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BRIEF OF INTERNATIONAL LAW EXPERTS AS *AMICI CURIAE*

IMPERMISSIBILITY OF AMNESTY IN RELATION TO SERIOUS VIOLATIONS OF HUMAN RIGHTS AND CRIMES AGAINST HUMANITY, GENOCIDE AND WAR CRIMES

I. Introduction

This brief is submitted on behalf of the *amici curiae*, listed below, in relation to the applicability of Guatemala's Law of National Reconciliation to grave violations of international human rights and humanitarian law, including genocide, war crimes and crimes against humanity. As set out in the annex, *amici* are former judges, prosecutors and experts in international law and practice. Some have experience in the investigation and prosecution of international wrongs. Others, as judges in the context of national and international systems, have grappled with similar questions to those currently before the court.

This intervention will address firstly the international and comparative jurisprudence on amnesty, to establish that the interpretation and application of amnesty laws to preclude the investigation or prosecution of grave human rights violations and international crimes would be inconsistent with regional and international norms binding on the state of Guatemala (Section II). In addressing the current state of the law, this brief will highlight pertinent parts of the deluge of international legal developments that indicate the duties on states to investigate and prosecute such crimes and the incompatibility of any amnesty that prevents this. A growing body of national practice has also developed, rejecting broad amnesties for serious international crimes. In numerous cases national courts have found that amnesties must be interpreted consistently with these obligations, and held that amnesties that cannot be so interpreted are null and void. Taken together, such practice points to the emergence of a regional and an international norm precluding amnesty for serious crimes. Although the focus of this brief is on the non-applicability of amnesty to such crimes, Section III notes that such crimes are also imprescriptible as a matter of international law.

The next part of this intervention focuses on the characterization of the crimes at issue in this case as crimes under international law, as well as serious violations of international human rights law (IHRL) and international humanitarian law (IHL) (Section IV.). [It will be noted that the legal classification of such acts as crimes against humanity, war crimes or other violations of IHRL or IHL already pertained in 1982 (Section V).]

The *amici* respectfully submit this brief in the hope that it will assist this honorable Court as it assumes the responsibility of considering these issues in the Guatemalan context.

As experts in international and comparative law, we would not presume to address the Court on matters of domestic law. We note however that Article 8 of the 1996 Law of National Reconciliation (LNR), providing amnesty for political crimes committed in the course of the armed conflict,[1] limits the scope of the amnesty thus:

> La extinción de la responsabilidad penal a que se refiere esta ley, no será aplicable a los delitos de genocidio, tortura y desaparición forzada, así como aquellos delitos que sean imprescriptibles o que no admitan la extinción de responsabilidad penal, de conformidad con el derecho interno o los tratados internacionales ratificados por Guatemala.[2]

The Government of Guatemala is to be commended for adopting a reconciliation law that is consistent with international law, in that it excludes amnesty for those who have committed crimes that are "imprescriptible" or in respect of which responsibility cannot be "extinguished" under international law—that is, international crimes. The Guatemalan judiciary, including this honorable Court, has set an example for the region by upholding – in previous decisions concerning the massacre of Las Dos Erres – the fundamental principle that there can be no amnesty or other impediments to prosecution for grave violations. We note that this jurisprudence is consistent with Articles 46 and 149 of the constitution, which stand for the general principle that in human-rights related areas, the treaties and conventions ratified by Guatemala[3] have preeminence over internal law, and that Guatemala accepts and applies general international law, including customary international law.[4]

It is our understanding, therefore, that there is no conflict between domestic and international law. Unlike the situation in some of the other states mentioned in Section II (v), where national provisions presented a conflict with international norms, and in some cases have been revoked, we note that the Reconciliation Law allows the Court to have regard to those provisions of international law that require investigation and prosecution, and to exclude amnesty where such is prohibited under international law. Having regard to the legal standards set out in this brief, it should be apparent that crimes such as those

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[1] Ley de Reconciliación Nacional [National Reconciliation Act], Diciembre, 18, 1996, Decreto núm. 145-96 del Congreso de la Repúublica, Art. 8 (Guat.).

[2] Guatemala ratified the Convention on the Prevention of the Crime of Genocide in 1950, the Geneva Conventions in 1952, the American Convention in 1978, Additional Protocol II to the Geneva Conventions in 1987 and the Rome Statute in 2012.

[3] Judgments of the Constitutional Court of April 24, 2000 (Appendixes to the application, judicial file, piece XIV, appendix 30, f. 4148); May 8, 2000 (Appendixes to the application, judicial file, piece XIV, appendix 30, f. 4159), and June 20, 2000 (Appendixes to the application, judicial file, piece XVI, f. 4403).

[4] Preeminencia del Derecho Internacional [Preeminence of International Law], Constitución de La Republica de Guatemala, art. 46 (Enero, 14, 1986) "Se establece el principio general de que en materia de derechos humanos, los tratados y convenciones aceptados y ratificados por Guatemala, tienen preeminencia sobre el derecho interno." *Id;* De Las Relaciones Internacionales [Pertaining to International Relations], Constitución de La Republica de Guatemala, art. 46. "Guatemala normará sus relaciones con otros Estados, de conformidad con los principios, reglas y prácticas internacionales con el propósito de contribuir al mantenimiento de la paz y la libertad, al respeto y defensa de los derechos humanos, al fortalecimiento de los procesos democráticos e instituciones internacionales que garanticen el beneficio mutuo y equitativo entre los Estados." *Id.*

committed in 1982 come within the scope of excluded violations under international treaties as well as customary law. Rejecting amnesty for international crimes would be consistent with and contribute to this substantial body of international law and practice; a decision to uphold application of an amnesty law or other measures that precludes criminal responsibility to these crimes would be out of step with it, and bring the Guatemalan state into conflict with its international obligations.

II. THE IMPERMISSIBILITY OF AMNESTIES UNDER INTERNATIONAL LAW

A substantial and growing body of practice exists at both the international, regional and national levels dealing with the applicability of amnesties to grave human rights violations. The law makes clear that states have obligations to investigate and prosecute serious violations of human rights, and that laws that are inconsistent with the discharge of such obligations are invalid. The Inter-American system has been at the forefront of clarifying the nature of states positive obligations – to investigate, prosecute, punish and provide reparation – in respect of egregious violations amounting to crimes under international law. The standards first set down by the Inter-American Court of Human Rights have become stalwart principles, recognized universally across the international human rights system and across regional systems.

The jurisprudence of international courts, tribunals and supervisory mechanisms and the position adopted by numerous national legal systems, points to extensive practice precluding amnesties, *inter alia*, for grave human rights violations, and international crimes including genocide, crimes against humanity, war crimes and torture. The prohibition on amnesty and other legal impediments to investigation and prosecution has become a well-settled norm of international law. This is particularly clear in the Americas region, as set out below.

a. The Inter-American system and the rejection of amnesty laws that preclude investigation and/or prosecution for serious violations, including crimes against humanity

The institutions of the Inter-American system have consistently held that State Parties have a specific obligation to investigate cases alleging violations of the rights recognized in the American Convention as part of their general obligation to guarantee those rights under Article 1(1) of the Convention.[5] The Court has consistently set down certain benchmarks for such investigation, noting that "in cases of . . . serious human rights violations, conducting ex officio a prompt, genuine, impartial and effective investigation

[5] Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 162 (July 29, 1988); Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reperations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, ¶ 116, (May 26, 1988) (citing *Velásquez Rodríguez*, Inter-Am. Ct. H.R., at ¶ 162); González v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 287, (Nov. 16, 2009); Perozo et al. v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 195, ¶ 298, (Jan. 28, 2009).

is a fundamental factor and a condition for the guarantee and protection of certain rights affected by these situations, such as personal liberty, personal integrity and life."[6]

As the Court has made clear, part of this is the obligation to "remove all the obstacles that prevent the adequate investigation of the facts in the respective proceedings so as to avoid a repetition of [similar] acts and circumstances . . . *In this regard, the State may not apply amnesty laws or argue prescription, non-retroactivity of the criminal law, res judicata, the principle of ne bis in idem, or any other similar mechanism that excludes responsibility, in order to exempt itself from this obligation*." (emphasis added)[7]

The Inter-American Commission has repeatedly confirmed that amnesty laws were incompatible with the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.[8] In the *Lucio Parada* communication, for example, the Commission observed that "amnesty laws have deprived large segments of the population of the right to justice in their claims against those who committed excesses and acts of barbarity against them."[9] The Commission's approach to this question was subsequently reaffirmed on many occasions.[10]

The Inter-American Court first explicitly recognized the existence of a customary rule under which perpetrators of serious human rights violations must be prosecuted in *Barrios Altos v. Peru*[11], which related to the extrajudicial killing of a group of civilians by members of the Peruvian armed forces. The Court, taking into account the above-mentioned obligations, held:

> [A]ll 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

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[6] *Vargas*, Inter-Am. Ct. H.R., at ¶ 117 (citing Pueblo Bello Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 145 (Jan. 31, 2006); Radilla Pacheco v. Mexico, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 143 (Nov. 23, 2009); Anzualdo Castro v. Peru, Inter-Am. Ct. H.R. (ser.C) No. 202, ¶ 65 (Sept. 22, 2009).

[7] *Vargas*, Inter-Am. Ct. H.R., at ¶ 216(d) (citing Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 41-44 (Mar. 14, 2001) [hereinafter Barrios Altos No. 75]); *Id.* at ¶ 182; Dos Erres Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 233 (Nov. 24, 2009).

[8] *See* Herrera v. Argentina, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Inter-Am. Comm'n H.R., OEA/Ser/L.V/II.83, Report No. 28/92, doc. 14, corr.1, (1992). *E.g.*, Parada Cea v. El Salvador, Case 10.408, Inter-Am. Comm'n H.R., Report No. 1/99, OEA/Ser.L/V/II.102, doc. 6 rev. (1998); Catalan Lincoleo v. Chile, Case 11.771, Inter-Am. Comm'n H.R., Report No. 61/01, OEA/Ser.L/V/11.111, doc. 20 rev. (2000).

[9] *Parada Cea*, Inter-Am. Comm'n H.R., at ¶ 108.

[10] *See* Hermosilla v. Chile, Case 10.843, Inter-Am. Comm'n H.R., Report No. 36, 96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 78 (1996); Meneses Reyes v. Chile, Case 11.228, Inter-Am. Comm'n H.R., Report No. 34/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 76 (1996); *Herrera,* Inter-Am. Comm'n H.R., ¶ 4; Santos Mendoza v. Uruguay, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Inter-Am. Comm'n H.R., Report No. 29/92 OEA/Ser./L/V/II.83, doc. 14, corr. 1 ¶ 51 (1992); Gonzalez v. Dominican Republic, Case 11.324, Inter-Am. Comm'n H.R., Report No. 16/98, OEA/Ser.L/V/II.102, doc. 6 rev. ¶ 71 (1998).

[11] *Barrios Altos (No. 75)*, Inter-Am. Ct. H.R.

> they violate non-derogable rights recognized by international human rights law.[12]

It is noted that in the *Barrios Altos case* the domestic prosecutions had failed because Peruvian criminal law had not defined crimes against humanity at the time of the alleged massacre of Peruvian citizens by State actors. As a result, the killings were treated as common crimes, for which amnesty was granted under Peru's national amnesty laws. The Court rejected the argument that amnesty could be permissible in these circumstances.

In *Almonacid Arellano v. Chile*,[13] the Inter-American Court again considered whether the murder of Almonacid Arellano, by State actors, constituted a crime against humanity and, if so, if it could be subject to Chile's national amnesty law. After exhaustively examining the history of crimes against humanity in international law, the Court concluded that "crimes against humanity include the commission of inhuman acts, such as murder, committed in a context of generalized or systematic attacks against civilians. A single illegal act as those mentioned above, committed within the described background, would suffice for a crime against humanity to arise."[14] The Inter-American Court then found that amnesty could not be granted for a crime against humanity because this would prevent States from complying with their obligations under international law to investigate and prosecute such crimes.[15] After finding this obligation under customary international law, the Court noted that in the Inter-American system it arises under Article 1(1) of the American Convention.[16] As discussed above, Article 1(1) imposes a general obligation on all State Parties to respect and ensure basic rights and fundamental freedoms to all persons subject to their jurisdiction.[17]

In *Moiwana Village v. Suriname*,[18] the Inter-American Court likewise considered a national amnesty law that excluded crimes against humanity "as defined by international law." While much of the national legal proceedings had focused on whether the extrajudicial killings at issue in the case met the definition of a crime against humanity under international law, the Court held that:

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[12] *Id.* ¶ 41.
[13] Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).
[14] *Id.* ¶ 96.
[15] *Id.* ¶¶ 96-108.
[16] *Id.* ¶ 109. ("The obligation that arises pursuant to international law to try, and, if found guilty, to punish the perpetrators of certain international crimes, among which are crimes against humanity, is derived from the duty of protection embodied in Article 1(1) of the American Convention.") *Id.*
[17] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 1(1) (*entered into force* Jul. 18, 1978) ("The States Parties to this Convention undertake to respect the rights and freedoms recognized 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."). *Id.*
[18] Moiwana Village v. Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (Jun. 15, 2005).

> [I]n response to the extrajudicial killings that occurred on November 29, 1986, the foremost remedy to be provided by the State is an effective, swift investigation and judicial process, leading to the clarification of the facts, punishment of the responsible parties, and appropriate compensation of the victims. As the Tribunal has asserted on repeated occasions, no domestic law or regulation – including amnesty laws and statutes of limitation – may impede the State's compliance with the Court's orders to investigate and punish perpetrators of human rights violations. If this were not the case, the rights found in the American Convention would be deprived of effective protection. This conclusion is consistent with the letter and spirit of the Convention, as well as general principles of international law. Figuring prominently among said principles, *pacta sunt servanda* requires that a treaty's provisions be given meaningful effect within a State Parties' internal legal framework.[19]

In a subsequent interpretative judgment dealing with judgment on the merits in *Barrios Altos*, the Inter-American Court of Human Rights made clear that its findings in that case as to the invalidity of the laws in question was "general in nature".[20] The Court's position on amnesty legislation has been reaffirmed in numerous other cases in addition to those cited above, including *Myrna Mack Chang v. Guatemala,*[21] *El Caracazo v. Venezuela*,[22] *Trujillo-Oroza v. Bolivia*,[23] and *Almonacid-Arellano et al v. Chile.*[24]

Most recently, in December 2010, the Court provided further confirmation of this line of case law, in *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, where the Court found that Brazil's 1977 amnesty was incompatible with its obligations under the American Convention.[25] Finally, it should be noted that although a significant number of the cases before the Inter-American Court have been concerned with "self-amnesties" (that is to say amnesty laws passed by a regime to prevent the prosecution of the individuals comprising it) the Court has not hesitated to apply the principle laid down in *Barrios Altos v. Peru* in other cases too.[26] The Court has noted that, the fact that an amnesty has been enacted to end a conflict, to promote reconciliation, or for any other purpose, does not change its legal invalidity.

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[19] *Id.* ¶¶ 166-167.
[20] Barrios Altos v. Peru, Interpretation of the Judgment on the Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 18 (Sep. 03, 2001) [hearinafter Barrios Altos No. 83].
[21]Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 101, ¶ 276 (Nov. 25, 2003).
[22]Caracazo v. Venezuela, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 119 (Aug. 29, 2002).
[23]Trujillo-Oroza v. Bolivia, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 106 (Feb. 27, 2002). .
[24]Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sep. 26, 2006).
[25]Gomes-Lund v. Brazil, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219 (Nov. 24, 2010).
[26] Merchants v. Colombia**,** Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 261 *et seq* (Jul. 05, 2004).

Finally, it is noted that in the case of the Las Dos Erres Massacre specifically, the Inter-American Court has already held that Guatemala has an obligation to investigate and prosecute those responsible. In 2009, the Inter-American Court held as follows:

> [T]he events of the Las Dos Erres Massacre, recognized by the State, constitute grave human rights violations. The context of these facts has been recognized by this Court as "a pattern of selective extrajudicial executions promoted by the State, which was directed to those individuals considered 'internal enemies.'" Additionally, since the date when the facts occurred until today, there have been no effective judicial mechanisms to investigate the human rights violations or to punish all those responsible. Based on the above, the Court determines that the eventual application of the amnesty provisions of the LRN [Laws on National Reconciliation] in this case would violate the obligations derived from the American Convention. Thus the State has the duty to continue the criminal proceeding without major delays, and include the multiple crimes generated in the events of the massacre for their proper investigation, prosecution and eventual punishment of those responsible for those acts.[27]

The Court noted Guatemala's obligation to "investigate all of the allegedly responsible parties, including the participation by high officials and State employees[.]"[28]

b. Other regional Human Rights Courts and Bodies' Rejection of Amnesty Laws

Although the European Court of Human Rights has been called upon less frequently than its Inter-American counterpart to determine whether amnesty laws comply with the obligations inherent in the ECHR[29], where it has had the opportunity to do so it has likewise rejected the applicability of amnesty to serious rights violations. In the case of *Ould Dah v. France*, the Court held that "amnesties are generally incompatible with states obligations [to investigate] in respect of such acts."[30]

In addition, the European Court has insisted on several occasions on the need for investigation and provision of an effective remedy in respect of serious crimes, including attacks on civilians, rape and torture.[31] In so doing, it has provided detailed jurisprudence

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[27] *Dos Erres Massacre*, Inter-Am. Ct. H.R., at ¶¶ 130-131(internal citations omitted).
[28] *Id.* ¶ 152.
[29] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222. (Nov. 4, 1950).
[30] Ould Dah v. France, Admissibility, Unreported, Application No. 13113/03, Eur. Ct. H.R., 16-17 (Mar. 17, 2009). (judgment available only in French: '***l'amnistie est généralement incompatible avec le devoir qu'ont les États d'enquêter sur de tels actes***").
[31] Musayeva et al. v. Russia, Merits, App. No. 7439/01 47 Eur. H.R. Rep. 25 (Jul. 26, 2007); Aydin v. Turkey, Merits, Application No. 23178/94, 25 Eur. H.R. .Rep. 251 (Sep. 25, 1997); Assenov. v. Bulgaria, Merits, App. No. 24760/94, 28 Eur. H.R.Rep. 652 (Oct. 28, 1998); Kurt v. Turkey, Merits, App. No. 24276/94, 27 Eur. H.R. Rep. 373 (May 25, 1998); Yasa v. Turkey, Merits, App. No. 24495/93, 28 Eur. H.R. Rep. 408 (Sep. 2, 1998).

on the benchmarks of independence and effectiveness required of an investigation and that such investigation must be capable of identifying persons responsible for the purposes of criminal prosecution.

The African system for its part has also repeatedly noted the duty to investigate and prosecute serious crimes.[32] It has also noted specifically that amnesty laws cannot preclude this investigation and prosecution of serious crimes and violations of human rights. Citing the jurisprudence of the Inter-American Court as well as a number of U.N. Declarations, the African Commission on Human and Peoples' Rights has found that Zimbabwe's Clemency Law violated the State's international obligations. [33]

These regional approaches are at one with that adopted, more generally, by the universal mechanisms for the protection of human rights in respect of amnesties. Both the response of U.N. institutions to proposals for amnesty laws in practice, and through the work of quasi-judicial human rights bodies, the global human rights mechanisms increasingly reject amnesty laws that are irreconcilable with the states obligations to investigate and prosecute serious crimes and grave violations of human rights.

c. Instruments and Practice on the International or Universal Level on Amnesty for Serious Crimes

The United Nations has consistently maintained the position that amnesties cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law. It has created two tribunals to adjudicate such crimes, notwithstanding attempts to grant amnesties under domestic laws in both countries.[34] In addition, U.N. monitoring bodies have rejected the application of amnesties to crimes prohibited by peremptory norms.

i. The ICCPR/ U.N. Human Rights Committee

In both General Comments on the International Covenant on Civil and Political Rights (ICCPR) and in the views expressed in response to communications concerning alleged

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[32] *See* Zimbabwe Human Rights NGO Forum v. Zimbabwe, Afr. Comm'n Hum. & Peoples' Rights, Comm.,No 245/2002 (May 15, 2006). (Discussing the duty to investigate and prosecute crimes in reference to the Inter-American Court of Human Rights case Velásquez Rodríguez.and the United Nations Declaration on the Elimination of Violence against Women).; *See also* Ass'n of Victims of Post-Electoral Violence & INTERIGHTS v. Cameroon, Afr. Comm'n Hum. & People's Rights, Comm. No 272/2003 (Jun. 2009 – Nov. 2009); Egyption Inititative for Personal Rights & INTERIGHTS v. Arab Republic of Egypt, Afr. Comm'n Hum. & People's Rights, Comm. No 334/06 (Mar. 01, 2011).

[33] *Zimbabwe Human Rights NGO Forum,* Afr. Comm'n Hum. & People's Rights, at ¶ 211.

[34] March 6, 2012, Letter from U.N. Secretary General, to President of the Security Council, Statute of the Special Court for Sierra Leone, annexed to 2002 Agreement on the Special Court for Sierra Leone annexed to Letter dated 6 March from U.N. Secretary General to the President of the Security Council, UN. Doc. S/2002/246, Art. 10 (March 8, 2002) [hereinafter Statute of the Special Court for Sierra Leone]; UN-Cambodia Agreement Concerning the Prosecution of Crimes Committed During the Period of the Democratic Kampuchea, art. 11, G.A. Res. 57/228/B, U.N. Doc. A/RES/57/228, art. 11 (May 22, 2003) [hereinafter UN-Cambodia Agreement].

violations of the Convention, the U.N. Human Rights Committee has consistently adopted the position that amnesties in respect of serious human rights violations are incompatible with the obligations imposed by the ICCPR, in particular the obligation to investigate and prosecute such acts. In General Comment 20,[35] which concerns the prohibition of torture, inhuman or degrading treatment or punishment, the Committee observed:

> [S]ome States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[36]

Subsequently, in General Comment 31, which concerns the general legal obligations imposed upon States Parties by the Covenant, the U.N. Human Rights Committee made the broader observation that:

> Where investigations … reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with a 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. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6).[37]

Developing this analysis, the Committee noted that "where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties …"[38]

This is a position which the U.N. Human Rights Committee has also affirmed in its Concluding Observations in respect of state reports. Of particular significance, for present purposes, is the Committee's 2008 Concluding Observations on Spain which state:

> While taking note of the recent decision of the National High Court to consider the question of the disappeared, the Committee is concerned at the

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[35] CCPR General Comment 20: Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment, art. 7, U.N.H.C.H.R., 44th Sess. (1992), HRI/GEN/1/Rev.6, 151 (2003) , *available at* http://www1.umn.edu/humanrts/gencomm/hrcom20.htm

[36] *Id*. ¶ 15.

[37] CCPR General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties, U.N.H.C.H.R., CCPR/C/21/Rev.1/Add. 13, ¶ 18 (Mar. 29, 2004), *available at* http://www1.umn.edu/humanrts/gencomm/hrcom31.html.

[38] *Id*.

> continuing applicability of the 1977 amnesty law. It recalls that crimes against humanity are not subject to a statute of limitations and draws the State Party's attention to its general comment No. 20 (1992), on article 7, according to which amnesties for serious violations of human rights are incompatible with the Covenant, and its general comment No. 31 (2004), on the nature of the general legal obligation imposed on States parties to the Covenant.[39]

In light of these observations the Committee recommended that Spain "should consider repealing the 1977 amnesty law [and] (b) take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity." [40]

In numerous other concluding observations, the Committee has, in similar terms, consistently condemned the promulgation of amnesty statutes in countries including Argentina,[41] Bolivia,[42] Cambodia,[43] Chile,[44] Croatia,[45] El Salvador,[46] Haiti,[47] Lebanon[48] and Sudan.[49]

As regards individual communications, the Human Rights Committee has dealt with the question of amnesties in the views it has given in response to such communications. For instance, in the *Rodríguez v. Uruguay* communication, which concerned whether amnesty legislation enacted by the State Party in question was in compliance with its obligations under the Covenant, the Committee expressed the view 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 obligations of the State Party under the Covenant."[50] The Committee further observed that "the adoption of this

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[39] Human Rights Comm., 94th Sess., *Concluding Observations of the Human Rights Comm.: Spain,* ¶ 2, U.N. Doc. CCPR/C/ESP/CO/5 (Jan. 5, 2009) [hereinafter Human Rights Comm. Concluding Observations: Spain].
[40] *Id.*
[41] Human Rights Comm., 70th Sess., *Concluding Observations of the Human Rights Comm.: Argentina,* U.N. Doc. CCPR/CO/70/ARG, ¶ 9 (Nov. 3, 2000).
[42] Human Rights Comm., 59th Sess. *Concluding Observations of the Human Rights Comm.: Bolivia*, ¶ 15, U.N. Doc. CCPR/C/79/Add.74 (May 1, 1997).
[43] Human Rights Comm., 66th Sess., *Concluding Observations of the Human Rights Comm.: Cambodia,* ¶ 6, U.N. Doc. CCPR/C/79/Add. 108 (Jul. 27 1999).
[44] Human Rights Comm., 65th Sess., *Concluding Observations of the Human Rights Comm.: Chile,* ¶ 7, U.N. Doc. CCPR/C/79/Add. 104 (Mar. 30, 1999).
[45] Human Rights Comm., 61st Sess., *Concluding Observations of the Human Rights Comm.: Croatia,* ¶ 11, U.N. Doc. CCPR/CO/71/HRV (Apr. 30, 2001).
[46] Human Rights Comm., 50th Sess., *Concluding Observations of the Human Rights Comm.: El Salvador*, ¶ 7, U.N. Doc. CCPR/C/79/Add. 34 (Apr. 18, 1994).
[47] Human Rights Comm., 53rd Sess., *Concluding Observations of the Human Rights Comm.: Haiti*, ¶¶ 230-235, U.N. Doc. CCPR/C/79/Add.49 (Oct. 3, 1995).
[48] Human Rights Comm., 59th Sess., *Concluding Observations of the Human Rights Comm.: Lebanon,* ¶ 12, U.N. Doc. CCPR/C/79/Add. 78 (Apr. 1, 1997).
[49] Human Rights Comm., 61st Sess., *Concluding Observations of the Human Rights Comm.:* Sudan, ¶ 17, U.N. Doc. CCPR/C/79/Add. 85 (Nov. 19, 1997).
[50] Rodriguez v. Uruguay, Comm. No. 322, HRC, U.N. Doc. CCPR/C/51/D/322/1988, ¶ 12.4 (1994).

law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses."[51]

ii. The Convention against Torture/ U.N. Committee against Torture

Several provisions of the Convention against Torture also have a bearing on the permissibility of amnesty legislation which prevents the prosecution of acts of torture. Article 4(1) obliges States Parties to ensure that "all acts of torture are offences under its criminal law while Article 4(2) requires States Parties to "make these offences punishable by appropriate penalties which take into account their grave nature." In addition, Article 12 stipulates that "[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." Article 13 stipulates that "[e]ach State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities." The International Court of Justice recently found that the obligation to promptly investigate allegations of torture is absolute.[52]

Mirroring the practice of the Human Rights Committee, the Committee against Torture has noted its concern at the application of amnesty legislation to torture in Concluding Observations in respect of Azerbaijan,[53] Bahrain,[54] Benin,[55] Chile,[56] Croatia,[57] Kyrgyzstan,[58] Peru,[59] Senegal,[60] and Venezuela,[61] among others. In making such

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[51] *Id.*
[52] Questions relating to the Obligation to Prosecute or Extradite (Belgium v.Senegal), I.C.J., (Jul. 20, 2012).
[53] *Comm. against Torture, 30th Sess., Conclusions and Recommendations of the Comm. against Torture*: Azerbaijan, ¶¶ 68(e) and 69(c), U.N. Doc. CAT/C/CR/30/01 (May 14, 2003).
[54] *Comm. against Torture, 34th Sess., Conclusions and Recommendations of the Comm. against Torture: Bahrain,* ¶ 6(g), U.N. Doc. CAT/C/CR/34/BHR (Jun. 21, 2005).
[55] Rep. of the Comm. against Torture, 27th and 28th Sess., Nov. 12 – 23, 2001, Apr. 29 – May 17, 2002, ¶ 34(i), U.N. Doc. A/57/44; GAOR, 57th Sess., Supp. No. 44 (2002).
[56] *Comm. against Torture, 32nd Sess., Conclusions and Recommendations of the Comm. against Torture: Chile*, ¶¶ 6(b) and 7(b), U.N. Doc. CAT/C/CR/32/5 (Jun. 14, 2004) [hereinafter Comm. Against Torture Conclusions: Chile].
[57] Rep. of the Comm. against Torture, 23th and 24th Sess., Nov. 09 – 20, 1998, Apr. 26 – May 14, 1999, ¶ 54, U.N. Doc. A/54/44 at ; GAOR 54th Sess., Supp. No. 44 (1999) [hereinafter Comm. against Torture Report: Croatia].
[58] *Id.* ¶¶ 73(e) and 75(c).
[59] *Comm. against Torture, 32nd Sess., Conclusions and Recommendations of the Comm. against Torture: Peru,* ¶ 16, U.N. Doc. CAT/C/PER/CO/4 (Jun. 25, 2006).
[60] Rep. of the Comm. against Torture, Jul. 9, 1996, ¶ 112, U.N. Doc. A/51/44; GAOR 51st Sess. Supp. No. 44 (1996) (Senegal).
[61] *Comm. against Torture, 29th Sess., Conclusions and Recommendations of the Comm. against Torture: Venezuela*, ¶ 6(c), U.N. Doc. CAT/C/CR/29/2 (Dec. 23, 2002).

observations, in practice the Committee often observes that amnesty laws are incompatible with the relevant State Party's obligations under the Convention.[62]

The CAT's Concluding Observations on Spain's 2009 State Report addressed the 1977 Amnesty Act. The Committee observed that,

> While it takes note of the State party's comment that the Convention against Torture entered into force on 26 June 1987, whereas the Amnesty Act of 1977 refers to events that occurred before the adoption of that Act, the Committee wishes to reiterate that, bearing in mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by the principle of legality or the statute of limitation. The Committee has received various interpretations of article 1, paragraph (c), of the Amnesty Act — which stipulates that amnesty shall not apply to acts that "entailed serious harm to the life or inviolability of persons" — to the effect that this article itself would in any case exclude torture from the offences subject to amnesty (arts. 12, 13 and 14).[63]

The Committee concluded its observations on this issue with a clear recommendation that "[t]he State Party should ensure that acts of torture, which also include enforced disappearances, are not offences subject to amnesty."[64] It further encouraged Spain "to continue to step up its efforts to help the families of victims to find out what happened to the missing persons, to identify them and to have their remains exhumed, if possible." Finally, the CAT reiterated that "under article 14 of the Convention, the State party must ensure that the victim of an act of torture obtains redress and has an enforceable right to compensation."[65]

iii. U.N. Commission on Human Rights/Human Rights Council

For its part, the U.N. Commission on Human Rights has addressed the question of amnesties on numerous occasions, for instance, Resolution 2005/81 on Impunity, stated:

> Amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes. [The Commission] urges States to take action in accordance with their obligations under international law and welcomes the lifting, waiving, or nullification of amnesties and other immunities […][66]

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[62] *E.g. Id.;* Comm. against Torture Report: Croatia, *supra* note 57, ¶ 59; Comm. Against Torture Conclusions: Chile, *supra* note 56.
[63] Human Rights Comm. Concluding Observations: Spain, *supra* note 39, ¶ 21.
[64] *Id.*
[65] *Id*.
[66] U.N. Comm. on H.R., H.R. Res. 2005/81, U.N. Doc. E/CN.4/RES/2005/81, ¶ 3 (Apr. 21, 2005) (adopted without a vote).

This statement has been reiterated by the Commission on Human Rights (as it then was), on numerous occasions.[67] Likewise, expert reports approved by the U.N. human rights machinery have also supported a limited role for amnesties. For example, in 2005 the Updated Set of Principles to Combat Impunity, prepared on behalf of the U.N. Commission on Human Rights, stated:

> Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:
>
> The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to [investigate and, if warranted, prosecute] or the perpetrators have been prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question; …"[68]

iv. IHL Instruments and Amnesty

While much of the practice addressed above relates to the applicability of amnesty to serious violations of human rights and/or crimes against humanity, international humanitarian law has long recognized that war crimes are not amenable to amnesties or prescriptions of any kind.

During the drafting of the 1977 Additional Protocol II to the Geneva Conventions, the international community acknowledged the legal principle that amnesties for those involved in internal armed conflicts are permitted *except for* persons suspected of, accused of or sentenced to war crimes.[69] The International Committee of the Red Cross (ICRC), citing cases in Argentina, Chile and Ethiopia as examples, has noted that consistent state practice since that time reflects the near universal acceptance of this principle.[70] As further evidence of consistent state practice, the ICRC lists peace agreements and legislation from nearly twenty nations, including Guatemala.[71] In

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[67] *E.g.* U.N. Comm. H.R., H.R. Res. 2004/72, U.N. Doc. E/CN.4/RES/2004/72 ¶ 3 (Apr. 21, 2004) (adopted without vote); U.N. Comm. H.R., H.R. Res. 2005/44, U.N. Doc. E/CN.4/RES/2005/44 ¶ 7 (Apr. 17 2005) (adopted without vote); U.N. Comm. H.R., H.R. Res. 2004/48, U.N. Doc. E/CN.4/RES/2004/48 ¶ 6 (Apr. 20, 2004); U.N. Comm. H.R., H.R. Res 2002/79, U.N. Doc. E/CN.4/2002/200 ¶ 2 (Apr. 25, 2002) (adopted without a vote).

[68] U.N. Comm. H.R., Rep. of Diane Orentlicher: Principle 24: Restrictions and Other Measures Relating to Amnesty, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

[69] HENCKAERTS & DOSWALD-BECK, *supra* note 130, Rule 159; USSR, Statement at the Diplomatic Conference leading to the adoption of the Additional Protocols (explaining that the provision could not be construed to enable war criminals, or those guilty of crimes against humanity, to evade punishment).

[70] *Id.*, at 613 (citing Chile, Appeal Court of Santiago, *Videla case* [grave breaches are unamenable to amnesty)]; *Id.* (citing Ethiopia, Special Prosecutor's Office, *Mengitsu and Others case* (1995) [stating that it was "a well established custom and belief that war crimes and crimes against humanity are not subject to amnesty."]); *Id.* (citing Argentina, Federal Judge, *Cavallo case* (2001) [exempting crimes against humanity)].

[71] *Id.*, n. 237.

addition, the U.N. General Assembly approved, in Resolution 2391 of 1968, the Convention on the Imprescriptibility of War Crimes .[72]

v. Genocide Convention and Amnesty

International law also specifically provides that genocide cannot be subject to amnesty. The text of the Genocide Convention, ratified by Guatemala, states that "Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[73]

j. International Criminal Law Mechanisms

International criminal law supports the view that some crimes are so grave that the decision whether to condemn them is beyond the authority of any one nation. The preamble of the ICC Statute reflects the duty of states to prosecute such crimes.[74] In *re List and* Others, the US Military Tribunal at Nuremburg defined an international crime as: "such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances."[75]

This principle was invoked by the Supreme Court of Israel in its decision to uphold the conviction of Nazi war criminal, Adolf Eichmann.

> The abhorrent crimes defined in this Law are not crimes under Israeli law alone. These crimes which struck at the whole of mankind and shocked the conscience of nations, are grave offenses against the law of nations itself (*delicta juris gentium*).[76]

The ICTY has moreover noted that "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."[77] Most recently, the ICTY Appeals Chamber in the case against Bosnian Serb leader Radavan Karadic has stated that "Individuals accused of such crimes can have no legitimate expectation of immunity from prosecution."[78]

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[72] G.A. Res. 2391 (XXIII), Convention on the Non-Applicability of Statutory Limitations to WAr Crimes and Crimes AGainst Humanity, U.N. Doc. A/7218 (Nov. 26, 1968).
[73] Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, (Dec. 9, 1948).
[74] UN General Assembly, *Rome Statute of the International Criminal Court (last amended in 2010),* Preamble, Jul. 17, 2009, *available at* http://www.unhcr.org/refworld/docid/3ae6b3a84.html [accessed 6 October 2012 [hereinafter Rome Statute].
[75] *See* KRIANGSAK KITTICHAÍSARE, INTERNATIONAL CRIMINAL LAW 3 (Oxford, 2001).
[76] Attorney-General of the Government of Israel v. Eichmann, 36 ILR 5, 12 (1961).
[77] Prosecutor v. Furundzija, Judgment, Trial Chamber, Case No. IT-95-17/1-T 10, ¶ 155 (Dec. 10, 1998).
[78] Prosecutor v. Radovan Karadžić, Decision on Karadžić's Appeal of Trial Chamber Decision on the alleged Holbrooke Agreement, Case No IT-95-5/18-AR73.4, ¶ 50 (Oct. 12, 2009).

k. Developing Practice in Relation to International Agreements and Amnesty

A further aspect of international practice concerning amnesties arises in the context of instruments concluded in the aftermath of armed conflict or protracted violence which make arrangements regarding the scope of criminal prosecutions which may follow the conflict. Where such agreements provide for amnesties, it is normal for serious human rights violations, war crimes and crimes against humanity to be excluded from the scope of such amnesties.

In the aftermath of the conflict in Sierra Leone (c. 1991-2002) a general amnesty clause regarding participation in the civil war was included in the Lomé Peace Agreement. However, in his report on the establishment of the Special Court for Sierra Leone, the United Nations Secretary General made clear that "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".[79] In consequence, Article 10 of the 2002 Statute of the Special Court for Sierra Leone[80] states that "[a]n amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute [crimes against humanity, violations of common Article 3 of the 1949 Geneva Conventions and of the 1977 Additional Protocol II, and other serious violations of IHL] shall not be a bar to prosecution". A similar clause was inserted in the UN-Cambodia Agreement Concerning the Prosecution of Crimes Committed During the Period of the Democratic Kampuchea.[81]

More generally, the policy of the United Nations is now to refuse to participate in or fund transitional justice arrangements which countenance amnesty in respect of genocide, crimes against humanity or war crimes. This position was recommended by the 2004 Report of the Secretary General of the UN on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.[82] This position is also set out in the 1999 Guidelines for U.N. Mediators (revised and readopted in 2005).[83]

Peace agreements may also make arrangements for the return of refugees without fear of prosecution. Again, where such arrangements are made war crimes and crimes against humanity are commonly excluded from their scope. Following the Georgian Civil War (c. 1992-1994) an international agreement was reached regarding the return of refugees and

[79] U.N. Secretary General, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, ¶ 22, UN. Doc. S/2000/915 (Oct. 4, 2000).
[80] Statute of the Special Court for Sierra Leone, *supra* note 34, Annex.
[81] UN-Cambodia Agreement, *supra* note, art. 11.
[82] U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 21, U.N. Doc. S/2004/616 (Aug. 23 2004).
[83] Not publicly available.

Internally Displaced Persons (IDP). Article 3(c) of the Quadripartite Agreement on Georgian Refugees[84] and IDPs provides:

> Displaced persons/refugees shall have the right to return peacefully without risk of arrest, detention, imprisonment or legal criminal proceedings. Such immunity shall not apply to persons where there are serious evidences that they have committed war crimes and crimes against humanity as defined in international instruments and international practice as well as serious non-political crimes committed in the context of the conflict.

A similar provision is included in Article VI of the Agreement on Refugees and Displaced Persons annexed to the Dayton Accords.[85]

f. The Growing Rejection of Amnesty in National Practice

i. Latin America

The States Parties to the American Convention on Human Rights have by and large followed the consistent position of the Inter-American Court in annulling existing amnesty laws or interpreting them so as to exclude serious human rights violations and crimes under international law from their ambit. A sample of the region's recent jurisprudence shows that, with few exceptions, the states of the Americas have declined to pass new amnesty laws and have found existing ones to be contrary to law.[86] The Colombian Constitutional Court, for example, has held that:

> Measures such as the Full Stop laws that obstruct access to justice, blanket amnesties for any crime, self-amnesties (meaning the benefits, under criminal law that the legitimate or illegitimate authorities grant to themselves and to their aiders in the crimes committed), or any other method intended to keep victims from obtaining an effective legal remedy to assert their rights have been deemed a breach of the international obligation of States to provide legal remedies for the protection of human rights, which is embodied in [various international] instruments.[87]

Argentina, for its part, has annulled its amnesty laws, as void from the outset, both in the legislature and through judicial decision. Argentina held trials in 1985 with regard to egregious human rights violations perpetrated during the period of the military junta. Subsequently, however, laws were passed which limited prosecutions, in effect, providing an amnesty. These laws were finally annulled in 2005. The Argentine Supreme

[84] Quadripartite Agreement on Georgian Refugees between the Abkhaz and Georgian Sides, the Russian Federation and the UNHCR, annexed to a letter from the Permanent Representative of Georgia to the U.N. addressed to the President of the Security Council, U.N. Doc. S/1994/397, Annex II, (Apr. 4, 1994).
[85] General Framework Agreement for Peace in Bosnia and Herzegovina, 35 ILM 75 (1996).
[86] The exact reasoning of many of these cases can be found in extracts compiled by theme in a Digesto de Jurisprudencia Latinoamericano sobre Crimenes de Derecho Internacional, published by the Due Process of Law Foundation and available at http://www.iccnow.org/documents/DIGESTO_Esp.pdf.
[87] Revisión constitucional del Estatuto de Roma de la Corte Penal Internacional, Corte Constitucional de Colombia, § 2.3, Sentencia C-578/02 (Julio 30, 2002).

Court held that the law in question was incompatible with the Constitution because, *inter alia*, it was found to violate the country's obligations under customary and conventional international law.[88] This finding was reached notwithstanding the fact that the legislation in question was not a self-amnesty but had been granted by a subsequent, democratically elected regime.

In October 2009, the Uruguayan Supreme Court found that Articles 1, 3 and 4 of that state's amnesty law was unconstitutional because it violated the separation of powers and violated Uruguay's human rights commitments.[89] In particular, the Court cited the role of international law in Uruguay's legal system and precedents from neighbouring Argentina as well as the Inter-American Commission and Court in reaching its decision. A year later, the Court made clear that this position with regard to the non-applicability of amnesties applied to all cases of grave human rights violations perpetrated by members of the security forces.[90]

In Perú, the Constitutional Court addressed the issue of amnesties in the case of Santiago Rivas, one of the heads of the Colina Group, a clandestine intelligence body that operated during the government of Alberto Fujimori. The Court held that under the Constitution amnesty laws may not be enacted in contravention of the international obligations derived from the international human rights treaties and conventions ratified by the Peruvian State.[91] The Court further held that that the amnesty laws at issue in the case were unconstitutional when it is proved that the legislature used its authority to enact amnesty laws in order to cover up the commission of crimes against humanity or when such power is used to "guarantee" impunity for gross human rights violations.[92]

Chile's amnesty law, promulgated to cover crimes committed by state agents between 1973 and 1978, remains formally in place. It has not, however, been applied by the courts for several years and hundreds of military and police officers have been indicted and are being tried for crimes committed during the era of military rule. In fact, this process arguably began with the decision by a number of Chilean judges to investigate Pinochet-era atrocities despite the enactment of the Chilean amnesty law. Most notable among these was, perhaps, Judge Carlos Cerda of the Santiago Appeals Court, who issued indictments against General Gustavo Leigh and many other high-ranking military officials for grave crimes despite their being absolved by the Supreme Court on the basis of Chile's amnesty law. Judge Cerda's decision to continue with his investigation despite the Supreme Court's decision resulted in the latter deciding to suspend him for two months without pay.

Subsequently, however, other Chilean courts held, for example, that Chile's international obligations criminalize war crimes and require the prosecution of war crimes and crimes

[88] Sim6n, Julio Hictor y Otros s/ privación ilegitima de la libertad, Case S. 1767. XXXVIII (Jun. 14, 2005).
[89] Sabalsagaray Curutchet, Blanca Stela, Case No. 365, S.C. of Uruguay (Oct. 19, 2009)
[90] *Organization of Human Rights, Ruling on Constitutionality of Arts. 1, 3, 4 of Law. No. 15,848*, Supreme Court of Uruguay, Case file 2-21986/2006, Sentence No. 1525 (Nov. 1, 2010).
[91] Santiago Martín Rivas, Exp. 4587-2004, Constitutional Court of Perú (Nov. 29, 2005).
[92] *Id*.

against humanity regardless of amnesty laws.[93] In particular, the courts have held that Chile's obligations under the Geneva Conventions take precedence over contrary national laws. In addition, Chilean courts have reopened investigations that had been closed (*sobreseídos*) upon application of the amnesty law on grounds that it was only after full investigation, trial and conviction that they could decide whether or not the amnesty applied at all. In disappearance cases, the courts have adopted a different line of reasoning. They have held that in cases of continuing crimes like disappearance an amnesty cannot be applied because it is not clear whether the victim was killed within the period covered by the amnesty. Since the victim could theoretically have been alive when the amnesty expired, it cannot apply unless the date of death is firmly established.

The Salvadoran legislature passed a blanket amnesty law in 1999 and the law was upheld by the Supreme Court in 2000. However, even then, the Court left room for a case-by-case consideration of instances in which the amnesty might not apply, namely those in which fundamental rights are at issue. The Court held that, under the Salvadorian Constitution, international human rights law imposes limitations on the power of the executive to pass amnesty laws. According to the Court:

> This means that the Legislative Assembly may grant amnesty for political crimes or for common crimes related to them … as long as that amnesty does not get in the way of safeguards to preserve and defend—through criminal prosecution—the fundamental rights of the human person.[94]

The sole exception to an otherwise consistent regional trend on the non-application of amnesty laws to crimes under international law is Brazil, where the Supreme Court upheld the amnesty law as recently as April 2010.[95] However, in *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil* the Inter-American Court of Human Rights found in December 2010 that the enactment of this law contravened Brazil's international obligations.[96] Proceedings are currently underway with a view to ensuring that this decision is given effect, and prosecutors have brought charges against several former military officers in this case.[97] If Brazil brings its domestic legislation into line with this ruling, the states of Central and South America will have a generally consolidated a regional practice in support of the proposition that amnesties are impermissible in respect of crimes against humanity and certain other grave human rights violations.

ii. Europe

The practice in Europe relating to amnesties is much less extensive than that in Central and South America. In general, however, with the exception of Spain's 1977 Amnesty

[93] *See, e.g.* Videla, Third Criminal Chamber, Appeal Court of Santiago, Chile (Sept. 26, 1994).
[94] Acción de Inconstitucionalidad contra los Artículos 1 y 4 del Decreto Legislativo No. 486, Sala de lo Constitucional, Corte Suprema de Justicia, (Sept. 27, 2000); The Court reiterated this case-by-case approach in 2003. Proceso de Amparo Promovido por Juan Antonio Ellacuría Beascoechea y otros, Sala de lo Constitucional, Corte Suprema de Justicia, (Dec. 23, 2003).
[95] Acción de Incumplimiento No. 153, Supremo Tribunal Federal (Apr. 29, 2010).
[96] Gomes-Lund et al. v. Brazil, Merits, Reparations and Costs, Inter-Am. Ct. H. R., (ser. C), No. 219 (Nov. 24, 2010).
[97] *Brazil Prosecutors: Judge Takes First Junta Case*, ASSOCIATED PRESS, Aug. 31, 2012.

Act, it has not been the practice of European states to offer amnesties in respect of egregious conduct occurring within their territory. As part of the general settlement reached in Northern Ireland, for example, the United Kingdom offered accelerated release to paramilitaries convicted of crimes including, for instance, those involving grave sectarian atrocities.[98] Although all prisoners were released within two years, no amnesty was offered. A subsequent proposal to provide amnesty to those who, having not been convicted at the time of the agreement, did not benefit from accelerated release was abandoned after proving highly controversial politically.

With regard to the states of the former Yugoslavia, Croatia passed a General Amnesty Law in 1996 providing "general amnesty from criminal prosecution and proceedings to perpetrators of criminal offences committed during the aggression, armed rebellion or armed conflicts in the Republic of Croatia."[99] The law stipulates, however, that crimes under international law are exempted from its ambit.[100] Similarly, in Bosnia and Herzegovina, its Law on Amnesty provides amnesty to crimes committed in the conflict between 1991 and 1995, but excludes those alleged to have committed crimes against humanity from the benefits of this amnesty.[101]

The exception is Spain's amnesty law which provides a broad amnesty. The Spanish courts jurisprudence has been mixed. In respect of crimes committed in other jurisdictions, its rejection of amnesty has been consistent with these trends. For example, in a much celebrated decision, the Spanish *Audiencia Nacional* refused to take into account the existence of Chile's 1978 amnesty law in deciding whether to charge Augusto Pinochet and other high-ranking Chilean or Argentinian officers with torture, genocide and other international crimes.[102] Nor has an amnesty law in El Salvador been an impediment to Spanish trial court investigations into killings in that country.[103] In respect of the investigation into Franco-era crimes, however, the amnesty has been upheld by the Supreme Court.[104] However, notably this approach has been condemned by international bodies, such as the U.N. Committee against Torture.[105] The failure of Spanish courts to reject the applicability of amnesty to serious crimes in context of Franco-era crimes is the subject of challenges currently pending before the ECHR.[106]

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[98] Good Friday Agreement, 30, available at < http://www.nio.gov.uk/agreement.pdf > .
[99] General Amnesty Law (Croatia), art. 1, 3 (Oct. 5, 1996), *available at* http://www.unhcr.org/refworld/docid/3ae6b4de2c.html [accessed 5 October 2012.
[100] *Id*.
[101] Law on Amnesty 1999 (Bosnia and Herzegovina), art. 1 (Dec. 3, 1999), *available at* http://www.unhcr.org/refworld/docid/3ae6b528c.html.
[102] Chile, decision del Pleno de la *Audiencia Nacional*, Nov. 5, 1998, *available in* English in REED BRODY & MICHAEL RATNER, (eds*.),* THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN ***89*** (The Hague: Kluwer, 2000).
[103] Jesuit Massacre Case, Decision of the 6th Chamber of the Audiencia Naciona (Jan. 13, 2009).
[104] Sentencia No. 101/2012, Causa Especial nº 20048/2009, Sala Segunda del Tribunal Supremo (Febrero 27, 2012); Nº de Recurso 20380/2009, Tribunal Supremo, Sala de lo Penal, (Marzo 28, 2012).
[105] Human Rights Comm. Concluding Observations: Spain, *supra* note 39, ¶ 21.
[106] Canales Bermejo v. Spain, Appl. 56264/2012, Eur. Ct. H.R.

Thus, although the question of amnesties has not often arisen in European jurisdictions, from such practice as exists, it can be concluded that the overall trend is in favor of the non-application of amnesty legislation to crimes against humanity and war crimes.

iii. Other National Practice

A somewhat scattered and less coherent, body of practice has developed in Asia and Africa regarding the permissible scope of amnesty legislation. The general tenor of this practice is more mixed than that found in Europe or America. Perhaps the most prominent example of amnesty legislation in recent times is to be found in South Africa, where amnesty was offered to individuals who cooperated fully with, and provided full disclosure to, that country's truth and reconciliation commission. In *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*[107] the South African Constitutional Court considered whether South Africa's international legal obligations prevented the offering of amnesty in respect of crimes committed in internal armed conflicts, finding that they did not. Amnesty in South Africa was not, however, granted unconditionally. Individuals were required to apply to the Committee on Amnesty, committing themselves to provide full disclosure in respect of the crimes they had committed and showing that these crimes were perpetrated for a "political purpose" connected with the apartheid era conflict.[108] Many applications were rejected.

Other state practice in Africa and Asia, however, tends to support the non-applicability of amnesties to genocide and crimes against humanity. Article 28 of Ethiopia's constitution stipulates:

> The legislature and other organs of the state shall have no power to pardon or give amnesty with regard to inhuman punishment, forcible disappearance, summary executions, acts of genocide. Crimes against humanity shall not be subject to amnesty or pardon by any act of government.

In Asia, Article 40 of the Law on the Establishment of the Extraordinary Chambers of the Courts of Cambodia prohibits the provision of an amnesty to crimes within the jurisdiction of the Court. In Tajikistan, the General Amnesty Law 1998, provided amnesty to those who had participated in that country's war of independence, but excluded from the scope of this amnesty war crimes committed as part of an attack on the civilian population, murder, rape and pillage.[109] Even outside the context of crimes against humanity, Article 6 of the UN-Lebanon Agreement on the Establishment of a Special Tribunal for Lebanon, Lebanon committed not to provide amnesty to persons alleged to have committed the crimes of terrorism falling within the jurisdiction of the Special Tribunal.[110]

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[107] Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others, South African Constitutional Court, 1996 (8) BCLR 1015 (Jul. 25, 1996).
[108] *See* Promotion of National Unity and Reconciliation Act, 1995 (South Africa).
[109] General Amnesty Law 1998 (Tajikistan), arts. 1, 6, 8(b), (c), (Jan. 1, 2012), *available at* http://www.unhcr.org/refworld/docid/3ae6aa125f.html.
[110] Agreement Annexed to Security Council Resolution 1757 (May 30, 2007).

III. THE IMPRESCRIPTIBILITY OF INTERNATIONAL CRIMES

The Guatemalan National Reconciliation Law (LRN) applies to crimes that are imprescriptible under international law. As with amnesties, there is a very substantial and growing body of international law practice relating to the imprescriptibility of core international crimes notably genocide, war crimes, and crimes against humanity.

Examples of this practice can be seen in the work of the U.N. human rights mechanisms, such as the U.N. Human Rights Committee and UNCAT. The former, in General Comment 31, has stated that "[w]here public officials or State agents have committed violations of the Covenant rights referred to in this paragraph [torture, cruel, inhuman and degrading treatment, summary and arbitrary killing and enforced disappearance] the States Parties concerned may not relieve perpetrators from personal responsibility."[111] Moreover, the Comment observes that "[o]ther impediments to the establishment of legal responsibility should also be removed, such as … unreasonably short periods of statutory limitation in cases where such limitations are applicable."[112] The Committee has often noted with concern the application of statutory limitation periods to the investigation and prosecution of serious human rights abuses in its Concluding Observations on State Reports the HRC.[113] It had called on states to "review its rules on the statute of limitations and bring them fully into line with its obligations under the Covenant so that human rights violations can be investigated and punished".[114] Most recently in its Concluding Observations on Spain the Committee recalled "that crimes against humanity are not subject to a statute of limitations…"[115] For its part, the Committee against Torture has repeatedly expressed concern about the prescription of torture in domestic legislation in its Concluding Observations.[116]

These crimes have been recognized as imprescriptible for many years, as demonstrated by the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity ("Convention on the Non-Applicability of Statutes of

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[111] CCPR General Comment 31, *supra* note 37, ¶ 18.
[112] *Id*.
[113] Rep. of Human Rights Comm. on El Salvador, 76th Sess., Oct. 14-Nov. 1, 2002, 77th Sess, Mar. 17-Apr. 4, 2003, 78th Sess., Jul. 14 – Aug. 8, 2003, UN Doc. A/58/40 ¶ 84(7); GOAR, 58th Sess., Supp. No. 40 (2003); Rep. of Human Rights Comm. on Ecuador, UN Doc. A/53/40 ¶ 280; GOAR, 53rd Sess., Supp. No. 40 (Sep. 15, 1998) ; Rep. of Human Rights Comm. on Uruguay, UN Doc. A/53/40 ¶ 247. GOAR, 53rd Sess., Supp. No. 40 (Sep. 15, 1998)
[114] Rep. of Human Rights Comm. on El Salvador, supra note 113, ¶ 84(7).
[115] Human Rights Comm. Concluding Observations: Spain, *supra* note 39, ¶ 21.
[116] *Comm. against Torture, 29th Sess., Conclusions and Recommendations of the Comm. against Torture: Republic of Korea* ¶ 8, U.N. Doc. CAT/C/KOR/CO/2 (Jul. 25, 2006); Comm. Against Torture Conclusions: Chile, *supra* note 56,¶ 7(f); *Comm. against Torture, 29th Sess., Conclusions and Recommendations of the Comm. against Torture: France*, ¶ 5 , U.N. Doc. CAT/C/FRA/CO/3(Apr. 3, 2006); *Comm. against Torture, 29th Sess., Conclusions and Recommendations of the Comm. against Torture Morocco* ¶ 5 (f), U.N. Doc. CAT/C/CR/31/2 (Feb. 5, 2004); Rep. of the Comm. against Torture, Nov. 8-9, 1999, May 1-19, 2000, ¶ 116(b), U.N. Doc. A/55/44; GAOR 55th Sess. Supp. No. 44 (2000) (Slovenia); Rep. of the Comm. against Torture, Jun. 27, 1991, ¶ 123 (c), U.N. Doc. A/46/46; GAOR 46th Sess. Supp. No. 46 (1991) (Turkey).

Limitation"),[117] which itself "affirmed" earlier resolutions.[118] The statements of a number of those states involved in negotiations prior to the adoption of the Convention provide support for the interpretation that the principle of non-applicability was regarded as an established and important principle of international law.[119] A number of other treaties and international instruments also deal with the application of statutes of limitation to crimes under international law, albeit in different contexts, including Article 29 of the Rome Statute creating the ICC.[120] The Basic Principles on the Right to a Remedy and Reparation also state that "[w]here so provided for in an applicable treaty or contained in other international legal obligations statutes of limitation shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law."[121]

The Inter-American Court has repeatedly found that neither amnesty nor prescription can stand as a bar to investigation and prosecution of cases involving serious rights violations. In *Almonacid v. Chile*, a case which concerned a 1973 disappearance as part of a campaign of violence which the Court characterized as a crime against humanity, the Court held:

> The State may not invoke the statute of limitations … to decline its duty to investigate and punish those responsible. Indeed, as a crime against humanity, the offense committed against Mr. Almonacid-Arellano is neither susceptible of amnesty nor extinguishable.[122]

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[117] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, New York, 754 UNTS 73 (Nov. 26. 1968).

[118] *Id*, Preamble. The preamble notes that it is "timely to affirm in international law, through this Convention" the principle of non-applicability of statute of limitation to international crimes. *Id.*

[119] Bulgaria, Statement Before the Third Committee of the U.N. General Assembly, U.N. Doc. A/C.3/SR.1518, ¶ 5 (Nov. 17 1967), France, Statement Before the Third Committee of the U.N. General Assembly, U.N. Doc. A/C.3/SR.1515, ¶ 19 (Nov. 15, 1967); Czechoslovakia Statement Before the Third Committee of the U.N. General Assembly, U.N. Doc. A/C.3/SR.1514, ¶¶ 38-39 (Nov. 14, 1967); Israel, Statement Before the Third Committee of the U.N. General Assembly, U.N. Doc. A/C.3/SR.1547, ¶ 1 (Dec. 12, 1967); and Poland, Statement Before the Third Committee of the U.N. General Assembly, A/C.3/SR.1514, ¶ 18 (Nov. 14, 1967) (describing the principle of non-applicability of statutes of limitation to war crimes and crimes against humanity as "one of the basic principles of international law.").

[120] Rome Statute, art. 29. "[T]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." *Id.*

[121] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ["Basic Principles on the Right to Reparation"], ¶ 6, G.A. Res. 60/147, U.N. Doc. A/Res/60/148, Mar. 21, 2006.

[122] *Almonacid-Arellano,* Inter-Am. Ct. H.R., ¶¶ 151-152. The Court went on to opine that even though Chile had not ratified the Convention on the Non-Applicability of Statutory Limitations "the Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of general international law which is not created by said Convention, but is acknowledged by it. Hence, the Chilean State must comply with this imperative rule." *Id.* ¶ 193. The Inter-American Commission has reached similar determinations.

The European Court of Human Rights has consistently adopted the position that statutory limitations cannot be applied to crimes against humanity.[123] According to the ICRC, the rule on imprescriptibility of war crimes in either international or non-international armed conflict constitutes customary international law.[124]

IV. THE CRIMES AT ISSUE AS SERIOUS VIOLATIONS OF HUMAN RIGHTS AND IHL AND CRIMES UNDER INTERNATIONAL LAW

It is neither necessary nor appropriate for *amici* to address the Court on questions of fact. The legal observations that follow are premised on the facts set out in the findings of the Inter-American Commission and Court. They in no way purport to prejudge the responsibility of any particular individual.

The facts of the Las Dos Erres massacre as set in the judgment of the Court, can readily be classified legally as serious violations of human rights, as violations of international humanitarian law (IHL), and as crimes under international law including war crimes and crimes against humanity. Such crimes are imprescriptible in addition to not being subject to amnesty, as described above.

a. Serious Violations of Human Rights Obligations

The Inter-American Court judgment established that the massacres involved very serious violations of the human rights protected under international treaties to which Guatemala is a party. The Guatemalan military was found to be responsible for the Dos Erres massacre[125] which claimed the lives of nearly every member of the community.[126] Over the course of three days, the Court found that inhabitants of Dos Erres were beaten,

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[123] Kolk and Kislyiy v. Estonia, Admissibility, Unreported, Eur. Ct. H.R., Application No. 23052/04 (Jan. 17, 2006); Papon v. France, Admissibility, Unreported, Eur. Ct. H.R., Application No. 54210/00 (Nov. 15, 2001); Touvier v. France, Admissibility, 13 January 2007, Unreported, Eur. Ct. H.R., Application No. 29420/95 (Jan. 13, 2007); X. v. Federal Republic of Germany, Admissibility, Unreported, Eur. Ct. H.R., Application No. 6946/75 (Jul. 6,1976).

[124] Int'l Comm. of the Red Cross, Rule 60: Statutes of Limitation May Not Apply to War Crimes, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule160.

[125] In 2008, the Inter-American Commission concluded that the "Las Dos Erres massacre was planned and carried out as part of the 'scorched earth' (*tierra arrasada*) policy directed by the State of Guatemala against a population deemed to be an "internal enemy," in a context that was characterized by the infringement of fundamental human rights and values shared by the Inter-American community." Las Dos Erres v. Guatemala, Case 11.681, Inter-Am. Comm'n H.R., Report No. 22/08 (March 14, 2008).

[126] Application to the Inter-American Court of Human Rights in the case of Los Dos Erres Massacre v. Guatemala, Case 11.681, Inter-Am C.H.R. ¶ 323 (July 30, 2008). In the factual statement of the application, the Inter-American Commission recounts witness testimony from one of the soldiers regarding their instructions prior to entering the village: "In the first days of December they brought all of us in the patrol of *kaibiles* together, and they told us what it was that we had to do in 'Las Dos Erres.' The meeting included Lt. Rivera Martínez, Lt. Adán Rosales Batres, Second Lt. Sosa Orantes, and the other one, Lt. Ramírez, nicknamed 'Cocorico.' At the meeting they explained to us that they had orders to go to the hamlet of 'Las Dos Erres,' which was a conflictive zone, and that we had to go to destroy the village, everything that moved had to be killed." *Id.* ¶ 106.

tortured, raped, and killed.[127] The Inter-American Court of Human Rights concluded that these acts constituted grave violations of fundamental human rights.[128]

There can be little doubt that the facts set out by the Inter-American Commission and Court in relation to the events at Dos Erres amount to a range of the most egregious violations of human rights, including but not limited to, the right to life and freedom for torture and inhuman treatment. These rights are enshrined across human treaties ratified by Guatemala, including the ACHR and ICCPR, as well as in customary law. Indeed, freedom from arbitrary deprivations of life and torture have been described as *jus cogens* norms, impermissible in all circumstances without exception or derogation.

b. Violations of IHL and War Crimes subject to International Criminal Law

As the Las Dos Erres massacre appears to have occurred as part of the non-international armed conflict in Guatemala at the relevant time, the facts may also amount to serious violations of humanitarian law. Serious violations of IHL give rise to individual criminal responsibility as war crimes. The refusal to investigate and prosecute these crimes may also violate Guatemala's long-standing treaty obligations.

The principle of "distinction," and the prohibition on attacks against civilians, is the cornerstone of IHL. Direct attacks on civilians in the context of an armed conflict, whether of an international or internal character, are prohibited by treaties ratified by Guatemala.[129] Such attacks are also prohibited under customary international law.[130] This is reflected for example in the1968 adoption – by unanimous vote of 111 in favor with no opposition or abstention – of the U.N. General Assembly declaration on the principle of distinction applicable in all armed conflicts.[131] It is seen also in the jurisprudence of the International Court of Justice, such as the advisory opinion in the *Nuclear Weapons case*, where the world's apex court stated that the principle of distinction was one of the "cardinal principles" of international humanitarian law and one of the "intransgressible principles of international customary law."[132]

Attacks on civilians or other persons not taking a direct part in hostilities are serious violations of IHL giving rise to individual criminal responsibility. This is reflected in Article 8 of the ICC Statute, which defines war crimes as "serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities …"

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[127] *Id.* ¶¶ 112-115.
[128] *Los Dos Erres Massacre*, Inter-Am. Ct. H.R., ¶ 181.
[129] *See* Additional Protocol II to the Geneva Conventions, art. 13(2), (Jun. 8, 1977) ("[T]he civilian population as such, as well as individual civilians, shall not be the object of attack); *See also* 1949 Geneva Conventions, common art. 3 (Aug. 12, 1949).
[130] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES 3 (Cambridge: CUP, 2005).
[131] G.A. Res. 2444 (XXIII) (Dec. 19, 1968)
[132] Nuclear Weapons Case, Advisory Opinion, 1996 I.C.J. ¶ 79(Jul. 8).

Attacks on civilians as a war crime is illustrated by an ample body of prosecutions practice,[133] including in respect of attacks on villages comparable to the facts of the Las Dos Erres case.[134] As that jurisprudence makes clear, there can be little doubt that the killing of an entire community in the context of a non-international armed conflict would fall within this definition. Other measures such as the rape or ill-treatment described as forming part of the fact pattern in this case would also amount to war crimes established as such in international law and practice.[135]

c. Crimes against Humanity

The crimes at issue here also constitute crimes against humanity. Unlike many other international crimes, such as war crimes or torture or enforced disappearance of persons, this group of crimes has never been the subject of its own binding convention. However, regard can be had to the ICC Statute, the first treaty to set out comprehensive definitions of these crimes,[136] and to earlier international instruments,[137] as well as to the ample jurisprudence emanating from prosecutions for these crimes by international tribunals ranging from Nuremberg to the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) created by the U.N. Security Council,[138] to identify key elements of the definition of crimes against humanity.

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[133] *See, e.g.* Prosecutor v. Tihomir Blaskic REF; Prosecutor v. Zoran Kupreskic; Prosecutor v. Stanislav Galic, Judgment, ICTY, Case No. IT-98-29-T, (Dec. 5, 2003); Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, ICTR, Case No. ICTR-98-41-T, ¶¶ 2243-44 (Dec. 18, 2008); Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe, ICTR, Case No. ICTR-98-41-T, ¶ 794 (Feb. 25, 2004).

[134] *E.g.* in *Zoran Kupreskic et al.*, above, the six accused were charged in connection with their alleged role in the attack on the village of Ahmici in central Bosnia on 16 April 1993, and the massacre of 116 inhabitants of the village, including women and children.

[135] Rome Statute, *supra* note 20, art 8 (c) : "In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment…" *Id.]*

[136] *Id.* art. 10 notes that the definitions of all ICC crimes are for the purposes of the Statute only.

[137] *See, e.g.,* the Int'l Lab. Comm., Draft Code of Crimes against the Peace and Security of Mankind, Report of the ILC, May 6– Jul. 26, 1996, 97, U.N. Doc. UN Doc. A/50/10; GAOR, 51st Sess., Supp. No. 10, 30 (1995) [hereinafter ILC's Draft Code of Crimes].

[138] *See, e.g.,* the judgment and the proceedings of the Trial of the Major War Criminals before the International Military Tribunal Nuremberg International Military, TRIALS OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, vol. 42, (Nuremberg, 1946–50). For ICTY and ICTR judgments, *see, e.g.,* Prosecutor v. Furundija, Judgment, ICTY, Case No. IT-95-17/1-T, (Dec. 10, 1998); *Tadic* Jurisdiction Appeal Decision, ¶¶ 248–52; Prosecutor v. Blaskic, Judgment, ICTY, Case No. IT-95-14-T, ¶ 71 (Mar. 3, 2000); *Prosecutor* v. *Kunarac, Kovac and Vukovic*, Cases Nos. IT-96-23 and IT-96-23/1, Judgment, 22 February 2001; Prosecutor v. Krnojelac, Judgment, ICTY Appeals Chamber, Case No. IT-97-25-A, (Sept. 17, 2003); Prosecutor v. Stakic, ICTY, Judgment, Case No. IT-97-24-T, Judgment, (Jul. 31, 2003); Prosecutor v. Akayesu, Judgment, ICTR, Case No. ICTR-96-4-T, ¶¶ 591–2 (Sept. 2, 1998); Prosecutor v. Kayishema and Ruzindana, Judgment, ICTR, Case No. ICTR-95-1-T, ¶¶ 141–7 (May 21, 1999); Prosecutor v. Musema, Judgment and Sentence, ICTR, Case No. ICTR 96-13-T, ¶¶ 942–51 (Jan. 27, 2000); Prosecutor v. Popovic, Judgment, ICTY Trial Chamber, Case No. IT-05-88 (Jun. 10, 2010); Prosecutor v. Gotovina, Judgment, ICTY, Case No. IT-06-90 (Apr. 15, 2011); Prosecutor v.

The Rome Statute of the ICC provides the most authoritative and contemporary definitions of international crimes, including that of crimes against humanity. On April 2, 2012, Guatemala submitted its instrument of ratification of the Statute with the United Nations,[139] and is currently one of 121 state parties. The Rome Statute in Article 7 defines crimes against humanity as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination…
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity
(k) other inhumane acts…"[140]

For a particular underlying act (i.e. murder) to constitute a crime against humanity it must have occurred as part of "widespread or systematic attack" which was "directed against any civilian population." The "widespread" requirement is most commonly understood to refer to the *scale* of the crime[141] or of the number of victims.[142] "Systematicity" in turn can be satisfied by the repeated, continuous nature of the attack or campaign,[143] a 'pattern' in its execution,[144] a certain the level of organization,[145] or the existence of an underlying plan or policy.[146] It is the attack and not the underlying acts (e.g. murder) that must be "widespread or systematic;" even a single act by a perpetrator may constitute a crime against humanity, provided it forms part of a widespread or systematic attack or campaign.[147] In some circumstances, the nature and scale of the underlying act(s) may

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Nyiramasuhuko, Judgment, ICTR Trial Chamber, Case No. ICTR-98-42-T (Jun. 24, 2011); Prosecutor v. Perisic, Judgment, ICTY Trial Chamber, Case No. IT-04-81, (Sep. 6, 2011); Prosecutor v. Munyakazi, Judgment, ICTR Appeals Chamber, Case No. ICTR-97-36A-A, Sep. 28, 2011. See also national prosecutions, e.g., Attorney General of Israel v. Eichmann, 36 ILR 277, 299, 304 (Israel Supreme Court, 1962) and in re Demjanjuk, 612 F. Supp. 544 9N. D. Ohio 1985, aff'd, 776 F2d 571 (6th Cir. 1985).

[139] Press Release, International Criminal Coart, Guatamala Becomes the 121st State to Join the ICC's Rome Statute System, http://www.icc-cpi.int/NR/exeres/E2BBA18C-A830-4504-B9BE-6F118C3690F7.htm.

[140] Rome Statute, *supra* note 120, art. 7.

[141] *See, e.g., Musema*, ICTR, and *Akayesu* , ICTR, which refer to widespread as covering "massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.

[142] An earlier formulation of this criterion referred to "large scale" instead of "widespread." defining it as "meaning that the acts are directed against a multiplicity of victims." Int'l Lab. Comm's Commentaries to the Draft Code of Crimes, Commentary to Article 18(4): *see also Tadic*, ICTY, ¶ 648 ("widespread . . . refers to the number of victims."); *Blaskic*, ICTY, ¶ 206 ("directed at a multiplicity of victims").

[143] *Tadic*, ICTY, ¶ 648 (citing the Int'l Lab Comm's Draft Code of Crimes).

[144] *Akayesu*, ICTR, ¶ 580.

[145] *See, Popovic*, ICTY, ¶ 756 (On degree of organization).

[146] Int'l. Lab. Comm., Rep. of its Work, 45th Sess., 9, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10, (1996).

[147] *Prosecutor* v. *Mrskic, Radic and Sljivancanin*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ICTY, Case No. IT-95-13-R61, ¶ 3 (Apr. 3, 1996); *Prosecutor* v. *Tadic*, Judgment, ICTY Trial Chamber, Case No. IT-94-1 (May 7 1997). *Blaskic,* ICTY, ¶ 206. Nor does "widespread" necessarily imply geographic spread, finding in one case that crimes against humanity had

themselves constitute, or provide evidence of, that widespread or systematic nature of the attack.[148] According to the ICTY, any of the following may provide *evidence* of a systematic attack: (1) the existence of a plan or political objective; (2) very large scale or repeated and continuous inhumane acts; (3) the degree of resources employed, military or other; (4) the implication of high-level authorities in the establishment of the methodical plan.[149]

The analysis of the facts of the Las Dos Erres massacre suggest that its scale and magnitude, as well as its organization and occurrence as part of a broader pattern of atrocity, would render this attack both widespread and systematic (though the test is disjunctive and either one would suffice). Indeed, the Inter-American Commission on Human Rights referred to the massacre as occurring as part of a widespread attack against the civilian population.[150] The Inter-Court of Human Rights likewise concluded that there was "a pattern of selective extrajudicial executions promoted by the State, which was directed to those individuals considered 'internal enemies'."[151] The scale of victimization, resulting in the death of 251 inhabitants, speaks for itself. The facts drive unequivocally to the conclusion, advanced by the Guatemalan Supreme Court, that the massacre was a crime against humanity.[152]

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been committed against part of the civilian population of just one town. *Prosecutor* v. *Jelisic*, Judgment, ICTY Trial Chamber, Case No. IT-95-10-T (Dec. 14, 1999).

[148] The accused must have "knowledge of the attack," though the Elements of Crimes states, in regards to the last element of each crime against humanity: "However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack."

[149] Prosecutor v. Kordic and Cerkez, Appeal Judgment, Case No. IT-95-14/2-T, ICTY, ¶ 179 (Feb. 26, 2001).

[150] In 2008, the Inter-American Commission concluded that the "Las Dos Erres massacre was planned and carried out as part of the 'scorched earth' (*tierra arrasada*) policy directed by the State of Guatemala against a population deemed to be an 'internal enemy,' in a context that was characterized by the infringement of fundamental human rights and values shared by the Inter-American community." *Dos Erres,* Inter-Am. Comm'n H.R.

[151] *Id.*

[152] Corte Suprema de Justicia, Recursos de casación conexados, 01004-2012-01143 y 01004-2012-01173, 62.

V. The Principle of Legality Objection: The Crimes Were Prescribed in Law Before 1982

As the defense in the present has invoked questions regarding the "principle of legality," a few brief observations in this respect may be in order. The principle of legality is an underlying principle of any legal system and a fundamental principle of human rights law. The requirement of legality and certainty in criminal law enshrined in Article 15 of the ICCPR[153] and other instruments[154] is often referred to as the fundamental principle *nullum crimen sine lege*.[155] It mandates that criminal prosecution must be based on crimes that were clearly enshrined in criminal law at the time of their commission. However, the principle does not prevent prosecution for crimes which were recognized under international law at the relevant time. This is explicitly recognized, for example, in Article 15 which notes that the principle cannot be relied upon to preclude the prosecution of conduct that was an offence under international (but not national) law at the time committed.[156] If there were any question of the crimes not being enshrined in Guatemalan law at the relevant time, their criminal status under international law should therefore suffice. [157]

This section notes that the crimes in question were crimes established as such in international law at the time of the Las Dos Erres massacre.

a. Crimes against Humanity

Crimes against humanity formed part of customary international law to which individual criminal liability attached long before 1982. The recognition of crimes against humanity as an international crime dates back to at least 1945 when the first international codification of the crimes is found in the Charter of the International Military Tribunal at Nuremberg.[158] The Nuremberg Judgment resulted in numerous crimes against humanity

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[153] International Covenant on Civil and Political Rights, art. 15(1), Dec. 16, 1966 [hereinafter ICCPR] states: "No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." *Id.*

[154] *See* Universal Declaration of Human Rights, art. 11(2), Dec. 10, 1948; Eur. Convention H.R, art. 7(1), Nov. 4, 1950; Am. Convention H.R., art. 7(2), Nov. 22, 1969; Afr. Charter on Hum. and People's Rights, art. 7(2), Jan. 25, 2005; *see also* Rome Statute, art. 22 (*Nullum crimen sine lege*); Rome Statute, art. 23 (*Nulla poena sine lege*).

[155] ICCPR art. 4; Eur. Convention H.R., art. 15; and Am. Convention H.R., art. 27, all expressly proscribe derogation from the rights.

[156] ICCPR art. 15(2) provides: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations"; *see also* ECHR art. 7(2). Prosecution on the basis of offences enshrined in international criminal law has been found by the ICTY, e.g., not to breach the *nullum crimen* rules.

[157] *See, e.g.,* ICCPR, art. 15.

[158] London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, art. 6(c), 8 U.N.T.S. 279 (Aug. 8, 1945).

convictions.[159] Additionally, an almost identical definition was used in the 1946 International Military Tribunal for the Far East, better known as the Tokyo Trials, which also resulted in crimes against humanity convictions.[160] In 1946, the United Nations General Assembly passed a resolution affirming the principles established and the judgments rendered by these two international tribunals.[161]

Immediately after the Nuremberg and Tokyo Tribunals, the Allied Powers exercised criminal jurisdiction over individuals in various localities around the world, most notably in Germany, on the basis of Control Council Law No. 10.[162] This law was promulgated by the four Allied Powers in order to prosecute crimes of an international dimension, and its preamble referenced it as a continuation of the Nuremberg Charter.

Subsequent to the Nuremburg tribunals, the international community repeatedly recognized crimes against humanity as established norms of customary international law. In 1954, the International Law Commission, under a mandate from the United Nations General Assembly, issued a report discussing its work on a "Draft Code of Offenses Against the Peace and Security of Mankind" that would codify such crimes.[163]

In 2003, the United Nations and the Kingdom of Cambodia created an internationalized domestic criminal tribunal, the Extraordinary Chambers in the Courts of Cambodia ("ECCC"). This court was established to prosecute international and domestic crimes committed in Cambodia between 1975 and 1979.[164] In the ECCC's first judgment case,

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[159] International Military Tribunal, Judgment, (Oct. 1, 1946)*, reprinted in* The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, vol. 22 (1946).

[160] Charter of the International Military Tribunal for the Far East at Tokyo, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, T.I.A.S. No. 1589, 4 Bevans 20 (Apr. 26, 1946); International Military Tribunal for the Far East: Judgment, (Nov. 12, 1948).

[161] G.A. Res. 95 (I), Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, U.N. Doc. A/RES/95(I) (Dec. 11, 1946).

[162] Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council No. 10,* U.S. Government Printing Office, (1949) (defining crimes against humanity as "[a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."). The law was the basis on which Axis Power criminals were prosecuted outside Nuremberg process. Stuart Ford, *Crimes Against Humanity at the Extraordinary Chamber in the Courts of Cambodia: Is a Connection With Armed Conflict Required?,* 24 UCLA Pac. Basin L.J. 125. (2006).

[163] Report of the International Law Commission Covering the Work of its Sixth Session, Jun. 3- Jul. 28, 1954, *available in* 2 Y.B. Int'l L. Comm'n 140, 150 (1954).

[164]Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed during the Period of the Democratic Kampuchea, UN-Cambodia, 2329 U.N.T.S. 117, (Jun. 6, 2003) http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, U.N. Doc. No. NS/RKM/1004/006 (Oct. 27, 2004). The law governing the ECCC states "Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical,

the Trial Chamber explicitly addressed the concern that the principle of legality foreclosed liability pursuant to the ECCC's 2003 charter for crimes against humanity committed between 1975 and 1979. The Chamber concluded that crimes against humanity were clearly prohibited between 1975 and 1979 and therefore the Khmer Rouge regime could be prosecuted for crimes committed during that period.[165]

The Committee against Torture has specifically rejected arguments postulated around the principle of "legality" to evade obligations to prosecute serious violations such as torture.[166] The Committee concluded that "bearing in mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by the principle of legality or the statute of limitations."[167]

b. Genocide

Although not the focus of this intervention, for the sake of completeness it should be noted that genocide was recognized as a crime long before 1982. The Genocide Convention of 1948 itself specifically recognizes genocide as a crime.[168] It calls on states to prosecute and punish this crime. It is noted that Guatemala had ratified the Convention on the Prevention of Genocide when the alleged crimes occurred. International practice, including for example the work of the Cambodian Tribunal referred to above, or in respect of the atrocities committed during the Second World War, support the prosecution of genocide in respect of periods significantly before the time frame of relevance in Guatemala.

c. War Crimes

As regards war crime of direct attacks on civilians or torture of persons in the hands of the military, it is noted that Guatemala had ratified the Geneva Conventions and signed the Second Additional Protocol to the Geneva Conventions by 1982. Moreover, the prohibition on attacks on civilians has been a fundamental norm of international law applicable in non-international armed conflict since at least 1968, when the U.N. General Assembly unanimously declared the principle of distinction to be applicable in all armed conflicts.[169] The principle that such attacks must be punished was also well-established in the Geneva Conventions.[170]

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racial or religious grounds, such as: murder…, torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts." *Id.* art. 5.

[165] Case of Kaing Guek Eav *alias* Duch, Judgment, ECCC, Case File No. 001/18-07-2007/ECCC/TC, ¶¶ 281-296 (Jul. 26, 2010).

[166] Spain enacted an amnesty act in 1977, ten years prior to the coming into force of the Convention Against Torture. *See,* Spanish 1977 Amnesty Law (1977); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* (Dec. 10, 1984).

[167] Human Rights Comm. Concluding Observations: Spain, *supra* note 39, ¶ 21.

[168] Convention on the Prevention and Punishment of the Crime of Genocide, 102 Stat. 3045, 78 U.N.T.S. 277 (Dec. 9, 1948).

[169] G.A. Res. 2444 (XXIII), *supra* note 131.

[170] *See, e.g.,* Int'l Comm. of the Red Cross, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneval Convention) 75 U.N.T.S. 287, art. 147 (Aug. 12, 1949).

VI. **Conclusion**

For the reasons set out above, the *amici curiae* respectfully submit that the National Reconciliation Law cannot properly be interpreted to confer amnesty upon imprescriptible acts or acts which the state is obliged to prosecute as a matter of international law. These embrace the most serious violations of IHRL and IHL, including crimes against humanity, war crimes and genocide. Such an interpretation would ensure that Guatemalan law is interpreted consistently with Guatemala's international obligations, and that the Court discharges its responsibility to ensure accountability, within the framework for law, for the most serious international crimes at issue in the present case.

Respectfully submitted,

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SIGNED

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On behalf of,

Names of experts