70] Cherif Bassiouni provides an exhaustive list of conventions prohibiting slavery and the slave trade; see Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (Dordrecht, Netherlands: M. Nijihoff, 1992), pp. 767-83.

[71] North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (1967-1969), Merits - Judgment of 20 February 1969; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (1981-1984), Judgment of 12 October 1984; Continental Shelf (Libyan Arab Jamahiriya/Malta) (1982-1985), Judgment of 3 June 1985; Nottebohm (second phase) Liechtenstein v. Guatemala) (1951-1955).

in many human rights instruments is itself an important articulation of state practice" and may serve as "preferred indicator" of customary status.[72] It is clear that the adoption in an increasing number of multilateral treaties of the *aut dedere aut judicare* principle reflects the customary status of this rule with respect to serious crimes under international law, with the consequence that the rule is applicable even apart from specific treaties in which it is embodied.[73]

58. Judge Weeramantry, in the Lockerbie Case,[74] affirmed that the principle a*ut dedere aut judicare* has become a rule of customary international law:

> 'The principle *aut dedere aut judicare* is an important facet of a State's sovereignty over its nationals and the well-established nature of this principle in customary international law is evident from the following description: "The widespread use of the formula 'prosecute or extradite' either specifically stated, explicitly stated in a duty to extradite, or implicit in the duty to prosecute or criminalize, and the number of signatories to these numerous conventions, attests to the existing general jus cogens principle." (M. Cherif Bassiouni, International Extradition: United States Law and Practice, 1987, p. 22.) As with its failure to consider the Montreal Convention, so also resolution 731 fails to consider this well-established principle of international law.'

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[72] Meron, Human Rights and Humanitarian Norms as Customary International Law (Oxford, UK: Clarendon Press, 1989) pp. 92-93. Cited in N. Roht Arriaza (supra note 52), p. 41 footnote 13

[73] See for example: Article 8 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, adopted 16 December 1970, 860 UNTS 105, (1971) 10 ILM 134; Article 8 of the Montréal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted 23 September 1971, (1971) 10 ILM 1151; Article 10 of the International Convention Against the Taking of Hostages, adopted 17 December 1979, 1316 UNTS 205, (1979) 18 ILM 1456; Article 8 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, 1465 UNTS 85, (1984) 23 ILM 1027 and (1985) 24 ILM 535. Article 9 of the 1979 Convention on the Physical Protection of Nuclear Material; Articles 3(5) and 6 of the 1988 Convention for the Suppression of unlawful acts against Safety of Maritime Navigation; Article 7 of the 1997 International Convention for the Suppression of Terrorist Bombing; and Article 10 of the 1999 International Convention for the Suppression of Terrorist Financing.

[74] Dissenting opinion in the ICJ case "Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)" (1992-2003). Although this was contained in Judge Weeramantry's Dissenting Opinion, there was no dissention between the judges on this point.

59. Failing to prosecute or extradite the offenders who have committed serious large-scale violations of human rights vitiates the authority of the primary prohibition and is itself a violation of international law.[75] Accordingly, the surrender of an alleged perpetrator of crimes under international law— such as war crimes, crimes against humanity and crimes against peace—can be demanded as of right even in the absence of a treaty.[76]

60. Because it is an integral part of the duty to protect and ensure fundamental rights, the "Prosecute or extradite" obligation constitutes an obligation *erga omnes*, which means that the obligation of a state is towards the international community as a whole.[77] Whatever the domestic political reasons making it desirable to forego prosecution, states cannot override this international obligation.[78]

(iii) The obligation aut dedere aut judicare and internal armed conflicts

61. Serious violations to common Article 3 and Protocol II constitute crimes under international law and therefore carry the obligation to prosecute or extradite.

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[75] Cf. Restatement (third) of the Foreign Relations Law of the United States par. 702 (1987): 'A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide (b) slavery or slave trade, (c) murder or causing the disappearance of individuals, (d) torture and other cruel, inhuman, or degrading treatment or punishment…or (g) a consistent pattern of gross violations of internationally recognized human rights.' A comment to this section (comment b) adds: 'A government may be presumed to have encouraged or condoned acts prohibited by this section if such acts, especially by its officials, have been repeated and notorious and no steps have been taken to prevent or to punish the perpetrators. 2 *id*, at 162.

[76] I. Brownlie, Principles of Public International Law. (Clarendon Press, Oxford, 1998), p. 318 M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 499-508 (1992); M. Cherif Bassiouni, International Extradition: United States Law and Practise 22-24 (2nd ed. 1987); M. Cherif Boussiouni, Characteristics of International Criminal Law Conventions, in 1 Internatonal Criminal Law: Crimes (M. C. Bassiouni ed 1986), at 1, 7-8. M. Cherif Cassiouni, The Penal Characteristics of Conventional International Criminal Law, 15 Case A. Res. J. Int'l. 27, 34-36 (1983).

[77] "…Such obligations derive, for example, in contemporary international law, from the principles and rules concerning the basic rights of the human person, including the protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character". Case concerning the Barcelona Traction Light and Power Company, Ltd. (Second Phase, Belgium v. Spain), ICJ Reports 1970, p.32.

[78] See e.g. African Commission: Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98 *Various communications v. Mauritania, para 83.*

62. The crimes committed in Sierra Leone were so heinous and the impunity so prevalent that the UN Security Council defined the conflict as "a threat to international peace and security" and stated that it was in the interest of the international community to punish those most responsible.[79]

63. As has been widely confirmed by state practice, *opinio juris,* jurisprudence and the action undertaken by the Security Council, internal atrocities breach *jus cogens* norms giving rise to universal jurisdiction and to the obligation of all states to punish the perpetrators.

64. In the Nicaragua case, the International Court of Justice considered that common Article 3 was declaratory of customary international law, and that it constituted 'a minimum yardstick' for both internal and international armed conflicts. The Tadic decision on jurisdiction of the ICTY Appeals Chamber confirmed this finding and asserted in unequivocal terms that individual criminal responsibility exists for violations of the laws applicable to internal armed conflicts. As recognized by the Appeals Chamber, the Security Council clearly established that the expression 'laws and customs of war' used in Article 3 of the Statute covered all obligations under humanitarian law; in particular, common Article 3 of the 1949 Geneva Conventions and the two Additional Protocols. This decision was later reflected in the resolution of the Security Council to include violations of common Article 3 and Additional Protocol II in the Statute of the ICTR.

65. Similarly, the ICC Statute explicitly provides for individual criminal responsibility for "serious" violations of common Article 3[80] and for twelve other "serious violations of the laws and customs" applicable in non-international armed conflict,[81] including intentional attacks against civilians, crimes of sexual and gender violence, and forced displacement.[82]

[79] Security Council Resolution 1350.
[80] ICC Statute, Article 8 (2) (c).
[81] ICC Statute, Article 8 (2) (e).
[82] ICC Statute, Article 8 (2) (e) (i), (vi) and (viii).

66. In this sense, serious violations of common Article 3 and Protocol II constitute crimes under international law and therefore, the duty to prosecute and punish the perpetrators, arises under customary international law. As jurisprudence and common sense demonstrate, war crimes charges based on grave breaches of the Geneva Conventions (which carry the duty to prosecute or extradite) have a corollary in war crimes charges based on common Article 3 of the Geneva Conventions. Thus, for example, several ICTY Trial Chambers have ruled that there is no qualitative difference between the terms "wilful killing" as a grave breach and "murder" as used in common Article 3. Similarly, the grave breach of "inhuman treatment" corresponds to "cruel treatment" within the meaning of common Article 3. This lack of distinction between these concepts is manifest not only upon a 'black letter law' analysis but also from the perspective of the victim.

67. In this respect, the Trial Chamber of the ICTY has on two occasions referred to the current stage of development in customary international law where the 'grave breaches system' operates regardless of whether the armed conflict is international or internal,[83] which means that serious breaches to common Article 3 and Protocol II also give rise to the duty to prosecute or extradite.

68. Experience continues to dictate that cruelty and barbarism are committed more regularly in internal conflicts in a world in which the notion of nation-state is a far more fluid concept that the drafters of the Geneva Conventions could ever have anticipated. Furthermore, the increasing judicial trend which recognises that human rights are rights that are enshrined in individuals (as opposed to states) should also be noted – it is a trite observation that distinctions between the nature

[83] In its judgment of 16 November 1998, the Celebici trial chamber opined that there was a possibility that customary law had already reached the stage of development referred to by the Appeals Chamber in the Tadic Case: The Prosecutor v. Delalic et al., Case No. IT-96-21-T (hereinafter: Celebici Judgment), 76, para. 202; Furthermore, in a decision of 2 March 1999 in the Kordic and Cerkez case, the Trial Chamber took note of the dicta of the Appeals Chamber and the Celebici Trial Chamber on this question: Prosecutor v. Kordic and Cerkez, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, Case No. IT-95-14/2-PT, T. Ch. III, 2 Mar. 1999, 11, para. 15

it is a trite observation that distinctions between the nature of the conflict mean nothing to those faced with the barrel of a gun.[84]

(iv) The obligation to prosecute, bring justice and punish under general international law

69. Support for a duty to prosecute and punish perpetrators of serious crimes under international law, and in particular crimes against humanity, under international customary law can be found in numerous UN General Assembly Resolutions, resolutions of the UN High Commission for Human Rights and statements of members of the Security Council. [85]

70. The Security Council has emphasized 'the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual violence against women and girls.'[86]

71. The obligation to bring to justice and punish violators of protected non-derogable rights is strongly embedded in international human rights law. As the ICTY Trial Chambers noted in the Celibici and Furundzija cases, torture is prohibited by an absolute and non-derogable general rule of international law, which applies also to internal and international armed conflicts. According to the Tribunal, this norm is not only considered to be a norm of customary law but constitutes a norm of *jus cogens*. Confirming the interdependence between the protection of fundamental human rights and international humanitarian law, their decisions indicate that the Prosecution is justified in relying on the wider definition of torture contained in

[84] See for example the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law. This instrument is victim oriented and makes no distinction between violations committed during armed conflict or peacetime. See footnote 98.
[85] Human Rights Commission Res. 1999/1, supra note 125. (Stating "all countries are under an obligation to search for persons alleged to have committed <elip> grave breaches of [international humanitarian law] and bring such persons <elip> before their own courts <elip> "); The President of the Security Council stated that the Council "affirms the need to bring to justice, in an appropriate manner, individuals who incite or cause violence against civilians <elip>" U.N. Doc. S/PRST/1999/6 Feb. 12, 1999. See also Diane F. Orentlicher, SYMPOSIUM: INTERNATIONAL LAW: ARTICLE: Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime. In: 100 Yale Law Journal. 2537 (Yale Law Journal Company, 1991).
[86] Security Council Resolution 1325 (2000), par. 11

the UN Convention Against Torture which is regarded as reflecting customary international law.[87]

72. The Human Rights Committee, as the supervisory mechanism of the International Covenant on Civil and Political Rights (hereinafter: ICCPR), is the primary body to interpret the provisions laid down in the ICCPR. As stated before, Sierra Leone is a party to the ICCPR and thus obliged to act in accordance with its provisions. In its General Comment 20, concerning the prohibition of torture and cruel treatment or punishment, the Committee noted that states have a duty to 'to investigate such acts.' This was further developed in the Committee's views in Bautista de Arellana v. Colombia, where the Committee held that '*the State party is under a duty to investigate thoroughly the alleged human rights violations, and in particular… violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations*.'[88]

73. In its Concluding Observations on the Second Periodic Report of the Democratic Republic of Congo, the Committee stated that '*the State should ensure that these most serious human rights violations are investigated, that those responsible are brought to justice and that adequate compensation is provided to the victims or their families*'.[89] In 1996, the Committee reaffirmed Peru's duty to investigate under the ICCPR.[90] In its Concluding Observations regarding Croatia, the Committee stated that '*the State party is under an obligation to investigate fully all cases of alleged violations of articles 6 and 7 and to bring to trial all persons who are suspected of involvement in such violations*.'[91] Thus, if the violation includes either death or torture or other inhuman treatment, the Human Rights

[87] Celebici Judgment, 165-167, paras. 452-59, see footnote 18; Furundzija Judgment, Case No. IT-95-17/1-T,T. CH. II, 10 Dec. 1998, 55-64, paras 143-162.
[88] Bautista de Arellana v. Colombia, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993. This was reiterated in Case of Jose Vincente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel Maria Torres Arroyo and Antonio Hugues Chaparro Torres (Columbia) Communication No. 612/1995 CCPR/C/60/D/612/1995.
[89] Concluding Observations on the Second Periodic Report of the Congo: Congo. 27/03/2000. CCPR/C/79/Add.118, para 12.
[90] Human Rights Committee, Comments on Peru, U.N. Doc. CCPR/C/79/Add.67 (1996).
[91] Concluding Observations of the Human Rights Committee: Croatia. 30/04/2001. CCPR/CO/71/HRV para 10-11.

Committee has concluded that the state is under an obligation to conduct an investigation leading to the punishment of the perpetrator.[92]

74. In the same way, the Committee Against Torture has stressed that alleged torturers must be investigated and prosecuted where appropriate, according to Articles 4, 5 and 12 of the UN Convention Against Torture. It has recommended that '*In order to ensure that the perpetrators of torture and ill-treatment do not enjoy impunity, the State party shall ensure the investigation and, where appropriate, the prosecution of all those accused of having committed such acts*.'[93] The Committee also made it clear that this is not only a treaty-based obligation [94]

75. The Commission on Human Rights has stressed in its Resolution on torture and other cruel, inhuman or degrading treatment or punishment that allegations of torture should be promptly and impartially examined by the competent court and the perpetrators should be held responsible and severely punished.[95] In the same manner, the Commissions' mechanisms, such as the Special Rapporteurs, have stressed the duty of states to prosecute serious violations of human rights and humanitarian law.

76. The former Special Rapporteur on torture recommended, in relation to Chile, that all allegations of torture should be subjected to a thorough public inquiry and in cases where the evidence justifies it, those responsible should be brought to justice. The only exception he mentions is where the proceedings are barred by a statute of limitations, implying that amnesty laws do not constitute an exception.[96]

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[92] See, for example, Sarma v. Sri Lanka Communication No. 950/2000 : Sri Lanka. 31/07/2003. CCPR/C/78/D/950/2000.

[93] Conclusions and recommendations of the Committee against Torture, Kyrgyzstan, A/55/44, paras.70-75, 18 November 1999.

[94] 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 Nr. 44 (A/45/44), 1990.

[95] Resolution 1999/32 -Torture and other cruel, inhuman or degrading treatment or punishment, para. 4.

[96] Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Report of the Special Rapporteur, Mr. Nigel

In his note to this report, the United Nations Secretary General stresses the obligation to prosecute when violations of torture are concerned, as enshrined in the Vienna Declaration and Programme of Action.[97] Furthermore, he emphasises the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law submitted to the Commission on Human Rights that states that '*violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations*.' [98] The Special Rapporteur on Impunity, Mr. Joinet, has observed that 'the right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them'[99]

77. Importantly, the international obligation to bring to justice and punish serious violations of human rights has been recognized and established in all regional human rights mechanisms. The Inter-American Court stated in its first judgment that states must prevent, investigate and punish any violation of the rights recognized by the Convention.[100] This has been re-emphasized in subsequent cases. In the 'Street Children case', the Court reiterated 'that Guatemala is obliged to investigate the facts that generated the violations of the American Convention in the instant case, identify those responsible and punish them.'[101]

S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37, para 76; Addendum, Visit by the Special Rapporteur to Chile, E/CN.4/1996/35/Add.2, 4 January 1996.

[97] World Conference on Human Rights – The Vienna Declaration and Programme of Action, June 1993, Section II, para 60.

[98] E/CN.4/2000/62, annex: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law adopted by the Commission on Human Rights, para. 4.

[99] Question of the impunity of perpetrators of human rights violations (civil and political); Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, para 27

[100] Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988), para 166.

[101] The "Street Children" Case, Judgment of May 26, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 77 (2001), para. 101 and operative clause 8.

78. The Inter-American Court of Human Rights, in the Barrios Altos Case, Chumbipuma Aguirre y otros v. Perú (14 March 2001) held that amnesty provisions, prescription and the exclusion of responsibility which have the effect of impeding the investigation and punishment of those responsible for grave violations of human rights, such as torture, summary, extrajudicial or arbitrary executions, and enforced disappearances, are prohibited as contravening human rights of a non-derogable nature recognized by international human rights law. The Court considered the laws in question to be in violation of the duty on the state to give domestic legal effect to the rights contained in the Convention (Article 2). The Court held further that the self-amnesty laws lead to victims being defenceless and to the perpetuation of impunity, and, for this reason, were manifestly incompatible with the letter and spirit of the Convention. The Court concluded by stating that as a consequence of the manifest incompatibility of the self-amnesty laws with the Inter-American Convention on Human Rights, the laws concerned have no legal effect and may not continue representing an obstacle to the investigation of the facts of the case, nor to the identification and punishment of those responsible.[102] The Inter-American Commission and Court of Human Rights have consistently opposed the legality of amnesties in international law in many countries, including El Salvador, Chile, Argentina, and Uruguay.[103]

79. The European Court of Human Rights has recognized that where the alleged violations include acts of torture or arbitrary killings, the state is under a duty to undertake an investigation capable of leading to the identification and punishment of those responsible.[104]

[102] Cited in the Interim Report on the question of torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights, in accordance with paragraph 30 of General Assembly resolution 55/89. Interim Report A/56/156 3 July 2001.
[103] See Annex F.
[104] European Court of Human Rights Case Zeki Aksoy v. Turkey, 18 December 1996, para 98. See also, Aydin v. Turkey App. No. 23178/94 Judgment of 25 September 1997, para 103; Selçuk and Asker v. Turkey App. Nos. 23184/94 and 23185/94 Judgment of 24 April 1998, para 96; Kurt v. Turkey App. No. 24276/94 Judgment of 25 May 1998, para 139; and Keenan v. United Kingdom App. No. 27229/95 Judgment of 3 April 2001, para 122.

80. The African Commission, in the case Commission Nationale des Droits de l'Homme et des Libertés v. Chad, stated that '*the failure of the government to investigate these assassinations or prosecute those concerned constitutes a violations of Art 7.*'[105] The Commission has also appealed to the Nigerian government to conduct an investigation into the violations and to prosecute officials of the security forces and relevant agencies.[106]

81. The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind imposes, in Article 9, an absolute obligation to prosecute or extradite for the specified grave violations of humanitarian law. As the Commission's Commentary notes "*The fundamental purpose of this principle is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by competent jurisdiction.*"

III. The international obligation to afford full reparation to the victims of serious violations of human rights and humanitarian law, including access to judicial remedies

(i) The right to reparation

82. The duty to make reparations forms part of customary international law. This duty is supported by international human rights treaties and declarative instruments,[107]

[105] Communication 74/92 *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, para 51.
[106] Communication 155/96 Decision Regarding Communication No. 155/96.
[107] At the Universal level it is possible to find among others: the Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (art.2.3 and art 9,5 14.6), the International Convention on the Elimination of All Forms of Racial Discrimination (art 6), the Convention of the Rights of the Child (art. 39), the Convention Against Torture and other Cruel Inhuman and Degrading Treatment, (art.14) and the Rome Statute of the International Criminal Court (art. 75). It is also established in the Rules of Procedure and Evidence of the International Tribunal for Yugoslavia and the International Tribunal for Rwanda (Rule 106), as well as in several regional instruments, e.g. the European Convention on Human Rights (arts 5,5 13 and 41) the Inter-American Convention on Human Rights (arts 25, 68 and 63,1), the African Charter on Human and Peoples' Rights (art. 21,2), and it is also important to mention the following international standards: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and Declaration on the Elimination of Violence against Women. See also art 75 of the Rome Statute of the International Criminal Court (Idem).

and has been recognized by an array of international tribunals.[108] A violation of human rights creates a duty on the part of the wrongdoing state(s) to provide an effective remedy and to afford reparation to the victim(s). This principle - namely, that the right to a remedy for a violation of a human right protected by a human rights instrument is itself a right expressly guaranteed by the same,[109] is incorporated in every international human rights instrument[110] This principle has also been recognized as non-derogable.[111]

83. In fact, most human rights instruments guarantee both the procedural right to an effective access to a fair hearing (through judicial and/or non-judicial remedies)[112] and the substantive right to reparations (such as restitution, compensation and rehabilitation).[113] The nature of the remedy varies according to the rights protected and the type and circumstances of the violation. This is confirmed by the provisions of the International Covenant on Civil and Political Rights and the European Convention on Human Rights: the nature (judicial, administrative or other) of the remedy should be in accordance with the rights violated and the effectiveness of the remedy in granting appropriate relief for such violation.[114]

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[108] See, e.g. ruling of the Inter-American Court of Human Rights on the Velásquez Rodríguez Case. Serial C, No 4 (1989), par. 174 -. See also Papamichalopoulos vs. Greece /(Art. 50) E.C.H.R. Serial A, No 330-B (1995), Pg 36.

[109] As explained by the Human Rights Committee, "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in Article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under Article 2, paragraph 3, of the Covenant to provide a remedy that is effective." [General Comment N° 29, CCPR/C/21/Rev.1/Add.11, 31 de August 2001, para. 14.]

[110] Idem.

[111] See, for example, General Comment 29 on States of Emergency (Art. 4) of the UN Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, at para. 14. Footnote 109

[112] Some instruments explicitly call for the development of judicial remedies for the rights they guarantee, although effective remedies could be supplied by non-juridical bodies (Article 2(3)(b), International Covenant on Civil and Political Rights).

[113] See Jeremy McBride, "Access to Justice and Human Rights Treaties" (1998) 17 Civil Justice Q.235.

[114] Article 13 requires "the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief" although States have some discretion as to how to comply (para 69) D v. United Kingdom App. No. 30240/96 Judgment of 2 May 1997 (referring to Soering v. United Kingdom App. No. 14038/88 Judgment of 7 July 1989 and Vilvarajah *v. United Kingdom* App. No. 13163/87 Judgment of 30 October 1991). The HRC commented on Finland's report (CCPR/C/95/Add.6) regarding the obligation under Art 2(b) of the ICCPR that "while noting that a recent reform of the Penal Code makes punishable the violation of several rights and freedoms, including those protected by Articles 21 and 22 of the Covenant, the Committee is concerned that criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms (Concluding Observations of the Human Rights Committee, Finland: 08/04/98).

(ii) The right to access to justice

84. In the case of serious human rights violations, which would also constitute crimes under international law, the jurisprudence consistently finds that the right to an effective remedy entails a right to a judicial remedy. The Human Rights Committee has explained that "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of Article 2, paragraph 3 of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life".[115] In the case of forced disappearances, extrajudicial executions or torture, the remedy must be of a judicial nature.[116] The African Charter of Human and Peoples' Rights provides that remedies should be judicial.[117]

85. In General Comment 20 concerning the prohibition of torture and cruel treatment or punishment, the Human Rights Committee states 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.'[118]

86. Furthermore, Article 27.2 of the American Convention explicitly states that "the judicial guarantees essential for the protection of such [non-derogable] rights" are non-derogable. This means that not only the rights protecting individuals from grave human rights violations are non-derogable (meaning that not even a state of

[115] Decision of 13 November 1995, Communication 563/1993, Case *Nydia Erika Bautista* (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8(2). See also Decision of 29 July 1997, Communication 612/1995*, Case José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8(2).

[116] See Decision of admissibility of 13 de October de 2000, Communication N° 778/1997, Case Coronel *et al* (Colombia), United Nations document CCPR/C/70/D/778/1997, paragraph 6(4).

[117]See Art. 7 of the African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

[118] Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7) : . 10/03/92. CCPR General comment 20. (General Comments)

emergency can justify their violation) but also that the remedies necessary to claim a violation before a [judicial] court of law cannot be suspended at any time and under any circumstances. In this regard, the Inter-American Court of Human Rights considered that: "the 'essential' judicial guarantees which are not subject to suspension, include those judicial procedures, inherent to representative democracy as a form of government… and whose suppression or restriction entails the lack of protection of such [non-derogable] rights."[119]

87. As stated above, Article 7 of the African Charter provides that remedies should be of a judicial character.[120] The African Commission has stated that 'It is our view that the provisions of Article 7 should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike especially under an unaccountable, undemocratic military regime.'[121]

88. The European Court of Human Rights has stated that the basic principle underlying Art. 6.1 of the Convention—regarding the individual's right of access to court for the determination of his civil rights— is consistent with the rule of law in a democratic society.[122]

89. In the same way, the Human Rights Committee has recognized that although victims of gross violations of human rights do not have an objective right to the prosecution of the perpetrators they do have a right to access to justice (through judicial remedies) and to obtain adequate reparation: "As the Committee has repeatedly held, the Covenant does not provide a right for individuals to require that the State criminally prosecute another person […]. The Committee nevertheless considers that the State Party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced

[119] Advisory Opinion OC-9/87 of 6 October 1987. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 25(8) American Convention on Human Rights. Series A No. 9.
[120] See footnote 9 and accompanying text
[121] Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project vs. Nigeria, African Comm. Hum. & Peoples' Rights, Comm. No. 218/98 (not dated)., par. 27
[122] European Court of Human Rights, Judgment 21 December 2001, Case Al-Adsani v. the United Kingdom, para. 47, Application no. 35763/97.

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."[123]

90. As can be seen from the above, the right to reparation is firmly established in international law. Moreover, the right to access to justice has emerged for gross violations of human rights. This is a non-derogable right and therefore applicable independent of the circumstances in which the violation took place.

IV. The incompatibility of amnesties with a) the obligation to prosecute or extradite and b) its corollary obligation to afford full reparation to victims

91. The foregoing sections demonstrate the overwhelming international law obligations to prosecute/extradite and to afford full reparations to victims. Taken individually each obligation plainly makes the application of an amnesty unlawful – seen collectively they amount to an overwhelming prohibition.

92. It is hardly surprising therefore that amnesties have consistently been held to be unlawful by international bodies. We set out below relevant statements, findings and judgments of international jurisprudence.

93. The incompatibility of amnesty laws with state obligations to investigate and punish serious crimes under international law was recognized in the Vienna Declaration and Programme of Action adopted at the 1993 World Conference on Human Rights which called on states "to abrogate legislation leading to impunity

[123] Decision 13 November 1995, Communication N 563/1993, Case of Nydia Erika Bautista (Colombia) UN Doc. CCPR/C/55/D/563/1993. See also other related cases in appendix A.

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".[124]

94. The U.N. Human Rights Committee dealt with the issue as early as 1978 in relation to Chile's amnesty law and has since made similar observations in regard to amnesty laws passed by Lebanon, El Salvador, Haiti, Peru, Uruguay, France, Yemen, Croatia and Argentina.[125] In its General Comment on Article 7 of the International Covenant on Civil and Political Rights prohibiting torture, the Committee stated 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".[126] The Committee has also consistently criticised states that have sought to impose amnesties for serious breaches.[127]

95. Declaratory instruments such as the already cited Joinet Principles have also dealt with the issue of amnesties, determining that the perpetrators of serious crimes may not be included in amnesties unless the victims have been able to obtain justice by means of an effective remedy.[128]

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[124] See The Vienna Declaration and Programme of Action, Section II, para. 60, at www.unhchr.ch/huridocda/huridoca.nsf/Sym.../A..CONF.157.23.En?OpenDocument.

[125] See ICJ Amicus Brief, pp. 30-32 and pp. 36-38.

[126] See Human Rights Committee General Comment No. 20 (44) on Article 7, para. 15 at www.unhchr.ch/tbs/doc.nsf/view40?SearchView.

[127] For example: Comments on Uruguay, U.N. Doc. CCPR/C/79/Add.19 (1993); Concluding Observations on the Second Periodic Report of El Salvador CCPR/C/79/Add.34 (1994); Nineteenth Annual report of the Human Rights Committee A/50/40 (1995) Nineteenth Annual report of the Human Rights Committee A/50/40 (1995); Preliminary Observations of the Human Rights Committee: Peru CCPR/C/79/Add.67 (1996); Concluding Observations: France, May 1997 CCPR/C/79/Add.80; Concluding Observations of the Human Rights Committee: Lebanon. 01/04/97. CCPR/C/79/Add.78. (Concluding Observations/Comments); and Concluding Observations on the Fourth Periodic Report of Chile (1999), CCPR/C/79/Add.104; Concluding observations of the Human Rights Committee: Argentina. 03/11/2000. CCPR/CO/70/ARG; Concluding Observations on the second periodic report of the Congo: Congo. 27/03/2000. CCPR/C/79/Add.118; Concluding observations of the Human Rights Committee: Croatia. 30/04/2001. CCPR/CO/71/HRV para 10-11. For full text of relevant parts of these documents, see appendix B

[128] E/CN.4/Sub.2/1997/20/Rev.1, Annex II

96. Other human rights bodies have also stressed the incompatibility of amnesty laws with the obligation to bring to justice perpetrators of serious crimes under international law.

a) Relevant resolutions of the UN General Assembly and Security Council

In 1989 the General Assembly endorsed Resolution 1989/65 adopting the "Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, principle 19.2 of which states "*In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions*". Note also the absolute obligation to prosecute under Principle 18.

Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the UN General Assembly (Resolution 47/133 of 18 December 1992) states:: "*Persons who have or are alleged to have committed offences referred to in Article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction*".

This has been reaffirmed in several subsequent documents. For instance, Presidential Statement S/PRST/1996/6 "*The Council affirms the need to bring justice, in an appropriate manner, individuals who incite or cause violence against civilians in situations or armed conflict or who otherwise violate international humanitarian and human rights law.*"[129]

b) Relevant conclusions of the Committee Against Torture

[129] Similarly, see the Declaration on the Protection of All Persons from Enforced Disappearance, Presidential Statement S/PRST/1998/18 and Resolution 935 (1996). For the relevant parts of these document see Appendix A

The Committee against Torture has also consistently voiced concerns as to the use of amnesty laws. It has repeatedly recommended that '*In order to ensure that perpetrators of torture do not enjoy impunity, the State party ensure the investigation and, where appropriate, the prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach.'*[130]

Specifically, the Committee against Torture took the view that the passing of the "Full Stop" and "Due Obedience" Laws in Argentina 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]"" (Committee against Torture, Communications Nº 1/1988, 2/1988 and 3/1988, Argentina, decision dated 23 November 1989, paragraph 9.)

c) Findings of the United Nations Human Rights Commission

Resolutions of the Human Rights Commission demonstrate the unabridged obligation to prosecute and the consequent illegality of amnesty. For instance, Resolution 1999/32 stresses in particular 'that *all allegations of torture or cruel, inhuman or degrading treatment or punishment should be promptly and impartially examined by the competent national authority, that those who encourage, order, tolerate or perpetrate such acts must be held responsible and severely punished, including the officials in charge of the place of detention where the prohibited act is found to have taken place, and that national legal systems should ensure that the victims of such acts obtain redress and are*

[130] Conclusions and recommendations of the Committee against Torture, Azerbaijan, A/55/44, paras.64-69, 17 November 1999, para 69(c). See also: Conclusions and recommendations of the Committee against Torture, Senegal, A/51/44, paras. 102-119, 9 July 1996; Conclusions and recommendations of the Committee against Torture, Peru, A/55/44, paras.56-63, 15 November 1999; Conclusions and recommendations of the Committee against Torture, Kyrgyzstan, A/55/44, paras.70-75, 18 November 1999; and Conclusions and recommendations of the Committee against Torture, Croatia, A/54/44, paras. 61-71, 11 November 1998. For full text of relevant parts of these documents, see Appendix C.

awarded fair and adequate compensation and receive appropriate socio-medical rehabilitation'.[131]

d) Relevant reports of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment of Punishment

The Special Rapporteur has stated that '*A person in respect of whom there is credible evidence of responsibility for torture or severe maltreatment should be tried and, if found guilty, punished. Legal provisions granting exemptions from criminal responsibility for torturers, such as amnesties, indemnity laws etc., should be abrogated.'*[132]

e) Relevant judgments of the Inter-American Court of Human Rights.

The Inter-American Court of Human Rights has stressed that *'States…, have the obligation to prevent human rights violations, investigate them, identify and punish their intellectual authors and accessories after the fact, and may not invoke existing provisions of domestic law, such as the Amnesty Law in this case…*[133]

f) The relevant documents of the African Commission on Human and People's Rights.

Guideline 16 of the Robben Island Guidelines states that 'in order to combat impunity States should: a) Ensure that those responsible for acts of torture or ill-

[131] Resolution 1999/32 - Torture and other cruel, inhuman or degrading treatment or punishment, para. 4. See also: Resolution 1999/1, Situation of human rights in Sierra Leone; and Resolution 1999/34 – Impunity. For full text of relevant parts of these documents, see Appendix D

[132] R*eport to the Commission on Human Rights (E/CN.4/2001/66, recommendation (j).For further relevant documents of the Special Rapporteur see appendix E*

[133] Loayza Tamayo Case Reparations (Art. 63(1) of the American Convention on Human Rights Judgment of November 27, 1998, para. 168. See also: Velasquez Rodriguez Case Judgment of July 29, 1988; Godinez Cruz Case, Judgment of 20 January 1989; Barrios Altos Case (Chumbipuma Aguirre *et al*. *versus* Peru) Judgment of March 14, 2001. This position has also been mirrored by the Inter-American Commission on Human Rights. For full text of relevant parts of these judgments see Appendix F.

treatment are subject to legal process and b) Ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law.[134]

97. Importantly, several States have incorporated in their Constitutions different provisions prohibiting the application of statutes of limitations, amnesties or pardons for crimes under international law. See for example the Constitutions of Ethiopia, Bulgaria, Colombia, Ecuador, Paraguay, Venezuela, Guatemala and Cote d'Ivoire.".[135]

98. We respectfully submit that (applying the test under Article 38(1) of the Statute of the ICJ) the decisions listed above, when taken together with the treaty obligations, state practice and judgments referred to in the foregoing arguments, plainly demonstrate that the granting of amnesties is contrary to customary international law.

99. As described in section A, the amnesty provision contained in Article 6(5) of the 1977 Protocol II cannot, according to the ICRC, be read as support to amnesties for war crimes or other offences committed in internal armed conflicts that constitute crimes under international law.[136] As it is clear in the *travaux préparatoires*, the intention of the drafters was to avoid political persecutions after non-international armed conflicts.[137] To this end, the provision calls 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,

[134] Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia. See also: Various communications v. Mauritania Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98 and Jean Yokovi Degli on behalf of Corporal N. Bikagni, Union Interafricaine des Droits de l'Homme, Commission International de Juristes v Togo Communications 83/92, 88/93, 91/93. For the full text of the relevant parts of these judgments see Appendix G.
[135] See Appendix H
[136] See footnote 33
[137] See footnote 34

whether they are interned or detained".[138] In the same way, crimes under international law cannot be considered to amount to 'political offences' for the purpose of extradition when the obligation to extradite arises from a treaty[139] or from the customary rule *aut dedere aut judicare* (the obligation to prosecute or extradite).[140]

100. The Human Rights Committee and the Inter-American Commission of Human Rights has reiterated this interpretation. The Human Rights Committee has considered that amnesties given for acts committed during armed conflicts, that constitute gross violations of human rights, are not compatible with states' obligations under the ICCPR. This has been established by the Committee in respect of amnesties in El Salvador, Democratic Republic of Congo, Croatia and Lebanon. Specifically, in the case of Lebanon where an amnesty was provided to both state and non-state actors for violations committed against civilian during the course of the civil war, the Committee established that: "this general amnesty will prevent the proper investigation and punishment of past human rights violations, and will end with the efforts to impose the observance of human rights and to establish democracy"[141]

101. The Inter-American Commission of Human Rights rejected the argument, where according to the Government of El Salvador, the amnesty approved by Legislative Assembly was valid under the provisions contained in Protocol II. The Commission clearly established: "The Protocol cannot be interpreted as covering violations to the fundamental human rights enshrined in the American Convention of Human Rights".[142]

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[138] Additional Protocol II, Article 6, para. 5.
[139] See part A, See Ronald C. Slye, The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible? 43 Va. J. Int'l L. 173 (2002).
[139] Ibid. E.g., these principles are enshrined in the bilateral extradition treaty between Sierra Leone and the United Kingdom, originally signed December 22, 1931 (1935 United Kingdom Treaty). Entered into Force for the United States June 24, 1935, Article 6. See also, European Convention on Extradition (Article 3)
[140] See part A.
[141] Documento de las Naciones Unidas CCPR/C/79/Add.78, párrafo 12.
[142] Case Nº 11138, *Nazario de Jesús Gracias (El Salvador)*, en Informe sobre la Situación de los Derechos Humanos en EL Salvador, documento OEA/Ser.L/V/II.85, Doc. 28 rev. de 11 febrero 1994. See also Informe Nº 1/99, Caso10.480, *Lucio Parada Cea y otros* (El Salvador), 27 de enero de 1999, párrafo 115

Conclusions

102. At the outset of our submissions we clarified why amnesties are so objectionable to those who cherish the respect of human rights and the rule of law. This Court is presented with an historic opportunity to provide a clear and categorical statement of the principles of international law, namely that amnesties cannot apply for those who have committed serious violations of international human rights and humanitarian law that constitute crimes under international law.

103. Such general amnesties contravene the duty of states to investigate, prosecute and to punish perpetrators of serious violations of human rights and international humanitarian law. In the same way, a general amnesty breaches the obligation on states to afford effective judicial remedies to victims and adequate reparations.

104. We urge the Court to rise to this challenge. A clear statement of the principle is needed so that those in not only Sierra Leone but throughout the world who have committed (or are contemplating committing) crimes against humanity know that they will not go unpunished – and so that victims, whose suffering was the spur for the very existence of human rights law, know that their suffering will not be forgotten.

APPENDIX A

Relevant Resolutions of the UN General Assembly and the Security Council

In 1989 the united Nations General Assembly endorsed Resolution 1989/65 adopting the "Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, principle 19.2 of which states "*In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.*" Please note also the absolute obligation to prosecute under Principle 18.

Similarly in 1992 the General Assembly rejected amnesty laws by endorsing the Declaration on the Protection of All Persons from Enforced Disappearance, which states that perpetrators "*shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction*"

Presidential Statement S/PRST/1998/18 notes that "*The Council stresses the obligations of all States to prosecute those responsible for grave breaches of international humanitarian law*" and S/PRST/1996/6 that "*The Council affirms the need to bring justice, in an appropriate manner, individuals who incite or cause violence against civilians in situations or armed conflict or who otherwise violate international humanitarian and human rights law.*" Resolution 935 of 1994 specifies "*that all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for those violations and should be brought to justice.*"

The terms of Article 10 of the Special Court's Statute is itself a plain reflection of the Security Council's view on the legality of amnesties as is the reservation of the Secretary-General to the Lome Accords.

APPENDIX B

Relevant Conclusions of the Human Rights Committee

The Committee is the mechanism by which States' duties under the International Covenant on Civil and Political Rights (ICCPR) are monitored. In its General Comment 20 Concerning Article 7 (the prohibition of torture) it noted "*that some States have granted amnesty in respect of acts of torture. 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 of individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.*"

The Committee has also consistently criticised States that have sought to impose amnesties for grave breaches, for example:

Comments on Uruguay, U.N. Doc. CCPR/C/79/Add.19 (1993).
"*The Committee expresses once again its deep concern on the implications for the Covenant of the Expiry Law. In this regard, the Committee emphasizes the obligation of States parties, under article 2 (3) of the Covenant, to ensure that all persons whose rights or freedoms have been violated shall have an effective remedy as provided through recourse to the competent judicial, administrative, legislative or other authority. The Committee notes with deep concern that the adoption of the Law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses. The Committee is particularly concerned that the adoption of the Law has impeded follow-up on its views on communications. Additionally, the Committee is particularly concerned that, in adopting the Law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to*

further grave human rights violations. This is especially distressing given the serious nature of the human rights abuses in question." (para 7)

"*The Committee emphasizes the obligation of the State party under article 2 (3) of the Covenant to ensure that victims of past human rights violations have an effective remedy. In order to discharge that obligation under the Covenant, the Committee recommends that the State party adopt a legislation to correct the effects of the Expiry Law.*" (para 11)

Concluding Observations on the Second Periodic Report of El Salvador CCPR/C/79/Add.34 (1994) "*The Committee emphasizes the obligation of the State party under article 2, paragraph 3, of the Covenant to ensure that victims of past human rights violations have an effective remedy. In order to discharge that obligation, the Committee recommends that the State party review the effect of the Amnesty Law and amend or repeal it as necessary*" (para 5)

"*The Committee recommends that all necessary measures be urgently taken to combat the continuing human rights violations in El Salvador, All violations should be thoroughly investigated, the offenders punished and the victims compensated*" (para 13)

Nineteenth Annual report of the Human Rights Committee A/50/40 (1995) Chapter VI- Consideration of Reports Submitted by States Part under Article 40 of the Covenant –Haiti

"*The Committee expresses its concern about the effects of the Amnesty Act, agreed upon during the process which led to the return of the elected Government of Haiti. It is concerned that, despite the limitation of its scope to political crimes committed in connection with the coup d'etat or during the past regime, the Amnesty Act might impede investigations into allegations of human rights violations, such as summary and extra judicial executions, disappearances, torture and arbitrary arrests, rape and sexual assault, committed by the armed forces and agents of national security services. In this connection, the Committee wishes to point out that an*

amnesty in wide terms may promote an atmosphere of impunity for perpetrators of human rights violations and undermine efforts to re- establish respect for human rights in Haiti and to prevent a recurrence of the massive human rights violations experienced in the past. (para 230)

Nineteenth Annual report of the Human Rights Committee A/50/40 (1995) Chapter VI- Consideration of Reports Submitted by States Part under Article 40 of the Covenant - Yemen

"*The Committee notes that the civil war has left much of the infrastructure destroyed and created severe economic difficulties, which have served to restrict the resources allocated to the protection of human rights. The Committee also notes that national reconstruction and reconciliation remains handicapped by internal disorder.*" (para 245)

"*The Committee notes with concern the general amnesty granted to civilian and military personnel for human rights violations they may have committed against civilians during the civil war. The Committee notes in this regard that some amnesty laws may prevent appropriate investigation and punishment of perpetrators of past human rights violations, undermine efforts to establish respect of human rights, contribute to an atmosphere of impunity among perpetrators of human rights violations, and constitute impediments to efforts undertaken to consolidate democracy and promote respect for human rights.*" (para 252)

"*The Committee expresses its deep concern at allegations of arbitrary deprivation of life, acts of torture or other cruel, inhuman or degrading treatment, arbitrary arrest and detention, abusive treatment of persons deprived of their liberty, and violations of the rights to a fair trial. It is deeply concerned that those violations were not followed by inquiries or investigations, that the perpetrators of such acts were not punished, and that the victims were not compensated. Ill-treatment of prisoners and overcrowding of prisons continue to be of concern.*"(para 254)

Preliminary Observations of the Human Rights Committee Peru CCPR/C/79/Add.67 (1996)

"*The Committee is deeply concerned that the amnesty granted by Decree Law 26,479 on 14 June 1995 absolves from criminal responsibility and, as a consequence, from all forms of accountability, all military, police and civilian agents of the State who are accused, investigated, charged, processed or convicted for common and military crimes for acts occasioned by the "war against terrorism" from May 1980 until June 1995. It also makes it practically impossible for victims of human rights violations to institute successful legal action for compensation. Such an amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations, undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity among perpetrators of human rights violations, and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and is thus in violation of article 2 of the Covenant. In this connection, the Committee reiterates its view, as expressed in its General Comment 20 (44), that this type of amnesty is incompatible with the duty of States to investigate human rights violations, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future.*" (para 9)

" *In addition, the Committee expresses serious concern in relation to the adoption of Decree Law 26,492 and Decree Law 26,6181, which purport to divest individuals of the right to have the legality of the amnesty law reviewed in courts. With regard to article 1 of this law, declaring that the Amnesty Law does not undermine the international human rights obligations of the State, the Committee stresses that domestic legislation cannot modify a State party's international obligations under the Covenant.*" (para 10)

Concluding Observations to France May 1997 CCPR/C/79/Add.80,

"*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*" (para 13)

Concluding observations of the Human Rights Committee : Lebanon. 01/04/97. CCPR/C/79/Add.78. (Concluding Observations/Comments)Lebanon

"*The Committee notes with concern the amnesty granted to civilian and military personnel for human rights violations they may have committed against civilians during the civil war. 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*."(para 12)

Concluding Observations on the Fourth Periodic Report of Chile (1999), **CCPR/C/79/Add.104**

"*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 obligation under article 2, paragraph 3, to ensure an effective remedy to anyone whose rights and freedoms under the Covenant have been violated. The Committee reiterates the view expressed in its General Comment 20, that amnesty laws covering human rights violations are generally incompatible with the duty of the State party to investigate human rights violations, to guarantee freedom from such violations within its jurisdiction and to ensure that similar violations do not occur in the future*" (para 7).

Concluding observations of the Human Rights Committee : Argentina. 03/11/2000. CCPR/CO/70/ARG

"*Despite positive measures taken recently to overcome past injustices, including the repeal in 1998 of the Law of Due Obedience and the Punto Final Law, the Committee is concerned that many persons whose actions were covered by these laws continue to serve in the military or in public office, with some having enjoyed promotions in the ensuing years. It therefore reiterates its concern at the atmosphere of impunity for those responsible for gross human rights violations under military rule.*

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 to justice their perpetrators. The Committee recommends that rigorous efforts continue to be made in this area, and that measures be taken to ensure that persons involved in gross human rights violations are removed from military or public service." (para 9)

Concluding observations on the second periodic report of the Congo: Congo. 27/03/2000. CCPR/C/79/Add.118

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

The State party should ensure that these most serious human rights violations are investigated, that those responsible are brought to justice and that adequate compensation is provided to the victims or their families. (para 12)

Concluding observations of the Human Rights Committee : Croatia. 30/04/2001. CCPR/CO/71/HRV para 10-11 (the Amnesty Law of 1996 excludes "war crimes" from its scope yet doesn't define the term)

"*While welcoming the establishment of specialized departments for the investigation of war crimes in the Ministry of the Interior, the Committee remains deeply concerned that many cases involving violations of articles 6 and 7 of the Covenant committed during the armed conflict, including the "Storm" and "Flash" operations,*

have not yet been adequately investigated, and that only a small number of the persons suspected of involvement in those violations have been brought to trial. Although the Committee appreciates the declared policy of the present Government of carrying out investigations, irrespective of the ethnic identity of those suspected, it regrets that it was not provided with detailed information on the number of prosecutions brought, the nature of the charges and the outcome of the trials.

The State party is under an obligation to investigate fully all cases of alleged violations of articles 6 and 7 and to bring to trial all persons who are suspected of involvement in such violations. Towards this end, the State party should proceed, as a matter of urgency, with the enactment of the draft law on the establishment of specialized trial chambers within the major county courts, specialized investigative departments, and a separate department within the Office of the Public Prosecutor for dealing specifically with the prosecution of war crimes" (para 10)

" *The Committee is concerned with the implications of the Amnesty Law. While that law specifically states that the amnesty does not apply to war crimes, the term "war crimes" is not defined and there is a danger that the law will be applied so as to grant impunity to persons accused of serious human rights violations. The Committee regrets that it was not provided with information on the cases in which the Amnesty Law has been interpreted and applied by the courts.*

The State party should ensure that in practice the Amnesty Law is not applied or utilized for granting impunity to persons accused of serious human rights violations." (para 11)

APPENDIX C

Relevant Conclusions of the Committee Against Torture

This committee is tasked with monitoring States obligations under the Torture Convention. It has consistently voiced concerns as to the use of amnesty laws, for example:-

Conclusions and recommendations of the Committee against Torture, Senegal, A/51/44, paras. 102-119, 9 July 1996.

The Committee is concerned that, in its report, the State party invokes a discrepancy between international and internal law to justify granting impunity for acts of torture on the basis of the amnesty laws. (para 112)

The Committee recommends that article 79 of the Senegalese Constitution, establishing the precedence of international treaty law ratified by Senegal over internal law be implemented unreservedly. The Committee considers the amnesty laws in force in Senegal to be inadequate to ensure proper implementation of certain provisions of the Convention. (para 117)

Conclusions and recommendations of the Committee against Torture, Peru, A/55/44, paras.56-63, 15 November 1999

59. The Committee expresses concern about the following:

(g) The use of, in particular, the amnesty laws which preclude prosecution of alleged torturers who must, according to articles 4, 5 and 12 of the Convention, be investigated and prosecuted where appropriate;

61. In addition, the Committee recommends that:

(d) Amnesty laws should exclude torture from their reach;

Conclusions and recommendations of the Committee against Torture, Azerbaijan, A/55/44, paras.64-69, 17 November 1999

68. The Committee expresses its concern about the following:

(c) The apparent failure to provide prompt, impartial and full investigation into numerous allegations of torture that were reported to the Committee, as well as the failure to prosecute, where appropriate, the alleged perpetrators;

(e) The use of amnesty laws that might extend to the crime of torture.

69. The Committee recommends that:

(c) In order to ensure that perpetrators of torture do not enjoy impunity, the State party ensure the investigation and, where appropriate, the prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach;

Conclusions and recommendations of the Committee against Torture, Kyrgyzstan, A/55/44, paras.70-75, 18 November 1999

74. The Committee expresses its concern about the following:
(e) The use of amnesty laws that might extend to torture in some cases.

75. The Committee recommends that:

(c) In order to ensure that the perpetrators of torture and ill-treatment do not enjoy impunity, the State party ensure the investigation and, where appropriate, the prosecution of all those accused of having committed such acts, and ensure that amnesty laws exclude torture from their reach;

Conclusions and recommendations of the Committee against Torture, Croatia, A/54/44, paras. 61-71, 11 November 1998

3. Subjects of concern

66. The Committee notes that the Amnesty Act adopted in 1996 is applicable to a number of offences characterized as acts of torture or other cruel, inhuman or degrading treatment or punishment within the meaning of the Convention.

4. Recommendations

69. As during the consideration of the initial report, the Committee recommends that the State party should make all necessary efforts to ensure that the competent authorities immediately conduct an impartial, appropriate and full investigation whenever they have to deal with allegations of serious violations made in a credible manner by non-governmental organizations.

APPENDIX D

Relevant Findings of the Human Rights Commission

These Resolutions demonstrate the unabridged obligation to prosecute and the consequent illegality of amnesty:

Resolution 1999/1, Situation of human rights in Sierra Leone: *Reminds all factions and forces in Sierra Leone that in any armed conflict, including an armed conflict not of an international character, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international humanitarian law, and that all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and to bring such persons, regardless of their nationality, before their own courts* (para 2)

Resolution 1999/32 - Torture and other cruel, inhuman or degrading treatment or punishment

Urges all Governments to promote the speedy and full implementation of the Vienna Declaration and Programme of Action (A/CONF.157/23), in particular Part II, section B.5, relating to freedom from torture, in which it is stated that 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; (para 2)

Reminds Governments that corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture; (para 3)

Stresses in particular that all allegations of torture or cruel, inhuman or degrading

treatment or punishment should be promptly and impartially examined by the competent national authority, that those who encourage, order, tolerate or perpetrate such acts must be held responsible and severely punished, including the officials in charge of the place of detention where the prohibited act is found to have taken place, and that national legal systems should ensure that the victims of such acts obtain redress and are awarded fair and adequate compensation and receive appropriate socio-medical rehabilitation; (para 4)

Resolution 1999/34 – Impunity

Recognizes that, for the victims of human rights violations, public knowledge of their suffering and the truth about perpetrators of these violations are essential steps towards rehabilitation and reconciliation, and urges States to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated and made public and to encourage victims to participate in such a process; (para 2)

Emphasizes the importance of taking all necessary and possible steps to hold accountable perpetrators of violations of international human rights and humanitarian law, and urges States to take action in accordance with due process of law; (para 4)

(U.N. Doc E/CN.4/RES/2000/24 of 18 April 2000 para 2) that: "*The Special Representative of the Secretary-General entered a reservation, attached to his signature of the Lome Agreement, that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious breaches of international law, and affirms that all persons who commit or authorize serious violations of human rights or international humanitarian law at any time are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice*"

APPENDIX E

Relevant reports of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment

U.N. Commission on Human Rights, Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, U.N. Doc. E/CN.4/1994/31 (1994)(Nigel Rodley, Special Rapporteur).

III. CONCLUSIONS AND RECOMMENDATIONS

666. As in previous years, it must be concluded that torture occurs, lamentably, in a significant number of countries. It is virtually axiomatic that situations where torture is systematically practised are characterized by one or both of the following phenomena:

(a) The legal system does not provide the institutional safeguards needed to restrain law enforcement officials and members of security forces from resorting to abusive and illegal behaviour to achieve their aims. In particular, persons suspected of crimes or of possessing information relevant to the detection of crime are left in the hands of their interrogators without access to the outside world or other authoritative external supervision. In effect, they are detained incommunicado. They cannot call the outside world to their aid and their captors and interrogators presume they are insulated from external interference. Indeed, in this sense, this element is connected with the second one.

(b) Those conducting the torture enjoy de jure or de facto impunity. De jure impunity generally arises where legislation provides indemnity from legal process in respect of acts to be committed in a particular context or exemption from legal responsibility in respect of acts that have in the past been committed, for example, by way of amnesty or pardon. De facto impunity occurs where those committing the acts in question are in practice insulated from the normal operation of the legal system. Such immunity may begin with the absence of safeguards of the sort mentioned in (a) above. Sometimes the safeguards may be formally in place and applicable, but those charged

with maintaining public order are allowed to become "a law unto themselves" or, more accurately, the law is prevented from reaching their acts. Legality and the rule of law are dispensed with. In the case of torture, grave crimes are committed in the name of maintaining public order. Nothing can be more corrosive of general respect for law, without which no organized society can in the long term be secure.

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR: TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37

Addendum, Visit by the Special Rapporteur to Chile, E/CN.4/1996/35/Add.2 4 January 1996

6. The persistence of the abovementioned features has a significant influence on the treatment of human rights questions, not only regarding violations that might occur in the present or in the future, but more particularly regarding those which occurred under the military Government. One of the most important aspects in that connection is the maintenance of the Amnesty Act of 1978, which prevents the prosecution of those responsible for violations committed between 1973 and 1978. Although there are many cases currently before the courts, also involving events subsequent to 1978, only extremely few have resulted in judgements clarifying the facts, which is tantamount to making impunity the general rule and is in sharp contrast to the seriousness of the facts described in the report of the National Commission for Truth and Reconciliation.

76. In light of the above considerations the Special Rapporteur wishes to make the following recommendations

(u) All allegations of torture committed since September 1973 should be the subject of a thoroughgoing public inquiry, similar to that carried out by the National Commission for Truth and Reconciliation in respect of forced disappearances and

extra-legal executions. In cases where the evidence justifies it - and, given the period of time that has elapsed since the worst practices of the military government took place, this would admittedly be rare - those responsible should be brought to justice, except where proceedings are barred by the statute of limitations (prescription).

Question of torture and other cruel, inhuman or degrading treatment or punishment, Interim Report A/56/156 3 July 2001

26. The Special Rapporteur has noted in the past that the single most important factor in the proliferation and continuation of torture is the persistence of impunity, be it of a de jure or de facto nature. Causes of impunity of a de jure nature encompass measures relieving perpetrators of torture of legal liability, inter alia, by providing an unrealistically short period of prescription, adopting acts of impunity or by granting amnesties to perpetrators of grave violations of human rights. It is with regard to the granting of amnesties that the Special Rapporteur wishes to review the recent developments in international law on the question of the compatibility of amnesties with States' international obligations to combat torture.

27. The Special Rapporteur would like to draw Governments' attention to the Vienna Declaration and Programme of Action, which stipulates that "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".[17] The Special Rapporteur further notes the report "Question of the impunity of perpetrators of human rights violations (civil and political)", prepared by Mr. Louis Joinet of the Subcommission on Prevention of Discrimination and Protection of Minorities, pursuant to Subcommission decision 1996/119, which states that "amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy" and that "the right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them".[18] As requested by the Subcommission in its decision 1996/119, Mr. Joinet drafted a set of principles for the

protection and promotion of human rights through action to combat impunity,[19] *in which he states that "there can be no just and lasting reconciliation unless the need for justice is effectively justified" and that "national and international measures must be taken ... with a view to securing jointly, in the interests of the victims of human rights violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity". The Set of Principles further states that "even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds: (a) the perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met" their "obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take acts to prevent the recurrence of such violations".*[20]

28. The Special Rapporteur wishes to stress the duty of States to bring to justice perpetrators of torture as an integral part of the victims' right to reparation, as noted by Mr. Joinet, of the Subcommission on Prevention of Discrimination and Protection of Minorities, and the last independent expert of the Commission on Human Rights on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni, in their reports[21] *and in the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law.*[22] *In his final report, Mr. Bassiouni revised the basic principles and guidelines, holding that the victim's right to a remedy encompasses (a) access to justice; (b) reparation for the harm suffered; and (c) access to factual information concerning the violations.*[23] *He furthermore stated that "violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and*

appropriate international judicial organs in the investigation and prosecution of these violations".[24]

29. The Special Rapporteur further wishes to refer to the jurisprudence of the Human Rights Committee, which, in its General Comment 20, of 3 April 1992, on the prohibition of torture, concluded that amnesties are generally incompatible with the duty of States to investigate such acts of torture; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in future. In the case of Hugo Rodríguez v. Uruguay, the Committee reaffirmed its position that amnesties for gross violations of human rights are incompatible with the obligations of the State party under the Covenant and expressed concern that in adopting the amnesty law in question, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further human rights violations. The Special Rapporteur notes that, in its conclusions and recommendations following the review of the third periodic report of Peru, the Committee against Torture expressed concern about "the use of, in particular, the amnesty laws which preclude prosecution of alleged torturers who must, according to articles 4, 5 and 12 of the Convention, be investigated and prosecuted where appropriate"[25] *and recommends that "amnesty laws should exclude torture from their reach".*[26]

30. The Special Rapporteur notes the extensive jurisprudence developed by the Inter-American Commission and Court of Human Rights on the question of amnesty legislation. The Inter-American Commission on Human Rights has condemned amnesty laws issued by democratic successor Governments in the name of reconciliation, even if approved by a plebiscite, and has held them to be in breach of the 1969 American Convention on Human Rights, in particular the duty of the State to respect and ensure rights recognized in the Convention (article 1(1)), the right to due process of law (article 8) and the right to an effective judicial remedy (article 25). The Commission held further that amnesty laws extinguishing both criminal and civil liability disregarded the legitimate rights of the victims' next of kin to reparation and that such measures would do nothing to further reconciliation. The Commission held that, as regards countries that had not ratified the American Convention on Human Rights at the time of the perpetration of human rights violations subject to the

amnesty laws, the violations were incompatible with article XVIII (right to a fair trial) and with the above-mentioned provisions of the American Convention.[27] *Finally, the Commission clarified that new democratic Governments bear responsibility for the human rights violations of previous (military) regimes, in accordance with the principle of the State's continuing responsibility in international law, and hence for the non-revocation of a self-amnesty law, promulgated by a previous military dictatorship.*[28]

31. The Special Rapporteur would like to draw the attention of the General Assembly to a recent judgement of the Inter-American Court of Human Rights, Caso Barrios Altos, Chumbipuma Aguirre y otros v. Perú (14 March 2001). The Court held that amnesty provisions, prescription and the exclusion of responsibility which have the effect of impeding the investigation and punishment of those responsible for grave violations of human rights, such as torture, summary, extrajudicial or arbitrary executions, and enforced disappearances, are prohibited as contravening human rights of a non-derogable nature recognized by international human rights law. The Court considered the laws in question to be in violation of the duty on the State to give domestic legal effect to the rights contained in the Convention (article 2). The Court held further that the self-amnesty laws lead to the victims' defencelessness and to the perpetuation of impunity, and, for this reason, were manifestly incompatible with the letter and spirit of the Convention. The Court concluded by stating that as a consequence of the manifest incompatibility of the self-amnesty laws with the Inter-American Convention on Human Rights, the laws concerned have no legal effect and may not continue representing an obstacle to the investigation of the facts of the case, nor for the identification and punishment of those responsible.

32. The Special Rapporteur would also like to draw the attention of the General Assembly to the fact that, in conjunction with the Special Rapporteurs on extrajudicial, summary or arbitrary executions and on the independence of judges and lawyers, and with the Chairman of the Working Group on Enforced or Involuntary Disappearances, he had sent a communication to the Government of

Peru regarding the amnesty laws promulgated in June and July 1995. The Special Rapporteurs considered, inter alia, that those laws denied the right to an effective remedy for victims of human rights violations and, therefore, were contrary to the spirit of various international human rights instruments.[29]

33. In the light of the consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights has become a rule of customary international law, the Special Rapporteur expresses his opposition to the passing, application and non-revocation of amnesty laws (including laws in the name of national reconciliation, the consolidation of democracy and peace, and respect for human rights), which prevent torturers from being brought to justice and hence contribute to a culture of impunity. As before, he calls on States to refrain from granting or acquiescing in impunity at the national level, inter alia, by the granting of amnesties, such impunity itself constituting a violation of international law.

F. Recommendations

39. In his last report to the Commission on Human Rights (E/CN.4/2001/66) the Special Rapporteur revised the recommendations that he had compiled in 1994 (E/CN.4/1995/34) into one global recommendation — an end to de facto or de jure impunity. He would like to encourage States to reflect upon them as a useful tool in efforts to combat torture. A further revised version of the recommendations follows:

(a) Countries that are not party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the International Covenant on Civil and Political Rights should sign and ratify or accede to these Conventions. Torture should be designated and defined as a specific crime of the utmost gravity in national legislation. In countries where the law does not give the authorities jurisdiction to prosecute and punish torture, wherever the crime has been committed and whatever the nationality of the perpetrator or victim (universal jurisdiction), the enactment of such legislation should be made a priority;

(j) When a detainee or relative or lawyer lodges a torture complaint, an inquiry should always take place and, unless the allegation is manifestly ill-founded, public

officials involved should be suspended from their duties pending the outcome of the investigation and any subsequent legal or disciplinary proceedings. Where allegations of torture or other forms of ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment. Serious consideration should also be given to the creation of witness protection programmes for witnesses to incidents of torture and similar ill-treatment which ought to extend fully to cover persons with a previous criminal record. In cases where current inmates are at risk, they ought to be transferred to another detention facility where special measures for their security should be taken. A complaint that is determined to be well founded should result in compensation to the victim or relatives. In all cases of death occurring in custody or shortly after release, an inquiry should be held by judicial or other impartial authorities. A person in respect of whom there is credible evidence of responsibility for torture or severe maltreatment should be tried and, if found guilty, punished. Legal provisions granting exemptions from criminal responsibility for torturers, such as amnesties, indemnity laws etc., should be abrogated. If torture has occurred in an official place of detention, the official in charge of that place should be disciplined or punished. Military tribunals should not be used to try persons accused of torture. Independent national authorities, such as a national commission or ombudsman with investigatory and/or prosecutorial powers, should be established to receive and to investigate complaints. Complaints about torture should be dealt with immediately and should be investigated by an independent authority with no relation to that which is investigating or prosecuting the case against the alleged victim. Furthermore, the forensic medical services should be under judicial or other independent authority, not under the same governmental authority as the police and the penitentiary system. Public forensic medical services should not have a monopoly of expert forensic evidence for judicial purposes. In that context, countries should be guided by the Principles on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment as a useful tool in the effort to combat torture;

APPENDIX F

Relevant Judgments of the Inter-American Court

The Inter-American Court has had to grapple with the issue of amnesties perhaps more than any other international or domestic tribunal. It has consistently found amnesty laws to be unlawful and has developed a position of initially merely stressing the obligation to prosecute to more recently explicitly condemning amnesties – a reflection of the increasingly secure position that the illegality of amnesties has in the canon of international law, for example:

Velasquez Rodriguez Case Judgment of July 29, 1988

"*The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, 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.*" (para 166)

"*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*." (para 174)

"*The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. 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. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention." (para 176)

Godinez Cruz Case, Judgment of 20 January 1989 "*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.* (para 184)

Loayza Tamayo Case Reparations (Art. 63(1) of the American Convention on Human Rights Judgment of November 27, 1998
"*Under the American Convention, every person subject to the jurisdiction of a State Party is guaranteed the right to recourse to a competent court for the protection of his fundamental rights. States, therefore, have the obligation to prevent human rights violations, investigate them, identify and punish their intellectual authors and accessories after the fact, and may not invoke existing provisions of domestic law, such as the Amnesty Law in this case, to avoid complying with their obligation 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 fact that gave rise to the present Case must be rejected.* (para 168)

Barrios Altos Case (Chumbipuma Aguirre *et al. versus* Peru) Judgment of March 14, 2001 *Section VII "The Incompatibility of Amnesty Laws with the Convention*"

"This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited

because they violate non-derogable rights recognized by international human rights law. (para 41)

"*The Court, in accordance with the arguments put forward by the Commission and not contested by the State, considers that the amnesty laws adopted by Peru prevented the victims' next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention; they violated the right to judicial protection embodied in Article 25 of the Convention; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the Convention, and they obstructed clarification of the facts of this case. Finally, the adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the Convention.*" (para 42)

"*The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation*." (para 43)

"*Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to*

obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated." (para 44)

This position has also been mirrored by the Commission, for example:

Garay Hermosilla et al v Chile Case 10.843, Report No. 36/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 156 (1996)

"*The Commission has on a number of occasions considered the question of amnesties, in relation to complaints against States Parties to the American Convention that, in searching for a mechanism to restore peace or achieve national reconciliation, have resorted to amnesties, at the expense of groups of people among whom were many innocent victims of violence, who have thus seen themselves deprived of their right to due process for their just complaints against persons who had committed excesses and acts of barbarism against them.*" (para 49)

"*The Commission has repeatedly stated that the application of amnesties renders ineffective and worthless the obligations that States Parties have assumed under Article 1.1 of the Convention, and thus constitute a violation of that article and eliminate the most effective means for protecting such rights, which is to ensure the trial and punishment of the offenders*." (para 50)

The Government's recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation are not enough, in themselves, to fulfill 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." (para 77)

In sanctioning the de facto Decree-Law 2191 on self-amnesty, the State of Chile failed to comply fully with the duty stipulated in Article 1.1 of the Convention, and violated to the prejudice of the petitioners the human rights recognized by the American Convention." (para 78)

REPORT Nº 34/96 CASES 11.228, 11.229, 11.231 AND 11.182 Chile October 15, 1996

"*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*." (para 84)

APPENDIX G

Relevant Judgments of the African Commission

Relevant communications and declarations include:

Jean Yokovi Degli on behalf of Corporal N. Bikagni, Union Interafricaine des Droits de l'Homme, Commission International de Juristes v Togo Communications 83/92, 88/93, 91/93

While the Commission considers that conciliation, reconciliation and pardon are very important, responsibility for human rights abuses must always lie with the government for violations of human rights. (para 39)

In its letter of 20 March 1995 the government acknowledged that the communications concern violations of the Charter, and that these had occurred in the process of the transition to democracy. The violations took place at a time that the political insecurity of Togo was particularly bad and caused general insecurity, In this general confusion the government itself was guilty of criminal acts. (para 44)

While the Commission welcomes the actions taken by the new Togolese government since it came to power, international law stipulates that a government inherits the previous administration's responsibilities (para 47)

Various communications v. Mauritania Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98

On 14 June 1993, The Mauritanian government issued an enactment, no. 023/93, granting amnesty to those accused of perpetrating the series of murders for which the beneficiaries of the victims are hereby claiming compensation of injuries suffered. (para 57)

On 9 October 1997, the Secretariat acknowledged receipt of the said note, pointing out that the fact that the Mauritanian State had paid compensation to the

beneficiaries of the victim of the alleged violations (which are in any case not denied by the State) cannot invalidate the Commission's deliberations (para 61)

The Commission notes that the amnesty law adopted by the Mauritanian legislature had the effect of annulling the penal nature of the precise facts and violations of which the plaintiffs are complaining; and that the said law also had the effect of leading to the foreclosure of any judicial actions that may be brought before local jurisdictions by the victims of the alleged violations (para 82)

The Commission recalls that its role consists precisely in pronouncing on allegations of violations of human rights protected by the Charter of which it is seized in conformity with the relevant provisions of that instrument. It is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, which having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter (para 83)

Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia.

E. Combating Impunity

16. In order to combat impunity States should:

a) Ensure that those responsible for acts of torture or ill-treatment are subject to legal process.

b) Ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law.

APPENDIX H

National Constitutions

Ethiopia

Constitution 1994, Article 28 Crimes Against Humanity

"(1) Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.

"(2) In the case of persons convicted of any crime stated in sub-article 1 of this article and sentenced with the death penalty, the Head of State may, without prejudice to the provisions here in above, commute the punishment to life imprisonment."

Bulgaria

Constitution, 1991, Article 31 [Criminal Trials]

"[…] (7) There shall be no limitation to the prosecution and the execution of a sentence for crimes against peace and humanity."

Colombia.

Ley 589 de 7 de julio de 2000:

- la Ley tipificó como delito en la legislación penal interna los delitos de: desaparición forzada, Genocidio y desplazamiento forzado de población (Articulo 1° de la ley, modificando los artículos 268 A, 268B, 268 C; 279 A; 284A; 284B y 322 A del Código Penal) y tortura (artículo 6, modificando el artículo 279 del Código Penal)
- La Ley establece que no se podrá dar amnistías ni indultos por les delitos de desaparición forzada, Genocidio, tortura y desplazamiento forzado de población (Artículo 14. Los delitos que tipifica la presente ley no son amnístiables ni indultables.),

Ecuador. Constitución, 1998,
artículo 23 (2):

- " Las acciones y penas por genocidio, tortura, desaparición forzada de personas, secuestro y homicidio por razones políticas o de conciencia, serán imprescriptibles. Estos delitos no serán susceptibles de indulto o amnistía. En estos casos, la obediencia a órdenes superiores no eximirá de responsabilidad."

Paraguay. Constitución, 1993,
art. 5° (2° párrafo)
" El genocidio y la tortura, así como la desaparición forzosa de personas, el secuestro y el homicidio por razones políticas son imprescriptibles."

Venezuela. Constitution, 1998:
Artículo 29.
"El Estado estará obligado a investigar y sancionar legalmente los delitos contra los derechos humanos cometidos por sus autoridades. Las acciones para sancionar los delitos de lesa humanidad, violaciones graves a los derechos humanos y los crímenes de guerra son imprescriptibles. Las violaciones de derechos humanos y los delitos de lesa humanidad serán investigados y juzgados por los tribunales ordinarios. Dichos delitos quedan excluidos de los beneficios que puedan conllevar su impunidad, incluidos el indulto y la amnistía.

- Ley de reforma parcial del Código Penal (realizada en el 2000, Gaceta Oficial Nº 5.494 Extraordinario de fecha 20 de octubre de 2000), art. 181-A ; tipifica como delito la desaparición forzada; no admite causas de justificación; declara la imprescriptibilidad del crimen; y prescribe que no se puede dar no amnistía ni indulto a sus autores):

"Artículo 181-A. La autoridad pública, sea civil o militar, o cualquier persona al servicio del Estado que ilegítimamente prive de su libertad a una persona, y se niegue a reconocer la detención o a dar información sobre el destino o la situación de la persona

desaparecida, impidiendo, el ejercicio de sus derechos y garantías constitucionales y legales, será castigado con pena de quince a veinticinco años de presidio. Con igual pena serán castigados los miembros o integrantes de grupos o asociaciones con fines terroristas, insurgentes o subversivos, que actuando como miembros o colaboradores de tales grupos o asociaciones, desaparezcan forzadamente a una persona, mediante plagio o secuestro. Quien actúe tamo cómplice o encubridor de este delito será sancionado con pena de doce a dieciocho años de presidio.

"El delito establecido en este artículo se considerará continuado mientras no se, establezca el destino o ubicación de la víctima.

"Ninguna orden o instrucción de una autoridad pública, sea esta civil, millar o de otra índole, ni estado de emergencia, de excepción o de restricción de garantías, podrá ser invocada para justificar la desaparición forzada.

"La acción penal derivada de ese delito y su pena serán imprescriptibles, y los responsables de su comisión no podrán gozar de beneficio alguno, incluidos el indulto y la amnistía.

"Si quienes habiendo participado en actos que constituyan desapariciones forzadas, contribuyen a la reaparición con vida de la víctima o dan voluntariamente informaciones que permitan esclarecer casos de desaparición forzada, la pena establecida en este artículo les podrá ser rebajada en sus dos terceras partes."

Guatemala.

La Ley de Reconciliación Nacional (Diciembre de 1996) establece que no se aplicara la amnistía ni se podrá extinguir la responsabilidad penal para los delitos de Genocidio, tortura y desaparición forzada ni en aquellos delitos considerados imprescriptibles de conformidad a los tratados internacionales ratificados por Guatemala (El problema es que al momento de adoptar esa ley Guatamala no había suscrito la Convención sobre la imprescritiblidad de los crímenes de guerra y de los crimenes contra la humanidad.)

Cote d'Ivoire:

Loi d'amnistie 2003: La loi d'amnistie promulguée par le Président de la République a promulgué la loi d?amnistie votée le 6 août 2003, par 179 pour, 2 contre et 1 abstention à l'Assemblée Nationale, faisant d'elle la loi n° 2003-309 du 8 août 2003 portant amnistie.

Article 4:

La présente loi d'amnistie ne s'applique pas:

a) aux infractions économiques

b) aux infractions constitutives de violations graves des droits de l'homme et du droit international humanitaire.

c) plus particulièrement aux infractions qualifiées par le code pénal ivoirien de crimes et délits contre le droit des gens, crimes et délits contre les personnes, crimes et délits contre les biens, y compris les infractions spéciales prévues et punies par la loi n° 88-650 du 7 Juillet 1988 modifiée par la loi n° 89-521 du 11 mai 1989 relative à la répression des infractions en matière de commercialisation des produits agricoles et la loi n° 94-497 du 6 Septembre 1994 portant répression de l'exportation illicite de produits agricoles. d) aux infractions visées par les articles 5 à 8 du Traité de Rome sur la Cour Pénale Internationale (CPI) et la Charte Africaine des Droits de l'Homme et des Peuples.

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- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment , adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984; *entry into force* 26 June 1987.

- *Convention on the Prevention and Punishment of the Crime of Genocide; approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948, entry into force 12 January 1951*

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