Research Brief: Pardons in international jurisprudence

International Center for Transitional Justice (ICTJ)

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INTERNATIONAL JURISPRUDENCE

Inter-American Court and Commission

Both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, have interpreted the American Convention of Human Rights to require the prosecution of individuals responsible for the violation of rights in its provisions.[1]

The Inter-American Court of Human Rights

In the *Velásquez Rodríguez Case*[2] the Inter-American Court interpreted Article 1(1) as imposing a duty on member states to "prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[3]

In considering Peru's general amnesty laws,[4] the Court stated that, under the American Convention, every person subject to the jurisdiction of a State Party is guaranteed the right to recourse to a competent court for the protection of his fundamental rights.[5] States, therefore, have the obligation to prevent human rights violations, investigate them, identify and punish their intellectual authors and accessories after the fact, and may not invoke existing provisions of domestic law, such as the Amnesty Law, 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. The Court rejected Peru's argument that it could not comply with the duty to investigate the facts.[6]

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[1] The American Convention of Human Rights in Article 1(1) requires:

> The State Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

[2] Inter-Am.Ct. H.R , Judgment of July 29, 1988. Series C No. 4. The case was brought by the relatives of a "disappeared" Honduran against the government.

[3] *Id.* ¶ 166.

[4] *See* discussion *infra* ICTJ Research Brief: Country case studies on the use of pardons (Peru case study).

[5] Loayza-Tamayo v. Peru. Reparations and Costs. Inter-Am.Ct. H.R , Judgment of November 27, 1998. Series C No. 42, 168.

[6] *Id.*

The Court took this analysis further in the *Barrios Altos Case*.[7] The Barrios Altos massacre took place on November 3, 1991, in the Barrios Altos neighbourhood of Lima, Peru. Fifteen people were killed and four injured by assailants later determined to be members of *Grupo Colina*, a death squad of members of the Peruvian Armed Forces. Judicial authorities were unable to launch a serious investigation of the incident until April 1995, at which time the military courts responded by filing a petition before the Supreme Court for jurisdiction over the case. However, before the Court ruled on the petition, the case was effectively closed by the government's amnesty – granted to members of the security forces and civilians who were the subject of a complaint, investigation, indictment, trial or conviction, or who were serving prison sentences, for human rights violations committed after May 1980.

In a unanimous opinion the Court declared Peru's two amnesty laws to be incompatible with the American Convention and lacking in legal effect. It stated that it:

> ...considers unacceptable amnesty provisions, statutory limitations provisions and the establishment of exclusions from responsibility that seek to impede the investigation and punishment of the persons responsible for serious violations of human rights such as torture, summary, extralegal or arbitrary executions and forced disappearances, all of which are prohibited as contravening non-derogable rights recognized by International Human Rights Law.[8]

The Court went on to say that "…[s]elf-amnesty laws lead to victims who are unable to defend themselves and to the perpetuation of impunity, and are therefore manifestly incompatible with the letter and spirit of the American Convention."[9]. As a consequence, the Court concluded that such laws "lack legal effect.[10]

Judge Cançado Trindade stated that self-amnesties are "in sum, an inadmissible offence against the right to truth and the right to justice"[11] and this is the case even if there is no illegality under municipal law. He stated that while such laws are in force, there is a continuing violation of international human rights law, and noted that since self-amnesties usually affect non-derogable rights, they have no validity in international human rights law. He concluded: "...in the domain of the International Law of Human Rights, the so-called "laws" of self-amnesty are not truly laws: they are nothing but an aberration, an inadmissible affront to the juridical conscience of humanity.[12]

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[7] Chumbipuma Aguirre Et Al v. Peru (Barrios Altos Case), Inter-Am.Ct. H.R, Judgment March 14, 2001. Series C No. 75.
[8] *Id.* ¶ 41.
[9] *Id*. ¶ 43.
[10] *Id*.
[11] Concurring Op. (Judge A.A. Cancado Trindade) ¶ 5.
[12] *Id.* ¶ 26. Judge Garcia Ramirez recognized that amnesty laws can be particularly convenient for promoting civil unity, but that these can not apply to grave human rights violations; he noted that because of the laws' invalidity in this case, Peru's amnesties can produce no judicial effect. Concurring Op. (Judge Sergio Garcia Ramirez) 15-22.

In *Walter Bulacio vs Argentina*,[13] the Court considered the case of a teenager, who was detained arbitrarily and thereafter diagnosed with a "head injury," which, he told doctors, he suffered as a result of being beaten by the police. He died five days after his arrest, on April 26, 1991, with the existence of marks produced by blows from a hard instrument on his face, legs and feet. On November 21, 2002, eleven years after the National Juvenile Criminal Trial Court took cognizance of Bulacio's injuries, the Appellate Court ruled that criminal action was extinguished due to the statute of limitations. The Inter-American Court emphasized that the right to effective judicial protection requires that judges direct the process so that undue delays and hindrances do not lead to impunity and undermining adequate and due protection of human rights.[14] The Court restated that "extinguishment provisions or any other domestic legal obstacle that attempts to impede the investigation and punishment of those responsible for human rights violations are inadmissible."[15] The Court went on to express grave concern about the fact that twelve years later, no one had been punished for his responsibility in the beating death. As the Court stated, "[t]here exists a situation of grave impunity"[16] caused by "the overall lack of investigation, pursuit, capture, trial and conviction of those responsible for violations of rights protected under the American Convention, as the State has the obligation to combat said situation by all legal means within its power, as impunity fosters chronic recidivism of human rights violations and total defencelessness of the victims and of their next of kin."[17] In light of this, the Court held it was necessary for the State to continue and conclude the investigation of the facts and to punish those responsible.

The Court also has considered the legality of the Salvadoran amnesty.[18] In *Serrano-Cruz Sisters v. El Salvador*,[19] the Court concluded that El Salvador had violated the human rights of Ernestina and Erlinda Serrano Cruz – two young girls who disappeared in June 1982 during a military operation – and of their family, by failing to carry out an effective and timely investigation into the girls' disappearance. In considering the obligation to investigate, identify and punish those responsible, and conduct a genuine search for the victims, the Court reaffirmed that the State has the obligation to avoid and combat impunity.[20] The Court noted that the domestic criminal proceedings were ongoing and that while the General Amnesty Law had not been applied in these particular proceedings, the amnesty law was still in force in El Salvador and had been applied in other cases.[21] The Court observed that the State must "abstain from using figures such as amnesty and prescription or the establishment of measures designed to eliminate responsibility, or measures intended to prevent criminal prosecution or suppress

[13] Inter-Am.Ct. H.R, Judgment of September 18, 2003. Series C No. 100.
[14] *Id.* ¶ 115.
[15] *Id.* ¶116.
[16] *Id*. ¶¶ 119, 49.
[17] *Id.*
[18] *See* discussion *infra.* Annex II (El Salvador case study).
[19] Inter-Am. Ct. H.R, Judgment of March 1, 2005. Series C No. 120.
[20] *Id.* ¶ 170.
[21] *Id.* ¶ 171.

the effects of a conviction."[22]

The Court also addressed Chile's amnesty laws.[23] In *Almonacid-Arellano et al. v. Chile*[24] the Court examined the lack of investigation and punishment of the persons responsible for the 1973 extrajudicial execution of Mr. Almonacid-Arellano. On March 25, 1998, a court martial finally upheld the dismissal of criminal proceedings by applying the 1978 Amnesty Law. The petitioners contended that the court martial ruling definitively closed off judicial inquiries. The Court determined 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. The Court concluded that amnesty laws like Chile's leave victims defenseless and perpetuate impunity for crimes against humanity; therefore, they are overtly incompatible with the wording and the spirit of the American Convention and affect the rights enshrined in it.[25] As this, in and of itself, constitutes a violation of the Convention and generates international liability for the State, the Amnesty Law is of no legal effect.[26]

Inter-American Commission

The Inter-American Commission has explicitly determined that the amnesties of Uruguay,[27] Chile,[28] Peru,[29] Argentina,[30] and El Salvador[31] are incompatible with the rights under the American Convention and Declaration on Human Rights.

In *Alicia Consuelo Herrera et al. v. Argentina*[32] the Commission noted that the effect of passage of the amnesty laws was to "cancel all proceedings pending against those responsible for past human rights violations", thereby closing off any recourse to a "thorough and impartial judicial investigation to ascertain the facts."[33] The Commission

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[22] *Id.* ¶ 172. The Court reiterated 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."

[23] *See* discussion *infra* Annex II (Chile case study)

[24] Inter-Am. Ct. H.R , Judgment of September 26, 2006. Series C No. 154.

[25] *Id.* at ¶ 116.

[26] *Id*.

[27] See *Mendoza et. al. v. Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 154 (1993), October 2, 1992.

[28] *Gary Hermosilla et al*, Case 10.843, Report No. 36/96, Inter-Am. Comm. H.R, OEA/Ser.L/V/II.95 Doc. 7 rev. at 156 (1996). See discussion *supra* text accompanying notes x-y and *infra* text accompanying notes x-y.

[29] *Barrios Altos Case Supra note X* ¶¶ 41–44. See discussion *supra.* text accompanying notes x-y and *infra.* text accompanying notes x-y..

[30] Inter-Am. Comm.H. R.Report No 24/92 (Argentina*)*, OEA/ser.L/V/II.82, Doc 24 (2 October 1992); see *infra* text accompanying notes x-y.

[31] Inter-Am. Comm.H. R., Report 26/92 (El Salvador),OEA/ser.L/V/II.82 (24 September 1994). See *supra.* text accompanying notes x-y and *infra.* text accompanying notes x-y.

[32] Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No. 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993**),** 2 October 1992.. See discussion *infra* Annex II (Argentina case study).

[33] *Id*.at ¶ [32.

"denounced as incompatible with the Convention" "the legal consequences of the laws and the Decree with respect to the victims' right to a fair trial."[34]

In *Meneses et al. v. Chile*[35], the Commission determined that, under international law, the Chilean State could not justify its failure to comply with the Convention by relying on the previous government's self-amnesty law. Nor could it rely on the acts of the judiciary confirming the application of the law.[36] Under international law, a State Party shall not invoke the provisions of domestic law as a justification for failure to comply with a treaty.[37]

In *Carmelo Espinoza v. Chile,*[38] the Commission again declared the amnesty law incompatible with the American Convention and, consequently, that the judgment of the Supreme Court of Chile declaring the Amnesty Law constitutional and of mandatory application violated the Convention. It recommended that Chile repeal the amnesty law, in order that human rights violations committed by the military government against Espinoza be investigated and punished.[39] In its report on compliance, the Commission accepted the proposal on compliance which included an obligation for the Government of Chile to present before the Chilean courts an application to reopen criminal proceedings that were initiated to prosecute those who killed Espinoza.[40]

In *Garay Hermosilla et al v Chile*[41] the Commission noted that, in relation to questions of amnesties, States frequently claimed to be "searching for a mechanism to restore peace or achieve national reconciliation [and] have resorted to amnesties."[42] This, however, has been "at the expense of groups of people among whom were many innocent

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[34] *Id*. at ¶ 33.

[35]Case 11.228, 11.229, 11.231 and 11.182, Report No. 34/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 196 (1997), October 15 1996.

[36] *Id*. at ¶ 84

[37] *Id. See also Lincoleo v. Chile*, Case.771, Report No. 61/01, Inter-Am.C.H.R., OEA/Ser.L/V/II.111 Doc. 20 rev. at 818 (2000), April 16 2001 (noting enactment and application of the amnesty law, issued by the military government for benefit of its own members, precluded the possibility of judging those responsible for the illegal detention and forced disappearance of Lincoleo and that State had kept law in force after ratifying the American Convention despite the IACHR's declarations of its illegality.)

[38] *Carmelo Soria Espinoza v. Chile*, Case 11.725, Report No. 133/99, Inter-Am.C.H.R., OEA/Ser.L/V/II.106 Doc. 3 rev. at 494 (1999), March 6 2003. Carmelo Soria Espinoza, a Spanish-Chilean citizen and chief of the editorial and publications section of the Latin American Demographic Center (CELADE), was kidnapped by security agents of the Dirección de Inteligencia Nacional (DINA) and murdered. The Chilean courts determined that State agents participated in the crime, and their identities were established. However, pursuant to the self-amnesty law, criminal prosecution of the perpetrators was dismissed: see ¶ 1

[39] *Id*.

[40] Case 11.725, Report No. 19/03, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 588 (2003), ¶ 9.

[41] *Supra note* X In August 1978, acting on behalf of relatives of persons who had been arrested and disappeared between 974 and 1976, the Solidarity Office of the Archbishopric of Santiago brought criminal charges against General Manuel Contreras Sepúlveda, Director of the Dirección de Inteligencia Nacional (DINA). On August 24, 1990, the Supreme Court of Chile unanimously decided to dismiss the proceedings, thereby confirming the constitutionality of the self-amnesty Decree Law of 1978.

[42] *Id.*. See also *Lincoleo v. Chile*, *Supra note* X (acknowledging the actions of the Chilean State including compensating victims' relatives and creating a National Truth and Reconciliation Commission but stating that such measures were "not enough.")

victims of violence, who have thus seen themselves deprived of their right to due process for their just complaints against persons who had committed excesses and acts of barbarism against them."[43] It reiterated its statement that: "the application of amnesties renders ineffective and worthless the obligations that States Parties have assumed under . . . the Convention."[44] The Commission concluded that in sanctioning the *de facto* Decree-Law 2191 on self-amnesty, the State of Chile failed to comply fully with the duty stipulated in Article 1.1 of the Convention, and violated the human rights of the petitioners.

In *Monsenor Oscar Arnulfo Romero and Galdamez v. El Salvador*, the Commission, in ruling on the compatibility of El Salvador's General Amnesty Law[45] with the American Convention, considered a similar rationale. The Commission stated that "some states, seeking mechanisms for peacemaking and national reconciliation, have adopted amnesty laws whose result is to leave without remedies the victims of serious human rights violations by depriving them of the right of access to justice."[46] It referred to the clear doctrine of the Court that an amnesty law can not be used to justify the failure to carry out the duty to investigate and to grant access to justice.[47] Consequently, a state cannot rely on the existence of provisions of internal law to elude carrying out its obligation to investigate human rights violations and prevent impunity, and, thus the application of the General Amnesty Law of 1993 is incompatible with El Salvador's obligations under the Convention.

These statements were reiterated in *Ellacuria et.al. v. El Salvador*.[48] The Commission noted that, in effect, the amnesty decree provides that "all persons who have been convicted must be released immediately, and that those against whom proceedings are underway, or who were in any way involved in serious violations of human rights, may not be investigated, prosecuted or punished, nor sued in the civil courts, all of which surrounds these grave human rights violations with impunity."[49] Consequently, that law "legally removes the right to justice established by the Convention" and "disregards the legitimate rights of the victims' next-of-kin to reparation." The Commission reiterated that the General Amnesty Law was unlawful under the Convention as it made possible a "reciprocal amnesty" (without first acknowledging responsibility), despite the recommendations of the United Nations Truth Commission for El Salvador, because it applies to crimes against humanity, and because it eliminated any possibility of obtaining adequate reparations, including financial compensation, for the damages caused."[50]

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[43] *Id.* ¶ 49.
[44] *Id*., ¶ 50: *See also* Consuelo et al. v. Argentina**,** Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No. 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993), October 2, 1992 and Inter-Amer. Commi. on H.R., Rep.28/92 (Argentina) and Mendoza et. al. v. Uruguay, *Supra note* X
[45] See discussion *infra* Annex II (El Salvador case study).
[46] Case 11.481, Report N° 37/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 671 (1999), April 13, 2000. .
[47] *Id.*.
[48] Case 10.488, Report N° 136/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 608 (1999), December 22, 1999.
[49] *Id.* ¶ 215.
[50] *Id.* ¶ 216.

In *El Mozote Massacre v. El Salvador*,[51] the Commission considered the effect of the amnesty in the context of addressing the question of the exhaustion of internal remedies.[52] The Commission reiterated that the time frame under consideration was marked by systematic violations of human rights and impunity, facilitated in part by the ineffectiveness of the Salvadoran judicial system.[53] It was not possible or necessary to file any complaint, and the General Amnesty Law effectively disposed of the case within the internal jurisdiction. The Commission noted that "in cases such as this one, involving offenses subject to public prosecution, that is to say, that may be prosecuted *ex officio*, the State has the legal obligation--which it may not delegate or waive--to investigate."[54] Accordingly, the Commission determined, the requirements prescribed for exhaustion of internal remedies in the Convention did not apply.[55]

European Court of Human Rights

The European Court of Human Rights has not commented on the compatibility of amnesty laws with the European Convention on Human Rights.[56] While no provision in the ECHR states an explicit duty to proceed to a "prompt and impartial" investigation in situations of alleged breaches of rights, the Court has implied such a duty in relation to Article 2 (right to life) and Article 3 (prohibition of torture and inhuman and degrading treatment and punishment). These fundamental rights, in conjunction with the State's duty under Article 1 to preserve the rights and freedoms in the ECHR and to provide an "effective remedy" under Article 13, implicitly require an effective, official investigation of any alleged breach of the right to life or allegation of torture.[57] This obligation is triggered by the authorities' knowledge of alleged misconduct.[58] They cannot leave the initiative to the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures.[59] The notion of an "effective remedy" entails the payment of compensation where appropriate, a thorough and effective investigation

[51] Case 10.720, Report No. 24/06, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2006).
[52] The massacre took place in the village of El Mozote, in Morazán department, El Salvador, on December 11, 1981, when Salvadoran armed forces, trained by the United States, killed hundreds of civilians. On September 4, 1994, the judge dismissed all charges against any member of the Salvadoran military who had taken part in the massacre, on the basis of the General Amnesty Law. The Commission earlier had heard the claims of the victims of the Las Hojas massacre. Case 10.287, Report No. 26/92, Inter-Am. Comm..H.R., OEA/Ser.L./V.II.83 Doc. 14 at 83 (1993), September 24, 1992.
[53] *Id*. ¶ 35.
[54] *Id*. ¶ 37.
[55] *Id*. ¶ 38.
[56] Convention for the Protection of Human Rights and Fundamental Freedoms *Opened for signature 4 November 1950, CETS No.: 005* (*entered into force* 3 September 1953).
[57] With respect to Article 2 see McCann and Others v. United Kingdom, ECtHR, App. No. 18984/91, *27 September 1995, 16;* Kaya v. Turkey, ECtHR, App. No. 22535/93, 28 March 2000;*86;* Yaşa v. Turkey, ECtHR, App. No. 22495/93, 2 September 1998, 98 *;* Oğur v. Turkey, ECtHR, App. No. 21594/93, 20 May 1999, 88. With respect to Article 3 see Assenov and Others v. Bulgaria ECtHR, App. No. 24760/94, 28 October 1998, 102; Aksoy v. Turkey, ECtHR, App. No. 21987/93, 18 December 1996, ¶¶ 98, 114.)
[58] Yasa v. Turkey, *Id*. ¶ ¶ 98, 100.
[59] Musayeva and others v. Russia, ECtHR, App. No. 74239/01, 26 July 2007, ¶¶ 85, 86, 116.

capable of leading to the identification and punishment of those responsible and effective access for the complainant to the investigatory procedure.[60]

UN Treaty Bodies

Human Rights Committee

The UN Human Rights Committee ('HRC'), responsible for monitoring state compliance with the International Covenant on Civil and Political Rights ("ICCPR"), on numerous occasions, has determined that States Parties have a duty, pursuant to the treaty, to investigate and prosecute those committing disappearances, summary executions, ill-treatment, and arbitrary arrest and detention. In 1992, the HRC adopted General Comment No 20(44) (article 7), which states that amnesties covering acts of torture:

> are generally incompatible with the duty of States to investigate acts of torture and 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.[61]

In *Rodríguez v. Uruguay*,[62] the HRC rejected Urugauy's assertion that it had no obligation to investigate violations of ICCPR rights by a prior regime, even when these include crimes as serious as torture. Article 2, paragraph 3 (a) of the ICCPR clearly stipulates that each State party undertakes "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."[63] The HRC found that the responsibility for investigations falls under Uruguay's obligation to grant an effective remedy. The HRC reaffirmed its position that amnesties for gross violations of human rights and legislation, such as Law No. 15,848, *Ley de Caducidad de la Pretensión Punitiva del Estado*, are incompatible with the

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[60] Aksoy v. Turkey, s*upra* note X, ¶¶ 98, 114. The investigation must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State. Mahmut Kaya v. Turkey, Eur. Ct., *supra* note X, ¶ 124.

[61] The Human Rights Committee General Comment No. 20 replaces general comment 7 concerning the prohibition of torture and cruel treatment or punishment (1992), ¶ 15. In General Comment No. 31, on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, the HRC remarked that States Parties must ensure that those responsible are brought to justice. 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. Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, May 26, 2004, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), ¶¶ 15, 18, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/58f5d4646e861359c1256ff600533f5f?Opendocument. *See also* recommendation of the Economic and Social Council that the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions should be taken into account and respected by Governments within the framework of their national legislation and practices. E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989).

[62] Communication No. 322/1988, 9 August 1994, UN Doc. CCPR/C/51/D/322/1988, ¶¶ 12.3 ,12.4.

[63] ICCPR, art. 2(3)(a).

obligations of the Uruguay under the ICCPR. The HRC noted with deep concern that the adoption of this law effectively excludes, in a number of cases, the possibility of investigation into past human rights abuses and, thereby, prevents Uruguay from discharging its responsibility to provide effective remedies to the victims of those abuses. Moreover, the HRC expressed concern that, in adopting this law, Uruguay had contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.

In *Bautista de Arellana v. Colombia*,[64] the HRC rejected the notion that disciplinary sanctions and a judgment of the Administrative Tribunal granting a claim for compensation constituted an effective remedy for the family of the victim. The HRC noted that purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2 (3) of the Covenant, in the event of particularly serious violations such as the right to life.[65] This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified. The HRC also rejected Colombia's assertion that the retirement of the perpetrators from the army constituted an effective remedy for the same reasons.[66]

In considering the case of *Ana Laureano v. Peru*, the HRC noted that, under the ICCPR, the State party is under an obligation to provide the victim and the author with an effective remedy. It urged Peru to open a proper investigation into the disappearance of Ana Rosario Celis Laureano, to provide for appropriate compensation, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary.[67]

In *Quinteros v. Uruguay*,[68] the HRC reiterated that it is implicit in article 4 (2) of the Optional Protocol[69] that the State party has the duty to investigate in good faith all allegations of violation of the ICCPR made against it and its authorities, especially when such allegations are corroborated by evidence.

In 2003, the HRC expressed concern about El Salvador's 1993 General Amnesty Act and the application of that act to serious human rights violations, including those considered and established by the United Nations Truth Commission for El Salvador. The HRC considered that the Act infringed the right to an effective remedy, since it prevented

[64] Communication No. 563/1993, 27 October 1995, UN Doc. CCPR/C/55/D/563/1983, ¶¶ 12.3, 12.4.
[65] *Id.* The HRC noted that while the ICCPR does not provide a general right for individuals to require that the State to criminally prosecute another person, the State party is under a duty to investigate thoroughly alleged violations of human rights, in particular, forced disappearances of persons and violations of the right to life, and to prosecute criminally and punish those held responsible for such violations.
[66] *José Vicente Chaparro et al. v. Columbia,* Communication No. 612/1995, 19 August 1997, UN Doc. CCPR/C/60/D/612/1995, ¶. 8.2.
[67] Communication No. 540/1993, 16 April 1996, UN Doc. CCPR/C/56/D/540/1993, ¶. 10.
[68] Communication No. 107/1981, 16 April 1996, UN Doc. CCPR/C/19/D/107/1981, ¶ 11
[69] Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976.

the investigation and punishment of all those responsible for human rights violations and the granting of compensation to the victims.[70]

Committee against Torture

In considering the 2004 periodic report on Chile, the Committee against Torture expressed concern about the fact that the Amnesty Law remained in force, prohibiting the prosecution of human rights violations committed from September 11, 1973 to March 10, 1978, jeopardizing the full exercise of fundamental human rights, and entrenching the impunity of those responsible.[71] The Committee recommended that Chile should "reform the Constitution to ensure the full protection of human rights, including the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment in conformity with the Convention, and to this end abolish the Amnesty Law."[72]

In relation to Guatemala, the Committee expressed concern with the persisting impunity regarding human rights violations committed during the civil conflict, genocide, and state repression, and noted that the 1996 National Reconciliation Act, in fact, had become an obstacle to the effective investigation of the 1982 case of the Dos Erres massacre.[73] It recommended that Guatemala should apply the Act in conformity with its strict limitations, which "explicitly exclude any amnesty for the perpetrators of acts of torture and other grave human rights violations," ensures the adequate investigations of all acts of torture and other grave human right violations, and grants adequate compensation to the victims.[74]

African Commission on Human and Peoples' Rights

In *Zimbabwe Human Rights NGO Forum v. Zimbabwe,*[75] the African Commission considered Clemency Order No. 1 of 2000. The Clemency Order granted pardons to every person liable to criminal prosecution for any politically motivated crime committed between January 1, 2000 and July 2000. The Order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period. The only crimes exempted from the Clemency Order were murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty. The Order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period. The question that the Commission addressed was whether the clemency order was a negation of the State's responsibility under Article 1 of the African Charter.[76]

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[70] Human Rights Committee, Conclusions and Recommendations: El Salvador, ICCPR/CO/78/SLV (HRC, 2003).
[71] CAT, Conclusions and Recommendations: Chile, CAT/C/CR.32/5 (2004), ¶. 6.
[72] *Id*., ¶ 7(b).
[73] Guatemala, CAT/C/GTM/CO/4 (2006) ¶ 15.
[74] *Id*.
[75] Communication 245/2002, Annex III, 21st Annual Activity report, EX.CL/322(X).
[76] *Id*. [194]. African [Banjul] Charter on Human and Peoples' Rights, *adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982),* (entered into force *21 October 1986*): Art 1: "The Member

As to the distinction between clemency, amnesty and pardon, the Commission noted:

> Clemency embraces the constitutional authority of the President to remit punishment using the distinct vehicles of pardons, amnesties, commutations, reprieves, and remissions of fines. An amnesty is granted to a group of people who commit political offences, for example, during a civil war, during armed conflicts or during a domestic insurrection. A pardon may lessen a defendant's sentence or set it aside altogether. One may be pardoned even before being formally accused or convicted. While a pardon attempts to restore a person's reputation, a commutation of sentence is a more limited form of clemency. It does not remove the criminal stigma associated with the crime; it merely substitutes a milder sentence. A reprieve on its part postpones a scheduled execution.[77]

The Commission noted that, generally "a Clemency power is used in a situation where the President believes that the public welfare will be better served by the pardon, or to people who have served part of their sentences and lived within the law, or a belief that a sentence was excessive or unjust or again for personal circumstances that warrant compassion. In all these situations, the President exercises a near absolute discretion."[78]

The Commission noted that consistent international jurisprudence suggests that the prohibition of amnesties leading to impunity for serious human rights has become a rule of customary international law.[79] The Commission's view was that by "passing the Clemency Order the State did not only encourage impunity but effectively foreclosed any available avenue for the alleged abuses to be investigated, and prevented victims of crimes and alleged human rights violations from seeking effective remedy and compensation."[80] This constituted a violation of the victims' right to judicial protection and to have their cause heard.[81] Accordingly, the Commission held that by enacting Decree No. 1 of 2000 - foreclosing access to any remedy for victims to vindicate their rights, and then failing to create alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations compensated, - the State not only prevented the victims from seeking redress but also encouraged impunity. Thus, the state violated its obligations under the African Charter.[82]

UN Position on Amnesties[83]

States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter [I] and shall undertake to adopt legislative or other measures to give effect to them."

[77] *Id*. at ¶ 196.
[78] *Id*. at ¶ 198.
[79] *Id*. at ¶ 201.
[80] *Id.* at ¶ 211.
[81] *Id.* at ¶ 212. See African Charter, arts. 6 & 7. As the Commission stated, "If there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard."
[82] *Id*. at ¶ 215.

The UN position on amnesties does not constitute a direct source of law, although it can be said to be indicative of *opinio juris* insofar as the positions of the Secretariat have been endorsed by Member States. None of the documents mentioned below have been generally ratified by the General Assembly, but the UN prohibition on amnesties, to a limited extent, is reflected in case practice, such as in amnesties in Kenya, Liberia, Burundi and DRC.

Until relatively recently, the position of the United Nations on amnesties was rather cautious and mostly politically pragmatic[84] However, "in mid-1999, the Office of the UN Secretary-General sent out a cable from New York to all UN representatives around the world, attaching 'Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution.' These Guidelines indicated that the UN could not condone amnesty for war crimes, crimes against humanity or genocide."[85] In 1999, at the occasion of the signing of the Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, the former Special Representative of the Secretary-General of the UN, Francis Okelo, made a reservation,[86] and stated that "the UN holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."[87] This was congruent with contemporaneous, ongoing efforts of the United Nations to foster accountability for these core international crimes, notably through the functioning of the UN *ad hoc* international tribunals and the creation of the International Criminal Court.

In a 2000 report, the UN Secretary-General reiterated this position and indicated that: "While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law."[88]

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[83] This section of the draft is indebted to the research of Marieke Wierda, Thomas Unger and others on the Prosecutions team of ICTJ.

[84] The first official study commissioned by the United Nations on amnesties took a generally positive view towards them. *See* Louis Joinet, *Study on Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights*, UN Doc. E/CN.4/Sub.2/1985/16.

[85] Priscilla Hayner, *Negotiating Peace in Sierra Leone: Confronting the Justice Challenge*, Dec. 2007, at 17, available at http://www.ictj.org/static/Africa/SierraLeone/HaynerSL1207.eng.pdf (last viewed Oct. 4, 2008).

[86] This reservation was apparently not raised during the negotiation, did not reflect the views of the parties to the agreement, and was hand-written on a single copy of the Agreement, apparently not handed over to the representatives of the RUF. The legal consequences of this last-minute reservation are unclear. For a discussion of the amnesty in the Lomé process and Accord and the UN, *see* Priscilla Hayner, supra note X, at 17-18.

[87] See United Nations Security Council, *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, UN Doc. S/1999/836, ¶ 54; William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 12 UC DAVIS J.INT'L L. & POL,. No. 1, at 145 (2004).

[88] UN Doc. S/2000/915.

The 2004 *Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* of the UN Secretary-General clarified this position: "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights;"[89] Further, "carefully crafted amnesties can help in the return and reintegration of both groups and should be encouraged, although, as noted above, these can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights."[90] The report recommends that any peace agreements and Security Council resolutions and mandates: "reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, and ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court …"[91]

The position of the UN also is reflected in the *Updated Set of Principles to Combat Impunity,* which, although they do not constitute a direct source of international law,[92] state that a key part of the general obligation to combat impunity is the understanding that, even when intended to establish peace or foster reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:

(a) The perpetrators of serious crimes under international law may not benefit from amnesties until the State has met its obligations under Principle 19[93] or the perpetrators have been prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question;

(b) Amnesties shall not prejudice the victims' right to reparation or the right to know;

[89] United Nations Security Council, *Report of the Security-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, ¶ 10..
[90] *Id*., at ¶. 32..
[91] *Id.,* at ¶. 64(c). *see also Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (Orentlichter Report), UN Doc. E/CN.4/2005/102/Add.1, Principle 24; "Cross-Border Population Movements," in INTEGRATED DISARMAMENT, DEMOBILIZATION, AND REINTEGRATION STANDARDS (New York: United Nations Department of Peacekeeping Operations, 2007), Level 5.40, ¶ 12.4. *See* discussion *infra* text accompanying notes x – y.
[92] The Commission on Human Rights "took note with appreciation" of the principles..Human Rights Resolution, 2005/81, Impunity, U.N. Doc. E/CN.4/RES/2005/81, ¶. 20.
[93] Orentlichter Report *supra.* note X,. Principle 19 states, "States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished. Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as parties *civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein."

(c) Insofar as it may be interpreted as an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for the peaceful exercise of their right to freedom of opinion and expression; and

(d) Any individual convicted of offences (other than those referred to above), without the benefit of a fair trial, or on the basis of a coerced confession, is entitled to refuse an amnesty and request a retrial.[94]

Generally speaking, the UN position on amnesty is important, and can be interpreted as indicative of the trend of emerging international customary law, but it should be noted that the UN usually refrains from endorsing blanket amnesties rather than actually qualifying them as illegal.

[94] Orentlicher Report *supra.* note X, Principle 24: Restrictions and other Measures Relating to Amnesty.