



Towards a Convention on the Prevention and Punishment of Crimes against Humanity: recommendations to States on the prohibition of amnesties and other similar measures of impunity

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# Introduction

In 2019, the International Law Commission (hereinafter, "ILC") adopted the [Draft Articles on Prevention and Punishment of Crimes against Humanity](#) (hereinafter, "the Draft Articles") and, pursuant to Art. 23 of its Statute, transmitted them to the UN General Assembly, recommending that the General Assembly itself or an international conference of plenipotentiaries elaborate a convention on the basis of the Draft Articles.

In December 2022, the General Assembly launched a two-year process to consider the ILC's recommendation and convened, in April 2023 and 2024 respectively, sessions of the Sixth Committee, with a view to exchanging observations and comments on the Draft Articles. The Sixth Committee of the General Assembly will take a decision on the ILC recommendation in autumn 2024.

The undersigned organizations consider it of paramount importance to **begin work to elaborate an international treaty aimed at the prevention and punishment of crimes against humanity**. Such a treaty would **fill a glaring gap in international treaty law**, crystallizing the obligations of States in this regard and spelling out the corresponding **rights of victims and their relatives**, as well as of law enforcement personnel and public officials, **human rights defenders, lawyers, witnesses and other persons involved in the process of seeking justice**.

The undersigned organizations consider that the Draft Articles adopted by the ILC represent a solid basis and starting point for the elaboration of a future Convention. However, taking into account that perpetrators of crimes against humanity often enjoy **impunity**,<sup>1</sup> it is important that, in a **future Convention, the guarantees set forth in this regard be strengthened**, especially with regard to the **prohibition of amnesties and legal measures that have the effect of preventing the possibility of prosecuting and punishing** those allegedly responsible for crimes against humanity.

Without prejudice to other specific recommendations made on previous occasions<sup>2</sup> and others that may be made in the future, the undersigned organizations call on States to:

- a. **Approve the opening of negotiations for the elaboration and adoption**, on the basis of the ILC Draft Articles, of a **Convention on the Prevention and Punishment of Crimes against Humanity**;
- b. Ensure that the **future Convention explicitly prohibits amnesties in respect of crime against humanity and other similar measures of impunity** that may have the effect of exempting perpetrators or alleged perpetrators from any criminal proceedings or sanctions.

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<sup>1</sup> In the present document, in accordance with the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (adopted by resolution No. 2005/81 of 8 February 2005 of the Commission on Human Rights, hereinafter "the Principles against Impunity"), impunity is understood as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims". See also Principle 24 for restrictions and other measures relating to amnesties.

<sup>2</sup> See, inter alia, TRIAL International, [Towards a Convention on the Prevention and Punishment of Crimes against Humanity: Recommendations to States](#), March 2024; and REDRESS, FIDH, Global Survivors Fund and TRIAL International, [Victims' and Survivors' Rights in a Convention on the Prevention and Punishment of Crimes Against Humanity](#), March 2024.

# Prohibition of amnesties and other similar measures of impunity



## Recommendation

Explicitly prohibit amnesties and similar measures of impunity that may have the effect of exempting perpetrators or alleged perpetrators of crimes against humanity from any criminal proceedings or sanctions.

Numerous countries around the world have adopted amnesty laws that have the effect of preventing the criminal investigation and punishment of perpetrators of crimes under international law, including crimes against humanity,<sup>3</sup> often justifying this decision as a measure needed to facilitate transitional processes or political negotiations.

Without prejudice to the aim declared, amnesty laws and measures of a similar nature foster a culture of impunity and thus contribute to encouraging the commission of the same type of acts.

In this sense, both at the national and international level, the explicit prohibition of amnesty laws and similar measures of impunity having the effect of exempting the perpetrators of, among others, crimes against humanity, from any criminal proceedings or sanctions has been affirmed.

However, the ILC Draft Articles do not contain a provision in this regard, although it should be noted that Art. 6 of the Draft on “criminalization under national law” contains some clauses aimed at preventing impunity for those responsible for these crimes, such as the imprescriptibility of crimes against humanity and the irrelevance of a person’s official position to exempt him/her from criminal responsibility. Furthermore, Art. 10 of the ILC Draft Articles enshrines the principle *aut dedere aut judicare*, affirming the State’s obligation to prosecute the alleged responsible for crimes against humanity who are present in the territory under its jurisdiction. In the commentary to Art. 10 of its Draft, the ILC indicates that “an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the offence” and that, in any event, the permissibility of an amnesty adopted by a State “would need to be evaluated, inter alia, in light of that State’s obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others”.<sup>4</sup> In other words, the adoption of an amnesty or similar measure of impunity at the national level would hardly be compatible with the obligations under the Draft Articles. Moreover, the ILC refers to rules, jurisprudence and praxis, both at the national and international levels, which suggest that, in cases involving crimes against humanity, the prohibition of amnesties and similar measures of

<sup>3</sup> For instance, Argentina adopted the Full Stop Law No. 23492 of 24 December 1986 and the Due Obedience Law No. 23521 of 8 June 1987; Algeria adopted the Charter for Peace and National Reconciliation by Ordinance No. 06-01 of 27 February 2006; Brazil adopted the Amnesty Law No. 6683/79; El Salvador adopted the General Amnesty Law for the Consolidation of Peace by Decree No. 486 of 20 March 1993 and published on 22 March 1993; Spain adopted the Amnesty Law No. 46/1977 of 15 October 1997; Mali adopted Law No. 2021-047 of 24 September 2021; Mauritania adopted Amnesty Law No. 93-23 of 14 June 1993; Nepal adopted Law No. 1 of 11 May 2014; the Democratic Republic of the Congo (DRC) adopted Law No. 21-99 of 20 December 1999; Peru adopted Law No. 26479, promulgated on 14 June 1995; and Uruguay adopted the Law on the Expiration of the Punitive Claims of the State, Law No. 15848, promulgated on 22 December 1986 and published on 31 December 1986.

<sup>4</sup> ILC, UN Doc. A/74/10, Commentary to Art. 10 of the Draft Articles, para. 13.

impunity has attained a customary character.<sup>5</sup>

The International Court of Justice (hereinafter, "ICJ") concluded that two criteria must be fulfilled for a norm to be considered as part of customary international law, namely: (1) an established, widespread and consistent practice of States; and (2) *opinio juris*, i.e. that States comply with that norm because they consider themselves bound by it.<sup>6</sup> The ICJ has considered universally applicable international instruments and General Assembly resolutions as evidence of *opinio juris*, as they demonstrate the commitment of States to be bound by a norm.<sup>7</sup> Rules of customary international law bind all States, irrespective of whether they participated in the formulation of the practice concerned.<sup>8</sup>

It is therefore considered that a future Convention on the Prevention and Punishment of Crimes against Humanity should include a provision explicitly prohibiting amnesties and similar measures of impunity that have the effect of exempting perpetrators of crimes against humanity from any criminal proceedings or sanctions, as an essential rule for the realization of the object and purpose of the treaty itself.

In this regard, it should be recalled that, within the framework of the United Nations, the Secretary-General has clearly stated that, even in the framework of peace agreements and transitional periods, it is not considered admissible to grant amnesties in cases of crimes against humanity.<sup>9</sup> The Security Council has also affirmed that amnesties cannot be granted for crimes against humanity.<sup>10</sup> Similarly, several UN Committees have considered amnesty laws to be at odds with the respective treaties.

In its General Comment No. 36 on the right to life, the Human Rights Committee has observed that "[...] Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy".<sup>11</sup> Previously, in its General Comment No. 31, the Committee had stressed that States parties have an obligation to ensure that those responsible for certain crimes - including crimes against humanity - are brought to justice. The Committee recalled that "[...] as with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. [...] Accordingly, where public officials or State agents have committed violations of the Covenant [...], the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties [...]".<sup>12</sup> Similarly, in its General Comment No.

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<sup>5</sup> *Ibid.*, paras. 10-13.

<sup>6</sup> ICJ, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark and the Netherlands)*, 20 February 1969, para. 77.

<sup>7</sup> ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012, para. 99; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, para. 73; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, para. 188.

<sup>8</sup> ICJ, *Dispute regarding Navigation and Related Rights (Costa Rica v. Nicaragua)*, 13 July 2009, para. 47, referring to the fact that the Vienna Convention on the Law of Treaties is applicable to all States since it is customary international law.

<sup>9</sup> UN Secretary-General, Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616 of 23 August 2004, paras. 10, 32 and 64(c). See also the Guidance note of the Secretary-General: United Nations approach to transitional justice, UN Doc S/2011/634 of March 2010; and International Committee of the Red Cross, Report on the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law, p. 32, emphasising the prohibition of amnesties for crimes under international law.

<sup>10</sup> See, *inter alia*, Security Council Resolution No. 1529 of 29 February 2004; Resolution No. 1315 of 14 August 2000; and Resolution No. 1120 of 14 July 1997.

<sup>11</sup> Human Rights Committee, General Comment No. 36 - The right to life, UN Doc. CCPR/C/GC/36 of 3 September 2019, para. 27.

<sup>12</sup> Human Rights Committee, General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Cov-

20 on the prohibition of torture, the Committee indicated 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”.<sup>13</sup> The Human Rights Committee has reiterated these principles both in its views on individual communications,<sup>14</sup> and in its concluding observations on the periodic review of States parties to the Covenant.<sup>15</sup>

In the framework of the examination of the reports submitted by States parties to the International Convention for the Protection of All Persons from Enforced Disappearance, the Committee on Enforced Disappearances has repeatedly expressed its deep concern about provisions that have - or may have - the effect of exempting alleged perpetrators of enforced disappearances from any criminal proceedings or sanction and has recommended their abrogation.<sup>16</sup>

Other UN Committees, including the Committee against Torture,<sup>17</sup> the Committee on the Elimination of Discrimination against Women<sup>18</sup> and the Committee on the Rights of the Child<sup>19</sup> have affirmed the same principle and recommended that States parties to the respective treaties refrain from granting or applying amnesties and derogate or abrogate them.

Several Special Procedures of the UN Human Rights Council have also pronounced themselves against amnesties and other measures of a similar nature which would benefit alleged perpetrators of, *inter alia*, crimes against humanity and promote their impunity. Among them, the Working Group on Enforced or Involuntary Disappearances has stated that “amnesties and similar measures that may contribute to impunity are in direct violation of the rights of the families to an effective remedy and to be heard before a competent, impartial and independent court in order to determine and learn the truth”.<sup>20</sup> Similarly, in its General Comment on Art. 18 of the Declaration on the Protection of All Persons from Enforced Disappearance (which provides that perpetrators or alleged perpetrators of enforced disappearances shall not benefit from any special amnesty law or other similar measures which have the effect of exempting them from any criminal proceedings or sanctions), the Working Group has urged States to refrain from drafting or enacting amnesty laws which exempt perpetrators of enforced disappearances from any criminal proceedings or sanctions and other similar measures which prevent the proper implementation of other provisions of the Declaration.<sup>21</sup> In the same General Comment, the Working Group has indicated that similar mea-

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enant, UN Doc. CCPR/C/21/Rev.1/Add.13 of 29 March 2004, para. 18.

<sup>13</sup> Human Rights Committee, General Comment No. 20 - The Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 March 1992, para. 15.

<sup>14</sup> See, *inter alia*, Human Rights Committee, Case of *Djaou v. Algeria*, Views of 24 October 2022, para. 8.2; and Case of *Hugo Rodríguez v. Uruguay*, Views of 19 July 1994, para. 12.4.

<sup>15</sup> See, *inter alia*, Human Rights Committee, Concluding Observations on Brazil, UN Doc. CCPR/C/BRA/CO/3 of 26 July 2023, paras 11-12; Concluding Observations on Mauritania, UN Doc. CCPR/C/MRT/CO/2 of 26 July 2019, paras 10-11; Concluding Observations on Algeria, UN Doc. CCPR/C/DZA/CO/4 of 27 July 2018, para. 11-12; Concluding Observations on Spain, UN Doc. CCPR/C/ESP/CO/6 of 24 July 2015, para. 21; and Concluding Observations on Nepal, UN Doc. CCPR/C/NPL/CO/2 of 28 March 2014, para. 5.

<sup>16</sup> Among others, Committee on Enforced Disappearances, Concluding Observations on Bosnia and Herzegovina, UN Doc. CED/C/BIH/CO/1 of 14 October 2016, paras. 25-26; and Concluding Observations on Mali, UN Doc. CED/C/MLI/CO/1 of 23 September 2022, paras. 24-25.

<sup>17</sup> See, *inter alia*, Committee against Torture, General Comment No. 3 of 2012 on the implementation of Art. 14, para. 41. See also, *inter alia*, Concluding Observations on Spain, UN Doc. CAT/C/ESP/CO/7 of 28 July 2023, paras. 35-36; Concluding observations on El Salvador, UN Doc. CAT/C/SLV/CO/3 of 25 November 2022, paras. 7, 9 and 12-13; Concluding Observations on Benin, UN Doc. CAT/C/BEN/CO/3 of 17 May 2019, paras. 6-7; and Concluding Observations on Indonesia, UN Doc. CAT/C/IDN/CO/2 of 16 May 2008, para. 27.

<sup>18</sup> See, among others, Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30 of 1 November 2013, para. 81.

<sup>19</sup> See, *inter alia*, Committee on the Rights of the Child, Concluding Observations on the Democratic Republic of Congo, UN Doc. CRC/C/OPAC/COD/CO/1 of 7 March 2012, para. 38.

<sup>20</sup> Working Group on Enforced or Involuntary Disappearances (WGEID), Report on standards and public policies for an effective investigation of enforced disappearances, UN Doc. A/HRC/45/13/Add.3 of 8 August 2020, para. 30.

<sup>21</sup> WGEID, General Comment on Art. 18 of the Declaration, UN Doc. E/CN.4/2006/56 of 27 December 2005, para. 49.

asures which may be considered contrary to the Declaration include: "(a) Suspension or cessation of an investigation into disappearance on the basis of failure or inability to identify the possible perpetrators, in contravention of article 13 (6) of the Declaration; (b) Making the victim's right to truth, information, redress, reparation, rehabilitation, or compensation conditional on the withdrawal of charges or the granting of pardon to the alleged perpetrators of the disappearance; (c) Application of statutory limitations that are short or that commence even as the crime of disappearance is still ongoing, given the continuing nature of the crime, thereby breaching articles 4 and 17 of the Declaration; (d) Application of any statutory limitation when the practice of disappearance constitutes a crime against humanity; (e) Putting perpetrators on trial as part of a scheme to acquit them or impose insignificant sanctions, which would in fact amount to impunity".<sup>22</sup> In this regard, it should be noted that, in its comments on the Draft Articles, the Working Group proposed the inclusion of a provision explicitly prohibiting amnesties for crimes against humanity.<sup>23</sup>

Furthermore, in his report on accountability for prosecuting and punishing gross violations of human rights and serious violations of international humanitarian law in the context of transitional justice processes, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition has stated that "amnesties violate a number of human rights, such as the right of victims to be heard by a judge and the right to judicial protection by means of an effective remedy. They also pave the way for impunity by preventing the investigation, pursuit, capture, prosecution and punishment of persons responsible for human rights violations".<sup>24</sup> Furthermore, he added that "[...] it has been found that, in addition to running counter to international law, they further entrench a culture of impunity by placing some people above the law and fail to prevent the recurrence of new violations",<sup>25</sup> and that, even in cases of overcrowding of the prison population, as far as those convicted of crimes against humanity are concerned, "[...] under no circumstances should they be granted dispensations or remissions such as amnesties, pardons or sentence reductions".<sup>26</sup> Finally, in his report on prosecutorial prioritization strategies in the aftermath of gross human rights violations and serious violations of international humanitarian law, the Special Rapporteur clarified that "States may not relieve suspected perpetrators of individual responsibility through amnesty or prior immunity or indemnity".<sup>27</sup> It is also worth underlining that, in his comments on the Draft Articles, by noting the customary international law nature of the prohibition of amnesties, the Special Rapporteur recommended the addition of "a provision expressly prohibiting amnesties, pardons, sentence commutation and any other measures designed to free persons suspected of committing crimes against humanity from individual criminal responsibility or to remove the effects of a conviction".<sup>28</sup>

For his part, "in the light of the consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights has become a rule of

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<sup>22</sup> *Ibid.*

<sup>23</sup> WGEID, [Comments on the Draft Articles](#), 71<sup>st</sup> session of the ILC, 2019.

<sup>24</sup> Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Report on accountability: prosecuting and punishing gross violations of human rights and serious violations of international humanitarian law in the context of transitional justice processes, UN Doc. A/HRC/48/60 of 9 July 2021, para. 29.

<sup>25</sup> *Ibid.*, para. 33.

<sup>26</sup> *Ibid.*, para. 40.

<sup>27</sup> Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Report on prosecutorial prioritization strategies in the aftermath of gross human rights violations and serious violations of international humanitarian law, UN Doc. A/HRC/27/56 of 27 August 2014, paras. 29 and 101.

<sup>28</sup> Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Observations on the Draft Articles on Crimes against Humanity, 71<sup>st</sup> session of the ILC, 2019, in [Comments and observations received from Governments, international organizations and others](#), UN Doc. A/CN.4/726, 21 January 2019, p. 131.



customary international law”,<sup>29</sup> the Special Rapporteur on torture expressed his opposition to the passing, application and non-revocation of amnesty laws (including laws in the name of national reconciliation, the consolidation of democracy and peace, and respect for human rights), which prevent torturers from being brought to justice and hence contribute to a culture of impunity. In a recent report on good practices in national criminalization, investigation, prosecution and sentencing for offences of torture, the Special Rapporteur noted that by interfering with the obligation to investigate and prosecute those responsible for torture, amnesty laws are contrary to the non-derogable nature of the prohibition of torture, adding that this is a customary rule.<sup>30</sup> Furthermore, the Special Rapporteur stressed that “any pardon, early release or other measures that reduce sentencing for good behavior or clemency or prepare perpetrators for release back into the community [...] must not be used to exonerate convicted persons after a fair trial, negate the commission of the crime or result in impunity”, nor must they “act as de facto amnesties”.<sup>31</sup>

Although in most cases a provision explicitly prohibiting amnesties has not been included in the respective statutes, international criminal tribunals have also ruled on the matter. Among others, the International Criminal Court has stated that “granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights”.<sup>32</sup> The International Criminal Tribunal for the former Yugoslavia<sup>33</sup> and the Extraordinary Chambers in the Courts of Cambodia<sup>34</sup> have pronounced themselves in the same sense. For its part, the Special Court for Sierra Leone recognized that a norm in this regard was developing and crystalizing under international law.<sup>35</sup>

Regional human rights mechanisms agree on the inadmissibility of amnesty laws that exempt perpetrators or alleged perpetrators of crimes against humanity from any criminal procedure or sanction.

The regional human rights protection system that has developed the most exhaustive jurisprudence in this regard is the Inter-American one. In this regard, the Inter-American Court of Human Rights has established that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”.<sup>36</sup> Furthermore, the Inter-American Court has expressly stated that “States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Accordingly, crimes against

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<sup>29</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report to the General Assembly, UN Doc. A/56/156 of 3 July 2001, para. 33.

<sup>30</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report on good practices in national criminalization, investigation, prosecution and sentencing for offences of torture, UN Doc. A/HRC/52/30 of 16 February 2023, paras. 21 and 24.

<sup>31</sup> *Ibid.*, para. 73.

<sup>32</sup> International Criminal Court, *Prosecutor v. Saif al-Islam Gaddafi*, decision of 5 April 2019, Pre-Trial Chamber I, para. 77.

<sup>33</sup> International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundžija*, Judgement of 10 December 1998, para. 155.

<sup>34</sup> Extraordinary Chambers in the Courts of Cambodia, *Prosecutor v. Ieng Sary*, Judgment of 11 April 2011, para. 199.

<sup>35</sup> Special Court for Sierra Leone, *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, decision of 13 March 2004, paras. 66-74 and 82-84.

<sup>36</sup> Inter-American Court of Human Rights (IACtHR), Case of *Barrios Altos v. Peru, Merits*, Judgment of 14 March 2001, Series C No. 75, para. 41; Case of the “*Las Dos Erres*” Massacre v. *Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 24, 2009, Series C No. 211, para. 129; Case of *Gomes Lund et al (“Guerrilha do Araguaia”) v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 24, 2010, Series C No. 219, para. 171; and Case of *Gelman v. Uruguay*, Merits and Reparations, Judgment of February 24, 2011, Series C No. 221, para. 225.

humanity are crimes which cannot be susceptible of amnesty".<sup>37</sup>

Likewise, the Inter-American Court has emphasized that amnesty laws prevent the investigation and punishment of those responsible for serious human rights violations and crimes against humanity, which should be aimed at "clarify[ing] the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences, and not merely to discover, prosecute and, if applicable, punish the direct perpetrators. In other words, the protection of human rights should be one of the central purposes that determine how the State acts in any type of investigation".<sup>38</sup> Therefore, amnesty laws prevent the protection of human rights as a result of investigations.

Furthermore, amnesty laws hinder "access to victims and their families to the truth of what happened and to the corresponding reparation, thereby hindering the full, timely, and effective rule of justice in the relevant cases. This, in turn, favors impunity and arbitrariness and also seriously affects the rule of law, reason for which, in light of International Law, they have been declared to have no legal effect".<sup>39</sup>

The Inter-American Court has also made it clear that the incompatibilities of amnesty laws in favor of perpetrators of serious human rights violations with State obligations in terms of fair trial and access to justice are not limited to so-called "self-amnesty" laws, since this incompatibility arises not so much from the process of adoption and the authority that issued the amnesty law, but from its "*ratio legis*", namely to leave unpunished serious violations of international law that have been committed.<sup>40</sup>

In this same sense, the Inter-American Court has pointed out that the fact that an amnesty law "has been approved in a democratic regime and yet ratified or supported by the public"<sup>41</sup> does not legitimize it under international law. This is because "the protection of human rights constitutes an impassable limit to the rule of the majority, that is, to the forum of the 'possible to be decided' by the majorities in the democratic instance, those who should also prioritize 'control of conformity with the Convention'".<sup>42</sup>

The Inter-American Court has also analyzed the adoption of amnesty laws for their application to crimes committed in the context of a non-international armed conflict, taking into account the obligations under Protocol II to the Geneva Conventions to examine their compatibility with the State's international human rights obligations.<sup>43</sup> In this regard, it concluded that while Art. 6, para. 5, of Protocol II allows for broad amnesties in favor of those who have participated in a non-international conflict, this does not include war crimes or crimes against humanity.<sup>44</sup>

Finally, the Court has referred to other measures similar to amnesties that hinder access to justice and accountability, as in the case of pardons granted for supposed "humanitarian reasons" in

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<sup>37</sup> IACtHR, Case of *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 26, 2006, Series C No. 154, para. 114.

<sup>38</sup> IACtHR, Case of *Cepeda Vargas v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 May 2010, Series C No. 213, para. 118.

<sup>39</sup> IACtHR, Case of *Gelman*, op. cit., paras. 225-226.

<sup>40</sup> *Ibid.*, paras 225 and 229. IACtHR, Case of *Gomes Lund et al ("Guerrilha do Araguaia")*, op. cit., para 175.

<sup>41</sup> IACtHR, Case of *Gelman*, op. cit., paras. 225 and 238.

<sup>42</sup> *Ibid.*, paras. 225 and 239.

<sup>43</sup> IACtHR, Case of the *Massacres of El Mozote and nearby places v. El Salvador*, Merits, Reparations and Costs, Judgment of 25 October 2012, Series C No. 252, para. 284 et seq.

<sup>44</sup> *Ibid.*, para. 286.



favor of persons convicted of serious human rights violations who have not served their sentences. In this regard, the Court held that “the international obligation to punish those responsible for serious human rights violations with penalties appropriate to the gravity of the criminal conduct cannot be unduly affected or become illusory during the execution of the sentence that imposed the sanction in accordance with the principle of proportionality”.<sup>45</sup>

Furthermore, the Inter-American Court pointed out that “a pardon by the Executive that pardons, suppresses or extinguishes the sentence imposed in criminal proceedings for acts relating to serious human rights violations produces the most serious breach of the principle of proportionality of the sentence and of the right of access to justice of the victims and their relatives”.<sup>46</sup> Furthermore, the Court added that “there is a growing tendency in international human rights law and international criminal law to limit the possibility of sentences imposed by criminal courts for serious human rights violations being pardoned or extinguished by discretionary decisions of the executive or legislative branches”.<sup>47</sup> Accordingly, the Inter-American Court considered that the granting of a pardon in cases of serious human rights violations could not be discretionary, but that the proportionality between the measure granted to protect the life and integrity of the convicted person to whom the pardon is intended to be granted and the impact on the right to access to justice of the victims of these violations and their relatives must be assessed.<sup>48</sup> These considerations apply, *mutatis mutandis*, in cases related to crimes against humanity.

For its part, the European Court of Human Rights has stated that “a growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights”.<sup>49</sup> Likewise, referring to the prohibition of torture, the Court has added that “[...] the absolute necessity of prohibiting torture and prosecuting anyone who violates that universal rule [...] would be deprived of [its] very essence [...] the Court considers that an amnesty is generally incompatible with the duty incumbent on the States to investigate such acts”.<sup>50</sup>

The African Commission on Human and Peoples' Rights has also found amnesty laws to be incompatible with States' international human rights obligations. In particular, it has stated that “[...] adopting laws that would grant immunity from prosecution of human rights violators and prevent victims from seeking compensation render the victims helpless and deprives them of justice. [...] The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy”.<sup>51</sup> The Commission has also specified that, in relation to acts of torture, “amnesty laws [...] violate the victims' right to judicial protection and to have their cause heard under Article 7 (1) of the African Charter. [...] Hence, States should not extend blanket amnesty to individuals

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<sup>45</sup> IACtHR, Case of *Barrios Altos and Case of La Cantuta v. Peru*, Monitoring Compliance with Judgment, Order of the IACtHR of 30 May 2018, para. 47 (unofficial translation); Case of *Barrios Altos and Case of La Cantuta v. Peru*, Request for Provisional Measures and Monitoring Compliance with Judgment, Order of the IACtHR of 19 December 2023, para. 33.

<sup>46</sup> IACtHR, Case of *Barrios Altos and Case of La Cantuta v. Peru*, Request for Provisional Measures and Monitoring Compliance with Judgment, Order of the IACtHR of 19 December 2023, para. 34 (unofficial translation). Cf. IACtHR, Case of *Barrios Altos and Case of La Cantuta v. Peru*, Monitoring Compliance with Judgment, Order of the IACtHR of 30 May 2018, paras. 26, 37 and 54-57.

<sup>47</sup> IACtHR, Case of *Barrios Altos and Case of La Cantuta v. Peru*, Monitoring Compliance with Judgment., Order of the IACtHR of 30 May 2018, para. 45 (unofficial translation); Case of *Barrios Altos and Case of La Cantuta v. Peru*, Request for Provisional Measures and Monitoring Compliance with Judgment, Order of the IACtHR of 19 December 2023, para. 34.

<sup>48</sup> IACtHR, Case of *Barrios Altos and Case of La Cantuta v. Peru*, Request for Provisional Measures and Monitoring Compliance with Judgment, Order of IACtHR of 19 December 2023, para. 36.

<sup>49</sup> European Court of Human Rights, Case *Marguš v. Croatia*, Grand Chamber Judgment of 13 November 2012, para. 139.

<sup>50</sup> European Court of Human Rights, Case *Ould Dah v. France*, Judgement of 17 March 2009, excerpts.

<sup>51</sup> African Commission on Human and Peoples' Rights, Case of *Mouvement Ivoirien des Droits de l'Homme (MIDH) v. Côte d'Ivoire*, decision of 29 July 2008, paras. 97-98. See also Case of *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, decision of 15 May 2006, paras. 211-212; and Case of *Malawi African Association and Others v. Mauritania*, decision of 11 May 2000, paras. 82-83 and 85.

for acts of torture".<sup>52</sup>

Finally, it should be noted that, globally, several States have explicitly excluded crimes against humanity or other crimes under international law from the application of amnesty laws or similar measures<sup>53</sup> and there is abundant jurisprudence from national courts<sup>54</sup> reaffirming the non-applicability of amnesty laws to alleged perpetrators of these crimes.

Likewise, the customary nature of the prohibition of amnesties and similar measures of impunity in cases of crimes against humanity has been recognized in doctrine by the most competent publicists of different nations.<sup>55</sup>

In light of the above, the undersigned organizations consider that the prohibition of amnesties and similar measures of impunity in cases of crimes against humanity has attained a customary character and that a future Convention on the Prevention and Punishment of Crimes against Humanity should include a provision crystallizing and enshrining such a rule.

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<sup>52</sup> African Commission on Human and Peoples' Rights, General Comment No. 4 on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, 2017, para. 28.

<sup>53</sup> Among others, see: Argentina (Art. 1 of Law No. 27156 of 21 July 2015); Burkina Faso (Art. 14 of Law No. 052/2009 of 3 December 2009); Burundi (Art. 173 of the Penal Code); Colombia (Art. 14 of Law No. 589 of 2000; and Law No. 1820 of 30 December 2016); Comoros (Art. 14 of Law No. 011-022 of 13 December 2011); Ivory Coast (Art. 4 of Law No. 2003-309 of 8 August 2003); Ecuador (Art. 80 of the Constitution); Philippines (Art. 23 of Law No. 10353 of 21 December 2012); Iraq (Art. 15.6 of the Law on the Supreme Penal Code of Iraq of 18 October 2005); Panama (Art. 116 of the Penal Code); Central African Republic (Law No. 08-020 of 13 October 2008); Uruguay (Art. 8 of Law No. 18026 of 4 October 2006); Democratic Republic of the Congo (Law No. 014/006 of 11 February 2014); and Venezuela (Art. 181 of the Penal Code and Art. 29 of the Constitution).

<sup>54</sup> Among others, see: Supreme Court of Argentina, Case S.1767.XXXVIII, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, judgment of 14 June 2005; and Case *Santiago Omar Riveros*, judgment of 13 July 2007. In Chile, the Supreme Court of Justice adopted several decisions excluding the application of the Amnesty Decree Law of 1978 to crimes against humanity. See also Tribunal Regional Federal da 2ª Região, 181-Habeas Corpus Criminal, Turma Espec. Penal, Previdenciário e Propriedade Industrial, judgment of 10 September 2014; Constitutional Court of Peru, Santiago Enrique Martín Rivas, Case No. 679-2005-PA/TC, judgment of 2 March 2007; and High Central Court of Addis Ababa, Case Col. Mengistu Haile Mariam et al., judgment of 23 May 1995.

<sup>55</sup> See, inter alia, Werle G., *Principles of International Criminal Law* (2nd edn., TMC Asser Press, 2009), p. 77; C. Van der Wyngaert C., Ongena T., 'Ne bis in idem Principle, Including the Issue of Amnesty', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 705, p. 727; and Méndez J., *Accountability for Past Abuses*, in 19:2 Human Rights Quarterly, 1997, p. 259.

The undersigned organizations:

1. Apuesta Solidaria AC (ASAC), Mexico
2. Asociación Centroamericana para el Desarrollo y la Democracia, Nicaragua
3. Asociación de Familiares de Detenidos-Desaparecidos de Guatemala (FAMDEGUA)
4. Asociación Pro Derechos Humanos (APRODEH), Peru
5. Bufete Jurídico de Derechos Humanos (BDH)
6. Centro de Documentación en Derechos Humanos "Segundo Montes Mozo S.J." (CSMM), Ecuador
7. Centro de Estudios Legales y Sociales (CELS), Argentina
8. Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX), Peru
9. Center for Justice and International Law (CEJIL), international organization
10. Centro Regional de Derechos Humanos y Justicia de Género (Corporación Humanas), Chile
11. Civicus, international organization
12. Comité de América Latina y el Caribe para la Defensa de los Derechos de las Mujeres (CLADEM), regional organization
13. Convergencia por los Derechos Humanos de Guatemala
14. Estudio para la Defensa de los Derechos Humanos de la Mujer (DEMUS), Peru
15. Instituto de Defensa Legal (IDL), Peru
16. Instituto sobre Raza e Igualdad y Derechos Humanos (Raza e Igualdad), regional organization
17. Movimiento de Mujeres Dominico-Haitianas (MUDHA), Dominican Republic
18. Observatorio Luz Ibarburu, Uruguay
19. Oficina para Mesoamérica de Protection International, regional organization
20. Robert F. Kennedy Human Rights (RFKHR), regional organization
21. TRIAL International, international organization
22. Unidad de Protección a Defensoras y Defensores de Derechos Humanos -Guatemala (UDEFEHUA)
23. Urnas Abiertas, Nicaragua
24. Washington Office for Latin America (WOLA), regional organization