



OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR
HUMAN RIGHTS



RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES

Amnesties



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NOTE

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With the publication of *Amnesties* and *National Consultations on Transitional Justice*, the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations system's lead entity on transitional justice, launches the third part of its series on transitional justice tools for post-conflict States. These publications are meant to help develop sustainable institutional capacity within United Nations missions, as well as to assist transitional administrations and civil society to better craft their responses to transitional justice needs.

Amnesties are now regulated by a substantial body of international law that sets limits on their permissible scope. Most importantly, amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights are inconsistent with States' obligations under various sources of international law as well as with United Nations policy. In addition, amnesties may not restrict the right of victims of violations of human rights or of war crimes to an effective remedy and reparations; nor may they impede either victims' or societies' right to know the truth about such violations.

The United Nations policy of opposing amnesties for war crimes, crimes against humanity, genocide or gross violations of human rights, including in the context of peace negotiations, represents an important evolution, grounded in long experience. Amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict.


These experiences call into question the commonplace assumption that a choice must be made between peace and justice. The United Nations has recognized that, when properly pursued, justice can help ensure a just and sustainable peace. By opposing amnesties that establish impunity for atrocious crimes, United Nations policy seeks to safeguard a space for justice even when conditions for prosecutions are not yet adequately established.

Amnesties identifies the principal rules of international law and United Nations policy that should guide United Nations personnel when confronted with draft amnesties. Examples of amnesties are provided to illustrate the rules of international law that are applicable when assessing an amnesty. This publication further considers the relationship between amnesties and various processes of transitional justice and provides guidance to practitioners who may encounter questions when seeking to apply the principles summarized in *Amnesties* to ambiguous situations in the field.

Amnesties, along with the parallel publication *National Consultations on Transitional Justice*, builds on our 2006 and 2008 series, which included *Prosecution Initiatives*, *Truth Commissions*, *Vetting*, *Maximizing the Legacy of Hybrid Courts*, *Reparations Programmes*, *Mapping the Justice Sector*, and *Monitoring Legal Systems*. Each of these tools can stand on its own, but also fits into a coherent operational perspective. The principles used in these tools are firmly grounded in previous experience and lessons learned from United Nations field operations.

In line with its engagement in transitional justice policy development and responding to requests from the United Nations system, particularly its field presences, as well as other partners, OHCHR will continue to develop rule-of-law tools.

I would like to take this opportunity to express both my appreciation for the feedback received from our partners thus far and my gratitude to all those who have contributed to this important initiative.

A handwritten signature in black ink, appearing to read "N. Pillay". The signature is fluid and cursive, with a long horizontal stroke at the end.

Navanethem Pillay
United Nations High Commissioner for Human Rights

INTRODUCTION

This tool identifies core principles that should guide United Nations personnel when confronted with draft amnesties that may be inconsistent with international law and United Nations policy.

The first chapter defines amnesties, describes their use and distinguishes them from other legal measures that bear some similarities to amnesties but which are not addressed in this tool. Chapter II summarizes the principal rules of international law and United Nations policy that should guide the consideration of amnesties. Both of these chapters include examples of amnesties from many countries to illustrate the rules of international law and United Nations policy that are applicable when assessing a proposed amnesty. Chapter III considers the relationship of amnesties to processes of transitional justice. Finally, chapter IV provides further guidance to practitioners who may encounter questions when seeking to apply the legal principles summarized in the tool to ambiguous situations in the field.

Long subject to the broad discretion of States, amnesties are now regulated by a substantial body of international law. Most importantly, amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights¹ are inconsistent with States' obligations under various widely ratified treaties as well as United Nations policy, and may also be inconsistent with emerging principles of customary law. In addition, amnesties may not abridge the right of victims of violations of human rights or of war crimes to an effective remedy and reparations; nor may they impede either victims' or societies' right to know the truth about such violations.

While framed in terms of amnesties that States may *not* adopt, these core principles follow from States' *affirmative* obligations to ensure that individuals are effectively protected against violations of their rights. By its nature, impunity invites further abuse, and international law has long recognized this by requiring States to investigate gross violations of human rights and war crimes, to institute criminal proceedings against those implicated in the violations, to impose appropriate punishment on those found guilty, and to provide an adequate and effective remedy to those whose rights have been violated.

In a larger perspective, experience has shown that amnesties that foreclose prosecution or civil remedies for atrocious crimes are unlikely to be sustainable, even when adopted in the hope of advancing national reconciliation rather than with the cynical aim of shielding depredations behind a fortress of impunity. When, for example, Argentina adopted amnesty laws in the 1980s, the Government defended its actions on the ground that there was a "compelling need for national reconciliation and consolidation of the democratic

¹ As explained in chapter II, section A.6, offences in this category include torture and similar cruel, inhuman or degrading treatment; extrajudicial, summary or arbitrary execution; slavery; and enforced disappearance, including gender-specific instances of these violations.

system.”² In 2003, Argentina’s Congress annulled the laws with retroactive effect; two years later, its Supreme Court upheld the Congress’s actions. Two decades after Argentina’s 1980s failed coup attempts, “Argentina has had more transitional human rights trials than any other country in the world and has enjoyed the longest uninterrupted period of democratic rule in its history.”³

In some countries, courts have progressively cut back on the scope of amnesties that violate their countries’ human rights obligations. In Chile, for example, courts have interpreted a Pinochet-era amnesty narrowly, allowing cases to go forward on legal theories that defy the amnesty’s attempt to secure wholesale impunity. Elsewhere, human rights groups have mobilized to challenge amnesties enacted decades earlier—and claim international law in support of their cause.⁴

The United Nations has played a leading role in advancing the law that has bolstered these efforts and which is summarized in this tool. United Nations human rights officials and bodies have long condemned amnesties for gross violations of human rights. More recently, the political bodies and senior officials of the United Nations have affirmed that there can be no impunity for atrocious crimes.

The legal principles and United Nations policy described in this tool constrain the discretion of States in particular. But they also have significant implications for the United Nations. Recognizing this, the Secretary-General in his report on the rule of law and transitional justice in conflict and post-conflict societies⁵ affirmed that “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.” Similarly, United Nations staff, whether in Headquarters or in field operations, may never condone amnesties that international law and United Nations policy unite in condemning.

The United Nations policy of opposing amnesties for war crimes and for gross violations of human rights even in the context of peace negotiations represents an important evolution, grounded in long experience. In the past, United Nations mediators have at times encouraged parties to armed conflicts to agree to a broad amnesty with a view to ending the conflicts. More recently, however, United Nations political officers and organs have recognized, as then Secretary-General Kofi Annan noted in his above-mentioned report, that “justice and peace are not contradictory forces. Rather, properly pursued, they promote and sustain one another.” Secretary-General Ban Ki-moon sounded a similar theme during a visit to Sudan in September 2007, affirming that “justice is an important part of building and sustaining peace. A culture of impunity and a legacy of past crimes that go unaddressed can only erode the peace.”

² Inter-American Commission on Human Rights, *Alicia Consuelo Herrera et al. v. Argentina*, cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Report No. 28/92, 2 October 1992, para. 25.

³ Kathryn Sikkink and Carrie Booth Walling, “The impact of human rights trials in Latin America,” *Journal of Peace Research*, vol. 44, No. 4 (2007), p. 427.

⁴ See, for example, Larry Rohter, “Groups in Brazil aim to call military torturers to account,” *New York Times*, 16 March 2007.

⁵ S/2004/616.

Amnesties that exempt from criminal sanction those responsible for human rights crimes have often failed to achieve their goals and instead seem to have emboldened beneficiaries to commit further crimes. A well-known example is the amnesty provision of the 1999 Lomé Peace Agreement, which not only failed to end armed conflict in Sierra Leone but also did not deter further atrocities.⁶

Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace. A noted example is the May 1999 indictment of then-Yugoslav President Slobodan Milošević by the International Criminal Tribunal for the former Yugoslavia at a time when he was engaged in negotiations aimed at securing an end to the conflict in Kosovo. Many feared that the indictment would prolong the conflict, but Mr. Milošević agreed to withdraw Serbian forces from Kosovo shortly after his indictment. Recalling this episode, one diplomat concluded: “These and other cases cast considerable doubt on the received wisdom that peace and justice are somehow at odds.”⁷

The United Nations position that the peace agreements it endorses can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights⁸ has the effect of “safeguarding a space for justice.”⁹ If conditions for prosecutions are not fully established during or in the immediate aftermath of an armed conflict, the Organization’s policy seeks to ensure that the door to justice remains open.¹⁰

⁶ See Human Rights Watch, “Benchmarks for assessing possible national alternatives to International Criminal Court cases against LRA leaders – A Human Rights Watch memorandum,” No. 1 (May 2007), p. 4.

⁷ Darryl Robinson, “Serving the interests of justice: amnesties, truth commissions and the International Criminal Court,” *European Journal of International Law*, vol. 14, No. 3 (2003), p. 481.

⁸ S/2004/616, para. 10.

⁹ Natalie Nougayrède, “La justice a ses raisons que la raison politique ne connaît pas,” *Le Monde*, 8 February 2007, quoting Louise Arbour, then United Nations High Commissioner for Human Rights.

¹⁰ This is not to say that States should pursue criminal investigations and prosecutions without regard to the costs of delay. Human rights treaty bodies have repeatedly emphasized “the general rule” that “a criminal investigation should be carried out promptly to protect the interests of the victims, preserve the evidence, and even safeguard the rights of any person who, in the context of the investigation, may be considered a suspect.” Inter-American Commission on Human Rights, *Mariela Morales Caro et al.* (La Rochela Massacre) (Colombia), Admissibility, Report No. 42/02, 9 October 2002, para. 33. In extraordinary circumstances, however, prosecutions may be delayed but not terminated in the interests of restoring international peace. See Rome Statute of the International Criminal Court, art. 16 (authorizing the United Nations Security Council in the exercise of its powers to maintain or restore international peace and security to suspend for up to 12 months at a time investigations or prosecutions of the International Criminal Court).

I. AMNESTIES DEFINED AND DESCRIBED

What is an amnesty?

Unless otherwise qualified, this tool uses the word *amnesty* to refer to legal measures that have the effect of:

- (a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or
- (b) Retroactively nullifying legal liability previously established.¹¹

Amnesties do not prevent legal liability for conduct that has not yet taken place, which would be an invitation to violate the law.

Pardons distinguished. An amnesty as defined above is distinct from a *pardon*, which as used in this tool refers to an official act that exempts a convicted criminal or criminals from serving his, her or their sentence(s), in whole or in part, without expunging the underlying conviction.¹² In practice, States have used a broad range of terms—including pardon and clemency—to denote laws that fall within the definition of *amnesties* used in this tool.¹³ While pardons as defined here may in some instances violate international law,¹⁴ they are beyond the scope of this tool.

Official immunities distinguished. Amnesties are also distinct from various forms of official immunity under international law, such as Head of State and diplomatic immunities. To the extent that and during the period when they are applicable, these immunities shield officials from the exercise of a foreign State's jurisdiction but should not immunize them from accountability for

¹¹ The word amnesty derives from the Greek word *amnestia*, which is also the root of *amnesia*. The Greek root connotes oblivion and forgetfulness rather than forgiveness of a crime that has already been criminally condemned. See Diane F. Orentlicher, "Settling accounts: the duty to prosecute human rights violations of a prior regime," *Yale Law Journal*, vol. 100, No. 8 (1991), p. 2537.

¹² See "Report by Mr. Louis Joinet, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study on amnesty laws and their role in the safeguard and promotion of human rights", noting that a pardon "remits the penalty but does not expunge the conviction" (E/CN.4/Sub.2/1985/16/Rev.1, para. 5). The approach taken here is not uniformly followed. For example, one writer distinguishes amnesties from pardons on the basis that an "amnesty promotes peace or reconciliation" while a pardon "provides a discretionary mechanism for sidestepping the courts." Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (The Hague, Kluwer International, 2004), p. 2. In a separate opinion, a member of the Appeals Chamber of the Special Court for Sierra Leone described amnesties as a form of "mass pardon." *Prosecutor v. Kondewa*, case No. SCSL-2004-14-AR72(E), Decision on lack of jurisdiction/abuse of process: amnesty provided by the Lomé Accord (25 May 2004), Separate Opinion of Justice Robertson, para. 15.

¹³ See, for example, African Commission on Human and Peoples' Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, communication No. 245/2002, para. 196. ("One may be pardoned even before being formally accused or convicted.")

¹⁴ Some human rights treaties require States parties to ensure punishment of certain offences with penalties that reflect the gravity of the crimes. See, for example, article 4.2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

human rights atrocities. As the International Court of Justice has emphasized in the context of a foreign minister's official immunity,

the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. [...] Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.¹⁵

Like pardons, official immunities are beyond the scope of this tool.

Other elements of impunity. Also beyond the scope of this tool are other forms of impunity that do not fall within the definition of amnesty used here but which may achieve similar effects.¹⁶ These include States' failure to enact laws prohibiting crimes that should, under international law, be punished; States' failure to bring criminal prosecutions against those responsible for human rights violations even when their laws present no barriers to punishment; States' failure to provide prosecutors the resources they need to ensure effective prosecution; and intimidation of witnesses whose testimony is needed to ensure a full legal reckoning.

Characteristics of amnesties

The exemption from criminal prosecution and, possibly, civil action achieved through amnesty is typically limited to conduct occurring during a specific period and/or involving a specified event or circumstance, such as a particular armed conflict. For example, the Ouagadougou Political Agreement of March 2007 between representatives of the President of **Côte d'Ivoire** and of Forces nouvelles includes a provision embodying the parties' decision to adopt:

“a new amnesty law covering crimes and offences related to national security and arising from the conflict that shook Côte d'Ivoire and which were committed between 17 September 2000 and the date of entry into force of the present Agreement”

¹⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, para. 60.

¹⁶ The Updated Set of principles for the protection and promotion of human rights through action to combat impunity provides that:

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations (E/CN.4/2005/102/Add.1, principle 1).

with the exception of several crimes.¹⁷ Subject to certain exceptions, a 1978 **Chilean** amnesty applied to:

“all individuals who performed illegal acts... during the state of siege in force from 11 September 1973 to 10 March 1978, provided they are not currently subject to legal proceedings or have already been sentenced.”¹⁸

Amnesties commonly specify a category or categories of beneficiaries, such as members of rebel forces, State agents or political exiles. Amnesties often and increasingly specify particular crimes or circumstances for which criminal prosecution and/or civil actions are barred. For example, a **Zimbabwean** clemency order that was found to violate the African Charter on Human and Peoples’ Rights exempted “murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty” from its scope.¹⁹

A study of amnesty laws adopted since the Second World War concludes that there are an increasing number of amnesties that exclude some or all crimes under international law. In practice, amnesties have taken several legal forms. The two most common methods of adoption since the Second World War have been through (a) executive decrees or proclamations and (b) parliamentary enactment into law.²⁰

Amnesties have also been accorded pursuant to a peace agreement or other negotiated accord, such as an agreement between the incumbent Government and opposition groups or rebel forces. Provisions of this kind have, however, often been implemented through national legislation or executive action. For example, the Lomé Peace Agreement of 7 July 1999 between the Government of Sierra Leone and the Revolutionary United Front of **Sierra Leone** included a provision pursuant to which the Government undertook to “grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives” and to “ensure that no official or judicial action is taken against any member” of specified forces (art. IX). One week after the Agreement was signed, the Parliament of Sierra Leone enacted a law ratifying it.

Sometimes amnesties are conditional. For example, an amnesty aimed at inducing rebel forces to cease their rebellion may provide that the benefits bestowed will be forfeited by a beneficiary who once again takes up arms.²¹

¹⁷ S/2007/144, annex, para. 6.3.

¹⁸ Decree Law No. 2.191, art. 1 (18 April 1978).

¹⁹ See *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, para. 52.

²⁰ Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford, Hart Publishing, 2008), p. 30.

²¹ Such amnesties might not strictly come within the general definition of amnesty used in this tool, as they effectively suspend rather than extinguish criminal responsibility. See *Prosecutor v. Kondewa*, Separate Opinion of Justice Robertson, para. 15.

Blanket amnesties

Although frequent, the phrase “blanket amnesties” is rarely defined and does not appear to be used consistently. Still, a working definition can be derived from the way this phrase has been used: blanket amnesties exempt broad categories of serious human rights offenders from prosecution and/or civil liability without the beneficiaries’ having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis.²²

De facto amnesties

In addition to de jure amnesties, some State laws, decrees or regulations constitute de facto amnesties: while not explicitly ruling out criminal prosecution or civil remedies, a law, decree or regulation may have the same effect as an explicit amnesty law.²³ Two laws enacted in

Argentina had such an effect:

- The *Punto Final* (“Full Stop”) Law of December 1986, which was subsequently annulled, set a 60-day limit on the initiation of new criminal complaints relating to Argentina’s “dirty war.”
- The Due Obedience Law of June 1987 came close to constituting a de jure amnesty: it established a presumption that military officials other than certain commanders committed human rights abuses under coercion and rendered them immune from prosecution on this basis. It, too, was later annulled.

²² The Amnesty Committee of South Africa’s Truth and Reconciliation Commission asserted that the country’s “amnesty process was unique in that it provided not for blanket amnesty but for a conditional amnesty, requiring that offences and delicts related to gross human rights violations be publicly disclosed before amnesty could be granted.” Truth and Reconciliation Commission of South Africa, *Report of the Amnesty Committee*, vol. 6, sect. 1, chap. 5, para. 1. See also *Prosecutor v. Kondewa*, Separate Opinion of Justice Robertson, para. 32 (explaining that South Africa’s Constitutional Court had “approved an amnesty which was not ‘blanket’ because each person had to be considered in the circumstances of individual cases by a Truth and Reconciliation Commission”). Some writers have defined *blanket* amnesties as “amnesties that apply ‘across the board without requiring any application on the part of the beneficiary or even an initial inquiry into the facts to determine if they fit the law’s scope of application’.” Garth Meintjes and Juan E. Méndez, “Reconciling amnesties with universal jurisdiction,” *International Law Forum*, vol. 2, No. 2 (2000), p. 76. Blanket amnesties have often been singled out for special condemnation. See, for example, Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65, annex, Principle 19); *Prosecutor v. Kondewa*, Separate Opinion of Justice Robertson, para. 47; Kristin Henrard, “The viability of national amnesties in view of the increasing recognition of individual criminal responsibility at international law,” *Michigan State University—DCL Journal of International Law*, vol. 8 (Fall 1999), p. 595. It does not follow, however, that other amnesties are permissible under international law.

²³ Some writers use the phrase “de facto amnesty” to describe a broad range of practices of impunity, including a State’s failure to investigate and prosecute crimes even when its law appears to enable prosecution. This tool uses the phrase only to describe legal measures, such as the Argentine laws described in the text, that effectively foreclose prosecutions.

If the effect of a law, regulation or decree is to prevent prosecution of certain crimes, it will be invalid if a de jure amnesty for the same crimes would be impermissible.

Thus, in one of its early decisions assessing the validity of amnesty laws, the Inter-American Commission on Human Rights found that the *Punto Final* and the Due Obedience Laws adopted by Argentina violated the American Convention on Human Rights.²⁴

The same would apply to “disguised amnesties.” While these can take various forms, they include amnesties whose operation is prescribed in regulations interpreting laws that, on their face, may be compatible with international law but which, as interpreted by their implementing regulations, are inconsistent with a State’s human rights obligations.

An example is the ordinance implementing the previously noted amnesty provision in **Côte d’Ivoire’s** 2007 Ouagadougou Political Agreement. Although the peace accord commits the parties to excluding war crimes and crimes against humanity from the amnesty’s scope,²⁵ the ordinance implementing it does not explicitly exclude these crimes. While the ordinance excludes from its amnesty provision several offences under domestic law that may sound similar to war crimes, such as “prisoner of war” crimes, it is not clear that the domestic offences excluded by the ordinance cover all of the offences that were to be excluded in accordance with the peace accord.

²⁴ *Alicia Consuelo Herrera et al. v. Argentina*.

²⁵ These exclusions were in accordance with international legal requirements described in this tool. Other offences, including gross violations of human rights that are not necessarily war crimes or crimes against humanity, should also have been excluded. See chapter II.

II. INTERNATIONAL LAW AND UNITED NATIONS POLICY ON AMNESTIES

Under various sources of international law and under United Nations policy, amnesties are impermissible if they:

(a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations;

(b) Interfere with victims' right to an effective remedy, including reparation; or

(c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law.

Moreover, amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or in some respects perpetuate the original violations.

A. Amnesties that are inconsistent with international law

A number of widely ratified international human rights and humanitarian law treaties explicitly require States parties to ensure punishment of specific offences either by instituting criminal proceedings against suspected perpetrators in their own courts or by sending the suspects to another appropriate jurisdiction for prosecution.²⁶ It is generally accepted that an amnesty that foreclosed prosecution of an offence that is subject to this type of obligation would violate the treaty concerned.²⁷ As noted below, amnesties have also been found to be incompatible with human rights treaties that do not explicitly address prosecution but which have consistently been interpreted to require States parties to institute criminal proceedings when serious violations occur. Amnesties for gross violations of human rights and serious violations of humanitarian law may also violate customary international law.²⁸

²⁶ This section does not address various regional human rights treaties, which may also be relevant.

²⁷ See, for example, Special Court for Sierra Leone, *Prosecutor v. Morris Kallon*, case No. SCSL-2004-15-AR72(E), and *Prosecutor v. Brima Bazzy Kamara*, case No. SCSL-2004-16-AR72(E), Appeals Chamber, Decision on challenge to jurisdiction: Lomé Accord Amnesty (13 March 2004), para. 73; Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003), p. 314.

²⁸ International tribunals have had few opportunities to address the question whether States' obligations under customary international law may be violated by an amnesty. A 1998 decision by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia suggested, however, that an amnesty for torture (and, by implication, for other conduct whose prohibition in international law has the status of a peremptory norm) would be "internationally unlawful." *Prosecutor v. Anto Furundžija*, case No. IT-95-17/1-T, Judgement of 10 December 1998, para. 155. See also *Prosecutor v. Morris Kallon and Prosecutor v. Brima Bazzy Kamara*, para. 82.

With the exception of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, each of the human rights treaties summarized in this section²⁹ explicitly requires that victims of specified violations should have access to remedies.³⁰ An amnesty that interfered with civil remedies would violate these treaty provisions. Moreover, victims of genocide and other human rights violations enjoy the right to an effective remedy, including reparation, under general international law.³¹

1. Genocide

- **An amnesty for genocide would violate the Genocide Convention and customary international law.**

Article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that genocide “is a crime under international law” which the contracting parties undertake “to punish.” Article IV provides that persons who commit genocide or several related acts “shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Since the principles underlying the Genocide Convention embody customary international law, an amnesty that prevented prosecution of genocide would also violate States’ obligations under customary law.

What is genocide?

According to article II of the Genocide Convention, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

²⁹ These include the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the African Charter on Human and Peoples’ Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Convention for the Protection of All Persons from Enforced Disappearance.

³⁰ States parties to the Genocide Convention can, however, seek reparations for violations of the treaty. See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 460.

³¹ See 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 (General Assembly resolution 60/147).

2. Crimes against humanity

- **An amnesty for crimes against humanity would be inconsistent with States' obligations under several treaties and may be inconsistent with States' obligations under customary international law.**

Although crimes against humanity are addressed in various international treaties, including the statutes of every international and hybrid criminal tribunal established since and including the Nuremberg Tribunal, they are not yet the subject of a treaty similar to the Genocide Convention.³² They have, however, been recognized—in the words of the preamble to the Rome Statute of the International Criminal Court—as among “the most serious crimes of concern to the international community as a whole” which “must not go unpunished” and whose “effective prosecution must be ensured.”

An amnesty that exempted crimes against humanity from punishment and/or civil remedies would also be inconsistent with States parties' obligations under several comprehensive human rights treaties that do not explicitly mention this international crime, including the International Covenant on Civil and Political Rights and the American Convention on Human Rights, but which have been interpreted to require punishment of crimes against humanity.³³

What are crimes against humanity?

Under the Rome Statute, a crime against humanity is 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;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender..., or other grounds that are universally recognized

³² The 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity does, however, provide that no statutory limitation shall apply to crimes against humanity (art. I (b)).

³³ See, for example, Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 18; Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile*, Judgement of 26 Sept. 2006, para. 114.

as impermissible under international law, in connection with any act referred to in this paragraph or any [other crime within the jurisdiction of the Court];

- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

3. War crimes

- **Amnesties that prevent prosecution of war crimes, also known as serious violations of international humanitarian law, whether committed during international or non-international armed conflicts, are inconsistent with States' obligations under the widely ratified Geneva Conventions of 1949 and their 1977 Protocols, and may also violate customary international law.**

War crimes are serious violations of the laws of war, also known as international humanitarian law. This is the body of international law governing the conduct of international and non-international armed conflicts. Under the laws of war, certain violations are considered so serious as to give rise to individual criminal responsibility, both domestically and at the international level. War crimes typically include serious violations of the laws of war aimed at protecting persons who are not or are no longer participating in the hostilities and of rules that restrict the means and methods of warfare.

Grave breaches of the Geneva Conventions and of Additional Protocol I. All four Geneva Conventions dealing with international armed conflict identify certain violations as *grave breaches* and require High Contracting Parties to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” identified in the treaty. In addition, each High Contracting Party is “under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.”

Article 85 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) makes the grave breaches provisions of the 1949 Geneva Conventions applicable to grave breaches of the Protocol and introduces several additional acts considered grave breaches. **An amnesty that prevented prosecution of grave breaches would be plainly incompatible with States' obligations under the Geneva Conventions and Additional Protocol I to search for persons allegedly responsible for grave breaches and to ensure that they are prosecuted.**

What are grave breaches?

“Grave breaches” are war crimes that can be committed only in the context of international armed conflicts. They are separately defined for each of the Geneva Conventions and Protocol I, and include such acts as “wilful killing, torture or inhuman treatment” or “wilfully causing great suffering or serious injury to body or health”³⁴ to persons protected by the relevant convention.

Other war crimes committed in international armed conflicts. Although the Geneva Conventions and Additional Protocol I explicitly require High Contracting Parties to ensure prosecution of grave breaches, **other serious violations of their provisions are also war crimes that should be punished.** In a major study of customary international humanitarian law, the International Committee of the Red Cross (ICRC) notes that “there is international case law to support the proposition that war crimes may not be the object of an amnesty.”³⁵

What violations of the laws of war governing international armed conflicts other than grave breaches constitute war crimes?

In addition to grave breaches, the Rome Statute enumerates 26 “other serious violations of the laws and customs applicable in international armed conflict” that can be prosecuted by the International Criminal Court (art. 8.2 (b)). These include such violations as intentionally directing attacks against civilians not taking part in hostilities or against civilian populations as such and intentionally directing attacks against humanitarian organizations.

War crimes committed in non-international armed conflicts. Although grave breaches can be committed only during international armed conflicts, serious violations of the rules of humanitarian law that apply to non-international armed conflicts are also war crimes. Rules of humanitarian law governing non-international armed conflicts are set forth in common article 3 of the four Geneva Conventions of 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II). Some are also recognized under customary international law as serious violations of the “laws and customs of war.”³⁶

An amnesty that encompassed serious violations of the laws of war governing non-international armed conflicts would be of doubtful validity. As noted above, according to ICRC, there is international case law to support the proposition that war crimes may not be the object of an amnesty, and this applies to *all* war crimes.

³⁴ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 147.

³⁵ International Committee of the Red Cross, *Customary International Humanitarian Law*, vol. I, by Jean-Marie Henckaerts and Louise Doswald-Beck (Cambridge University Press, 2005), p. 613.

³⁶ See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, case No. IT-94-1-AR72, Decision of 2 October 1995, para. 134; *Prosecutor v. Delalić et al.*, case No. IT-96-21-A, Judgement of 20 February 2001, paras. 163–173.

This point bears special emphasis in the light of a provision in Additional Protocol II, article 6.5, that has at times been misunderstood. Article 6.5 stipulates:

At the end of hostilities [in a context of non-international armed conflict], the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Reflecting the drafting history of this provision, ICRC has affirmed that article 6.5 “aims at encouraging... a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law.”³⁷

While excluding war crimes, article 6.5 of Additional Protocol II encourages States to grant former rebels amnesty for such crimes as rebellion, sedition and treason. States can also grant rebels amnesty for legitimate acts of war, such as killing members of the opposing forces under circumstances not amounting to a war crime.

In its study of *Customary International Humanitarian Law*, ICRC also concluded that the following rule—essentially a reformulation of article 6.5—now has the status of customary law:

Rule 159. At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, *with the exception of persons suspected of, accused of or sentenced for war crimes.* (Emphasis added.)

Which violations of the laws of war governing non-international armed conflicts are war crimes?

Serious violations of common article 3 that can be punished by the International Criminal Court include, in accordance with article 8.2 (c) of the Rome Statute, “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;

³⁷ Quoted in Inter-American Commission on Human Rights, *Parada Cea et al. v. El Salvador*, case 10.480, Report No. 1/99, 27 January 1999, para. 116. When article 6, paragraph 5, was adopted, a Soviet delegate explained that this provision could not in any circumstances whatsoever be construed as enabling war criminals or those guilty of crimes against humanity to evade severe punishment. ICRC shares this interpretation. See International Committee of the Red Cross, *Customary...*, p. 612.

- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying-out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

In addition, in accordance with article 8.2 (e), it can exercise jurisdiction over the following war crimes when committed in non-international armed conflicts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (v) Pillaging a town or place, even when taken by assault;
- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy,..., enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- (vii) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities;
- (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (ix) Killing or wounding treacherously a combatant adversary;
- (x) Declaring that no quarter will be given;
- (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

4. Torture

- **An amnesty for torture would violate States parties' duties under the widely ratified Convention against Torture as well as other treaties, and may violate customary international law.**

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States parties to "ensure that all acts of torture are offences under [their] criminal law" (art. 4.1). The same duty applies to "an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture" (art. 4.1). These offences must be made "punishable by appropriate penalties which take into account their grave nature" (art. 4.2). When a State party finds someone in territory under its jurisdiction who is alleged to have committed one of these offences, that State must either extradite the suspect or "submit the case to its competent authorities for the purpose of prosecution" (art. 7.1).

The Convention against Torture also requires States parties to ensure in their legal systems "that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation" (art. 14).

What is torture?

Under article 1 of the Convention against Torture, torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

It should be noted that when torture is committed in a context that makes it a war crime, an act of genocide or a crime against humanity, it is not necessary to establish the involvement of public officials.³⁸

Amnesties for torture may, in addition to violating the Convention against Torture and other human rights treaties discussed below, also violate customary international law.³⁹ A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia has expressed the view that an amnesty for torture would be "internationally unlawful."⁴⁰

³⁸ See International Committee of the Red Cross, *Customary...*, p. 317.

³⁹ Under international humanitarian law, the rule prohibiting torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, is "a norm of customary international law applicable in both international and non-international armed conflicts." *Ibid.*, p. 315.

⁴⁰ *Prosecutor v. Anto Furundžija*, para. 155.

5. Enforced disappearance

- **An amnesty for enforced disappearances is incompatible with the International Convention on Enforced Disappearance, as well as various treaties that are already in force, and may also violate customary international law.**

The 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which has not yet entered into force, includes detailed provisions concerning criminal investigation and prosecution of the crime of enforced disappearance. For instance, it requires States parties to “hold criminally responsible at least: (a) any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance” as well as a person who is criminally responsible for an enforced disappearance pursuant to the doctrine of superior responsibility (art. 6.1). States parties must “make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness” (art. 7.1). When a person who is alleged to have committed an offence of enforced disappearance is found in territory under the jurisdiction of a State party, that State must, “if it does not extradite that person or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution” (art. 11.1).

Turning to civil remedies, the Convention requires each State party to “ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation” (art. 24.4).⁴¹

Enforced disappearances also violate comprehensive human rights treaties, such as the International Covenant on Civil and Political Rights and its regional counterparts, even though these treaties do not use the term “enforced disappearance.”⁴² These treaties’ monitoring bodies have found that the practice of enforced disappearance gives rise to a duty on the part of States parties to institute criminal proceedings, to provide reparation, and to ensure that the fate of direct victims of enforced disappearance is discovered and disclosed.⁴³

⁴¹ The Convention defines victim as “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance” (art. 24.1). The right to obtain reparation noted above “covers material and moral damages and, where appropriate, other forms of reparation such as: (a) restitution; (b) rehabilitation; (c) satisfaction... ; (d) guarantees of non-repetition” (art. 24 (5)).

⁴² Similarly, although “international humanitarian law treaties do not refer to the term ‘enforced disappearance’ as such, enforced disappearance violates, or threatens to violate, a range of customary rules of international humanitarian law.” See International Committee of the Red Cross, *Customary...*, p. 340.

⁴³ See, for example, *Quinteros v. Uruguay*, communication No. 107/1981, in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol. II (United Nations publication, Sales No. E.89.XIV.1); European Court of Human Rights, *Kurt v. Turkey*, No. 24276/94, Judgement of 25 May 1998; Inter-American Court of Human Rights, *Velásquez-Rodríguez Case*, Judgement of 29 July 1988, Series C, No. 4, para. 172.

What are enforced disappearances?

Article 2 of the International Convention on Enforced Disappearance defines “enforced disappearance” as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

It should be noted that many States do not include in their criminal codes a crime of “enforced disappearance” as such. In these States, enforced disappearances might be prosecuted as unlawful detention or arbitrary arrest and detention. It is thus important, when considering the scope of a proposed amnesty, to ensure that the proposed law does not prevent States from punishing enforced disappearances by including in the proposed amnesty crimes that appear to be ordinary crimes but which in fact, under relevant national law, provide the principal basis for prosecuting the crime of enforced disappearance.

6. Other violations of human rights

- **Under several human rights treaties and United Nations principles and guidelines that reflect “existing legal obligations under international... law,”⁴⁴ States may not grant amnesty for gross violations of human rights, which include but are not limited to torture and enforced disappearance. Amnesties for gross violations of human rights may also violate States’ obligations under customary law.**
- **Under various human rights treaties, victims of any violation of rights protected in the treaties are entitled to a remedy and reparations.**

Comprehensive human rights treaties, both international and regional, have been found by their monitoring bodies to require States parties to conduct an effective investigation and, if warranted by the results of the investigation, to ensure prosecution of gross violations such as torture and similar cruel, inhuman or degrading treatment; extrajudicial, summary or arbitrary executions; slavery; and enforced disappearance, including gender-specific instances of these violations, such as rape.⁴⁵ These treaty-monitoring bodies have found amnesties that prevent investigations and criminal proceedings to violate such treaties.

⁴⁴ 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 (preamble).

⁴⁵ Under the jurisprudence of treaty bodies discussed in this subsection, amnesties that prevent investigations and, where warranted, criminal prosecutions also violate the right to an effective remedy. Thus, the right to an effective remedy has been interpreted to require both an effective civil remedy and effective criminal processes.

What are gross violations of human rights?

As noted above, gross violations of human rights have been widely recognized to include extrajudicial, summary or arbitrary executions; torture and similar cruel, inhuman or degrading treatment; slavery; and enforced disappearance, including gender-specific instances of these offences. Although the phrase “gross violations of human rights” is used widely in human rights law, it has not been formally defined. Nevertheless, “it is generally assumed that genocide, slavery and slave trade, murder, enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, deportation or forcible transfer of population, and systematic racial discrimination fall into this category. Deliberate and systematic deprivation of essential foodstuffs, essential primary health care or basic shelter and housing may also amount to gross violations of human rights.”⁴⁶

All of the comprehensive human rights treaties addressed below explicitly provide that victims must have recourse to an effective remedy. An amnesty that forecloses or impedes victims’ recourse to effective civil remedies would violate this obligation.

The International Covenant on Civil and Political Rights requires States parties to ensure that victims of violations of the Covenant “have an effective remedy” (art. 2.3 (a)).⁴⁷ An amnesty that prevented victims from seeking a civil remedy would clearly violate the Covenant. In 2004, the Human Rights Committee reaffirmed the duty of States parties to “ensure that individuals... have accessible and effective remedies to vindicate [Covenant] rights” and to “make reparation to individuals whose Covenant rights have been violated.” In its view, “the Covenant generally entails appropriate compensation.”⁴⁸

Moreover, while the Human Rights Committee⁴⁹ has repeatedly held that the Covenant does not provide that private individuals have a right to demand that the State criminally prosecute another person, it has interpreted the Covenant to require States parties to take effective steps to investigate violations of human rights recognized as criminal (see below) and to bring to justice those who are responsible for these violations, as well as to provide an effective remedy to the victims.

⁴⁶ *Rule-of-law Tools for Post-conflict States: Reparations Programmes* (United Nations publication, Sales No. E.08.XIV.3), footnote 5.

⁴⁷ This right is assured “notwithstanding that the violation has been committed by persons acting in an official capacity.”

⁴⁸ General comment No. 31, paras. 15–16. Furthermore, “where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”

⁴⁹ *Arhuacos v. Colombia*, views on communication No. 612/1995, 29 July 1997 (A/52/40 (vol. II), annex VI, sect. Q, paras. 8.2 and 8.8) and *Bautista de Arellana v. Colombia*, views on communication No. 563/1993, 27 October 1995 (A/51/40 (vol. II), annex VIII, sect. S, paras. 8.2 and 8.6).

When particularly serious violations of human rights occur, disciplinary and administrative remedies do not adequately satisfy States parties' obligations to provide adequate and effective remedies. Instead, the Human Rights Committee has made clear that the State party has a duty to investigate thoroughly alleged violations of human rights, particularly enforced disappearances and violations of the right to life, and to criminally prosecute, try and punish those deemed responsible for such violations. In its general comment No. 31, the Human Rights Committee made clear that States parties' duty to bring violators to justice encompasses other serious violations as well:

Where [the investigations that States parties are required to undertake] reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. **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..., summary and arbitrary killing... and enforced disappearance...** (para. 18, emphasis added).

Accordingly, States parties to the Covenant "may not relieve" public officials or State agents who have committed violations that are recognized as criminal, including violations committed under circumstances that make them crimes against humanity, "from personal responsibility, as has occurred with certain amnesties... and prior legal immunities and indemnities" (para. 18).

The two supervisory bodies of the **American Convention on Human Rights**—the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights—have interpreted the Convention to require States parties to institute criminal proceedings in respect of acts that violate fundamental rights.⁵⁰ Both the Court and the Commission have found that criminal proceedings are necessary when especially serious violations, such as extrajudicial executions, occur.⁵¹ Both bodies have found that amnesties that foreclose prosecution of serious violations of the American Convention violate that treaty.⁵² In a case finding that **Peru's**

⁵⁰ Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras* is a leading case in this regard (para. 172).

⁵¹ Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia (OEA/Ser.L/V/II.102 doc. 9 rev. 1, chap. V, para. 3).

⁵² In 1992 the Commission rendered its first two decisions squarely concluding that amnesties, in **Argentina** and **Uruguay** respectively, were incompatible with the American Convention. See *Alicia Consuelo Herrera et al. v. Argentina*; *Santos Mendoza et al. v. Uruguay*, cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Report No. 29/92, 2 October 1992. See also *Garay Hermosilla et al. v. Chile*, case 10.843, Report No. 36/96, 15 October 1996; *Irma Reyes et al. v. Chile*, cases 11.228 et al., Report No. 34/96, 15 October 1996; *Catalán Lincoleo v. Chile*, case 11.771, Report No. 61/01, 16 April 2001; *Las Hojas Massacre Case v. El Salvador*, case 10.287, Report No. 26/92, 24 September 1992; *Ignacio Ellacuría et al. v. El Salvador*, case 10.488, Report No. 136/99, 22 December 1999.

promulgation and application of two amnesty laws violated the American Convention, the Court observed “that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”⁵³

The African Charter on Human and Peoples’ Rights, like other comprehensive human rights treaties, recognizes victims’ right to a remedy for violations of fundamental rights (art. 7.1 (a)). Although interpretations of the African Charter’s obligations of punishment by its supervisory bodies⁵⁴ are not as developed as interpretations of other comprehensive human rights treaties, decisions of the African Commission on Human and Peoples’ Rights indicate that investigation and criminal prosecution, along with compensation for violations, play a necessary part in States parties’ fulfilment of their obligations.⁵⁵

In its most thorough discussion of the permissibility of amnesties, the Commission found that a Clemency Order adopted in **Zimbabwe** violated the African Charter. The Clemency Order in question granted pardon to every person liable to criminal prosecution for any politically motivated crime committed between January and July 2000, a period of violence surrounding a February 2000 constitutional referendum and June 2000 parliamentary elections. The Order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period. It exempted, however, crimes of murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty.

⁵³ *Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru)*. Judgement of 14 March 2001. Series C, No. 75, para. 41. The Court held that since the Peruvian amnesty laws were incompatible with the American Convention, they had no legal effect (para. 51(4)). The Court subsequently made clear that “the effects” of this judgement “are general in nature,” meaning that any application of the amnesties at issue in that case would violate the American Convention. *Barrios Altos Case, Interpretation of the Judgement on the Merits*. Judgement of 3 September 2001. Series C, No. 83, para. 18. The Court reasoned: “Enactment of a law that is manifestly incompatible with the obligations undertaken by a State party to the Convention is per se a violation of the Convention for which the State incurs international responsibility.” Following the decision by the Court, the Inter-American Commission noted that Peru had chosen not to apply the amnesty law in specific cases. Although it considered this a positive step towards compliance with the Court’s decision in *Barrios Altos*, the Commission insisted that “the amnesty laws need to be repealed generally, rather than leaving it to the discretion of judicial organs in specific cases.” Annual Report 2001 (OEA/Ser.L/V/II.114 doc. 5 rev., chap. V (Peru), para. 25).

⁵⁴ The African Charter provides for the establishment of the African Commission on Human and Peoples’ Rights, whose case law is discussed in this section. A protocol to the African Charter adopted in 1998, which entered into force on 25 January 2004, provides for an African Court on Human and Peoples’ Rights.

⁵⁵ See, e.g., *Social and Economic Rights Action Center et al. v. Nigeria*, communication 155/96; and *Mouvement Burkinabé des Droits de l’Homme et des Peuples v. Burkina Faso*, communication 204/97.

The European Court of Human Rights has not yet ruled on whether an amnesty violates **the European Convention for the Protection of Human Rights and Fundamental Freedoms**. But an amnesty that impeded victims' right to an effective remedy for violations of the Convention would surely violate article 13 (read in conjunction with another substantive article), which provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The European Court has repeatedly found that, when certain violations of the European Convention occur, States parties must conduct a thorough and effective investigation capable of leading to the identification and punishment of those responsible.⁵⁶ In particular, the Court has emphasized the need to conduct such an investigation in cases involving serious ill-treatment, including rape and other forms of torture, a substantial risk of enforced disappearance, and violations of the right to life.⁵⁷

B. Further considerations in assessing amnesties

- **When States adopt amnesties that exclude war crimes, genocide, crimes against humanity and other violations of human rights, they must take care to ensure that the amnesties do not restrict or imperil the enjoyment of human rights, including those that are ostensibly restored.**

Amnesties that exclude violations of human rights and humanitarian law can, under appropriate circumstances, reverse the legal consequences of prior violations of human rights.⁵⁸ Examples include amnesties that expunge the conviction of persons previously convicted for their non-violent political dissent and/or remove the threat of prosecution for past conduct of this kind to encourage political exiles to return home.⁵⁹

While this type of amnesty seeks to reverse a human rights violation—typically committed by a previous Government—it risks perpetuating some aspects of the original violation unless drafted appropriately. As Special Rapporteur Louis Joinet noted, "granting amnesty to a prisoner of opinion is tantamount to an implicit acknowledgement that his conduct was criminal."⁶⁰

⁵⁶ See, e.g., *Musayeva et al. v. Russia*, No. 74239/01, Judgement of 26 July 2007, paras. 85–86 and 116.

⁵⁷ See, e.g., *Aydin v. Turkey*, No. 23178/94, Judgement of 25 September 1997, para. 103; *Assenov et al. v. Bulgaria*, No. 24760/94, Judgement of 28 October 1998, para. 102; *Kurt v. Turkey*, para. 140; *Yasa v. Turkey*, No. 22495/93, Judgement of 2 September 1998, para. 114; *Mahmut Kaya v. Turkey*, No. 22535/93, Judgement of 28 March 2000, para. 124; *Timurtaş v. Turkey*, No. 23531/94, Judgement of 13 June 2000, para. 87.

⁵⁸ That appropriately drafted amnesties can advance human rights is reflected in the fact that a seminal study by Special Rapporteur Louis Joinet (E/CN.4/Sub.2/1985/16/Rev.1) was undertaken with a view to exploring the potential role of amnesty laws "in the safeguard and promotion of human rights."

⁵⁹ Amnesties may facilitate programmes of voluntary repatriation of individuals who "can no longer benefit from the status of refugee" (E/CN.4/Sub.2/1985/16/Rev.1, para. 17).

⁶⁰ E/CN.4/Sub.2/1985/16/Rev.1, para. 54.

In recognition of this threat, the Updated Set of principles for the protection and promotion of human rights through action to combat impunity⁶¹ provides:

Insofar as it may be interpreted as an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for acts connected with the peaceful exercise of their right to freedom of opinion and expression. When they have merely exercised this legitimate right, ..., the law shall consider any judicial or other decision concerning them to be null and void; their detention shall be ended unconditionally and without delay (principle 24 (c)).

- An example of an amnesty that appears to be consistent with this principle was enacted by the Albanian Government in 1993. The **Albanian** law provided that “all those who have been sentenced for political crimes... are considered innocent.”⁶²

While the right to non-violent political expression must be fully protected, States must also ensure that they do not grant impunity to those who violate human rights by improperly denoting their violations as “political offences” that are eligible for amnesty.⁶³

Principle 24 (d) of the Updated Set of principles on combating impunity provides for further protections in situations where potential beneficiaries of an amnesty, who were previously convicted of offences other than those involving the peaceful exercise of their right to freedom of opinion and expression, may have been convicted under circumstances that violated their rights:

Any individual convicted of offences other than those to which paragraph (c) of this principle refers who comes within the scope of an amnesty is entitled to refuse it and request a retrial, if he or she has been tried without benefit of the right to a fair hearing... or if he or she was convicted on the basis of a statement established to have been made as a result of inhuman or degrading interrogation, especially under torture.

⁶¹ E/CN.4/2005/102/Add.1.

⁶² Law No. 7660, as quoted in Mallinder, *op. cit.*, p. 65. In his 1985 study, Mr. Joinet noted: “It is generally considered that persons [guilty of offences of opinion] should be priority candidates for amnesty” (E/CN.4/Sub.2/1985/16/Rev.1, para. 52). Similar considerations led the High Commissioner for Human Rights to commend a pardon of political leaders and activists in Ethiopia. In her words, the pardons “are significant for what they represent in terms of the expansion of the democratic space in Ethiopia and prospects for national reconciliation.” OHCHR press release, “High Commissioner for Human Rights welcomes release of prisoners in Ethiopia” (24 July 2007).

⁶³ Thus the Office of the United Nations High Commissioner for Human Rights in **Colombia** criticized then-pending amnesty legislation because it defined as a political offence “a form of behaviour which is clearly located in the sphere of common delinquency...” Letter to Legislators from the First Commissions of the Senate and House of Representatives: Observations on the “Justice and Peace” Draft Law, 30 March 2005, DRP/175/05, quoted in Amnesty International, “Colombia: the paramilitaries in Medellín: demobilization or legalization?” (AMR 23/019/2005).

Some amnesties include provisions that restore various rights which had been taken away from individuals included in the class of amnesty beneficiaries.

- For example a 1980 **Peruvian** amnesty law established, in the words of the Inter-American Commission on Human Rights, that “the rights and property that had been taken away by virtue of the acts or crimes for which amnesty was being granted would be restored to the persons covered by the amnesty.”⁶⁴

A striking trend since the Second World War has been the comparatively large number of amnesties that are accompanied by reparations measures. According to one study, 90 amnesty laws have been accompanied by such measures since 1990.⁶⁵

Another type of amnesty that seeks to restore human rights—and in this respect is reparative—encourages political exiles to return home by removing the threat of prosecution. These amnesties, too, should be drafted with a view to ensuring that they do not restrict the rights sought to be restored. In 1985, Special Rapporteur Louis Joinet wrote that amnesties adopted with a view to encouraging political exiles to return home “should not... be subject to the condition of actual return,” as various personal constraints may limit beneficiaries’ ability to exercise their internationally assured right to freely leave and enter their own country. When the security of potential beneficiaries of an amnesty is in doubt, the amnesty should include or be accompanied by adequate security guarantees.⁶⁶

As the United Nations Secretary-General has affirmed, “carefully crafted amnesties can help in the return and reintegration” of displaced persons and former fighters in the aftermath of armed conflict “and should be encouraged,” but “these can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights.”⁶⁷ By contributing to the demobilization and disbandment of paramilitary groups, amnesties that are consistent with these principles can help prevent further violence.⁶⁸

Under some circumstances amnesties for ordinary crimes—that is, crimes that were legitimately punished and were prosecuted in accordance with international standards of fair process—can advance humanitarian goals by, for example, enabling incurably ill prisoners to return home or alleviating harsh conditions in overcrowded prisons.⁶⁹

⁶⁴ Annual Report of the Inter-American Commission on Human Rights 1979–1980, OEA/Ser.L/V/II.50, Doc. 13 rev. 1, chap. IV, sect. I (2 October 1980).

⁶⁵ Mallinder, *op. cit.*, p. 173.

⁶⁶ E/CN.4/Sub.2/1985/16/Rev.1, paras. 81.2 and 46.

⁶⁷ S/2004/616, para. 32.

⁶⁸ See E/CN.4/2005/102/Add.1, principle 37.

⁶⁹ E/CN.4/Sub.2/1985/16/Rev.1, paras. 24–26.

C. United Nations principles and policies restricting amnesties

- **United Nations officials, including peace negotiators and field office staff, must never encourage or condone amnesties that prevent prosecution of those responsible for serious crimes under international law, such as war crimes, genocide and crimes against humanity, or gross violations of human rights, such as extrajudicial, summary or arbitrary executions; torture and similar cruel, inhuman or degrading treatment; slavery; and enforced disappearance, including gender-specific instances of these offences, or that impair victims' right to a remedy, including reparation, or victims' or societies' right to the truth.**

United Nations bodies, officials and experts have condemned amnesties for war crimes; genocide; crimes against humanity; and other gross violations of human rights, such as extrajudicial, summary or arbitrary executions, torture and similar cruel, inhuman or degrading treatment; slavery; and enforced disappearance, including gender-specific instances of these violations. The United Nations policy concerning amnesties is a corollary to the principles, which have been affirmed repeatedly within the United Nations system, that States must (a) ensure that those responsible for serious violations of human rights and humanitarian law are brought to justice⁷⁰ and (b) assure victims an effective right to a remedy, including reparation.⁷¹

Two sets of United Nations principles distil a broad range of policies and principles in this area, as well as recent developments in international law and practice that are summarized in the subsection that follows. First, the 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, which were adopted by the General Assembly in 2005⁷² and reflect existing obligations under international human rights and humanitarian law, provide:

⁷⁰ For example, the Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity provide that war crimes and crimes against humanity “shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to... trial and, if found guilty, to punishment” (General Assembly resolution 3074 (XXVIII)). The Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions provide: “In no circumstances... shall blanket immunity from prosecution be granted to any person allegedly involved in extralegal, arbitrary or summary executions” (Economic and Social Council resolution 1989/65, annex, principle 19). The Declaration on the Protection of All Persons from Enforced Disappearance provides that “persons who have or are alleged to have committed [acts of enforced disappearance] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction” (General Assembly resolution 47/133, art. 18), while the 1993 Declaration on the Elimination of Violence against Women provides that States should “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons” (General Assembly resolution 48/104, art. 4 (c)). The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, asserts that “States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law” (A/CONF.157/24 (Part I), chap. III, para. 60).

⁷¹ For example, the Universal Declaration of Human Rights proclaims: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” (art. 8). Other relevant United Nations principles are cited in the preamble to the Basic Principles and Guidelines on the Right to a Remedy and Reparation (see below).

⁷² General Assembly resolution 60/147, annex.

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law [i.e., “war crimes”], States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him (para. 4).

Principle 19 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, of which the United Nations Commission on Human Rights took note with appreciation in 2005,⁷³ affirms essentially the same norm:

States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.

Applying this principle to amnesties, principle 24 provides:

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:

(a) 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 which principle 19 refers or the perpetrators have been tried before a court with jurisdiction—whether international, internationalized or national—outside the State in question....

The Basic Principles and Guidelines on the Right to a Remedy and Reparation affirm a general duty of States to “provide effective remedies to victims, including reparation,” and provide detailed guidelines on the nature of this obligation (para. 3 (d)). The Updated Set of principles on impunity likewise reaffirms the right of victims of human rights violations to “have access to a readily available, prompt and effective remedy” (principle 32) and to obtain reparation (principle 31). Accordingly, it provides: “Amnesties and other measures of clemency shall be without effect with respect to the victims’ right to reparation...” (principle 24 (b)).

While United Nations human rights organs, experts and officials have long opposed amnesties that prevent accountability for human rights violations that constitute crimes, the political bodies of the Organization have adopted a similar position during the past decade. For example, the Security Council, in its resolution 1674 (2006), emphasized “the responsibility of States to

⁷³ Resolution 2005/81 on impunity, para. 20.

comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law....”

The responsibility of *States* to end impunity has implications for the United Nations as well. In his 2004 report on the rule of law and transitional justice in conflict and post-conflict societies, the Secretary-General reaffirmed that “**United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.**”⁷⁴ This policy reflects, among other considerations, a judgement that peace agreements secured at the price of amnesty for atrocious crimes may not secure a lasting peace and will not secure a just peace.

D. Legal effect of amnesties

- **An amnesty for gross violations of human rights or serious violations of international humanitarian law would not prevent prosecution before foreign or international courts.**

In a frequently cited passage, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia expressed its view that a domestic amnesty covering crimes whose prohibition has the status of a *jus cogens* norm, such as the prohibition of torture, “would not be accorded international legal recognition.” The Chamber explained:

The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-State and individual levels. At the inter-State level, it serves to internationally delegitimize any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against 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 authorizing or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorizing act. What is even more important is that perpetrators

⁷⁴ S/2004/616, para. 10. See also paragraph 32.

of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime.⁷⁵

The Special Court for Sierra Leone, which was established through a treaty between the United Nations and the Government of Sierra Leone, has rejected challenges to its jurisdiction over international crimes that had been covered by an amnesty. Noting that its Statute vested it with jurisdiction over certain international crimes notwithstanding the amnesty, the Appeals Chamber observed that “one consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes.” “Where jurisdiction is universal,” it concluded, “a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty.”⁷⁶

Finally, human rights treaty bodies have repeatedly affirmed their right to review the validity of amnesties adopted by States parties. For example, in *Malawi African Association et al. v. Mauritania*, the African Commission concluded that a domestic amnesty law that “had the effect of annulling the penal nature of the precise facts and violations of which the plaintiffs” were complaining could not have the effect of precluding review by the Commission itself:

The Commission recalls that its role consists precisely in pronouncing on allegations of violations of the human rights protected by the [African] Charter.... It is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter.⁷⁷

⁷⁵ *Prosecutor v. Anto Furundžija*, para. 155.

⁷⁶ See *Prosecutor v. Morris Kallon and Prosecutor v. Brima Bazzy Kamara*, paras. 70 and 67. See also *Prosecutor v. Kondewa*.

⁷⁷ Communications 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98 (11 May 2000), 13th Annual Activity Report of the African Commission on Human and Peoples’ Rights, 1999–2000, AHG/222 (XXXVI), annex V, paras. 82–83. The operation of an amnesty law may also have the effect of satisfying a treaty-monitoring body’s admissibility requirement that reasonably available domestic remedies should be exhausted.

E. Amnesties and the right to know

- **Amnesties may not compromise either individual victims' or societies' right to know the truth about human rights violations.**

As recognized in the Updated Set of principles on impunity, the right to truth has both a collective and individual dimension, both of which are inalienable:

Principle 2. The inalienable right to the truth

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systemic violations, to the perpetration of those crimes....

Principle 4. The victims' right to know

Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate.

Just as international law requiring States to ensure prosecution of certain offences and to provide victims an effective remedy sets limits on permissible amnesties, the Updated Set of principles on impunity recognizes that "amnesties and other measures of clemency... shall not prejudice the right to know" (principle 24 (b)). In accord with this approach, a 2006 report of the Office of the United Nations High Commissioner for Human Rights concluded "that the right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right" and "should be considered as a non-derogable right and not be subject to limitations." Accordingly, **"amnesties or similar measures and restrictions to the right to seek information must never be used to limit, deny or impair the right to the truth."**⁷⁸

⁷⁸ "Study on the right to the truth" (E/CN.4/2006/91, summary and para. 60).

III. RELATIONSHIP BETWEEN AMNESTIES AND MEASURES OF TRANSITIONAL JUSTICE

- Truth, justice and reparations are complementary rather than alternative responses to gross violations of human rights and serious violations of international humanitarian law. While in some instances an individual's full disclosure of the truth about violations may justify a reduction in sentence, measures of transitional justice such as the establishment and operation of truth commissions should not exempt perpetrators from criminal process in exchange for their testimony.
- Similarly, providing victims reparations for violations of human rights and humanitarian law does not relieve States of their obligation to ensure prosecution of war crimes and gross violations of human rights.

A. Truth commissions

"It is increasingly common for countries emerging from civil war or authoritarian rule to create a truth commission to operate during the immediate post-transition period."⁷⁹ Truth commissions—"officially sanctioned, temporary, non-judicial investigative bodies"—can play and have played an invaluable role in satisfying the "right to the truth" about violations.

In part because one of the best known and widely respected truth commissions—South Africa's Truth and Reconciliation Commission—had the power under defined circumstances to grant amnesty to perpetrators who fully disclosed the truth about apartheid-era crimes, some commentators believe it should be possible to forego prosecutions even for atrocious crimes if doing so would facilitate full disclosure of the truth. But although South Africa's amnesty was not tested before an international human rights body, it is doubtful whether it would survive scrutiny under the legal standards developed by such bodies as the Human Rights Committee and the Inter-American Commission on and Court of Human Rights.⁸⁰ These bodies have found amnesties to be incompatible with States' obligations under relevant treaties even when the State concerned convened a truth commission and provided reparations to victims.⁸¹

⁷⁹ *Rule-of-law Tools for Post-conflict States: Truth Commissions* (United Nations publication, Sales No. E.06.XIV.5), p. 1.

⁸⁰ See Sherrie L. Russell-Brown, "Out of the crooked timber of humanity: the conflict between South Africa's Truth and Reconciliation Commission and international human rights norms regarding 'effective remedies,'" *Hastings International and Comparative Law Review*, vol. 26, No. 2 (2003), p. 227. The South African amnesty was challenged before South Africa's Constitutional Court, which upheld the validity of the amnesty under both domestic and international law. The South African Court's treatment of relevant international law has, however, been widely criticized.

⁸¹ See, e.g., *Catalán Lincoleo v. Chile*, paras. 51, 53–55 and 57; *Alicia Consuelo Herrera et al. v. Argentina*. On the other hand, in its 1992 report concluding that Uruguay's amnesty law violated the American Convention, the Commission stated: "The Commission must also consider the fact that in Uruguay, no national investigatory commission was ever set up nor was there any official report on the very grave human rights violations committed during the previous de facto Government." *Santos Mendoza et al. v. Uruguay*, para. 36.

Other countries have adopted modifications to the South African model to address concerns about its compatibility with international human rights law and with local expectations.⁸² For example, the Commission for Reception, Truth and Reconciliation established in Timor-Leste in 2002 did not allow immunity for serious crimes such as murder or rape even when the perpetrator fully confessed, and allowed immunity for other crimes only when the confessor undertook community service or made a symbolic payment, pursuant to an agreement negotiated between the perpetrator, the victim(s) and the community. Perpetrators who reneged on their negotiated obligations could be prosecuted.⁸³ As noted in another Rule-of-law Tool, since “the criminal waiver [available for non-serious offences] is contingent on community service or payment, and is overseen by a local court, it is more akin to a negotiated plea bargain and is not considered an amnesty.” In the light of these features, as well as the exclusion of serious crimes from the operation of the criminal waiver provisions, Timor-Leste’s “variation of the amnesty-for-truth model... has been considered acceptable internationally as well as nationally, including by victim communities.”⁸⁴

While the operation of a truth commission does not discharge a State’s duty to ensure justice for gross violations of human rights and war crimes, a perpetrator’s full disclosure of what he or she knows about such violations may justify a reduction in sentence, as long as the sentence is still proportionate to the gravity of the crime. Consistent with this general approach, the International Convention for the Protection of All Persons from Enforced Disappearance allows States parties to reduce the sentences of individuals implicated in enforced disappearances who provide information that helps clarify the fate of the primary victim or identify the perpetrators. While requiring each State party to “make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness” (art. 7.1), the Convention further provides that States parties may establish “mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance” (art. 7.2 (a)).

It may also be necessary to empower a truth commission to grant *use immunity* to a perpetrator who testifies before the commission.⁸⁵ While this does not provide immunity from prosecution for witnesses, it ensures that the evidence they provide before the truth commission cannot be used as evidence against them in a later criminal proceeding. In short, truth commissions and other processes aimed at realizing the “right to truth” may be facilitated by granting perpetrators use immunity or reduced sentences for their testimony, but may not grant total immunity.

⁸² To date no other country has granted its truth commission the power to grant full amnesty in exchange for the truth. See *Rule-of-law Tools for Post-conflict States: Truth Commissions*, chap. II, sect. B.7.

⁸³ See E/CN.4/2004/88, para. 12.

⁸⁴ *Rule-of-law Tools for Post-conflict States: Truth Commissions*, chap. II, sect. B.7.

⁸⁵ See *Rule-of-law Tools for Post-conflict States: Truth Commissions*, chap. II, sect. B.6.

B. The right to a remedy, including reparation

As noted earlier, States are generally required to “provide effective remedies to victims [of gross violations of human rights and serious violations of humanitarian law], including reparation,”⁸⁶ and may not abrogate these duties through the operation of an amnesty. The general obligation to provide effective remedies is explicitly recognized in numerous treaties, including the International Covenant on Civil and Political Rights. As the Human Rights Committee noted in its general comment No. 31, the Covenant “requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.” Moreover, the Committee observed, “without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy... is not discharged” (paras. 15–16).

During a political transition following a period of widespread violations of human rights and/or humanitarian law, the duty to ensure victims adequate reparations may take on a qualitatively different dimension. In these circumstances, “States are under a moral and political duty to take comprehensive remedial measures and introduce elaborate programmes offering reparation to broader categories of victims affected by the violations” rather than leave it to each victim to try to vindicate his or her right judicially.⁸⁷

States’ legal obligation to provide reparations to victims is independent of other obligations that States may discharge during periods of transition following systemic violations of human rights and/or humanitarian law. Among other things, this means that the fact that a Government has provided reparations to victims of gross violations of human rights committed by a prior regime does not relieve that Government of its distinct and separate obligation to ensure that those responsible for gross violations are brought to justice.

C. Disarmament, demobilization and reintegration programmes

- **States may not grant amnesties that are inconsistent with the legal principles identified in chapter II even when their aim is to promote the disarmament, demobilization and reintegration of combatants.**

Just as the United Nations cannot condone amnesties for gross violations of human rights and serious violations of humanitarian law in peace accords, peace agreements should endeavour to ensure that any disarmament, demobilization and reintegration (DDR) programmes are consistent with international standards and best practices.

⁸⁶ General Assembly resolution 60/147, annex, para. 3 (d).

⁸⁷ *Rule-of-law Tools for Post-conflict States: Reparations Programmes*, chap. I.

As noted earlier, the Secretary-General has recognized that “carefully crafted amnesties can help in the return and reintegration of [displaced civilians and former fighters] and should be encouraged.” Even so, the Secretary-General cautions that amnesties “can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights.”⁸⁸

⁸⁸ S/2004/616, para. 32.

IV. ISSUES THAT ARISE WHEN EVALUATING AN AMNESTY OR A PROPOSED AMNESTY

1. Is a (proposed) legal measure an amnesty? Does it have the legal effect of foreclosing criminal prosecutions, civil remedies, or both?

Some legal provisions are unambiguously amnesties as defined in this tool even if they use formulations other than “amnesty is granted”.

- An example is a provision in the 1999 Lomé Peace Agreement entitled “Pardon and amnesty,” which provides:

1. In order to bring lasting peace to Sierra Leone, the Government of **Sierra Leone** shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.

2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.

3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organizations since March 1991, up to the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.⁸⁹

- Another unambiguous example is the amnesty accorded in article 1 of **Uruguay’s** 1986 Expiry Law (Ley de Caducidad de la Pretensión Punitiva del Estado, No. 15.848):

It is hereby recognized that as a consequence of the logic of the events stemming from the agreement between the political parties and the Armed Forces in August 1984 and in order to complete the transition to full constitutional order, any State action to seek punishment of crimes committed prior to 1 March 1985, by military and police personnel for political motives, in the performance of their functions or on orders from commanding officers who served during the de facto period, has hereby expired.

⁸⁹ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999 (S/1999/777, annex, art. IX).

Examples of more ambiguous provisions include:

- **Indonesia's** 2004 Law No. 27 on the Truth and Reconciliation Commission. Despite its ambiguities, this Law has amnesty provisions. It established and regulated the operation of a truth commission that had the power to recommend amnesty based on guidelines it was to establish. Although the final determination of amnesties it recommended was to be made by the President, article 44 provided an effective amnesty by stipulating that the cases of gross violations of human rights that have been resolved by the Commission cannot be brought before the Ad Hoc Court of Human Rights. Moreover, article 27 provided: "Compensation and rehabilitation [...] may be awarded when a request for amnesty is granted," thereby conditioning victims' access to reparations—which under international law is a fundamental right—on the award of an amnesty (which is incompatible with the legal principles and United Nations policy summarized in chapter II). On 7 December 2006 Indonesia's Constitutional Court found article 27 unconstitutional and, because it was integral to the Law as a whole, found the Law unconstitutional.⁹⁰
- **Colombia's** Justice and Peace Law, Law 975 (21 June 2005), offers benefits principally in the form of reduced sentences to members of paramilitary organizations who demobilize, disarm and provide information or collaborate in dismantling the group to which they belong. In exchange for satisfying these requirements, beneficiaries are eligible for "alternative sentences"—that is, sentences that are lower than the sentences the relevant court determined to be appropriate before applying the sentencing benefits of the Justice and Peace Law. An alternative sentence consists of "deprivation of liberty" for a term of at least five years but no more than eight years, the exact period "to be set based on the seriousness of the crimes" and the beneficiary's "effective collaboration in their clarification" (art. 29).

While offering reduced sentences to those who qualify, the Justice and Peace Law does not exempt them from criminal process. Instead, it establishes a National Prosecutorial Unit for Justice and Peace charged with investigating the criminal acts committed by applicants, verifying the truthfulness of the information provided, clarifying those facts, and initiating an arraignment against demobilized individuals who appear to be perpetrators of or participants in crimes under investigation (arts. 16–18).

Because the Law does not fully extinguish criminal responsibility for beneficiaries, it is not an amnesty as defined in this tool. This does not, however, obviate concerns about whether it is fully compatible with Colombia's international obligations to ensure that

⁹⁰ Decision number 006/PUU-IV/2006 regarding the substantiation of the Law on the Truth and Reconciliation Commission.

perpetrators of human rights crimes are subject to appropriate criminal processes; that victims' and societies' right to the truth is fully realized; and that victims receive an effective remedy and reparation.⁹¹

In May 2007, the Inter-American Court of Human Rights provided guidance on how the Justice and Peace Law would have to be implemented to be compatible with the American Convention on Human Rights. Among other things, the Court wrote that "dispositions that impede the investigation and punishment of those responsible for grave violations are inadmissible." Furthermore, "the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognized by law and the culpability with which the perpetrator acted, which in turn should be established as a function of the nature and gravity of the events. The punishment should be the result of a judgement issued by a judicial authority."⁹²

2. Does a (proposed) amnesty fully and clearly exclude all categories of conduct that, under international law and United Nations policy, should be subject to an effective investigation; where the evidence warrants, a criminal prosecution; and a remedy?

- **Comprehensive exclusions.** The Amnesty Act 2001 adopted in the **Solomon Islands** includes a provision that, on its face, is comprehensive in excluding international human rights violations and war crimes. After defining conduct subject to amnesty, the law provides: "The amnesty or immunity referred to in this section does not apply to any criminal acts done in violation of international humanitarian laws, human rights violations or abuses...."
- **Incomplete exclusions.** A 1996 amnesty adopted in **Guatemala** went a long way towards excluding from its scope crimes that should be prosecuted in accordance with international law, but may nonetheless not have excluded all of them. The National Reconciliation Law (Ley de Reconciliación Nacional, Decree 145-96) specifically excluded from the scope of its amnesty provisions genocide, torture and forced disappearance, as well as crimes that are imprescriptible under Guatemalan law or under treaties to which Guatemala is a party (art. 8). This Law did not, however, explicitly exclude crimes against humanity (Guatemala is not a party to the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity), war crimes, or gross violations of human rights other than torture and enforced disappearance.

⁹¹ In a judgement of 18 May 2006, the Colombian Constitutional Court declared several provisions of the Law unconstitutional and effectively amended others to bring the Law in line with Colombia's international and constitutional obligations.

⁹² *Case of the Rochela Massacre v. Colombia*, Judgement of 11 May 2007, Series C, No. 163, paras. 194 and 196.

- **Ambiguous provisions.** It is not always clear whether an amnesty excludes from its scope all of the offences that should be excluded in accordance with international law and United Nations policy. As the author of a study on amnesties observes, “States can... create ambiguity in the terms of the amnesty by using phrases such as ‘ferocious and barbarous acts’, ‘atrocious’ acts, or ‘blood crimes’, but failing to define these terms.” These terms can mask the operation of an impermissible amnesty. According to the study’s author, a 1982 amnesty in **Colombia** that excluded “atrocious crimes” nonetheless provided immunity to torturers.⁹³
- As this example suggests, it is important to read the text of a proposed amnesty in the light of a country’s penal code to ensure that the amnesty provisions do not prevent a State from meeting its international legal obligations. Suppose, for example, that genocide has just occurred in a country and that a proposed amnesty covering the period of the genocide explicitly excludes the crimes of genocide and crimes against humanity. On its face, the proposed amnesty would appear to be consistent with the State’s duty to ensure prosecution of these two international crimes. Yet that country’s criminal code might not make either genocide or crimes against humanity a crime. Despite its language exempting crimes against humanity and genocide, the proposed amnesty could have the effect of preventing prosecution of the perpetrators. In this situation, it may be necessary to ensure that the proposed amnesty excludes offences such as “murder”, which might be the only crime under local law that can be used to prosecute perpetrators of genocide.
- Somewhat similar considerations could apply to enforced disappearances, which are not yet criminalized as such in many countries. An amnesty that includes “unlawful detention” might in effect prevent prosecution of enforced disappearances.
- If an amnesty excludes “political offences,” it is important to clarify what crimes are encompassed by this phrase and to ensure that the amnesty excludes crimes that should, under international law and United Nations policy, be prosecuted.

3. Is the outcome of the legal analysis of a (proposed) amnesty affected by its use as a measure of disarmament?

If an amnesty would otherwise be invalid, the fact that it is used as an inducement for rebels to demobilize, disarm and reintegrate does not make it valid. (See chap. III, sect. C.)

⁹³ Mallinder, *op. cit.*, p. 120, note 6.

4. May States confer amnesties that would otherwise be invalid to secure a stable transition to democracy and to promote reconciliation?

Human rights treaty bodies have found that amnesties that were justified by Governments as measures of national reconciliation during transitions to democracy following military rule were incompatible with the International Covenant on Civil and Political Rights and the American Convention.⁹⁴

5. Can a (proposed) amnesty that would otherwise be invalid be legitimized if it is endorsed through democratic processes?

While public deliberations concerning human rights policies aimed at strengthening a transition to democracy should be strongly encouraged,⁹⁵ democratic processes cannot transform an amnesty that would otherwise be invalid into a lawful amnesty. The Human Rights Committee and Inter-American Commission have found amnesties adopted through democratic processes to be incompatible with the International Covenant and the American Convention, respectively.⁹⁶

⁹⁴ See, for example, *Hugo Rodríguez v. Uruguay*, views on communication No. 322/1988, 19 July 1994 (A/49/40 (vol. II), annex IX, sect. B); *Santos Mendoza et al. v. Uruguay*; *Alicia Consuelo Herrera et al. v. Argentina*; *Parada Cea et al. v. El Salvador*.

⁹⁵ See generally E/CN.4/2005/102, para. 7; E/CN.4/2004/88, para. 11.

⁹⁶ See, for example, *Santos Mendoza et al. v. Uruguay*.

Annex

CHECKLIST

Definitions

An **amnesty**, as used in the tool, refers to legal measures that have the effect of (a) prospectively barring criminal prosecution and, in some cases, civil action against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption, or (b) retroactively nullifying legal liability previously established.

An *amnesty* as defined above is distinct from a **pardon**, which as used in this tool refers to an official act that exempts a convicted criminal or criminals from serving his, her or their sentences. An *amnesty* is also distinct from various forms of **official immunity** under international law, such as Head of State and diplomatic immunities, which shield officials from the exercise of a foreign State's jurisdiction under certain circumstances. *Pardons* and *official immunities* are beyond the scope of this tool.

Self-amnesties are amnesties adopted by those responsible for human rights violations to shield themselves from accountability. Human rights treaty bodies, jurists and others have strongly criticized self-amnesties, which by their nature epitomize impunity.

Blanket amnesties exempt broad categories of offenders from prosecution and/or civil liability without the beneficiaries' having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis. Blanket amnesties have been nearly universally condemned when they cover gross violations of human rights and serious violations of humanitarian law.

Conditional amnesties exempt an individual from prosecution if he or she applies for amnesty and satisfies several conditions, such as full disclosure of the facts about the violations committed. A conditional amnesty often involves a prior investigation to allocate individual responsibility. See the discussion in chapter I regarding compliance of such amnesties with international standards.

De facto amnesties, as used in the tool, describe legal measures such as State laws, decrees or regulations that effectively foreclose prosecutions. While not explicitly ruling out criminal prosecution or civil remedies, they have the same effect as an explicit amnesty law. Such amnesties are impermissible if they prevent the prosecution of offences that may not lawfully be subject to an explicit amnesty.

Disguised amnesties can take various forms. For example, they include amnesties whose operation is prescribed in regulations interpreting laws that, on their face, may be compatible with international law but which, as interpreted by their implementing regulations, are inconsistent with a State's human rights obligations. Such amnesties are impermissible if they prevent the prosecution of offences that may not lawfully be subject to an undisguised amnesty.

International law and United Nations policy on amnesties

Impunity invites further abuse, and international law has long recognized this by reaffirming the **duty of States to put an end to impunity**.

Amnesties and similar measures that lead to impunity are incompatible with the duty of States to prosecute those responsible for gross violations of human rights, war crimes, crimes against humanity and genocide, impose appropriate punishment on those found guilty, and provide an adequate and effective remedy to victims whose rights have been violated.

Under international law and United Nations policy, amnesties are impermissible if they (a) prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights; (b) interfere with victims' right to an effective remedy; or (c) restrict victims' or societies' right to know the truth about violations of human rights and humanitarian law.

International law and United Nations policy are not opposed to amnesties per se, but set limits on their permissible scope. It has been recognized that amnesties can play a valuable role in ending armed conflicts, reconciling divided communities and restoring human rights - provided that they do not grant immunity to individuals responsible for genocide, crimes against humanity, war crimes or gross violations of human rights.

When States adopt amnesties that exclude war crimes, genocide, crimes against humanity and other violations of human rights, they must take care to ensure that the amnesties do not restrict or imperil the enjoyment of human rights, including those that are ostensibly restored.

An amnesty for gross violations of human rights or serious violations of international humanitarian law would not prevent prosecution before foreign or international courts.

United Nations peace negotiators and staff cannot encourage or condone amnesties regarding war crimes, crimes against humanity, genocide or gross violations of human rights or foster amnesties that violate relevant treaty obligations of the parties, or that impair victims' right to a remedy, or victims' or societies' right to the truth.

The gross violations of human rights have been widely recognized to include extrajudicial, summary or arbitrary executions; torture and similar cruel, inhuman or degrading treatment; slavery; and enforced disappearance, including gender-specific instances of these offences. Although

the phrase “gross violations of human rights” is widely used in human rights law, it has not been formally defined. The Rule-of-law Tool for Post-conflict States on reparations programmes notes that it is generally assumed that genocide, slavery and slave trade, murder, enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, deportation or forcible transfers of population, and systematic racial discrimination fall into this category. Deliberate and systematic deprivation of essential foodstuffs, essential primary health care, and/or basic shelter and housing may also amount to gross violations of human rights.

United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.

The United Nations has recognized that justice and peace are not contradictory. Rather, properly pursued, they promote and sustain one another. Experience has shown that a culture of impunity and a legacy of past crimes that go unaddressed are likely to undermine a lasting peace.

Amnesties and measures of transitional justice

Public deliberations considering human rights policies aimed at strengthening a transition to democracy should be strongly encouraged. However, a **democratic process** cannot transform an amnesty that would otherwise be invalid into a lawful amnesty.

Truth, justice and reparations are complementary rather than alternative responses to gross violations of human rights and serious violations of international humanitarian law.

While in some instances an individual’s full disclosure of the truth about violations may justify a reduction in sentence, measures of transitional justice such as the establishment and operation of a **truth commission** should not fully exempt perpetrators from criminal process in exchange for their testimony.

Even when reduced in exchange for a full confession, **the sentence imposed on an individual responsible for a gross violation of human rights or a serious violation of humanitarian law must be proportionate to the gravity of the offence;** and victims’ right to an effective remedy must not be compromised.

Similarly, providing victims **reparations** for violations of human rights and humanitarian law does not relieve States of their obligation to ensure prosecution of war crimes and gross violations of human rights.

Even when amnesties are used to promote the **disarmament, demobilization and reintegration** of combatants, States may not grant amnesties that are inconsistent with their international legal obligations.

Amnesties, peace and reconciliation

Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights.

Even when intended as a measure for consolidating democratic transition, an amnesty must be consistent with States' international legal obligations to ensure justice, the right to know the truth and an effective remedy, including reparations. Experience has shown that amnesties that prevent justice for gross violations of human rights and serious violations of humanitarian law may not be sustainable, even when adopted to facilitate a democratic transition.

Issues to consider in an amnesty situation

Is a proposed legal measure an amnesty? Does it have the legal effect of foreclosing criminal prosecutions, civil remedies, or both?

Does a proposed amnesty fully and clearly exclude all categories of conduct that, under international law and United Nations policy, should be subject to an effective investigation and, where the evidence warrants, a criminal prosecution?

Does a proposed amnesty interfere with victims' right to an effective remedy?

Does a proposed amnesty restrict victims' or societies' right to know the truth about violations of human rights and humanitarian law?

When in doubt, United Nations staff are encouraged to consult appropriate legal officers at Headquarters.

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