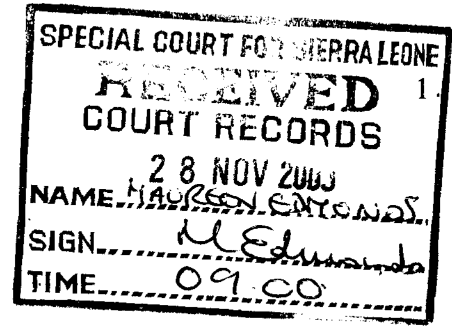
051

SCSL-2003-01-I
(2839-2865)



November 16, 2003

The President,
Special Court for Sierra Leone,
Freetown,
Sierra Leone.

APPLICATION TO APPEAR AS AN AMICUS CURIAE IN THE PROSECUTOR VS. CHARLES GHANKAY TAYLOR

I, FEMI FALANA, Legal Practitioner and Secretary General of the African Bar Association hereby apply to appear as an ***Amicus Curiae*** in the case of ***The Prosecutor Vs. Charles Ghankay Taylor*** pending before the Special Court for Sierra Leone.

This application is brought pursuant to Article 5 of the Practice Direction of the Special Court which empowers the Court President to permit amici curiae to make oral or written submission in the course of the proceedings. Under the said Article the Briefs of all the parties and other interested persons are required to be submitted before the hearing of any case.

In considering this application brought out of the time permitted by the Practice Direction I wish to draw the attention of the Court President to the fact that I only knew on October 30 2003 of the hearing scheduled for 1-7 November, 2003. My frantic efforts to confirm from the Court Registrar the hearing dates and discuss the possibility of my appearance before the Special Court did not succeed I was however able to speak to the Court Registrar after the hearing in respect of Mr. Charles Taylor's Preliminary Objection had been concluded.

In the circumstance, the Court Registrar informed me that he would make my interest to the President of the Court I have since submitted my ***Amicus Brief*** on the issues formulated by the Court.

As the Preliminary Objection raises very serious legal issues I urge the President to admit my amicus brief along with the submissions already made in the course of the proceedings.

In order to ensure that this application does not occasion injustice or prejudice to any of the Parties the Court President is obliged to welcome reactions to the brief which was submitted after the hearing of the Preliminary Objection.

It is submitted that as part of the sacred owed to the Court a Counsel may assist the Court, either upon invitation or on his own volition by addressing the Court on vital points of law which may be recondite. See ***Horton Vs. Ruesby*** (1980) 90 E.R 326; ***R. Vs. Peters*** (1758) 1 Burr 568. ***Awojugbade Light Ind. Ltd. Vs. Chinukwe*** (1995) 4 NWLR (PT 390) 379.

Since the Federal Government of Nigeria granted political asylum to Charles Taylor I have, on behalf of the African Bar Association been campaigning that the suspect be surrendered to the Special Court to face his trial. To that extent I have a direct interest in the case of Mr. Charles Taylor. In ***Hoffman Vs. South African Airways*** (2001) 38 WRN 147 the role of an ***amicus curiae*** was explained thus:

> ***"An amicus curiae assists the Court to furnish information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join, unless requested by the Court to urge a particular position."***

In the light of the foregoing, I urge the President of the Court to grant this application in view of the public interest which Mr. Charles Taylor's case has generated throughout the African continent. It will also go a long way to enhance the credibility of the Court.

FEMI FALANA

(Secretary General, African Bar Association)

SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)

UN Intermission 178 7000 or 178 (+Ext)

FAX: +232 22 297001 or UN Intermission: 178 7001

IN THE APPEALS CHAMBER

Before: Justice Robertson, Presiding
Justice Ayoola
Justice King
Justice Winter

Registrar: Mr Robin Vincent

Date: 20th day of November 2003

The Prosecutor Against (PROSECUTION)

Charles Ghankay Taylor (RESPONDENT)

African Bar Association
(APPLICANT)

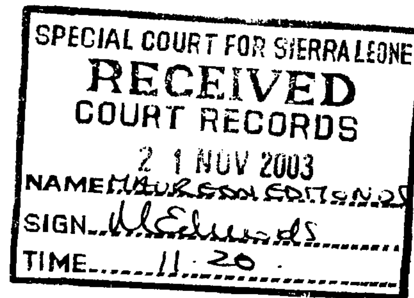
Case No. SCSL-2003-01-AR72(E)

DECISION ON APPLICATION BY THE AFRICAN BAR ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Office of the Prosecutor:
Luc Coté, Chief of Prosecutions
Desmond de Silva, Deputy Prosecutor

Defence Counsel:
Terence Michael Terry

Applicant:
Femi Falana



THE APPEALS CHAMBER OF THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court")

BEING SEISED OF an Application by the African Bar Association to appear as an *amicus curiae* in the Prosecutor vs. Charles Ghankay Taylor filed on 18 November 2003 relating to the Preliminary Motion "made under protest and without waiving of immunity accorded to a Head of State requesting that the Trial Chamber quash the indictment and declare null and void the warrant of arrest and order of transfer and detention" filed on 23 July 2003 and in relation to which oral arguments were heard on 31 October and 1 November 2003;

CONSIDERING the submissions of the Applicant, in particular as to why the application was made out of the time permitted by Article 5 of the Practice Direction on filing documents under Rule 72 of the Rules of Procedure and Evidence before the Appeals Chamber of the Special Court for Sierra Leone dated 22 September 2003;

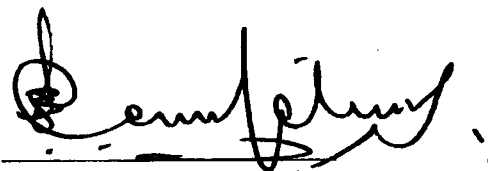
CONSIDERING the principles enunciated in the Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae Brief in the case of *Prosecutor v Morris Kallon* of 4 November 2003;

HEREBY DECIDES to grant leave to the Applicant to appear in writing as an *amicus curiae*, and

ORDERS that the written brief submitted by the Applicant to the Special Court in anticipation of this Decision be filed and distributed to the parties.

Done at Freetown

This twentieth day of November 2003



Justice Robertson, Presiding

Seal of the Special Court

2843

IN THE SPECIAL COURT FOR SIERRA LEONE HOLDEN AT FREETOWN

CASE NO: SCSL 2003 –01-I

THE PROSECUTOR

VS.

CHARLES GHANKAY TAYLOR

AMICUS BRIEF

FEMI FALANA ESQ.
Secretary General
African Bar Association
25, Adekeunle Fajuyi Way,
G.R.A Ikeja,
Lagos

AMICUS BRIEF ON PRELIMINARY OBJECTIONS FILED BY MR. CHARLES TAYLOR AND OTHER SUSPECTS

1.00 INTRODUCTION

1.01 The African Bar Association is a body of national bar associations and law societies in Africa. In line with its commitment to promote fundamental rights, rule of law and democracy in Africa it has decided to submit a written brief in respect of the Preliminary Objections filed by Mr. Charles Ghankay Taylor and some of the suspects who have been indicted by the Special Court for Sierra Leone for grave violations of international humanitarian law.

1.02 In this ***amicus*** brief filed pursuant to Article 5 of the Practice Direction of the Special Court for Sierra Leone we intend to demonstrate the incompatibility of amnesties and immunity for international crimes including war crimes, genocide and crimes against humanity and that those responsible for such crimes are prosecuted irrespective of their social or political standing at the material time. We shall also address the other issues which have been well formulated by the Court.

2.00 ISSUES FOR DETERMINATION

2.01 Having regard to the Preliminary Objections filed by Mr. Taylor and other accused persons the Appeal Chamber has formulated the following issues for determination:

i. Whether the Special Court has been lawfully established.

ii. Whether the Special Court's voluntary funding by UN member states deprives it of the necessary guarantees of independence and impartiality.

iii. Whether the indictment of Charles Taylor, at the time he was President of Liberia or subsequently, was invalid because he was/is immune from prosecution. Whether in any event the Special Court writ can run outside Sierra Leone.

iv. *Whether the indictees can benefit from any Amnesty or Government undertaking not to prosecute allegedly given them before or in the Lome Agreement.*

v. *Whether there is a crime of recruiting child soldiers in customary international law.*

2.02 **ISSUE ONE: WHETHER THE SPECIAL COURT HAS BEEN LAWFULLY ESTABLISHED**

2.03 By virtue of Article 24(1) of the Charter of the United Nations the Security Council has been conferred with the "primary responsibility for the maintenance of international peace security". In order to discharge such onerous responsibility the Security Council is empowered under Chapter VII of the Charter to establish the International Tribunal.

2.04 On August 14, 2000 the United Nations Security Council adopted Resolution 1315 requesting the Secretary General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violation of international humanitarian law and crimes under Sierra Leonean law. Accordingly, the Special Court for Sierra Leone was established to try suspects indicted for war crimes, crimes against humanity and serious violations of international humanitarian law that took place in Sierra Leone between 1996 and 2000

2.05 It is our submission that the Special Court is neither competent to determine the validity of the acts of organs of the United Nations nor empowered to sit in review of a given resolution of the Security Council. See the decisions of the International Court of Justice in (1) ***Certain Expenses of the United Nations, 1962 I.C.J. 1541, 168 (Advisory Opinion of 20 July); Legal Consequences for states of the Continued Presence of South Africa in Namibia (South West Africa). Notwithstanding, security council, Resolution 276,1971 I.C.J. 16, 45 (Advisory Opinion) and Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya Vs. U.S) 1992 I.C.J. 114, 176 (Provisional Measures Order 14 April) (the Lockerbie decision").***

2.06 In the case of ***Prosecutor Vs. Dusko Tadic*** A/K/A Dule decided on August 10, 1995 the establishment of the International Tribunal was also challenged. In dismissing the objection the Court held ***inter alia:***

"The making of a judgment as to whether there was such an emergency in the former Yugoslavia as would justify the setting up of the International Tribunal under Chapter VII is eminent one for the Security Council and only for it, it is certainly not a justiciable issue but one involving considerations of high policy nature. As to whether the particular measure of establishing the International Tribunal is, in fact, likely to be conducive to the restoration of peace and security is, again, pre-eminently a matter for the Security Council and for it alone and no judicial body, certainly not this Trial Chamber, can or should review the step.

The concept of non-justiciability, in a national context, has been described as follows:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department, or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The validity of the decision of the Security Council to establish the International Tribunal rests on its finding that the events in the former Yugoslavia constituted a threat to the peace. This finding is necessarily fact-based and raises political, non-justiciable issues. As noted by Judge Weeramantry, such a decision "entails a factual and political judgment and not a legal one" (The Lockerbie decision at 176). A commentator has

agreed, saying that " a threat to international peace and security is not a fixed standard which can be easily and automatically applied" (David L. Johnson, Note, Sanctions and South Africa, 19 Harv. Int. I L.J 887, 901 (1978)). The factual and political nature of an Article 39 determination by the Security Council makes it inherent inappropriate for any review by this Trial Chamber."

2.07 In the light of the forgoing we submit that the Special Court for Sierra Leone lacks the competence or power to determine the validity of its existence having been established by the Security Council. It is also submitted that since the decision of the Security Council to establish the Special Court for Sierra is political and non-judicial it is inherently appropriate for any review of same by the Special Court. This leg of the preliminary objection ought to be dismissed ***in toto.***

3.00 **ISSUE TWO: WHETHER THE SPECIAL COURT'S VOLUNTARY FUNDING BY UNITED NATIONS MEMBER STATES DEPRIVES IT OF THE NECESSARY GUARANTEES OF INDEPENDENCE AND IMPARTIALITY.**

3.01 It has been contended that the voluntary funding of the Special Court by members of the United Nations has deprived it of the necessary guarantees of independence and impartiality. Our response to this contention is that it is not the funding of a court that determines its independence and impartiality but its establishment, constitution, its members and how they function.

3.02 It is submitted that the fact that municipal courts are funded by governments does not deprive them of independence and impartiality. In the ***Effect of Awards*** case the International Court of Justice held that the General Assembly of the United Nations could and had created "***an independent and truly judicial body***"(See Effect of Awards of Compensation made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 53 (Advisory Opinion of 13 July) ("Effect of Award").

3.03 In the instant case the Special Court has been established pursuant to a Resolution of the Security Council at the request of the legitimate Government of Sierra Leone. The members of the Court have not been appointed by the member States that have

contributed for the funding of the Court but by the United Nations through a process that is democratic and transparent. It can therefore not be right to impugn the integrity of the Court and its members.

3.04 Pursuant to the instrument establishing the Court it has drawn up Practice Directions that are meant to promote fair trial and due process in line with the rights of suspects recognized by the Universal Declaration of Human Rights and other relevant instruments. In order to further guarantee its independence and impartiality the Court has a legal personality necessary for the exercise of its functions and fulfillment of its purposes. (see Article 4(1) of the Statute of Rome.). The Court, its members and staff are also accorded immunity like other organs and officials of the United Nations.

3.05 In the Preliminary Objection under consideration the objectors have not challenged the constitution or appointment of members of the Court. Neither have they accused the Court of bias or likelihood of bias. We submit that since the Court has been properly constituted so as to ensure its independence and impartiality the funding of the Court by voluntary member states of the United Nations cannot ***ipso facto*** compromise its integrity. To that extent this leg of the Preliminary Objection is also misconceived and ought to be dismissed.

4.00 **ISSUE THREE: WHETHER THE INDICTMENT OF CHARLES TAYLOR, AT THE TIME HE WAS PRESIDENT OF LIBERIA OR SUBSEQUENTLY, WAS INVALID BECAUSE HE WAS/IS IMMUNE FROM PROSECUTION. WHETHER IN ANY EVENT THE SPECIAL COURT WRIT CAN RUN OUTSIDE SIERRA LEONE.**

4.01 It is the contention of Mr. Charles Taylor that as the President of Liberia at the time he was alleged to have committed the offences of crimes against humanity, war crimes and violations of international humanitarian law in Sierra Leone he was immune from prosecution for any of his actions. As a former Head of Government Mr. Taylor maintains that he is immune for life from any form of prosecution for any of his actions.

4.02 Under customary international law a Head of State or government could not be sued in a foreign court without his consent. The historical basis of the principle of ***par imparem non habet imperium*** was the equality of sovereigns which made it impossible for them to exercise power over one another. It has been said that the privilege is based "on reciprocity and on comity and ensures that States and Heads of States are not impeded in the exercise of their functions". (See Professor U.O Umozurike: INTERNATIONAL LAW, Spectrum Law Publishing, Ibadan, 1993 P. 92.

4.03 In other words, a Head of State cannot be sued or charged in a foreign court as a sovereign state is immune from being sued extra-territorially. Accordingly, a former Head of State enjoys continuing immunity with respect to his actions while in office. But such absolute immunity has since been whittled down to cover only legitimate acts and functions of the office of a Head of Government. Thus, in the case of the ***United States of America Vs. Noriega*** (1990) 746 F. Supp. 1506 the Defendant, the President of Panama was deposed, abducted and charged for drug related offences in an American Court. The Court dismissed his plea of continuing immunity as a former Head of Government on the ground that Noriega's drug trafficking could not be said to be official acts on behalf of the Panamanian State.

4.04 In ***Regina Vs. Bartle & the Commissioner of Police for the Metropolid Ex parte Pinochet, Lords of Appeal*** 25:11:98 Augusto Duarte Pinochet was accused of murder, torture and detention of many citizens of Chile while he was the Head of State. Following the warrant of arrest issued by a Magistrate in Spain, Senator Pinochet was arrested in Britain while he was there on medical grounds. At about the same time other courts in Belgium, France and Switzerland sought the extradition of General Pinochet for alleged extra judicial executions, enforced disappearances or torture of some nations of these European countries.

4.05 Counsel for General Pinochet had submitted that even if the procedural bar of statutory immunity could not be established the House of Lords ought to uphold the challenge to the validity of the warrant on the ground of the act of state doctrine. In dismissing the plea the House of Lords held that the former Chilean dictator was not entitled to statutory immunity in respect of charges of torture and crimes against

humanity committed during his rule. In the same vain, Mr. Milosevic, the former President of Yugoslavia is currently undergoing trial at the Hague for crimes against humanity committed during his regime.

4.06 The World Conference of Human Rights in 1993 called upon States "to 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.

4.07 Article 17(2) of the Statute of Rome provides that in deciding whether a State is unwilling to exercise jurisdiction, the Court should determine whether the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility form crimes within the jurisdiction of the Court".

4.08 By virtue of Article 59 of the Statute of Rome States have an obligation to assist the Court in the investigation, arrest and prosecution of suspects indicted by the Court for crimes against humanity and war crimes. Accordingly, each state is required to surrender any indicted suspect that may be found in its territory for trial by the Court. To that extent the writ issued by the Court can be validly served outside the border of Sierra Leone.

4.09 It is therefore our submission that notwithstanding his status as a former Head of State of the Republic of Liberia, Mr. Charles Taylor enjoys no immunity for war crimes, crimes against humanity, torture, genocide and extra judicial executions alleged to have been committed in Sierra Leone by him and his cohorts. Regardless of his so called political asylum in Nigeria Mr. Taylor ought to be put on trial on account of the 17-count charge pending before this Court so as to promote peace in Sierra Leone and in the West African sub-region.

5.00 **ISSUE FOUR: WHETHER THE INDICTEES CAN BENEFIT FROM ANY AMNESTY OR GOVERNMENT UNDERTAKING NOT TO PROSECUTE ALLEGEDLY GIVEN THEM BEFORE OR IN THE LOME AGREEMENT.**

5.01 **The obligation to bring to justice and punish**

5.01.1 The obligation to bring to justice and punish the perpetrators of gross violations of human rights, is supported in law in Article 2 of the International Covenant on Civil and Political Rights as well as in Article 1 of the African Charter on Human and Peoples' Rights. Where torture is concerned, it is upheld in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 4, 5 and 7) and the Inter-American Convention to Prevent and Punish Torture (Articles 1 and 6).

5.01.2 The Inter-American Court of Human Rights has pointed out that, in the light of its obligations under the American Convention on Human Rights:

> "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." ***(Inter-American Court of Human Rights, Velázquez Rodríguez Case, Judgment of 29 July 1988)*** **in Series C: Decisions and Judgments N° 4, paragraph 174, and *Godínez Cruz Case, Judgment of 20 January 1989*, in Series C: Decisions and Judgments N° 5, paragraph 184.**

5.01.3 In several of its judgements, the Inter-American Court of Human Rights has pointed out that the States parties to the American Convention on Human Rights have an international obligation to bring to justice and punish those responsible for human rights violations(26). This obligation is directly related to the right of every person to be heard by a competent, independent and impartial tribunal for the determination of his rights, as well as to the right to an effective remedy, both of which are enshrined in the African Charter on Human and Peoples' Rights. As pointed out by the Inter-American Court of Human Rights:

"The American Convention guarantees everyone the right to recourse to a competent court for the determination of his rights and States have a duty to prevent human rights violations, investigate them and identify and punish those responsible for carrying them out or covering them up. [...] Article 8.1 of the American Convention, which is closely related to Article 25 in conjunction with Article 1(1) of the same Convention, obliges the State to guarantee every individual access to simple and prompt recourse, so that, *inter alia,* those responsible for human rights violations may be prosecuted."***(Inter-American Court of Human Rights, Nicholas Blake Case, Reparation Judgment of 22 January 1999, Series C: Decisions and Judgments Nº 48, paragraphs 61 and 63. [Spanish original, free translation)***

5.01.4 Failure to meet this obligation amounts to a denial of justice and, therefore, to impunity, meaning "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of [the] rights" ***(Inter-American Court of Human Rights, Case of Paniagua Morales et al., Judgment of 8 March 1998, Series C: Decisions and Judgments Nº 37, paragraph 173.***

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

"Even though the aggrieved party may pardon the author of the violation of his human rights, the State is nonetheless obliged to sanction said author... The State's obligation to investigate the facts and punish those responsible does not erase the consequences of the unlawful act in the affected person. Instead, the purpose of that obligation is that every State party ensure, within its legal system, the rights and freedoms recognized in the Convention." ***(Inter-American Court of Human Rights, Garrido and Baigorria Case, Reparations Judgment of 27 August 1998, paragraph 72, in the Annual Report of the Inter-American Court of Human Rights - 1998, OEA/Ser.L/V/II/43. Doc. 11, p.317.)***

5.01.6 The Inter-American Commission on Human Rights has equally pointed out that this obligation to bring to justice and punish the perpetrators of human rights violations cannot be delegated or renounced. In its "Report on the Situation of Human Rights in Peru", the Inter-American Commission on Human Rights stated that:

> "The state is under the obligation of investigating and punishing the perpetrators [of human rights violations]... This international obligation of the state cannot be renounced".***(Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paragraph 230.)***

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

> "...the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified." (***Decision dated 13 November 1995, Communication N° 563/1993, Case of Nydia Erika Bautista (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8.6. See also the Decision dated 29 July 1997, Communication N° 612/1995, Case of José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.8.)***

5.01.8 There is undoubtedly an obligation to bring to justice those responsible for gross violations of human rights in a court of law and to punish them. It is laid down not only in the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights and other human rights treaties but also in other international instruments which are declaratory in nature.

5.01.9 It is an obligation which is not only treaty-based. This was recognized by the Committee against Torture when considering cases of torture committed before the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had entered into force. The Committee against Torture pointed out that the obligation to punish those responsible for acts of torture was already a requirement before the Convention took effect because "there existed a general rule of international law which should oblige all States to take effective measures [...] to punish acts of torture"(34). The Committee against Torture based its view on the "principles of the judgment of the Nuremberg International Tribunal" and the right not to be tortured contained in the Universal Declaration of Human Rights

5.01.10 It is through the action of the courts that the obligation to prosecute and punish the perpetrators of human rights violations is carried out. The courts must also guarantee victims of human rights violations and their relatives the rights to a fair trial and an effective remedy as well as ensure that judicial guarantees are accorded to those facing prosecution. While fulfilling this dual function, the courts must abide by the relevant provisions of the International Covenant on Civil and Political Rights (articles 2 and 14) and international humanitarian law). Within this legal framework, the responsibility for fulfilling the obligations to prosecute and punish and to guarantee the rights to a fair trial and an effective remedy fall on an independent and impartial tribunal. The Inter-American Court of Human Rights has pointed out that:

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

'According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.' ***Advisory Opinion OC-9/87, 6 October 1987, Judicial Guarantees in States of Emergency" (Arts. 27.2, 25 and 8, American Convention on Human Rights), Series A: Judgments and Opinions, Nº 9, paragraph 24.***

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

> "It is difficult to imagine a justice system which protects the rights of the victims while at the same time remaining indifferent and inactive with regard to the flagrant crimes committed by those who have violated such rights".***(United Nations document E/CN.4/Sub.2/1992/8, paragraph 5.5. [Spanish original, free translation)***

5.01.12 The question of State responsibility arises not only when, through the behaviour of its agents, the State infringes a right but also when it fails to take appropriate action to investigate the facts, prosecute and punish those responsible and provide compensation, or when it interferes with the work of the courts. Therefore, when a State is in breach of, or fails to exercise, its duty to guarantee, it becomes internationally responsible. This principle was established early on in international

law and one of the earliest existing precedents on the matter in jurisprudence is the decision delivered by Professor Max Huber on 1 May 1925 concerning British claims for damages caused to British subjects in the Spanish part of Morrocco. In his decision, Professor Max Huber recalled that, under international law:

> "State responsibility can arise [...] as a result of insufficient vigilance in preventing damaging acts as well as through insufficient diligence in criminally prosecuting the offenders. [...] It is generally recognized that repression of crime is not only a legal obligation incumbent on the competent authorities but also [...] an international duty incumbent on the State."' ***(Recueil de sentences arbitrales** [Reports of International Arbitral Awards], United Nations, Vol. II, pp. 645 and 646 [French original, free translation)*

5.01.13 By allowing impunity for human rights violations to continue, the State is in breach of its international obligations and is internationally responsible. The Inter-American Court of Human Rights has said the following on the subject:

> "If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.***(Inter-American Court of Human Rights, Velázquez Rodríguez Case, Judgment of 29 July 1988, Series C: Decisions and Judgments, N° 4, paragraph 176.)***

5.02 **The incompatibility of amnesties with the obligation to bring to justice and punish**

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

5.02.2 The incompatibility of amnesty laws with the obligation to investigate, bring to justice and punish those responsible for gross human rights violations was implicitly recognized by the World Conference on Human Rights, which was held in Vienna in June 1993 under the auspices of the United Nations. The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights contains the following clause:

> "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law." ***(World Conference on Human Rights - The Vienna Declaration and Programme of Action, June 1993, United Nations Document DPI/1394-39399-August 1993-20M, Section II, paragraph 60).***

5.02.3 The United Nations Human Rights Committee addressed the issue very early on when in 1978 an amnesty was decreed by the government of General Augusto Pinochet Ugarte.***(Decree Law N° 2191 of 18 April 1978).***

5.02.4 The Human Rights Committee questioned the validity of applying the measure to perpetrators of gross violations of human rights, especially disappearance.***(Report of the Human Rights Committee, United Nations document, Supplement N° 40(A/34/40), 1979, para. 81.)*** The Sub-Commission for the Prevention of Discrimination and the Protection of Minorities also addressed the issue. In 1981, it called on States to refrain from passing laws such as amnesties to prevent the investigation of forced disappearances.***(Resolution 15 (XXXIV) of 1981)***

5.02.5 The Human Rights Committee, in General Comment N° 20 on article 7 of the International Covenant on Civil and Political Rights, concluded that:

> "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible." ***General Comment No. 20 (44) on Article 7, 44th session of the Human Rights Committee (1992) in Official***

Documents of the General Assembly, Forty-Seventh Session, Supplement N° 40 (A/47/40), appendix VI.A.)

5.02.6 The Human Rights Committee has repeatedly reaffirmed this jurisprudence when examining amnesties passed by States parties to the International Covenant on Civil and Political Rights. In its "Concluding Observations" to Chile in 1999, the Human Rights Committee was of the view that:

> "The Amnesty Decree Law, under which persons who committed offences between 11 September 1973 and 10 March 1978 are granted amnesty, prevents the State party from complying with its obligations under article 2, paragraph 3, to ensure an effective remedy to anyone whose rights and freedoms under the Covenant have been violated.'***(United Nations document CCPR/C/79/Add.104, paragraph*** *7.*)

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

> 'The Amnesty Acts of November 1988 and January 1990 for New Caledonia are incompatible with the obligation of France to investigate alleged violations of human rights." ***(United Nations document CCPR/C/79/Add.80, paragraph 13.)***

5.02.8 It has stressed that these types of amnesty help to create a climate of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for human rights and the rule of law, both of which are in breach of State obligations under the International Covenant on Civil and Political Rights. In all the cases mentioned above, the Human Rights Committee considered that such amnesty laws were incompatible with the obligation on States parties to guarantee an effective remedy for victims of human rights violations, which is protected under article 2 of the International Covenant on Civil and Political Rights.

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

granting impunity to persons accused of serious human rights violations.(***Concluding Observations of the Human Rights Committee: Republic of Croatia*, 4 April 2001, United Nations document, CCPR/CO/71/HRV, paragraph 11.)**

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

> "It is unacceptable to use amnesty provisions, statutes of limitations or measures designed to remove criminal liability as a means of preventing the investigation and punishment of those responsible for gross violations of human rights such as torture, summary, extra-legal or arbitrary executions and disappearances, all of which are prohibited as breaches of non-derogable rights recognized under International Human Rights Law." ***(Inter-American Court of Human Rights, Judgment of 14 March 2001, Case of Barrios Altos (Chumbipuma Aguirre and others vs. Peru), paragraph 41. [Spanish original, free translation)***

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

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

5.02.12 The Inter-American Commission on Human Rights then concluded as follows:

> "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."***(Inter-American Commission on Human Rights, Report NE 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 50.)***

5.02.13 In general, the Inter-American Commission on Human Rights has taken the view that "such laws remove the most effective measure for enforcing human rights, i.e., the prosecution and punishment of the violators."***(Inter-American Commission on Human Rights, Report N° 136/99, Case 10,488, IgnacioEllacuría S.J. and others (El Salvador), 22 December 1999, paragraph 200)*** The Inter-American Commission on Human Rights has repeatedly taken the position that the amnesty laws from Chile***(Inter-American Commission on Human Rights, Report NE 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 105; Report NE 34/96,)*** El Salvador***(Inter-American Commission on Human Rights, Report N° 136/99)*** Peru(60) ***(Inter-American Commission on Human Rights, Report NE 1/96,)*** and Uruguay ***(Inter-American Commission on Human Rights, Report NE 29/92,)*** are incompatible with the obligations of those States under the American Declaration on the Rights and Duties of Man (Article XVIII, Right to Justice) and the American Convention on Human Rights (articles 1(1), 2, 8 and 25).

5.03. **Amnesties and internal armed conflict**

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

"The *travaux préparatoires* of 6 (5) indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities. It does not aim at an amnesty for those having violated international humanitarian law."***(Letter dated 1995 from the International Committee of the Red Cross to the Prosecutor of the Criminal Court for the Former Yugoslavia. This interpretation was repeated in another communication from the International Committee of the Red Cross dated 15 April 1997.)***

5.03.2 Both the Inter-American Commission of Human Rights***(Inter-American Commission on Human Rights, Report N° 1/99, Case 10,480, Lucio Parada Cea and others (El Salvador), 27 January 1999, paragraph 115.)*** and the United Nations Human Rights Committee have used the same interpretation. For example, in the case of the amnesty granted to civilian and military personnel for human rights violations committed against civilians during the civil war in Lebanon, the Human Rights Committee stated the view that:

"Such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy." ***(United Nations document CCPR/C/79/Add.78, paragraph 12)***

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

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

5.03.4 In its "Concluding Observations" dated November 2000, the Human Rights Committee reminded the Argentinian State that:

"Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice."***(Concluding Observations of the Human Rights Committee: Argentina, 3 November 2000, United Nations document CCPR/CO/70/ARG, paragraph 9.)***

5.03.5 It is a universally recognized general principle of international law that States must implement treaties and the obligations arising from them in good faith. A corollary of this general principle of international law is that the authorities of a particular country cannot escape their international commitments by arguing that domestic law prevents them from doing so. They cannot cite provisions of their Constitution, laws or regulations in order not to carry out their international obligations or to change the way in which they do so. This is a general principle of the law of nations which is recognized in international jurisprudence***(Permanent Court of International Justice, Advisory Opinion of 4 February 1932,)*** International jurisprudence has also repeatedly stated that, in keeping this principle, judgments rendered by domestic courts cannot be put forward as a justification for not abiding by international obligations.***(Permanent Court of International Justice, Sentence NE 7, 25 May 1923,)*** The *pacta sunt servanda* principle and its corollary have been refined in articles 26 and 27 of the Vienna Convention on Treaty Rights. Argentina signed the Convention on 23 May 1969 and ratified it on 5 December 1972, without expressing any reservations to articles 26 and 27.

5.03.6 International Human Rights Law is no stranger to the *pacta sunt servanda* principle and its corollary as has been reiterated by the Inter-American Court of Human Rights. In its Advisory Opinion on "International Responsibility for the Promulgation and Enforcement of Laws in violation of the American Convention", the Inter-American Court on Human Rights recalled that:

"Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify non-fulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions". ***Inter-American Court of Human Rights, International Responsibility for the Promulgation and Enforcement of Laws which violate the Convention***

Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of 9 December 1994, Series A, No. 14, paragraph 35.

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

> "A State may violate an international treaty and, specifically, the Convention, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2 [of the American Convention on Human Rights]. Likewise, it may adopt provisions which do not conform to its obligations under the Convention. Whether those norms have been adopted in conformity with the internal juridical order makes no difference for these purposes." ***(Inter-American Court of Human Rights, Advisory Opinion OC-13/93, 16 July 1993, Certain attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights, Series A: Judgments and Opinions, No. 13, paragraph 26.)***

5.03.8 If a law of a country violates rights which are protected under international treaty and/or obligations arising from it, the State is internationally responsible. The Inter-American Court of Human Rights has reiterated this principle on several occasions and, in particular, in Advisory Opinion Nº 14:

> "The promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question."***(Advisory Opinion OC-14/94, Op. Cit., paragraph 50.)***

5.03.9. On the subject of the incompatibility of amnesty laws with the international obligations of States under the American Convention on Human Rights, the Inter-American Court of Human Rights has pointed out that an amnesty law cannot be used to justify not fulfilling the duty to investigate and to grant access to justice. With reference to the amnesty law in Peru, the Inter-American Court of Human Rights said:

> "States [...] may not invoke existing provisions of domestic law, such as the Amnesty Law in this case, to avoid complying with their obligations under international law. In the Court's judgment, the Amnesty Law enacted by Peru

precludes the obligation to investigate and prevents access to justice. For these reasons, Peru's argument that it cannot comply with the duty to investigate the facts that gave rise to the present Case must be rejected." ***Loyaza Tamayo Case, Reparations Judgment, 27 November 1998, paragraph 168, in the Annual Report of the Inter-American Court of Human Rights 1998, OAS/SER.L/V/III.43, Doc. 11, p. 487. (81) Inter-American Commission on Human Rights, Report N° 34/96, Cases 11,228, 11,229, 11, 231 and 11,282 (Chile), 15 October 1996, paragraph 84***

5.03.10. The same point was reiterated by the Human Rights Committee in its "Concluding Observations" to Peru in 1996. Having concluded that the amnesty laws (Decree-Laws N° 26,479 and 26,492) were incompatible with Peru's obligations under the International Covenant on Civil and Political Rights, the Human Rights Committee stressed that:

> "National legislation cannot modify the international obligations contracted by a State party by virtue of the Covenant." ***(United Nations document CCPR/C/79/Add.67, paragraph 10. [Spanish original, free translation)***

5.03.11 The Inter-American Commission on Human Rights also reiterated this principle when it concluded that the amnesty promulgated by the government of General Augusto Pinochet Ugarte (Decree Law N° 2191) was incompatible with Chile's obligations under the American Convention on Human Rights:

> "From the standpoint of international law, the Chilean State cannot justify its failure to comply with the Convention by alleging that self-amnesty was decreed by the previous government or that the abstention and omission of the Legislative Power in regard to the rescinding of that Decree Law, or that the acts of the Judiciary which confirm the application of that decree have nothing to do with the position and responsibility of the democratic Government, inasmuch as Article 27 of the Vienna Convention on the Law of Treaties establishes that a State Party shall not invoke the provisions of domestic law as a justification for failure to comply with a treaty."***(Inter-American Commission on Human Rights, Report N° 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 84.***

5.04 **International rejection of amnesties in other situations**

5.04.1 The ***World Conference on Human Rights*** in 1993 called upon states "to 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". The ***UN General Assembly*** has equally opposed legislative and other measures of impunity with regard to crimes against humanity and war crimes.

5.04.2 National amnesties and pardons which prevent the emergence of the truth and accountability before the law would be a ground for the International Criminal Court to exercise its concurrent jurisdiction over crimes under Article 17 (2) (a) of the ***Rome Statute.*** That article provides that in deciding whether a state is unwilling to exercise jurisdiction, the Court should determine whether "[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court".

5.04.3 A Trial Chamber of the ***Yugoslavia Tribunal*** in the *Furundzija* case stated:

> "It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition on torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision ... would not be accorded international legal recognition."

5.04.4 The ***Human Rights Committee*** has expressed its concern about the incompatibility of amnesties in ***Argentina, Croatia, El Salvador, France, Niger, Peru, the Republic of the Congo*** and ***Uruguay*** with the obligations of states parties under the International Covenant on Civil and Political Rights (ICCPR). It has welcomed the prohibition in national law of amnesties for violations of the ICCPR, in countries such as ***Ecuador***.

5.04.5 The ***Committee against Torture*** has repeatedly criticized amnesties and recommended that they should not be applied to torture in a number of countries, including ***Azerbaijan, Kyrgyzstan, Peru*** and ***Senegal***, and it has welcomed the absence of amnesties for torture in ***Paraguay***.