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Article abstract

The laws of *punto final* and *due obedience* violate international law as it stands today. Indeed, such laws breach the right to legal recourse and perpetrate impunity. The United Nations is presently drafting a set of principles to struggle against impunity. This “progressive development” of international law is in reaction to a wave of new atrocities in the last decade. Another, and most recent manifestation of this “progressive development”: in July 1998, a diplomatic conference was held in Rome and has created an International Criminal Court. This initiative, together with the *ad hoc* tribunals for the former Yugoslavia and for Rwanda, has breathed new life into the efforts to combat impunity, and suggests that there is a growing consensus within the international community regarding responsibility for crimes against humanity and gross human rights violations. One important consequence of this evolution is the obligation of all States to bring their domestic law into line with international law. In this respect, they must incorporate into their criminal legislation, crimes such as crimes against humanity, genocide, summary executions, torture and enforced disappearances. States should also remove and nullify, Argentina in this case as exposed by the author, any domestic legislation that interfere with international law in this field.

IMPUNITY AND INTERNATIONAL LAW*

*Par Rodolfo Mattarollo***

Les lois du *punto final* ainsi que de l'*obéissance dûe* violent le droit international existant. En effet, de telles lois sont en contravention au droit judiciaire d'intenter des recours et elles encouragent l'impunité. Les Nations Unies sont présentement en voie de rédiger une série de Principes visant à lutter contre l'impunité. Ce «développement progressif» du droit international se fait en réaction aux vagues d'atrocités commises dans la dernière décennie. Ce «développement progressif» s'est manifesté, plus récemment, au cours de la conférence diplomatique tenue à Rome en juillet 1998 qui a permis la création du la Cour criminelle internationale contre le crime. Cette initiative et la création de tribunaux *ad hoc* pour l'ex-Yougoslavie et le Rwanda, a permis de faire renaître les efforts mis de l'avant pour combattre l'impunité et fait état d'un consensus grandissant au sein de la communauté internationale relativement à la responsabilité suite à la commission de crimes contre l'humanité et aux violations flagrantes des droits de l'homme. Une conséquence importante de cette évolution réside dans l'obligation des États de modifier leurs lois domestiques pour les harmoniser au droit international. Les États se doivent donc d'introduire dans leur législation de droit criminel, des dispositions relativement aux crimes contre l'humanité, aux crimes de génocide, d'exécution sommaire, de torture et de disparitions suspectes. Les États doivent également retirer et annuler toute loi domestique qui contrevient au droit international en ces matières, ce qui est le cas de l'Argentine que décrit l'auteur.

The laws of *punto final* and *due obedience* violate international law as it stands today. Indeed, such laws breach the right to legal recourse and perpetrate impunity. The United Nations is presently drafting a set of principles to struggle against impunity. This "progressive development" of international law is in reaction to a wave of new atrocities in the last decade. Another, and most recent manifestation of this "progressive development": in July 1998, a diplomatic conference was held in Rome and has created an International Criminal Court. This initiative, together with the *ad hoc* tribunals for the former Yugoslavia and for Rwanda, has breathed new life into the efforts to combat impunity, and suggests that there is a growing consensus within the international community regarding responsibility for crimes against humanity and gross human rights violations. One important consequence of this evolution is

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* Text translated from Spanish to English.

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the obligation of all States to bring their domestic law into line with international law. In this respect, they must incorporate into their criminal legislation, crimes such as crimes against humanity, genocide, summary executions, torture and enforced disappearances. States should also remove and nullify, Argentina in this case as exposed by the author, any domestic legislation that interfere with international law in this field.

Las leyes del *punto final* y de *obediencia debida* violan el derecho internacional tal como concebido hoy en día. En efecto, leyes similares atentan contra el derecho al recurso legal y perpetúan la impunidad. Las Naciones Unidas están esbozando una resolución de principios cuyo objetivo es luchar contra la impunidad. Este «desarrollo progresivo» del derecho internacional constituye una respuesta a la olas de atrocidades cometidas durante la última década. Este «desarrollo progresivo» se manifestó hace poco, durante una conferencia diplomática en Roma en el 1998 con la creación de una Corte criminal internacional. Aquella iniciativa, conjuntamente con los tribunales *ad hoc* para la Ex-Yugoslavia y el Rwanda, ha dado lugar a un renacimiento de los esfuerzos desplegados para luchar contra la impunidad, y deja entrever un consenso creciente entre los miembros de la comunidad internacional en cuanto a la responsabilidad de los que cometen crímenes contra la humanidad y violaciones de los derechos humanos. Una consecuencia importante de esta evolución es la obligación de los Estados de modificar sus leyes para que éstas estén harmonizadas con el derecho internacional. En esta óptica, disposiciones relativas a los crímenes contra la humanidad, tales como el genocidio, la ejecución sumaria, la tortura y las desapariciones forzadas, deberían aparecer en la legislación penal de los Estados, que también tendrían que retirar y anular cualquier ley doméstica que contraviene al derecho internacional en este campo, como es el caso de Argentina en este artículo.

I. Summary

The laws of *punto final* and *due obedience* violate international law as it stands today. Indeed, according to the Inter-American Commission on Human Rights of the Organization of American States (OAS), such laws violate the right to recourse to a competent court enshrined in the *American Convention on Human Rights*.

A state cannot invoke the provisions of its domestic law to violate international law. This is prohibited by the *Vienna Convention on the Law of Treaties*. Furthermore, the *American Convention* has been incorporated in Argentine domestic law, so it enjoys the same position and status as the *Constitution* of the country. As a result, a violation of the *American Convention* is also a violation of the *Constitution*.

The final document of the World Conference on Human Rights, the *Vienna Declaration and Programme of Action (June 1993)*, adopted by all the States, established a binding principle: **the obligation to prevent, to investigate, to prosecute and to punish gross violations of human rights, such as torture and enforced disappearances.**

It is also said in the document 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."

On the matter of forced disappearance of persons, the World Conference reaffirmed that "it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that a forced disappearance of persons has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators."[1]

These principles are based on something that is often forgotten: the principle of legality in international law also means that it cannot be caused prejudice to "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." (Article 15 (2) of the United Nations *International Covenant on Civil and Political Rights* (ICCPR), incorporated into the National *Constitution* of Argentina).[2]

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[1] Non-official translations of the original text.

[2] This principle illustrates the relativity of the concepts of *res judicata* and *more benign criminal law* in relation to crimes against humanity. Both the *ad hoc* Tribunal for the Former Yugoslavia and the *ad hoc* Tribunal for Rwanda have competence in cases prosecuted in national courts when parodies of trials took place. The same principle will apply in the case of the International Criminal Court created in Rome in June 1998. In the case of crimes in international law, any benefit of statutes of limitations must be annulled; in this regard, see the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*; see also Graven, J., «L'imprescriptibilité du crime contre l'humanité» (1965) 81 Revue pénale suisse; see also the European jurisprudence on the application of article 7(2) of the *European Human Rights Convention*, which contains a provision similar to article 15(2) of the UN ICCPR. Indeed, the European Court of Human Rights declared that

The obligation to investigate and prosecute forms part of current international (and domestic) law. Some say that the abrogation of laws like the law of "Punto Final" ("Full Stop") (Ley 23.492 del 23 de Diciembre 1986) and the "Obediencia Debida" one ("Due Obedience") (Ley 23.521 del 4 de Junio de 1987) is anti-juridical: the opposite is true. The United Nations is presently drafting a set of principles to struggle against impunity; Principle 20 would unequivocally establishes the obligation of States to investigate violations, and to prosecute, try and punish the perpetrators.

The "progressive development" of international law has gained momentum in this decade, as always, in reaction to new atrocities. The adoption by the United Nations Security Council of the Statutes of the *ad hoc* Tribunals for the Former Yugoslavia (1993) and Rwanda (1994) has reaffirmed the principles of international criminal law enunciated strongly after World War II, and which are cited in the ICCPR.

Another recent manifestation of this "progressive development": On July 17, 1998 the Statute of Rome on the International Criminal Court was adopted by the United Nations Diplomatic Conference of plenipotentiaries on the establishment of such a tribunal.

The fact that forced disappearance of persons constitute crimes against humanity has been reaffirmed in the two international instruments that exist on the subject: the *OAS Convention*, ratified by Argentina, and the *United Nations Declaration.*

One important consequence of this evolution is the obligation for all States to bring their domestic law into line with international law. In this respect, they must incorporate into their *Criminal Code*, as crimes against humanity, crimes such as genocide, summary execution, torture and enforced disappearances, in the same manner that France did in its *Criminal Code* that entered into force in 1994.

II. Treaties as a source of the obligation to prosecute or extradite

A series of treaties establish either the specific obligation to prosecute or extradite, or a general obligation to do so, as part of the State's duty to respect rights.

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a Norwegian law adopted after the war that criminalised acts of collaboration with the Nazi occupiers was in accord with the *Convention*; see also on this key aspect of the application of the principle of legality under international criminal law, see C. Lombois, *Droit pénal international*, Paris, Dalloz, 1979.

A. Specific Obligation

International criminal law affirms the imperative nature of the specific obligation to prosecute, responsibility which lies, in first instance, with national courts. The crimes to which this obligation refers constitute a core of extremely grave offences against human dignity, such as murder, torture and disappearances.

Taken together, these norms provide a strong basis for affirming that there is now consensus that all cases of gross violations of fundamental human rights must be investigated and prosecuted.

The principle known as prosecute or extradite (*aut dedere aut judicare*) is contained in a number of instruments, including the following:

- The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;[3]

- The *Inter-American Convention on Forced Disappearance of Persons*;[4]

- The *Convention on the Prevention and Punishment of the Crime of Genocide*;

- The *International Convention on the Suppression and Punishment of the Crime of Apartheid*;

- The four *Geneva Conventions of 1949*;

- The *First Additional Protocol to the Geneva Conventions*.[5]

B. The State's obligation to respect rights and the right to recourse

Treaties on human rights of general nature ratified by Argentina like the *International Covenant on Civil and Political Rights* and the *American Convention on Human Rights* establish the obligation of the State to respect rights and the right to recourse, which require that States prosecute and punish the perpetrators of flagrant human rights violations.

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[3] The relatives of three Argentineans who were tortured to death challenged the laws of *punto final* and due obedience before the Committee against Torture. The Committee considered that the petition was inadmissible because it referred to acts committed prior to the entry into force of the *Convention*. However, it did state that the laws in question were incompatible with the aims and objectives of the *Convention*. The Committee urged the Argentine State to recognize the right of torture victims and their relatives to seek legal recourse and to compensate them adequately, see *Report of the Committee against Torture to the General Assembly of the United Nations*, UN GAOR, 1989, UN Doc. A/45/44. The Inter-American Commission on Human Rights (ICHR) reached a different conclusion. See below.

[4] This *Convention* requires that acts of enforced disappearances be made a criminal offence, be considered permanent crimes, and that the perpetrators be prosecuted or extradited.

[5] Initially it was affirmed that serious breaches of the *Conventions* were only punishable under international law if committed in the context of an international armed conflicts. There is now a tendency to consider also serious breaches committed in internal armed conflicts on the same footing. In this regard, see the Statute of the *ad hoc* tribunal for Rwanda.

The obligation to respect rights and the right to recourse are established in the *International Covenant on Civil and Political Rights* (article 2) and in the *American Convention on Human Rights* (article 1.I and article 25).

1. THE OBLIGATION TO RESPECT RIGHTS

a) International Covenant

With regard to the Covenant, the Human Rights Committee affirmed that the obligations deriving from the treaty include the obligation to investigate, to prosecute, to make reparation and to prevent future violations. According to the Committee, these obligations are part of the substantive obligations to guarantee and respect the right to life, afford protection against torture, treat detainees humanely and protect citizens from illegal and arbitrary detention.

Indeed, in a general comment on article 7 of the *Covenant* (prohibition of torture), the Human Rights Committee argued that "complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation."[6]

Subsequently, in another general comment on the same article, the Committee 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 [...]."[7]

The Committee reached the same conclusion in cases involving summary executions and enforced disappearances, examined in the context of the *Optional Protocol*.[8]

b) American Convention

The obligation to respect rights was clearly established in the *Velásquez Rodríguez Case (Honduras)*.[9] The Inter-American Court of Human Rights established that the State has a legal duty to take reasonable steps to prevent human rights

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[6] Committee on Human Rights, *General Comment* 7 (1982).

[7] Committee on Human Rights, *General Comment* 20 (1992).

[8] *Eduardo Bleier* v. *Uruguay*, Communication No. R.7/30 24 March 1980, U.N. Doc. Supplement No. 40 (A/37/40) at 130 (1981); *Maria del Carmen Almeida de Quinteros* v. *Uruguay*, Communication No. 107/1981 (15 October 1982), U.N. Doc. CCPR/C/OP/2 at 11 (1990); K. Baboeram-Adhin, and J. Kamperveen et al. v. Suriname, Communication Nos. 146/1983 and 148-54/1983, U.N. Doc. CCPR/C/21/D/146/1983 (1984), U.N. Doc. CCPR/C/OP/2 AT 5 (1990).

[9] (1988), Inter-Am. Ct. H.R. (Ser. C) No. 4, *Annual Report of the Inter-American Court of human Rights: 1988*, OEA/Ser.L/V/III.19/Doc.13 (1988) 35 [hereinafter *Velásquez Rodríguez*].

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. It also established that a government is responsible for the acts of its predecessors.

2. THE RIGHT TO RECOURSE

Of particular relevance is the *American Convention*, where it is stated, in Article 25 about the right to judicial protection, that:

> 1. Everyone has the right to a simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate one's fundamental rights recognized by the *Constitution* or laws of the state concerned or by this *Convention*, even though such violation may have been committed by persons acting in the course of their official duties.

This right was interpreted by the Inter-American Commission on Human Rights (ICHR) as part of the obligation to investigate and prosecute. Based on this, the ICHR repeatedly urged states to investigate the facts and punish the individuals responsible for acts of torture and disappearances.[10]

The ICHR has also stated its opinion that the right to recourse has been violated in recent cases of amnesties granted to armed forces and security forces (see below).

III. Customary international law as a source of the obligation to prosecute or extradite

A. Treaties as proof of custom

Treaties are also proof of custom. In this regard, treaties can create obligations even for states that have not ratified them, a principle that has been accepted by the International Court of Justice at The Hague.[11]

The most evident conventional obligation, which has become a principle of customary international law, is the obligation to "prosecute or extradite" included in treaties that criminalize human rights violations such as torture or disappearances. This is so because such conventional norms codify principles well recognized in the doctrine since a long time.[12]

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[10] (1982) Inter-Am.Comm.H.R., No. 7821, disappearance; (1983) Inter-Am.Comm. H.R., No. 6586, torture and arbitrary detention.

[11] See *Velásquez Rodríguez, supra* note 9. See *Nottebohm* Case (second phase), Judgment of April 6th, 1955, I.C.J. Reports 1955 at 24. In this respect, see also the Statute of the Ad Hoc Tribunal for the Former Yugoslavia.

[12] In 1758 Emmerich de Vattel recognized the duty to extradite persons accused of serious crimes.

The list of treaties that contain the rule "prosecute or extradite" is extensive and includes international humanitarian law treaties and treaties against genocide, apartheid, enslavement, the prostitution of others, piracy, the hijacking of aircraft, drug trafficking and terrorism.[13]

The existence of this obligation as part of customary international law relativizes the importance of the discussion on the date of the entry into force of human rights conventions.

B. Diplomatic practice as proof of custom

In statements made before international organs, representatives of many States invariably reaffirm their respect for current international norms and make a commitment to investigate and punish violations of them.[14]

C. The "law of the United Nations" as proof of custom

Both the treaty-based bodies and those created by the Commission on Human Rights, especially the thematic bodies and the special rapporteurs, have systematically urged States to enforce the rule of "prosecute or extradite." What has always been considered essential in such cases is the fact that investigation and prosecution serve as a deterrent against future violations.

Consequently, in 1991, when the Working Group Forced Disappearance of person of the UN Commission on Human Rights presented a report on its work over the previous ten years, it identified impunity as the principal factor contributing to enforced disappearances.

In 1992, the same organ recommended a number of measures intended to combat impunity, such as ensuring the publicity of any investigation, which should include the publication of the identity of both the victims and those responsible for planning and implementing a policy of forced disappearance of persons. According to the Group, decrees and laws that provide immunity for the perpetrators of forced disappearance of persons should not be enacted and, where they have been, should be abolished.[15]

The *Principles on Summary Executions*, adopted in 1989, reaffirm the obligation to prosecute or extradite, and establishes the rules that must be followed in any properly conducted investigation. Specifically, they prohibit any *blanket immunity from prosecution,* such as pardons or similar measures that benefit defendants.

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[13] The list, which runs to several pages, can be consulted in M.C. Bassiouni, *Crimes against humanity in international law and practice* (Boston: Martinus-Nijhoff, 1992).

[14] In this regard, see the statements made at the United Nations by the governments of Argentina, Uruguay, Chile and El Salvador, and others.

[15] UN Doc. E/CN.4/1993/25 (7 January 1993).

In 1985, the UN General Assembly unanimously adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which reaffirms the same principles.

The *Declaration on Forced Disappearance of Persons* of 1992 specifically calls for a set of rules to be established to prevent and punish enforced disappearances. The *Declaration* contains precise and detailed rules on the investigation, prosecution, trial and punishment of the individuals responsible, and on compensation for the victims of enforced disappearances.[16]

A key document

However, the document that undoubtedly is of fundamental importance in this regard is the UN project of a *Set of Principles on Impunity*, which French expert Louis Joinet was asked to draw up.[17]

According to this document:

> "Impunity" means the impossibility, *de jure* or de facto, of bringing the perpetrators of human rights violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry with a view to their inculpation, detention, indictment and, if found guilty, conviction, including their obligation of compensation to their victims for the damages caused.

The chapter of this project on the "right to know" sets forth and develops the principles related to an inalienable right to the truth, to the duty to remember, to the victim's right to know and to guarantees to give effect to the right to know.

The chapter on the right to justice establishes a series of principles, including the following:

> Principle 19. Safeguards against the use of reconciliation or forgiveness to further impunity.
>
> There can be no just and lasting reconciliation without an effective response to the need for justice; an important element in reconciliation is without any doubt forgiveness, but it implies as such, a private act which implies that the victim knows the perpetrator of the violations and that the latter has been able to show repentance.
>
> Principle 20. Duties of states with regard to the administration of justice.
>
> Impunity is a failure of States to meet their obligations to investigate violations, take appropriate measures in respect of the perpetrators, particularly in the area of justice, to ensure that they are prosecuted, tried and duly punished, to provide the victims with effective remedies and

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[16] See, in particular, articles 4, 9, 13, 14, 16, 17 and 18.

[17] See the Set of principles for the protection and promotion of human rights through action to struggle against impunity, in UN Doc. E/CN.4/Sub.2/1997/20 (26 June 1997).

> reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations.
>
> Although the decision to prosecute is primarily within the competence of the State, supplementary procedural rules should be set forth to enable any victim to institute proceedings on his or her own behalf where the authorities fail to do so, or to become an associated party. This option shall be extended to non-governmental organizations able to show proof of long-standing activities for the protection of the victims concerned.

It is worth to recall here the conclusions of the World Conference on Human Rights regarding the obligation to abrogate legislation leading to impunity (see above). These conclusions were adopted unanimously, and were not the object of discussion and negotiation, as in the case of numerous other points of the *Vienna Declaration and Programme of Action.*

D. Crimes against humanity and customary international law

Since the end of World War II, systematic or massive violations of fundamental human rights have been gradually assimilated into customary international law as crimes against humanity. Evidence of this is provided by the *Draft Code of Crimes Against the Peace and Security of Mankind,* as well as by many other documents.

The principles of international co-operation with respect to the identification, detention, extradition and punishment of individuals guilty of war crimes or crimes against humanity[18] clearly establish that such offences, *wherever and on whatever date they may have been committed, shall be the object of an investigation and the persons against whom proof of guilt exists shall be sought out, arrested, tried and, if found guilty, punished.*

Also the *Statute of the International Criminal Court,* has been finally adopted by a Diplomatic Conference, held in Rome, in June 1998 as we said previously.

This initiative, together with the *ad hoc* tribunals for the former Yugoslavia and for Rwanda, has breathed new life into the efforts to combat impunity, and suggests that there is growing consensus within the international community regarding the responsibility for crimes against humanity and gross human rights violations.

IV. Amnesty and the duty to prosecute or extradite

Can the State elude this duty by granting amnesty?

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[18] GA Res. 3074 (XXVIII) (3 December 1973).

The first distinction that should be made is between amnesties for political crimes for opponents, and amnesties that pardon the conduct of the agents of the State in violating human rights. In the latter case, amnesty is equivalent to eluding the obligation to investigate and prosecute. "Self-amnesty" violates the general principle of law which states that it is impossible for a person to be his own judge.[19]

Self-amnesty was not admitted in the trials of Nazi agents held after the Second World War.[20]

Furthermore, when amnesties are granted via illegitimate means, for example through a decree of a *de facto* government or a law approved under pressure, they can be challenged on the basis of the irregular way in which they were promulgated, and repealed.[21]

There is a growing tendency in international law of human rights to explicitly condemn amnesties granted for a number of particularly serious crimes, even when they are granted by a subsequent government.

The UN special rapporteur on the question of amnesty considered that amnesty could not be granted for crimes against humanity. In such cases, the "right to forgetfulness" would be equivalent to "a right to impunity".[22] His *Report* cites examples of amnesty laws which had excluded from their scope very grave crimes: in different European countries, the exclusion of former nazis from amnesty laws, or the 1992 amnesty law in Colombia, which excludes the crimes of torture, forced disappearance of persons and summary executions, or even the provision contained in the *Constitution* of Portugal which excludes officers of the security forces that have been accused of ordering the use of torture from benefiting from pardons of any kind.

As we have said, amnesties for such acts are prohibited by the United Nations *Declaration on Forced Disappearances of Persons*, the *Declaration on Summary Executions* and the *Basic Principles of Justice for Victims of Crime and Abuse of Power*.

The condemnation of amnesties formulated by the Human Rights Committee in its general comment No. 20 has been mentioned above. But the Committee also addressed the issue of amnesty in dealing with specific situations. Upon examining the third periodic *Report* of Uruguay regarding the *Covenant*, the Committee expressed concern at that country's Law of Expiry of the Punitive Powers of the State. The Committee recommended that the said law be corrected to ensure that the victims of past human rights violations would have access to effective remedies.

The Committee expressed deep concern at the fact that in a number of cases the adoption of the law effectively ruled out the possibility of investigating past humans rights abuses and thereby prevented the State from discharging its

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[19] See Frontier between Iraq and Turkey case, P.C.I.J. (Nov. 21, 1925).

[20] Article II (5) of Law No. 10 of the Allied Control Council.

[21] See L. Joinet and H. Guissé, Study on the Question of the Impunity of Perpetrators of Violations of Human Rights, UN Doc. E/CN.4/Sub.2/1993/6 (19 July 1993).

[22] Study on amnesty laws. UN Doc. E/CN.4/Sub.2/1985/16 (1985).

responsibility to provide effective remedies to the victims of such abuses. The Committee was particularly concerned that, in adopting the law, the State had contributed to an atmosphere of impunity which could undermine the democratic order and give rise to further grave human rights violations. This was particularly distressing given the serious nature of the human rights abuses in question.[23]

V. Cases considered by the ICHR

The ICHR has established that several recent amnesties violate the *American Convention*.[24] To understand this, it is necessary to compare the judgments of the Inter-American Court of Human Rights (IACHR) in the cases of *Velásquez Rodríguez* and *Godinez Cruz*, with the decisions of the Inter-American Commission on Human Rights (ICHR) in 1992 regarding amnesties in El Salvador, Uruguay and Argentina.[25]

In the three latter cases, the ICHR established that the *Convention* defines an obligation under international law to investigate and prosecute, which cannot be abrogated by an amnesty. The ICHR based its decision on the right to effective legal recourse (article 25 of the *Convention*), consistent with the right to life (article 4) and the right to human treatment (article 5), the State's obligation to respect rights (article 1.1), and the right to a fair trial (article 8).

The case involving El Salvador concerned the massacre of more than seventy peasants in 1983 near the village of Las Hojas, in the Department of Sonsonate. Given the overwhelming evidence gathered, thirteen individuals, including several officers of the armed forces, were arrested and prosecuted. With the trial pending, the National Assembly enacted an amnesty law, the basis the court used later to close the case.

In the opinion of the ICHR, both the *Constitution* of El Salvador and the *Vienna Convention on the Law of Treaties* establish that domestic legislation cannot nullify conventional obligations. As a result, the ICHR considered that the government had violated those obligations.

In the complaint against Uruguay, the petitioners contended that the "Expiry Law" denied them the right to resort to the courts and to a thorough and impartial investigation of past human rights violations. The Commission rejected the argument that article 8 (right to a fair trial) applies only to the accused in a criminal proceeding and that article 25 (right to judicial protection) only grants the right to damages.

Nor did the ICHR accept the government's argument related to reconciliation and to the democratic way in which the law was adopted. The legality of a norm vis-à-vis domestic law does not alter the State's obligations under international law.

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[23] UN Doc. CCPR/C/79/Add.19 (5 May 1993).

[24] OR OEA/Ser.L/V/II.23/Doc.211, rev. 6 (1949).

[25] ICHR, Report 26/92 (El Salvador) (24 September 1992), Report 29/92 (Uruguay) (2 October 1992), and Report 24/92 (Argentina) (2 October 1992).

For their part, the Argentine petitioners alleged that the law of due obedience violated the *Convention*. The ICHR found that the Argentine government had violated articles 8 and 25 of the *Convention*, considered jointly with article 1.1.

The principal objection of the Argentine government was that the request was inadmissible *ratione temporis* because the torture and disappearances took place before the *American Convention* entered into force in Argentina in 1984.

The ICHR rejected this argument, considering that the denial of the rights of the petitioners to a fair trial and to judicial protection referred to acts that occurred after 1984. The underlying act was the promulgation of the amnesty laws, more than the torture and disappearances. This is the reason why we said previously that the ICHR interpreted this question differently from the Committee against Torture (see above).

However, it should be noted that even authors who do not concur with the ICHR's interpretation have acknowledged that the same conclusion would be reached by applying the norms of the *OAS Charter* and the *Declaration of the Rights and Duties of Man*, adopted by the regional organization in 1948. In this respect, it is important to reiterate the importance of non-conventional sources of international law.[26]

VI. Harmonizing domestic law with international law

Argentina has been slow in discharging its conventional obligation to harmonize its domestic legislation with international law. For example, it never fulfilled its obligation, under article 5 of the *Convention on Genocide*, to establish effective criminal sanctions to punish people found guilty of genocide.

Comparative law provides many examples of the fulfillment of this obligation. The *French Criminal Code* incorporates crimes against humanity as the first heading of Book II, related to crimes and offences against persons.[27]

This legal text criminalizes genocide and other crimes against humanity: deportation, reduction to slavery, and the massive and systematic practice of summary executions, kidnapping of persons followed by their disappearance, torture or inhuman treatment, committed for political, philosophical, racial or religious reasons and organized as part of a concerted plan against a group of the civilian population.

The perpetrator of or the accomplice to a crime covered by this section cannot use as an excuse the fact that he or she was enforcing the law or regulations, or obeying the orders of superiors. However, such circumstances can be taken into account in mitigation of punishment.

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[26] See Article 38 of the Statute of the International Court of Justice at The Hague and the large amount of jurisprudence and doctrine on the subject.

[27] Law No. 92684 of 22 July 1992. See articles 211 *et seq.* of the current version of the *French Penal Code*.

Another example of the incorporation of the crimes established in international law into domestic law is provided by the legislation of a country located far from France: the *Penal Code* of Ethiopia of 1957.[28] Article 281 criminalizes genocide according to the broad definition of the United Nations *Declaration* which included political groups, unlike the international convention subsequently adopted. Articles 282 and subsequent dispositions incorporate serious breaches of the *Geneva Conventions* and violations of the laws and customs of war, without making any distinction between internal and international armed conflicts. This is an example of groundbreaking legislation from a country which is part of what, until recently, was known as the Third World.

It is clear from everything that has been said here, albeit briefly, that the first step that the Argentinian State should take to harmonize domestic law with international law, is to nullify the so called laws of "*punto final*" and "due obedience."

[28] See *Penal Code* of 1957. Addis Ababa. Offences against the law of nations. Art. 281 *et seq.*