

International Law and the Fight Against Impunity

A Practitioners Guide



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International Law and the Fight Against Impunity

Practitioners' Guide No. 7

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TABLE OF CONTENTS

Chapter I: Historical and Legal Considerations Regarding the Fight against Impunity 11

1. Political discourse, or impunity as a necessary evil.....	11
2. Emergence of legal discourse.....	14
a. United Nations Treaty Bodies	17
b. The Inter-American System	25
c. International Humanitarian Law.....	29
d. Emergence of the <i>ad hoc</i> Tribunals and the International Criminal Court	30
e. The political bodies of the United Nations system.....	32
3. The emergence of international norms	39
4. The concept of transitional justice and the fight against impunity	43

Chapter II: Gross Human Rights Violations and Crimes under International Law 55

1. Preliminary considerations.....	55
2. Gross violations of human rights	55
3. Crimes against humanity.....	61
4. Genocide	66
5. Grave Breaches of international humanitarian law and war crimes.....	73
6. The autonomy of international crimes	75
7. Crimes under international law and the plurality of definitions.....	79

Chapter III: State Duties and Impunity 89

1. General considerations.....	89
2. The duty to respect	90

3. The duty to guarantee	92
4. The obligation for States to adapt their legislation and state's apparatus	97
5. Pacta sunt servanda	100

Chapter IV: The Rights to an Effective Remedy and to Reparation..... 105

1. General Considerations	105
2. The right to an effective remedy	105
a. The obligation to provide an effective remedy	109
b. Concept of an effective remedy	110
c. Intangible and non-derogable nature of the right to an effective remedy	112
d. Judicial nature of the remedy	114
e. Effective remedy and rights of the victims in criminal proceedings	117
3. The right to reparation	123
a. Nature of the obligation to provide redress	124
b. The <i>corpus juris</i> on reparation	127
c. Content and modalities of the reparation	127
d. Persons entitled to the right to reparation	129

Chapter V: The Obligation to Investigate..... 133

1. Nature of the obligation to investigate	133
a. Legal basis for the obligation to investigate	134
b. An obligation of means	139
c. Due diligence	140
2. Object and content of the obligation to investigate	141
3. Requirements and characteristics of the investigation	151

a. Nature of the investigation	152
b. <i>Ex officio</i> investigation	154
c. Impartial and independent investigation	158
i) Independent investigation	158
ii) Impartial investigation	162
d. Prompt investigations without delay.....	165
e. Exhaustive and effective investigation	166
f. Framework and legal faculties for investigations.....	172
g. The security and protection of the victims, their family members and individuals who participate in the investigation	175
h. Suspension and/or reassignment of officials.....	180
i. Victims' and family members' rights and the investigation	182

Chapter VI: The Obligation to Prosecute and Punish.... 187

1. General Considerations	187
2. Sources and nature of the obligation.....	188
a. Treaties and international instruments	189
b. The duty to guarantee	190
c. Customary obligations and <i>jus cogens</i> norms	195
3. The obligation to codify international crimes in domestic law	200
4. Materializing the obligation to punish: criminal proceedings before a court	207
5. Evidence and expert reports	214
6. Sentencing and impunity.....	217
a. Prohibited punishments.....	218
b. Proportionality of sentencing.....	219

7. Mitigating factors or extenuating circumstances	223
8. Extraterritorial jurisdiction and international cooperation	224
1. Introduction	227
2. Origin and development of the right to truth	229
a. International humanitarian law	230
b. International human rights law	233
i) The UN Human Rights System	235
ii) The Inter-American Human Rights System	244
c. Other regional human rights systems	249
d. Intergovernmental political bodies	250
i) The United Nations	250
ii) The Organization of American States	253
iii) Other systems	254
3. International norms & standards on the right to the truth	255
4. Content and scope of the right to truth	259
a. Definition, nature and scope of the right to truth and the correlative State obligation	259
b. The right to the truth and truth commissions	265

Chapter VIII: Amnesties and Other Similar Measures.. 269

1. General considerations	269
2. International norms and standards	271
3. Doctrine and practice of the United Nations	275
4. Case law and doctrine of international human rights bodies and courts	279
a. The Human Rights Committee	279
b. The Committee against Torture	283

c. The Committee on the Rights of the Child	288
d. The Committee on the Elimination of Discrimination against Women	288
e. The Inter-American Court of Human Rights.....	288
f. The Inter-American Commission on Human Rights	291
g. Other systems for the protection of human rights	297
5. Case law of international criminal tribunals	299
6. Internal armed conflicts and amnesties and other similar measures.....	300
7. Legal developments in Latin America	303

Chapter IX: Military Courts and Impunity 317

1. General Considerations	317
2. General principles on the administration of justice	318
3. Competent courts and judges previously established by law	323
4. Specialized Courts	325
5. Military criminal courts: functional jurisdiction with limited scope.....	326
6. Military offenses and jurisdiction	332
a. Military offenses.....	332
b. Duty crimes.....	335
7. Crimes excluded from the judicial scope of military courts	338
a. International legal framework	338
b. Legal developments in Latin America	347
8. Military offenses and war crimes	353

Chapter X: Applicability or Non-Applicability of Statutory Limitations 363

1. General considerations..... 363
2. Crimes not subject to statutory limitations pursuant to International Law..... 363
3. Application of Statutory Limitations 378
 - a. Emerging trend regarding the non-applicability of statutory limitations to gross human rights violations 378
 - b. Conditions in which statutory limitations are valid..... 385

Chapter XI: The Principle of Legality and Non-Retroactivity 389

1. General considerations..... 389
2. The principle of legality 392
3. The principle and right to non-retroactive application of criminal law 397
4. Retroactive application of national criminal law for crimes under international law 399
 - a. International norms and standards 400
 - b. International jurisprudence..... 406
 - i) Human rights bodies and courts..... 406
 - ii) International criminal tribunals 416
5. Legal developments in Latin America 419

Chapter XII: Double Jeopardy, Former Adjudication, and Impunity 429

1. General Considerations 429
2. The principles of *ne bis in idem* and *res judicata* 429
3. Conditions for the validity of former adjudication and double jeopardy..... 432

4. Double jeopardy, res judicata, and fraudulent administration of justice	438
a. International norms and standards	438
b. International jurisprudence.....	439
c. Legal developments in Latin America.....	442

Annexes..... 449

Annex I: Updated Set of principles for the protection and promotion of human rights through action to combat impunity	450
Annex II: Selection of norms and standards on crimes under international law	468
Annex III: Selection of norms and standards on rights to an effective Remedy and Reparation	476
Annex IV: Selected norms and standards on Investigation... ..	498
Annex V: Selected norms and standards on Military Courts	518
Annex VI: Selected norms and standards on Applicability and Non-Applicability of Statutes of Limitation	520
Annex VII: Selected norms and standards on Retroactive Effects of National Criminal Law	524
Annex VIII: Selected norms and standards on <i>Res Judicata</i> and <i>Ne Bis in Idem</i>	528

CHAPTER I: HISTORICAL AND LEGAL CONSIDERATIONS REGARDING THE FIGHT AGAINST IMPUNITY

"Action to combat impunity has its origin in the necessity that justice be done, but it cannot be centered solely in this objective: to punish the guilty. It must respond to three imperatives: sanction those responsible, but also satisfy the right of the victims to know and to obtain reparation and, in addition, allow the authorities to discharge their mandate as the power which guarantees public order." Louis Joinet.¹

1. Political discourse, or impunity as a necessary evil

Impunity for grave human rights violations, although condemned many times over, was for a long time assumed to be a necessary evil by distinct instances of the United Nations. On this topic, the dominant idea was that impunity was the price to pay to ensure a transition to democracy, the return of the "soldiers to their bunkers," or the way to overcome internal armed conflicts. For instance, the UN General Assembly, which adopted numerous resolutions regarding the human rights situation in Chile, urging the authorities of the military regime to have the authors of grave human rights violations brought before the courts and punished,² would abstain from taking a stance on Decree Law No. 2191 for amnesty enacted by the military government in 1978. Also, in the case of the 1987 amnesty in El Salvador, the General Assembly would remain silent about this legislation, which established impunity for grave violations of human rights during the armed conflict.³ Even more revealing of the predominant conception regarding impunity would be the General Assembly's 1998 resolution, entitled "The situation in Central America: threats to international peace and security and peace initiatives."⁴ In it, the

¹ *Expert on the question of the impunity of perpetrators of violations of civil and*

² See, *inter alia*, Resolution No. 31/124 of 16 December 1976 (para. 2.6b).

³ See, *inter alia*, Resolutions No. 31/124 of December 16, 1976 (para. 2,b); 33/175 of 20 December 1978 (para. 4,c); 34/179 of 17 December 1979 (paras. 5, b and 7); 35/188 of 15 December 1980 (para. 7); 36/157 of 16 December 1981 (para. 4, d and 4, e); 37/183 of 17 December 1982 (para. 5); and 38/102 of 16 December 1983 (para. 5).

⁴ Resolution No. 42/24 of 15 November 1988.

General Assembly gave its unconditional support to the *Esquipulas II Agreements*, adopted in August 1987 following up on the *Agreement on Procedures for the establishment of a firm and lasting peace in Central America* (Esquipulas I), signed by the Governments of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. In the Esquipulas II Agreement, the Central American presidents had agreed to issue “amnesty decrees.” This clause of the Esquipulas II Agreement would be invoked when the respective amnesty laws were enacted by the governments of Guatemala,⁵ Honduras,⁶ Nicaragua,⁷ and El Salvador.⁸

“History has shown that amnesties have not been effective in achieving reconciliation and, rather, have helped make the perpetrators believe that they can violate as many rules as they want, over and over again, and that, finally, they will be pardoned and their acts, forgotten. Conferring impunity, far from helping society’s reconciliation and strengthening democracy, has only served to divide it more and generate contempt for the Rule of Law.”

Robert Goldman⁹

The Haitian crisis at the beginning of the 1990s would also set the stage for these kinds of events. The *Washington Protocols*, signed in 1993 between the constitutional government of Jean Bertrand Aristide and the *de facto* regime of General Raúl Cédras, under the auspices of the Organization of American States (OAS), set as the basis for the return of democracy to Haiti: the return of the deposed president to Haiti; the creation of the Government for National Salvation; the separation of the Police from the Armed Forces; and the enactment of amnesty for the members of the *coup d’état*. The terms of reference for the amnesty were ambiguous: they referred to common crimes, without including any safeguards for grave violations of human rights. The UN Secretary-General, in his report to the General Assembly in 1993, affirmed that the priority of the international community’s action

⁵ Decree No. 32/88 of 23 June 1988.

⁶ Decree No. 199/87 of 26 November 1987.

⁷ Amnesty Law of 1987.

⁸ Decree No. 805 of 27 October 1987.

⁹ “La aplicación de la justicia en contextos transicionales. La efectividad y necesidad de judicializar los casos de violaciones de los derechos humanos”, in *Democracia y derechos humanos en el Perú: del reconocimiento a la acción*, Fondo Editorial de la Pontificia Universidad Católica del Perú, Lima, 2005, page 32 (Original in Spanish, free translation).

was to guarantee stability and order in the Caribbean country, through the return of President Aristide, the designation of a Prime Minister at the head of the Government for National Salvation, and the granting of an amnesty.¹⁰ The Special Envoy of the Secretary-General for Haiti, Mr. Dante Caputo, would propose granting an amnesty as one of the key elements of his plan to overcome the Haitian crisis. This element would constitute one of the key elements of the Governors Island Accord, agreed upon between President Aristide and General Cédras.

The UN's vagueness regarding the questions of amnesties and impunity would be reflected in the Report of the Special Rapporteur on the Situation of Human Rights in Haiti, Mr. Marco Tulio Bruni-Celli, in the following terms: "[i]n Europe an international tribunal was set up recently for the prosecution of persons responsible for crimes committed during the civil war in the former Yugoslavia, while in the cases that have occurred in the Americas the prevailing position has been pardon and reconciliation, subsequently embodied in what the international human rights community has called 'impunity laws'. As we are aware, this question of amnesty laws also raises legal problems that are still being debated, involving on the one hand, the action and competence of international human rights bodies and, on the other, action by States that have ratified international human rights conventions or, as in the case of some 20 States in the Americas, have voluntarily accepted the jurisdiction of the Court, or have subscribed to the procedures for denunciation or individual communications such as the procedure provided for in the Optional Protocol to the International Covenant on Civil and Political Rights. In the case of Haiti it must not be forgotten that this controversial issue of amnesty was covered by the Governors Island Agreement and the question of compensation for victims was provided for in the New York Pact."¹¹

Various draft amnesty laws would be submitted for the consideration of the constitutional President, who finally would opt

¹⁰ UN Doc. A/47/908, of 27 March 1993, para. 17.

¹¹ *Interim report on the situation of human rights in Haiti submitted by the Special Rapporteur of the Commission on Human Rights pursuant to Commission resolution 1994/80 and Economic and Social Council decision 1994/266, A/49/513 of 14 October 1994*, para. 147.

for a text that would not impede bringing those responsible for grave human rights violations to justice.¹²

2. Emergence of legal discourse

Faced with the focus on “political pragmatism,” centered on the concepts of stability and security, a focus based on the international obligations of the States progressively began to emerge. But experience also showed that impunity for grave human rights violations would become a serious obstacle to the consolidation of the rule of law, and the full enjoyment of fundamental rights and liberties, one of the essential reasons for the United Nations. Also, several human tragedies in distinct regions of the world caused the way the question of impunity was framed to be modified by the political bodies of the United Nations.

“The ‘rule of law’ is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

Secretary-General of the United Nations (2004)¹³

In this process, the actions of non-governmental organizations and victims’ and family-members’ associations were decisive.¹⁴ Before the United Nations took up initiatives in the field of the fight against impunity, as Louis Joinet has pointed out, it was the non-government organizations and the victims’ associations,

¹² Andreu, Federico, “The International Community in Haiti: Evidence of the New World Order”, in *Impunity in Latino America*, edited by Rachel Sieder, Institute of Latino American Studies, London, 1995, pages. 33-44.

¹³ *The rule of law and transitional justice in conflict and post-conflict societies – Report of the Secretary-General*, S/2004/616 of 3 August 2004, paras. 6, 9, and 10.

¹⁴ See, in this regard, Tayler, Wilder, “La problemática de la impunidad y su tratamiento en las Naciones Unidas”, in *Revista IIDH/ Instituto Interamericano de Derechos Humanos*, Vol. 24, July-December of 1996, San José de Costa Rica, 1996, pp. 185 et seq.

particularly in Latin America, that brought this debate to inter-governmental forums.¹⁵ In this process the fight against the amnesties given during the 1980s, particularly in the processes of transition and of return to institutional normality in the Southern Cone of the Americas. As Louis Joinet said: “[a]mnesty, as a symbol of freedom, was more and more seen as a kind of ‘insurance on impunity’ with the emergence, then proliferation, of ‘self-amnesty’ laws proclaimed by declining military dictatorships anxious to arrange their own impunity while there was still time.”¹⁶

The action of the former Commission on Human Rights of the United Nations and its Sub-commission also proved decisive, as well as the control exercised by the human rights treaty bodies and the Inter-American Commission and Court. In particular, it is worth highlighting the pioneering work that the former United Nations Sub-commission for Prevention of Discrimination and Protection of Minorities undertook in this field. In 1981, the Sub-commission urged the States to abstain from enacting laws, such as amnesty laws, that would impede investigations of forced disappearances.¹⁷ In 1985, the Sub-commission would name a Special Rapporteur on Amnesties, Mr. Louis Joinet,¹⁸ whose work rejecting amnesties for grave violations of human rights would inspire the case law of the Inter-American Commission on Human Rights.¹⁹ Later, in 1991,²⁰ Joinet would begin a study on impunity that would culminate in the draft *Set of principles for the protection and promotion of human rights through action to combat impunity*,²¹ adopted by the Sub-commission in 1997. They would also play an important role in the *World Conference on Human Rights*, held in Vienna under the auspices of the United Nations in June of 1993. In effect, the *Vienna Declaration* and

¹⁵ *Revised final report on the question of the impunity of perpetrators of human rights violations (civil and political)*, E/CN.4/Sub.2/1997/Rev.1, of 2 October 1997, para. 44.

¹⁶ *Ibid.*

¹⁷ Resolution No. 15 (XXXIV) of 1981.

¹⁸ *Study on Amnesty Laws and the role they play in the safeguard and promotion of human rights*, E/CN.4/Sub.2/1985/16/Rev.1, of 21 June 1985.

¹⁹ See, among others: Report No. 48/97 of 16 October 1997, Case No. 10.548, *Hugo Bustíos Saavedra (Peru)*; Report No. 42/97 of 19 February 1998, Case No. 10.561, *Ángel Escobar Jurado (Peru)*; Report No. 43/97 of 19 February 1998, Case No. 10.562, *Héctor Pérez Salazar (Peru)*.

²⁰ Sub-commission for Prevention of Discrimination and Protection of Minorities, Decision No. 1991/110 of August 1991.

²¹ UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, Annex, of 2 October 1997.

Programme of Action, adopted by this Conference, would stipulate 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."²²

"Impunity for grave human rights violations which could constitute crimes against humanity continue to challenge the international community. There is a growing tendency to prioritize peace over justice which, in exceptional circumstances and for overcoming short and critical periods during the peace process, is understandable but it does undermine the rule of law and the sustainability of the peace process itself. Peace and justice go hand in hand and mutually support one another in the process of nation-building. Peace cannot simply be equated with the absence of conflict, but must contain the essential element of justice. It is the obligation of the international community to end impunity for all crimes against humanity. Such grave violations of human rights have an impact on the lives of every citizen of the world and should therefore not be seen as crimes against individuals or a particular nation."

Asma Jahangir, UN Special Rapporteur on extrajudicial, summary or arbitrary executions²³

It is also work highlighting the adoption of various international instruments during this process, which would come to lay the foundation for a new focus on the subject of impunity. First, there are the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*,²⁴ Principle 18 of which establishes that "[g]overnments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or co-operate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the

²² *World Human Rights Conference – Vienna Declaration and Programme of Action*, June 1993, DPI/1394-8164-October 1993-/M, Section II, para. 60, pag. 65.

²³ *Report of the Special Rapporteur, Asma Jahangir, presented in accordance with Resolution 2002/36 of the Commission on Human Rights*, E/CN.4/2003/3 of 13 January 2003, para. 73.

²⁴ Recommended by the Economic and Social Council in its Resolution 1989/65, of 24 May 1989, and by the UN General Assembly in various resolutions.

offence was committed.” Likewise, Principle 19 orders that “an order from a superior office or a public authority may not be invoked as a justification for extra-legal, arbitrary or summary executions. [...] In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.”

Secondly, it is worth highlighting the *Declaration on the Protection of All Persons from Enforced Disappearance* (DED), adopted by the UN General Assembly in 1992.²⁵ The Declaration would be the first international instrument to expressly deal with the question of the prohibition of amnesties. In effect, its Article 18 mandates that “[p]ersons who have or are alleged to have committed [enforced disappearances] 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.” Likewise, the DED would deal with the question of impunity by military tribunals. Its Article 16(2) establishes that persons alleged to have committed the crime of enforced disappearance “shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.”

a. United Nations Treaty Bodies

The monitoring activities of UN Human Rights Treaty Bodies would play a vitally important role in this field. Both through monitoring the situations of countries, and through observations and/or general recommendations and decisions on individual cases, the distinct UN Committees began examining the question of impunity – and in particular of amnesties – and their compatibility with the obligations stated in the respective human rights treaties and/or derived from the customary international law. It is also worth highlighting the case law and doctrine developed by the Human Rights Committee,²⁶ the Committee against Torture,²⁷ the Committee on the Elimination of Racial Discrimination,²⁸ the

²⁵ Resolution No. 47/133 of 18 December 1992.

²⁶ Established in the *International Covenant on Civil and Political Rights*.

²⁷ Established in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

²⁸ Established by the *International Convention on the Elimination of All Form of Racial Discrimination*.

Committee on the Rights of the Child,²⁹ and the Committee on the Elimination of Discrimination against Women.³⁰

The Human Rights Committee (HRC) took up the question from early on, when in 1978 the regime of General Augusto Pinochet issued Decree-Law No. 2191 on amnesty.³¹ The HRC, in its *General Comment No. 20 on Article 7 of the International Covenant on Civil and Political Rights*, concluded that: "[a]mnesties generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."³² The HRC has repeatedly affirmed this standard in "Concluding observations" examining amnesty adopted by States-Parties to the *International Covenant on Civil and Political Rights* (ICCPR): Peru,³³ Argentina,³⁴ Chile,³⁵ El Salvador,³⁶ Spain,³⁷ the Former Yugoslav Republic of Macedonia,³⁸ France,³⁹ Haiti,⁴⁰ Lebanon,⁴¹ Niger,⁴² the Republic of Congo,⁴³ the Republic of Croatia,⁴⁴

²⁹ Established by the *Convention on the Rights of the Child*.

³⁰ Established by the *Convention on the Elimination of All Forms of Discrimination against Women*.

³¹ *Report of the Human Rights Committee*, UN Doc. Supplement No. 40 (A/34/40), 1979, para. 81.

³² *General Comment No. 20 (44) on Article 7*, 44th Period of Sessions of the Human Rights Committee (1992) in *Official Documents of the General Assembly, forty-fourth period of sessions, Supplement No. 40 (A/47/40)*, Annex VI.A.

³³ *Concluding observations of the Human Rights Committee: Peru*, 1996, CCPR/C/79/Add.67, paras. 9 and 10; and *Concluding observations of the Human Rights Committee: Peru*, 15 November 2000, CCPR/CO/70/PER, para. 9.

³⁴ *Concluding observations of the Human Rights Committee: Argentina*, 5 April 1995, CCPR/C/79/Add.46; and *Concluding observations of the Human Rights Committee: Argentina*, 3 November 2000, CCPR/CO/70/ARG, para. 9.

³⁵ UN Doc. CCPR/C/79/Add.104, para. 7.

³⁶ *Concluding observations of the Human Rights Committee: El Salvador*, CCPR/CO/78/SLV of 22 August 2003, para. 6. See also, UN Doc. CCPR/C/79/Add.34, para. 7.

³⁷ *Concluding observations of the Human Rights Committee: Spain*, CCPR/C/ESP/CO/5 of 1 January 2009, para. 9.

³⁸ *Concluding observations of the Human Rights Committee: Former Yugoslav Republic of Macedonia*, CCPR/C/MKD/CO/2 of 3 April 2008, para. 12.

³⁹ UN Doc. CCPR/C/79/Add.80, para. 13.

⁴⁰ UN Doc. A/50/40, paras. 224 - 241.

⁴¹ UN Doc. CCPR/C/79/Add.78, para. 12.

⁴² *Concluding observations of the Human Rights Committee: Niger*, CCPR/C/79/Add.17, of 29 April 1993, para. 7.

Senegal,⁴⁵ Sudan,⁴⁶ Suriname,⁴⁷ Uruguay,⁴⁸ and Yemen.⁴⁹ The HRC has highlighted that this type of amnesties contribute toward creating an atmosphere of impunity for the perpetrators of human rights violations, and subvert efforts aiming to reestablish respect for human rights and the rule of law, situations which are contrary to States' obligations under the ICCPR. In all these situations, the Committee also considered that such amnesty laws were incompatible with States-Parties' obligations to guarantee an effective remedy for victims of human rights violations, protected under Article 2 of the ICCPR.

In situations in which amnesty laws or similar measures were not adopted, but in which grave human rights violations remained unpunished, such as in the case of Alfredo Stroessner's dictatorial regime (1954-1989) in Paraguay, the HRC has decided that: "[t]he State party should ensure that all the cases of serious human rights violations documented by the Truth and Justice Commission are duly investigated and that those responsible are tried and, where appropriate, punished."⁵⁰ Likewise, regarding the legal measures that have not yet been called amnesties as such, but that exonerate the authors of serious human rights violations of criminal liability or that imply renouncing criminal prosecution, the HCR has considered that such measures result in impunity and that States must "comply with [their] obligations under the Covenant and other international instruments, including the Rome Statute of the International Criminal Court, and investigate and

⁴³ *Concluding observations on the Second Periodic Report on Congo*, CCPR/C/79/Add.118, of 27 March 2000, para. 12.

⁴⁴ *Concluding observations of the Human Rights Committee: Republic of Croatia*, CCPR/CO/71/HRV of 4 April 2001, para. 11

⁴⁵ *Concluding observations of the Human Rights Committee: Senegal*, CCPR/C/79/Add.10 of 28 December 1992, para. 5.

⁴⁶ *Concluding observations of the Human Rights Committee: Sudan*, of 26 July 2007, para. 9, in A/62/40 (Vol. I).

⁴⁷ *Concluding observations of the Human Rights Committee: Suriname*, CCPR/CO/80/SUR of 4 May 2004, para. 7.

⁴⁸ UN Documents: CCPR/C/79/Add.19 paras. 7 and 11; CCPR/C/79/Add.90, Part "C. Principle Subjects of Concern and Recommendations"; and Views of 9 August 1994, *Case of Hugo Rodríguez*

(Uruguay), Communication No. 322/1988, CCPR/C/51/D/322/1988, para. 12.4.

⁴⁹ UN Document A/50/40, paras. 242 – 265.

⁵⁰ *Concluding observations on the third periodic report of Paraguay, adopted by the Committee at its 107th session* (11 – 28 March 2013), CCPR/C/PRY/CO/3, of 29 April 2013, para. 8.

punish serious violations of human rights and international humanitarian law with appropriate penalties which take into account their grave nature.”⁵¹

“It is imperative that stringent measures be adopted to address the issue of impunity by ensuring that allegations of human rights violations are promptly and thoroughly investigated, that the perpetrators are prosecuted, that appropriate punishments be imposed on those convicted, and that victims be adequately compensated. The State party should ensure that members of the security forces convicted of serious offences be permanently removed from the forces and that those members of the forces against whom allegations of such offences are being investigated be suspended from their posts pending completion of the investigation.”

Human Rights Committee⁵²

In its General Comment No. 31 of 2004, when referring to gross violations of human rights – such as torture, extrajudicial executions, and enforced disappearances – the HRC established that “States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. [...] Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity [...]. Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities.[...] Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable.

⁵¹ *Concluding observations of the Human Rights Committee: Colombia*, CCPR/C/COL/CO/6, 6 August 2010, para. 9. See also, Views of 31 March 1982, *Case of María Fanny Suárez de Guerrero (Colombia)*, Communication No. 45/1979.

⁵² *Concluding observations of the Human Rights Committee: Brazil*, CCPR/C/79/Add.66, 24 July 1996, para. 20.

States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.”⁵³

Generally, the HRC has considered that, under the ICCPR, the States have the obligation to fully investigate alleged human rights violations and to criminally indict, try, and punish those who may be considered responsible for these violations.⁵⁴ The Committee against Torture (CAT) has adopted a similar position. The CAT has considered that amnesty laws and similar measures that allow the authors of acts of torture to remain in impunity are contrary to the letter and the spirit of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.⁵⁵ For example, the CAT has reiterated this in its “Concluding observations” to: Peru,⁵⁶ Argentina,⁵⁷ Azerbaijan,⁵⁸ Benin,⁵⁹ Chile,⁶⁰ Croatia,⁶¹ Spain,⁶² the Former Yugoslav Republic of

⁵³ *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, of 29 March 2004, para. 18.

⁵⁴ See *inter alia*: Views of 13 November 1995, *Case of Nydia Erika Bautista v. Colombia*, Communication No. 563/1993, para. 8.6; Views of 29 July 1997, *Case of José Vicente and Amado Villafañe Chaparro et al v. Colombia*, Communication No. 612/1995, para. 8.8. See also the *Concluding observations of the Human Rights Committee* regarding: Peru, 2000, CCPR/CO/70/PER, para. 9; Uruguay, 1993, CCPR/C/79/Add. 19, para. 7; Chile, 1999, CCPR/C/79/Add. 104, para. 7; Lebanon, 1997, CCPR/C/79/Add.78, para. 12; El Salvador, 1994, CCPR/C/79/Add. 34 para. 7; Haiti, 1995, A/50/40, para. 230; France, 1997, CCPR/C/79/Add. 80, para. 13; Argentina, 1995, CCPR/C/79/Add. 46, para. 146 and 2000, CCPR/CO/70/ARG, para. 9; Croatia, 2001, CCPR/CO/71/HRV, para. 11; and Guatemala, 2001, CCPR/CO/72/GTM, para. 12.

⁵⁵ Views of 23 November 1989, Communications No. 1/1988, 2/1988 and 3/1988 (Argentina), para. 7.3.

⁵⁶ *Conclusions and recommendations of the Committee against Torture: Peru*, 15 November 1999, para. 59, UN Doc. A/55/44.

⁵⁷ *Ibid.* para. 9.

⁵⁸ “Concluding observations of the Committee against Torture: Azerbaijan,” in *Report of the Committee against Torture 23rd Period of Sessions (8 – 19 November 1999) 24th Period of Sessions (1 – 19 May 2000), General Assembly Official Documents of the Fifty-fifth Period of Sessions Supplement No. 44 (A/55/44)*, para. 68 and 69.

⁵⁹ “Concluding observations of the Committee against Torture: Benin” of 22 November 2007, para. 9 (*Report of the Committee against Torture – 29th Period of Sessions (5 – 23 November 2007) – 40th Period of Sessions (28 April to 16 May 2008)*, A/63/44, pag. 8).

⁶⁰ *Concluding observations of the Committee against Torture: Chile*, CAT/C/CR/32/5 of 14 June 2004, paras. 6(b) and 7(b).

Macedonia,⁶³ the Russian Federation,⁶⁴ Indonesia,⁶⁵ Mauritania,⁶⁶ Kyrgyz Republic,⁶⁷ Tajikistan,⁶⁸ and Senegal.⁶⁹ In its "Concluding observations" on Senegal, the CAT expressed its concern for "a discrepancy between international and internal law to justify granting impunity for acts of torture on the basis of the amnesty laws."⁷⁰ In its respective "Concluding observations" to Azerbaijan and the Kyrgyz Republic, the CAT recommended that to the authorities of both countries that, "[i]n order to ensure that perpetrators of torture do not enjoy impunity, the State party ensure the investigation and, where appropriate, the prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach."⁷¹ Likewise, the CAT has pointed out that the non-adoption of amnesties and other similar measures constitutes a positive factor for States' compliance with the obligations established under the

⁶¹ *Report of the Committee against Torture 21st Period of Sessions (9 – 20 November 1998) 22nd Period of Sessions (26 April – 14 May 1999) General Assembly Documents Fifty-fourth Period of Sessions Supplement No. 44 (A/54/44), para. 42.*

⁶² *Concluding observations of the Committee against Torture: Spain, CAT/C/EST/CO/5 of 19 November 2009, para. 21.*

⁶³ "Concluding observations of the Committee against Torture: Former Yugoslav Republic of Macedonia," 15 May 2008, para. 6 (*Report of the Committee against Torture – 39th Period of Sessions (5 – 23 November 2007) – 40th Period of Sessions (28 April – 16 May 2008)* A/63/44, pages. 103-104).

⁶⁴ *Concluding observations regarding the fifth periodic report of the Russian Federation, adopted by the Committee in its 49th Period of Sessions (29 October – 23 November 2012), CAT/C/RUS/CO/5, 11 December 2012, para. 13.*

⁶⁵ "Concluding observations of the Committee against Torture: Indonesia", 15 May 2008, para. 30 (*Report of the Committee against Torture – 39th Period of Sessions (5 – 23 November 2007) – 40th Period of Sessions (28 April – 16 May 2008)*, A/63/44, pag. 91).

⁶⁶ *Concluding observations of the Committee against Torture: Mauritania, CAT/C/MRT/CO/1, 18 June 2013, para. 19.*

⁶⁷ "Concluding observations of the Committee against Torture: Kyrgyzstan," 17 November 1999, para. 74 and 75, in UN Doc. A/55/44.

⁶⁸ *Concluding observations of the Committee against Torture: Tajikistan, CAT/C/TJK/CO/2, 21 January 2013, para. 7.*

⁶⁹ *Concluding observations of the Committee against Torture: Senegal, 9 July 1996, paras. 102-119, in UN Doc. A/51/44 and Concluding observations on the third period report of Senegal, adopted by the Committee in its 49th Period of Sessions (29 October – 23 November 2012), CAT/C/SEN/CO/3 of 17 January 2013, para. 9.*

⁷⁰ *Concluding observations of the Committee against Torture: Senegal, 9 July 1996, Doc. Cit., paras. 102-119.*

⁷¹ *Concluding observations of the Committee against Torture: Azerbaijan, para. 69, and Concluding observations of the Committee against Torture: Kyrgyzstan, 17 November 1999, para. 75, in UN Doc. A/55/44.*

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. For example, the Committee emphasized this in its "Concluding observations" to Paraguay⁷² and to Venezuela.⁷³

The CAT has considered that legal measures that fail to contemplate an adequate legal framework for establishing the criminal responsibility of perpetrators of grave human rights violations and establish absurdly light sentences constitute "a de facto amnesty in contravention of international human rights obligations."⁷⁴ The CAT has emphasized that such measures are contrary to the obligations contained in the Convention and other international instruments, including the *Statute of Rome of the International Criminal Court*, to investigate and punish the crimes of torture with adequate sentences that take into account their gravity.

In its General Comment No. 2 of 2008, recalling the nature of the prohibition of torture and ill-treatment as a "peremptory *jus cogens* norm," the CAT specified that "amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability."⁷⁵

Since the 1990s, the Committee on the Elimination of Racial Discrimination (CERD) has emphasized that "impunity of the perpetrators is a major factor contributing to the occurrence and recurrence of these crimes"⁷⁶. In numerous national contexts, CERD has spoken out against impunity.⁷⁷ In Burundi, the CERD stated that "the lack of effective investigation, prosecution and

⁷² *Concluding observations of the Committee against Torture: Paraguay*, 5 May 1997, paras. 189-213, UN Document A/52/44.

⁷³ *Conclusions and recommendations of the Committee against Torture: Venezuela*, CAT/C/CR/29/2, 23 December 2002, para. 6.

⁷⁴ *Concluding observations of the Committee against Torture: Colombia*, CAT/C/COL/CO/4, 4 May 2010, para. 14.

⁷⁵ *General Comment No. 2, Implementation of article 2 by States Parties*, para. 5.

⁷⁶ *General recommendation XVIII on the establishment of an international tribunal to prosecute crimes against humanity*.

⁷⁷ See, among others, *Concluding observations of the Committee on the Elimination of Racial Discrimination on: Bolivia* (CERD/C/BOL/CO/17-20, 8 April 2011, para. 17); *Burundi* (A/49/18, 1995, para. 44 and CERD/C/304/Add.42, 18 September 1997, para. 14); *Chad* (A/49/18, 1995, paras. 555 and 560); *Chile* (CERD/C/CHL/CO/19-21, 23 September 2013); *Colombia* (CERD/C/COL/CO/14 of 28 August 2009, para. 21); and *Rwanda* (A/49/18, 1995, para. 59).

punishment of those guilty of human rights violations committed against both ethnic communities threatens to undermine efforts to strengthen the rule of law and build confidence in democratic institutions. Concern is expressed that the impunity of perpetrators of human rights violations is one of the factors contributing to the threat of renewed and unrestrained violence.”⁷⁸ In 2005, in its *Declaration for the Prevention of Genocide*, the CERD “consider[ed] it imperative to dispel the climate of impunity that is conducive to war crimes and crimes against humanity by referring all perpetrators of these crimes to the International Criminal Court.”⁷⁹

For its part, the Committee on the Rights of the Child (CRC) has repeatedly called on the States to put an end to impunity, both *de facto* and *de jure*, in the cases of children who are victims of grave violations of human rights.⁸⁰ Likewise, the CRC has called on the States to ensure that criminal investigations are undertaken, and to see that the perpetrators are brought to justice.⁸¹ In the case of the Democratic Republic of the Congo, the CRC exhorted the State to “[e]nsure that no person responsible for the recruitment and use of child soldiers which constitute a war crime under the Rome Statute of the International Criminal Court is released on the basis of the 2009 Amnesty Law.”⁸² Recalling that rape, sexual slavery, forced prostitution, and forced pregnancy committed by armed groups and State security forces, within the framework of an armed conflict, constitute war crimes, the CRC emphasized that the States have “the obligation to prevent impunity.”⁸³

On numerous occasions, the Committee on the Elimination of Discrimination against Women (CEDAW) has called on the States to put an end to impunity in cases of violence against women, and

⁷⁸ *Report of the Committee on the Elimination of Racial Discrimination*, A/49/18, 1995, para. 44.

⁷⁹ “Declaration on the Prevention of Genocide,” 11 March 2005, para. 11, UN Doc. CERD/C/66/1 of 17 October 20015.

⁸⁰ See, *inter alia*, *Concluding observations on: Chile*, CRC/C/CHIL/CO/3 of 23 April 2007, para. 70; *Brazil*, CRC/C/15/Add.241, 3 November 2004, para. 41; and *Colombia*, CRC/C/COL/CO/3 of 8 June 2006, paras. 44, 45, 51, 80 and 86.

⁸¹ *Concluding observations: Colombia*, CRC/C/COL/CO/3 of 8 June 2006, para. 45.

⁸² UN Doc. CRC/C/OPAC/COD/CO/1, of 1 March 2012, para. 39.e.

⁸³ *Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Concluding observations: Colombia*, CRC/C/OPAC/COL/CO/1 of 21 June 2010, para. 35.

in particular in cases of sexual violence, and to ensure that the perpetrators of these crimes are tried and sanctioned.⁸⁴ CEDAW has recalled that Article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* includes the obligation of the States Parties to bring the perpetrators of human rights violations against women to justice.⁸⁵ Likewise, CEDAW highlighted that “[w]hen conflict comes to an end, society is confronted with the complex task of ‘dealing with the past’ and this involves the need to hold human rights violators accountable for their actions, putting an end to impunity, restoring the rule of law, addressing all the needs of survivors through the provision of justice accompanied by reparations. [...] Passive acquiescence of past violence reinforces the culture of silence and stigmatization. Reconciliation processes, such as truth and reconciliation commissions often provide women survivors with an opportunity to deal with their past in a safe setting and constitute official historical records, however, they should never be used as a substitute for investigations into and prosecutions of perpetrators for human rights violations committed against women and girls.”⁸⁶ In a general sense, the Committee has recommended that, in conflict and post-conflict situations, the States “[e]nsure that support for reconciliation processes do not result in blanket amnesties for any human rights violations, especially sexual violence against women and girls and ensure that such processes reinforce its efforts to combat impunity for such crimes.”⁸⁷

b. The Inter-American System

In the Americas, since 1992, the Inter-American Commission on Human Rights (IACHR) has repeatedly concluded that: “the

⁸⁴ See, *inter alia*, *Concluding observations on: Peru*, CEDAW/C/PER/CO/6 of 2 February 2007, paras. 18 and 19; *Colombia*, CEDAW/C/COL/CO/7-8, of 29 October 2013, paras. 15 and 16; *Sierra Leone*, CEDAW/C/SLE/CO/6, of 28 February 2014, paras. 20 and 21; *Bosnia and Herzegovina*, CEDAW/C/BIH/CO/4-5 of 30 July 2013; *Democratic Republic of the Congo*, CEDAW/C/COD/CO/6-7 of 30 July 2013, para. 10; and *Guatemala*, CEDAW/C/GUA/CO/6 of 2 June 2006, paras. 23 and 24.

⁸⁵ *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/29 of 16 December 2010, para. 32.

⁸⁶ *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, CEDAW/C/GC/30, of 1 November 2013, paras. 74 and 78.

⁸⁷ *Ibid.*, para. 81.

application of amnesties renders ineffective and worthless the obligations that States Parties have assumed under Article 1.1 of the Convention, and thus constitute a violation of that article and eliminate the most effective means for protecting such rights, which is to ensure the trial and punishment of the offenders.”⁸⁸

“In the event of a “forced disappearance”, the State is duty-bound to establish the fate and current circumstances of the victim, punish those responsible, and compensate the victim's relatives. [...] The Peruvian Amnesty laws, Laws Nos. 26479 and 26492, effectively tie the hands of the State from undertaking any investigation of any forced disappearance case or any other human rights violation committed by a member of the Armed Forces, or any other perpetrator, during the period May 1980 - June 14, 1995. [...] An amnesty, by its nature, removes the criminal element from the conduct and the penalty, if the individual has been convicted or served a sentence, is considered never to have been enforced. [...] In summary, this law provides that the instant case is not susceptible of investigation, in flagrant disregard of the Peruvian State's obligations under the American Convention and the jurisprudence of both the Commission and the Inter American Court of Human Rights. [...] Amnesty laws frustrate and run contrary to a State's obligation to investigate and punish those responsible for human rights violations whether those responsible be members of the military or civilians. The expectation of an eventual amnesty casts a blanket of impunity over the Armed Forces or any non-military perpetrator, enabling them to commit any atrocity in the name of their cause, and such a climate breeds inevitable excess and contempt for the rule of law. [...] An amnesty in one country in the region which has ended its civil conflict, breeds the expectation of an amnesty in a second, albeit the latter is still in a state of internal conflict. A state policy of impunity, enshrined in amnesty laws, eventually leads to a loss of prestige and professionalism of the military in the eyes of the rest of the population.”

Inter-American Commission on Human Rights⁸⁹

In a general sense, the IACHR has considered that “[amnesty] laws remove the most effective measure for enforcing human rights, *i.e.*, the prosecution and punishment of the violators.”⁹⁰The

⁸⁸ Report No. 36/96, Case 10.843 (Chile), 15 October 1996, para. 50.

⁸⁹ Report No. 42/97 of 19 February 1998, Case No. 10.561, *Angel Escobar Jurado (Peru)*, paras. 28, 31, 32 and 33.

⁹⁰ Report No. 136/99, Case 10.488, *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, para. 200.

IACHR has considered the amnesty laws of Peru,⁹¹ Argentina,⁹² Chile,⁹³ El Salvador,⁹⁴ and Uruguay⁹⁵ incompatible with States' obligations under the *American Declaration on the Rights and Duties of Man* and the *American Convention on Human Rights*. In the case of the 1993 amnesty in El Salvador (Decree No. 486 "General Amnesty Law for the Consolidation of Peace"), the IACHR stated that: "amnesty extinguishes criminal and civil liability and thus disregards the legitimate rights of the victims' next-of-kin to reparation. Such a measure will do nothing to further reconciliation and is certainly not consistent with the provisions of Articles 1, 2, 8 and 25 of the American Convention on Human Rights. [...] Consequently, [...] regardless of any necessity that the peace negotiations might pose and irrespective of purely political considerations, the very sweeping General Amnesty Law passed by El Salvador's Legislative Assembly constitutes a violation of the international obligations it undertook when it ratified the American Convention on Human Rights, because it makes possible a 'reciprocal amnesty' without first acknowledging responsibility (despite the recommendations of the Truth Commission); because it applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims."⁹⁶

⁹¹ See *inter alia*: Report No. 1/96, Case 10.559, *Chumbivilcas* (Peru), 1 March 1996; Report No. 42/97, Case 10.521, *Angel Escobar Jurador* (Peru), 19 February 1998; Report No. 38/97, Case 10.562, *Hector Pérez Salazar* (Peru), 19 February 1998; Report No. 39/97, Case 11.233, *Martín Javier Roca Casas* (Peru), 19 February 1999; and Report No. 41/97, Case 10.491, *Estiles Ruiz Dávila* (Peru), 19 February 1998.

⁹² Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), 2 October 1992.

⁹³ See *inter alia*: Report No. 36/96, Case 10.843 (Chile), 15 October 1996, para. 105; Report No. 34/96, Case 11.228 and others (Chile), 15 October 1996, para. 104; and Report No. 25/98, Cases 11.505 and others (Chile), 7 April 1998, para. 101.

⁹⁴ See *inter alia*: Report No. 136/99, Case 10.488, *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999; Report No. 37/00, Case 11.481, *Monsignor Oscar Arnulfo Romero y Galdámez* (El Salvador), 13 April 2000; Report No. 1/99, Case 10.480 *Lucio Parada Cea and others* (El Salvador), 27 January 1999; and Report No. 26/92, Case 10.287, *Massacre of las Hojas* (El Salvador), 24 September 1992. See also, *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.85, Doc. 28 rev. 1994, 11 February 1998, Chapter II.4 "

⁹⁵ Report No. 29/92, Cases No. 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 (Uruguay), 2 October 1992.

⁹⁶ *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.85, Doc. 28 rev. of 11 February 1994, "4. Enactment of the Amnesty Law and El Salvador's international commitments".

The IACHR has recalled that "States have the obligation to investigate, prosecute, and punish persons responsible for human rights violations. [...] This international obligation of the state cannot be renounced."⁹⁷

For its part, in 1998 the Inter-American Court of Human Rights defined impunity as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention,"⁹⁸ and has established that "the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives."⁹⁹ Likewise, the Court has stated that "[t]he State has the duty to avoid and combat impunity."¹⁰⁰

The Inter-American Court of Human Rights understands impunity to mean: "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives."¹⁰¹

The Court has also characterized impunity as "an infringement of the duty of the State to investigate and punish those responsible for the acts that abridged human rights in the instant case, injuring the next of kin of the victims and fostering chronic recidivism of the human rights violations involved."¹⁰²

In its transcendental judgment on the Barrios Altos massacre (Peru), the Court would establish that "all amnesty provisions, provisions on prescription and the establishment of measures

⁹⁷ *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 230.

⁹⁸ Judgment of March 8, 1998, *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*, Series C No. 37, para. 173.

⁹⁹ *Ibid.*

¹⁰⁰ Judgment of March 1, 2005, *Case of the Serrano-Cruz Sister v. El Salvador*, Series C No. 120, para. 60.

¹⁰¹ Judgment of July 8, 2004, *Case of the Brothers Gómez Paquiyauri v. Peru*, Series C No. 110, para. 148.

¹⁰² Judgment of July 8, 2004, *Case of the Brothers Gómez Paquiyauri v. Peru*, Series C No. 110, para. 228.

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.”¹⁰³ In that judgment, the Court recalled that “in [] light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.”¹⁰⁴

The Inter-American Court has also stated that the obligation to investigate crimes under international law – such as extrajudicial execution and forced disappearance – and to try and punish the perpetrators and other participants in these crimes is a peremptory norm of international law (*jus cogens*).¹⁰⁵

c. International Humanitarian Law

In the field of international humanitarian law, impunity for breaches of humanitarian norms has been rejected. It is worth highlighting the International Committee of the Red Cross (ICRC)’s

¹⁰³ Judgment of March 14, 2001, *Case of Barrios Altos (Chumbipuma Aguirre and others) v. Peru*, Series C No. 87, para. 41.

¹⁰⁴ *Ibid.*, para. 43.

¹⁰⁵ See, *inter alia*: Judgment of September 22, 2006, *Case of Goiburú and others v. Paraguay*, Series C No. 153, para. 84; Judgment of May 25, 2010, *Case of Chitay Nech and others v. Guatemala*, Series C No. 212, para. 86; Judgment of September 1, 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, para. 61; Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 75; and Judgment of November 24, 2010, *Case of Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*, Series C No. 219, para. 105.

interpretation of Article 6(5) of the *Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), which establishes the possibility that, upon the end of hostilities, a broad amnesty may be conceded 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.” The ICRC has recalled that: “[t]he preparatory work for Article 6(5) indicates that the purpose of this precept is to encourage amnesty, [...] as a type of liberation at the end of hostilities for those who were detained or punished merely for having participated in the hostilities. It does not seek to be an amnesty for those who have violated international humanitarian law.”¹⁰⁶

The ICRC has concluded that, under customary international humanitarian law, amnesties or similar measures may now be awarded for war crimes and crimes against humanity¹⁰⁷, and that individual criminal responsibility for war crimes is a norm of customary international humanitarian law, applicable both in international and internal armed conflicts.¹⁰⁸

“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.”

International Committee of the Red Cross¹⁰⁹

d. Emergence of the *ad hoc* Tribunals and the International Criminal Court

The creation of the *ad hoc* Tribunals for the Former Yugoslavia and for Rwanda,¹¹⁰ the Special Court for Sierra Leone,¹¹¹ the Panel with

¹⁰⁶ Letter from the International Committee of the Red Cross, directed to the Prosecutor of the International Tribunal for the Former Yugoslavia, in 1995. The International Committee of the Red Cross reiterated this interpretation in another communication dated April 15, 1997.

¹⁰⁷ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Ed. ICRC, Cambridge University Press, 2009, pp. 612-614.

¹⁰⁸ *Ibid.*, Rule 151, p. 551 *et seq.*

¹⁰⁹ *Ibid.*, p. 611.

exclusive competence for the most serious crimes in East Timor,¹¹² and the Extraordinary Chambers of the national courts of Cambodia,¹¹³ as well as the International Criminal Court have greatly contributed toward de-legitimizing the discourse of impunity as a necessary evil, and to support the obligation to prevent impunity for the most serious crimes under international law, through norms of international law.

In effect, international case law has confirmed the inapplicability of amnesties or analogous measures in cases of gross human rights violations, war crimes, and crimes against humanity. The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia, in its judgment in the case of *Prosecutor v. Anto Furundzija*, recalled that "[t]he 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 de-legitimise any legislative, administrative or judicial act authorizing torture. It would be senseless to argued, 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 in addition would not be accorded international legal recognition."¹¹⁴ The Appeals Chamber of the Special Court for Sierra Leone has likewise affirmed that it is "a norm crystallized in international law that a government may

¹¹⁰ The International Criminal Tribunal for the Former Yugoslavia was created by Resolution 827 of 25 May 1993, and the International Criminal Tribunal for Rwanda was created by Resolution 955 of 8 November 1994, by the Security Council of the United Nations.

¹¹¹ Resolution 1315 (2000) of the Security Council, 14 August 2000.

¹¹² Created by the United Nations Transitional Administration in East Timor (UNAMET).

¹¹³ Created through an agreement between the United Nations Secretary-General and the Kingdom of Cambodia, ratified by the United Nations General Assembly (Resolutions "Proceedings against the Khmer Rouge" No. 57/228-A of 18 December 2002 and No. 57/228-B of 13 May 2003).

¹¹⁴ Judgment of 10 December 1998, *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T 10, para. 155.

not concede amnesty for serious crimes under international law.”¹¹⁵

e. The political bodies of the United Nations system

This process would gradually have its effects on the political bodies of the United Nations system as shown by different resolutions by the General Assembly, the Security Council, the former Commission on Human Rights and, its successor, the Human Rights Council.

“War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment. [...] 8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.”

*Principle 1 of the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*¹¹⁶

Although following World War II, the UN General Assembly would adopt a series of resolutions regarding the question of the suppression of the perpetrators of crimes against humanity, war crimes and genocide,¹¹⁷ during the 1980s this political body had essentially confined itself to deploring or condemning human rights

¹¹⁵ Appeals Chamber of the Special Court for Sierra Leone, Judgment on preliminary objections, of 25 May 2004, *The Prosecutor v. Moinina Fofana*, Case No. SCSL-2004-14-AR72 (e), operative paragraph 3. See also, Judgment of 3 March 2004, *The Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Case No. SCSL-2004-15-AR72(E).

¹¹⁶ Resolution No. 3074 (XXVIII) of the General Assembly, 3 December 1973.

¹¹⁷ Resolutions No. 3(I), *Extradition and punishment of war criminals*, of 13 February 1946; 95(I), *Affirmation of the principles of international law recognized by the Charter of the Nurnberg Tribunal*, of 11 December 1946; 170(II), *Surrender of war criminals and traitors*, 31 October 1947; 96(I) *The crime of genocide*, 11 December 1946; 2338 (XXII), *War criminals and of persons who have committed crimes against humanity*, 18 December 1967; 2391 (XXIII), *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968; 2583 (XXIV), *Question of the punishment of war criminals and of persons who have committed crimes against humanity*, 15 December 1969; and 3074 (XXVIII), *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, 3 December 1973.

violations and inviting or exhorting the States to end these practices, both in resolutions regarding countries and in thematic resolutions,¹¹⁸ with rare exceptions.¹¹⁹

However, starting in the 1990s, the UN General Assembly would begin to adopt resolutions reaffirming that persons who commit, order or authorize crimes against humanity, war crimes and grave human rights violations have individual criminal responsibility for these crimes and should be detained, prosecuted and punished. These resolutions were initially adopted within the framework of the war in the former Yugoslavia and the genocide in Rwanda.¹²⁰ Some of these resolutions implicitly urged the States to exercise the principle of universal jurisdiction to suppress these crimes.¹²¹

Progressively, in thematic resolutions, the UN General Assembly began reiterating the obligation to investigate serious violations of human rights and to try and punish the perpetrators,¹²² as well condemning impunity.¹²³ For example, in 2000, the UN General Assembly would emphasize that "impunity with regard to enforced disappearances contributes to the perpetuation of this phenomenon [...] [and] perpetrators should be prosecuted [by the States]."¹²⁴ In this process, it is worth emphasizing the resolution

¹¹⁸ Such as, for example, the resolutions regarding Extrajudicial, summary or arbitrary executions; regarding Torture; and regarding Enforced disappearances.

¹¹⁹ For example, in some resolutions regarding the *apartheid* regime in South Africa, the General Assembly would reaffirm that this practice constitutes a crime against humanity, which should be combated and eradicated (Resolution No. 44/27 of 22 November 1989).

¹²⁰ See *inter alia*: Resolution No. 47/80, "Ethnic cleansing" and racial hatred, 16 December 1992, para. 4; Resolution No. 47/147, *The situation of human rights in the territory of the former Yugoslavia*, 18 December 1992, para. 7; Resolution No. 48/143, *Rape and abuse of women in the areas of armed conflict in the former Yugoslavia*, 20 December 1993, paras. 5 and 6; Resolution No. 49/206, *The situation of human rights in Rwanda*, 23 December 1994.

¹²¹ See, for example, Resolution No. 48/143, *Rape and abuse of women in the areas of armed conflict in the former Yugoslavia*, 20 December 1993, para. 6.

¹²² See for example: Resolution No. 51/92, *Extrajudicial, summary or arbitrary executions*, 12 December 1996, para. 3; Resolution No. 51/94, *Question of enforced or involuntary disappearances*, 12 December 1996, paras. 2 and 4; and Resolution No. 65/205, *Torture and other cruel, inhuman or degrading treatment or punishment*, 21 December 2010, paras. 6 and 18.

¹²³ See for example: Resolution No. 65/210, *Disappeared persons*, 21 December 2010; Resolution No. 65/213, *Human rights in the administration of justice*, 21 December 2010; and Resolution No. 68/165, *The right to truth*, 18 December 2013.

¹²⁴ Resolution No. 55/103, *Question of enforced or involuntary disappearances*, 4 December 2000, para. 4.

by the General Assembly regarding Haiti in 1999, in which it "[r]affirms the importance, for combating impunity and for the realization of a genuine and effective process of transition and national reconciliation, of the investigations undertaken by the National Commission for Truth and Justice, and once again calls upon the Government of Haiti to institute legal proceedings against the perpetrators of human rights violations [...]"¹²⁵

"The General Assembly: [...] Notes that impunity continues to be a major cause of the perpetuation of violations of human rights, including extrajudicial, summary or arbitrary executions; [...] Reiterates the obligation of all Governments to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, while ensuring the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity, to prevent the recurrence of such executions; [...] Stresses the importance for States to take effective measures to end impunity with regard to extrajudicial, summary or arbitrary executions, inter alia, through the adoption of preventive measures, and calls upon Governments to ensure that such measures are included in post-conflict peace-building efforts."¹²⁶

Likewise, in its Resolution on the Democratic Republic of the Congo in 2001, the UN General Assembly urged the Government of that country to "put an end to impunity and to fulfil its responsibility to ensure that those responsible for human rights violations and grave breaches of international humanitarian law are brought to justice."¹²⁷ It is also worth highlighting the Resolution on Cambodia adopted that same year, in which the General Assembly declared that "the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in

¹²⁵ Resolution 54/187, *Situation of human rights in Haiti*, 17 December 1999, para. 8.

¹²⁶ Resolution No. 51/111, *Extrajudicial, summary or arbitrary executions*, 4 December 2000, paras. 2, 6 and 9.

¹²⁷ Resolution No. 56/173, *Situation of human rights in the Democratic Republic of the Congo*, 19 December 2001, para. 4, c.

ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a State.”¹²⁸

“We commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law, and for this purpose we encourage States to strengthen national judicial systems and institutions.”

*Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*¹²⁹

The demand to put an end to impunity, and to prosecute and punish the perpetrators of grave violations of international human rights law norms and of international humanitarian law have been reiterated by the General Assembly with regards to various States, such as: Afghanistan,¹³⁰ Belarus,¹³¹ Cambodia,¹³² North Korea,¹³³

¹²⁸ Resolution No. 56/169, *Situation of human rights in Cambodia*, 19 December 2001, paragraph 8 of the Preamble. See also: Resolution No. 57/228-A, *Proceedings against the Khmer Rouge*, of 18 December 2002, paragraph 3 of the Preamble; and Resolution No. 57/190 of 18 December 2002 (paragraph 11), in which the General Assembly request for United Nations Member States to bring the perpetrators of child abductions to justice.

¹²⁹ *Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels*, adopted through Resolution No. 67/1 of 24 September 2012, para. 22.

¹³⁰ See, *inter alia*, Resolution No. 65/8, *The situation in Afghanistan*, 4 November 2010 and Resolution No. 55/119, *Question of human rights in Afghanistan*, 4 December 2000.

¹³¹ Resolution No. 61/175, *Situation of human rights in Belarus*, 19 December 2006.

¹³² Resolution No. 58/191, *Situation of human rights in Cambodia*, 22 December 2002.

¹³³ Resolution No. 67/181, *Situation of human rights in the Democratic People's Republic of North Korea*, 20 December 2012.

Israel,¹³⁴ Myanmar,¹³⁵ the Democratic Republic of the Congo,¹³⁶ Syria,¹³⁷ and Sudan.¹³⁸

The UN General Assembly would finally have to abandon its permissive doctrine on amnesties as a trade-off to pay for the return of institutional normality. It is worth highlighting Resolution No. 57/228 B "Khmer Rouge trials," adopted on May 13th, 2003, in which the General Assembly approved the draft *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*. This Agreement, contained in the annex of the Resolution, expressly stipulates that "[t]he Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present agreement."¹³⁹

Likewise, starting in the 1990s and gradually thereafter, the Security Council has adopted various resolutions rejecting impunity and reminding the States that the perpetrators of grave human rights and of crimes under international law should be brought to justice, tried and punished.¹⁴⁰ In resolutions related to the

¹³⁴ Resolution No. 64/10, *Follow-up to the report of the United Nations Fact Finding Mission on the Gaza Conflict*, 5 November 2009.

¹³⁵ See, *inter alia*, Resolution No. 67/233, *Situation of human rights in Myanmar*, 24 December 2012 and Resolution No. 66/230, *Situation of human rights in Myanmar*, 24 December 2011.

¹³⁶ Resolution No. 60/170, *Situation of human rights in the Democratic Republic of the Congo*, 16 December 2005.

¹³⁷ See, *inter alia*, Resolution No. 67/262 (B), *Situation of human rights in the Syrian Arab Republic*, 15 May 2003 and Resolution No. 66/253, *Situation of human rights in the Syrian Arab Republic*, 3 August 2012.

¹³⁸ Resolution No. 57/230, *Situation of human rights in Sudan*, 18 December 2002.

¹³⁹ Article 11 "Amnesty" of the *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*.

¹⁴⁰ See, *inter alia*, Resolutions Nos. 2136 (2014), *Democratic Republic of the Congo*, 30 January 2014; 2122 (2013), *Women and Peace and Security*, 18 October 2013; 2127 (2013), *Central African Republic*, 5 December 2013; 2100 (2013), *Mali*, 25 April 2013; 2101 (2013), *Côte d'Ivoire*, 25 April 2013; 2048 (2012), *Guinea-Bissau*, 18 May 2012; 2040 (2012), *Libya*, 12 March 2012; 2068 (2012), *Children and armed conflict*, 19 September 2012; 1998 (2011), *Children and armed conflict*, 12 July 2011; 1959 (2010), *Burundi*, 16 December 2010; 1894 (2009), *Protection of civilians in armed conflict*, 11 November 2009; 1889 (2009) *Women and Peace and Security*, 5 October 2009; 1820 (2008), *Women and Peace and Security*, 19 June 2008; 1738 (2006), *Protection of civilians in armed conflict*, 23 December

situations of countries, adopted under Chapter VII of the *UN Charter*, the Security Council has indicated that “there should be no impunity for any of those responsible for violations of international humanitarian law and violations and abuses of human rights in the DRC and the region, and, in this regard, urging the DRC, all countries in the region and other concerned United Nations Member States to bring perpetrators to justice and hold them accountable.”¹⁴¹

“The Security Council, [...] Stresses the importance of establishing effective comprehensive strategies of conflict prevention, focused on averting negative developments in the security, economic, social and humanitarian sectors and in the field of governance and human rights in countries which are facing crises, with special attention to [...] developing policy measures to foster good governance and the protection of human rights in order to strengthen weakened or collapsed governance mechanisms and to end the culture of impunity.”

Declaration on strengthening the effectiveness of the Security Council’s role in conflict prevention, particularly in Africa (2005)¹⁴²

In other thematic resolutions, the Security Council has recalled that the States have the obligation to end impunity, investigate exhaustively and prosecute the persons responsible for war crimes, genocide, crimes against humanity, and other grave breaches of international humanitarian law.¹⁴³ In various

2006; 1704 (2006), *Timor Leste*, 25 August 2006; 1591 (2005), *Sudan*, 29 March 2005; 1529 (2004) *Haiti*, 29 February 2004; 1479 (2003) *Côte d'Ivoire*, 13 May 2003; 1318 (2000), *Effective role for the Security Council in the maintenance of international peace and security, particularly in Africa*, 7 September 2000; 1315 (2000), *Sierra Leona*, 14 August 2000; 1272 (1999), *Timor Leste*, 25 October 1999; 1019 (1995), *Former Yugoslavia*, 9 November 1995; 941 (1994), *Bosnia and Herzegovina*, 23 September 1994; 935 (1994), *Commission of Experts to examine violations of international humanitarian law committed in Rwanda*, 1 July 1994; and 859 (1993), *Bosnia and Herzegovina*, 24 August 1993.

¹⁴¹ Resolution No. 2136 (2014), *Democratic Republic of the Congo*, of 30 January 2014, para. 12.

¹⁴² Resolution 1625 (2005), *Threats to international peace and security (Security Council Summit 2005)*, of 14 September 2005 (*Declaration on strengthening the effectiveness of the Security Council’s role in conflict prevention, particularly in Africa*).

¹⁴³ Resolutions No. 2122 (2013), *Women and Peace and Security*, of 18 October 2013; 2068 (2012), *Children and Armed Conflict*, of 19 September 2012; 1820 (2008), *Women and Peace and Security*, of 19 June 2008; 1894 (2009), *Protection of civilians in armed conflict*, of 11 November 2009; and 1738 (2006), *Protection of civilians in armed conflict*, of 23 December 2006.

resolutions, the Security Council has declared that amnesties do not apply to the crime of genocide, crimes against humanity, war crimes, and other grave violations of international humanitarian law.¹⁴⁴

Likewise, the action of the United Nations in its peacekeeping work would pay tribute to this evolution. The fight against impunity would be integrated into the mandate of the United Nations' field missions.¹⁴⁵ In this context, emphasis should be given to the position of the United Nations Secretary-General, who while discussing the peace accords in Sierra Leone in 1999, reiterated that amnesty measures were not applicable to serious international crimes such as crimes against humanity and genocide.¹⁴⁶ In his 2000 report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General summed up the Organization's policy in the following way: "[w]hile recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law."¹⁴⁷

Also worth mention is the Secretary-General's position with respect to the situation in Kosovo. In his 1999 report to the United Nations General Assembly, the Secretary-General recalled that it is indispensable to bring the perpetrators of grave human rights violations and of international crimes to justice in order to discourage the commission of new crimes, and to strengthen the hope for peace in Kosovo. The Secretary-General asserted that "[a]ny appearance of impunity for the perpetrators could become a real obstacle to the process of finding a peaceful to the conflict through negotiation."¹⁴⁸

¹⁴⁴ See, for example, Resolutions No. 1120 (1997), *Croatia*, 14 July 1997, and 1315 (2000), *Sierra Leone*, 14 August 2000.

¹⁴⁵ *Panel on United Nations Peace Operations*, A/55/305 - S/2000/809, 20 October 2000.

¹⁴⁶ *Seventh report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, S/1999/836, 30 July 1999, para. 7.

¹⁴⁷ *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, para. 22.

¹⁴⁸ *Report pursuant to resolutions 1160(1998), 1199(1998) and 1203(1998) of the Security Council*, S/1999/99 of 29 January 1999, para. 32.

3. The emergence of international norms

As mentioned in section 2, “Emergence of legal discourse,” at the end of the 1980s, the first norms of international human rights law that expressly point to the question of impunity arose: *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, in 1989; and the *Declaration on the Protection of All Persons from Enforced Disappearance* (DED), in 1992. Both international instruments addressed the question of impunity for grave violations of human rights – extrajudicial executions and enforced disappearances. But in 1997, the UN Sub-commission for Prevention of Discrimination and Protection of Minorities would adopt the first international instrument specifically about impunity: the *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*¹⁴⁹. This did not only address all gross human rights violations and crimes under international law, but also tackled distinct dimensions and aspects of the fight against impunity.

For several years this Set of Principles was under study for adoption by the former UN Commission on Human Rights. Also, before the Set of Principles was adopted, the IACHR and the Inter-American Court used it as a source of law and frequently cited it as a reference.¹⁵⁰ The former UN Commission on Human Rights confirmed that these “Principles have already been applied at the regional and national levels, and invite[d] other States, intergovernmental organizations and non-governmental organizations to consider integrating the Principles into their

¹⁴⁹ E/CN.4/Sub.2/1997/20/Rev.1, annex II.

¹⁵⁰ Inter-American Court of Human Rights: Judgment of November 27, 1998, *Case of Castillo Páez v. Peru*, Series C No. 43; Judgment of February 22, 2002, *Case of Bámaca Velásquez v. Guatemala*, Series C No. 91; and Judgment of February 27, 2002, *Case of Trujillo Oroza v. Bolivia*, Series C No. 92. Inter-American Commission on Human Rights: Report No.136/99, Case 10.488, *Ignacio Ellacuría S.J. and others* (El Salvador), December 22, 1999; Report No. 37/00, Case 11.481, *Monsignor Oscar Arnulfo Romero y Galdámez* (El Salvador), April 13, 2000; Report No. 45/00, Case 10.826, *Manuel Mónago Carhuaricra and Eeleazar Mónago Laura* (Peru), April 13, 2000; Report No. 44/00, Case 10.820, *Américo Zavala Martínez* (Peru), April 13, 2000; Report No. 43/00, Case 10.670, *Alcides Sandoval and others* (Peru), April 13, 2000; Report No. 130/99, Case 11.740, *Víctor Manuel Oropeza* (Mexico), November 19, 1999; Report No. 133/99, Case 11.725, *Carmelo Soria Espinoza* (Chile), November 19, 1999; and Report No. 46/00, Case 10.904, *Manuel Meneses Sotacuro and Félix Inga Cuya* (Peru), April 13, 2000.

efforts to combat impunity.”¹⁵¹ In 2004, the Commission decided that the draft Set of Principles should be updated, in accordance with the latest developments recorded in international law since 1998. In 2005, an updated version – the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*¹⁵² (*Principles against Impunity*) – was presented to the Commission, which accepted the new text and recommended for the States to implement it in their efforts against impunity.¹⁵³ (See Annex I).

It is worth emphasizing that the *Principles against Impunity* have been used as a normative guide by the UN General Assembly,¹⁵⁴ the UN Secretary-General,¹⁵⁵ the UN High Commissioner for Human Rights,¹⁵⁶ the former Commission on Human Rights,¹⁵⁷ and the UN Human Rights Council,¹⁵⁸ as well as by special procedures.¹⁵⁹ In the Americas, in addition to its aforementioned

¹⁵¹ Resolution No. 2003/72, 25 April 2003, para. 14.

¹⁵² UN Doc. E/CN.4/2005/102/Add.1.

¹⁵³ Resolution No. 2005/81, *Impunity*, 25 April 2005.

¹⁵⁴ See, *inter alia*, Resolutions No. 62/148, *Torture and other cruel, inhuman or degrading treatment*, 18 December 2007, para. 6; 65/205, *Torture and other cruel, inhuman or degrading treatment*, 21 December 2010, para. 7; and 68/165, *The right to truth*, 18 December 2013, paragraph 11 of the preamble.

¹⁵⁵ See, *inter alia*, *Uniting our strengths: Enhancing United Nations support for the rule of law – Report of the Secretary-General*, A/61/636-S/2006/980, of 14 December 2006, para. 25.

¹⁵⁶ *Study on the right to the truth – Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91 of 9 January 2006; *The right to truth – Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/5/7 of 7 June 2007; *the right to the truth – Report of the Office of the United Nations High Commissioner for Human Rights*, UN Document A/HRC/12/19 of 21 August 2009; *Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth*, UN Document A/HRC/17/21 of 14 April 2011; *Rule of Law tool for post-conflict states – Vetting: an operational framework*, New York and Geneva, 2006, index HR/PUB/06/5; *Rule of law tool for post-conflict States – Amnesties*, New York and Geneva, 2009, index HR/PUB/09/1; and *Working with the United Nations Human Rights Programme: A Handbook for Civil Society*, New York and Geneva, 2008, índice HR/PUB/06/10/Rev.1.

¹⁵⁷ See, *inter alia*: Resolutions No. 2000/68, 2001/70, 2003/72, 2004/72, 2995/66 and 2005/81 of the Commission on Human Rights.

¹⁵⁸ See, *inter alia* Resolutions No. 9/10, 9/11, 12/11, 12/12, 18/7 and 21/15 of the Human Rights Council.

¹⁵⁹ See, for example: United Nations Working Group on Enforced or Involuntary Disappearances (“General comment on the right to the truth in relation to enforced disappearance”, in *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48 of 26 January 2011); *Special Rapporteur on the*

use by the IACHR and the Inter-American Court, the General Assembly of the Organization of American States has mentioned the *Principles against Impunity* as a legal reference point on the matter.¹⁶⁰

"This culture of impunity constantly reminds us of profound rule of law deficits. [...]The importance of popular support for the rule of law and of civil society's demand for justice and security has often been overlooked. Communities gain most from legal protection and lose most by its absence. Development of strong State institutions, usually a long-term goal, is less likely where legal processes are not understood, access to justice is limited and impunity for crime and other violations undermines confidence in State institutions."

United Nations Secretary-General (2008)¹⁶¹

The *Principles against Impunity* have also been widely cited as a legal point of reference by state bodies and national courts such as, for example, Peru¹⁶² and Colombia.¹⁶³ The Constitutional Court of Colombia (*Corte Constitucional de Colombia*) has affirmed that this Set of Principles "indicates the rights to truth, justice and reparation as general principles, which must be observed and guaranteed by the States, through the adoption of procedures aimed at combating impunity."¹⁶⁴ Likewise, the Colombian Constitutional Court has indicated that the *Principles against Impunity* "contains guidelines formulated by the United Nations that contain normative and jurisprudential standards of

independence of judges and lawyers (Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, E/CN.4/2006/52 of 23 January 2006).

¹⁶⁰ See, for example, Resolution AG/RES. 2225 (XXXVI-O/06), *Cooperation among the Member States of the Organization of American States to ensure the protection of human rights and fight impunity*, June 6, 2006.

¹⁶¹ *Strengthening and coordinating United Nations rule of law activities – Report of the Secretary-General*, A/63/226 of 6 August 2008, paras. 31 y 38.

¹⁶² See, *inter alia*, Tribunal Constitucional [Constitutional Tribunal], Judgment of 18 March 2004, Case File No. 2488-2002-HC/TC, Piura, *Case of Genaro Villegas Namuche*.

¹⁶³ See, *inter alia*, Corte Constitucional [Constitutional Court] (Judgment C-426/06 of 31 May 2006, case file D-5935; Judgment C-370/06 of 18 May 2006, case file D-6032; and Judgment C-771/11 of 13 October 2011, case file D-8475) and Corte Suprema de Justicia, Sala Penal [Supreme Court of Justice, Criminal Chamber] (Decision on motion to appeal, 11 July 2007, Case of *Orlando César Caballero Montalvo / Tribunal Superior de Antioquia*).

¹⁶⁴ Judgment C-771/11, 13 October 2011, case file D-8475 (Original in Spanish, free translation).

international law, as well as the historical experience stemming from processes of the transition to democracy or of the consolidation of the rule of law in different nations, and that make up a conceptual framework of great value as a source of international law."¹⁶⁵

The *Principles against Impunity* contain a definition of impunity in the following terms: "[i]mpunity' means the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."¹⁶⁶

Likewise, Principle 1 of the *Principles against Impunity* establishes: "[i]mpunity 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 violation."

It is also worth highlighting the *Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Principles on Reparation)*, adopted by the UN General Assembly,¹⁶⁷ and the *Draft Principles Governing the Administration of Justice through Military Tribunals*, adopted by the former Sub-Commission on the Promotion and Protection of Human Rights in 2006.¹⁶⁸

¹⁶⁵ Judgment C-370/06 18 May 2006, case file D-6032.

¹⁶⁶ Definition I, "Impunity", from the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*.

¹⁶⁷ United Nations General Assembly Resolution 60/147, of 16 December 2005.

¹⁶⁸ These Draft Principles are published in UN Doc. E/CN.4/2006/58 of 13 January 2006.

4. The concept of transitional justice and the fight against impunity

The end of the 1990s saw the start of a process of reflection about the UN's peace and security activities and the questions of the rule of law and justice in peace processes and in overcoming armed conflicts or authoritarian regimes.

"International human rights law recognizes the existence of State obligations in response to massive or systematic violations of the fundamental rights of persons. [...] [Regarding] 'international crimes,' without a doubt human rights law and international humanitarian law instruments impose a series of affirmative obligations on the State, that are summed up in the duty to not allow such acts to remain unpunished. [...] [T]hese obligations apply not just to actions committed by State agents but, in the case of armed conflict, also to those attributable to armed forces, militias, and paramilitary forces that have acted in support of one side or the other. [...] First, the State must exhaustively seek out the Truth, in the sense of investigating and disseminated what remains hidden with respect to illegal repression. [...] The second obligation is that of justice. Dealing with international crimes, it is not permissible for the States to allow such crimes to remain in impunity. For this reason, international law establishes the incompatibility of broad and unrestricted amnesties with treaty-based human rights norms. [...] Third, victims and their family members (indirect victims) have the right to reparation for the damages they have suffered. [...] The reparation should be integral, and should not be made conditional on any abdication by the victims of their rights to truth and justice. [...] The final component of this quadruple obligation [...]: institutional reforms to prevent the repetition of the tragic repressive events. [...] All of the aforementioned obligations are coordinated with each other in such a way that the State may not choose to comply with one and neglect the others. They are also independent because the impossibility of complying with one of them does not exempt the State from its other obligations."

Juan Méndez¹⁶⁹

This process would begin to crystallize starting in the decade of the 2000s, in various reports of the Secretary-General and the Office

¹⁶⁹ "Reformas institucionales en procesos de transición y fortalecimiento democrático" [Institutional reforms in processes of transition and strengthening democracy], in *Democracia y derechos humanos en el Perú: del reconocimiento a la acción*, Fondo Editorial de la Pontificia Universidad Católica del Perú, Lima, 2005 pag. 39 et seq. (Original in Spanish, free translation).

of the High Commissioner for Human Rights.¹⁷⁰ These systematized the evolution of international norms, case law, and practices on the subject. The Security Council,¹⁷¹ the General Assembly,¹⁷² the former Commission on Human Rights¹⁷³ and the

¹⁷⁰ See, *inter alia*: Report of the Panel on United Nations Peace Operations to the Secretary-General, A/55/305-S/2000/809 of 21 August 2000 (known as "the Brahimi Report," for the name of the president of this panel); *The rule of law and transitional justice in conflict and post-conflict society – Report of the Secretary-General*, S/2004/616 of 3 August 2004; *Uniting our strengths: Enhancing United Nations support for the rule of law – Report of the Secretary-General*, A/61/636-S/2006/980, of 14 December 2006; *Strengthening and coordinating United Nations rule of law activities – Report of the Secretary-General*, A/63/226, 6 August 2008; *Responsibility to protect: State responsibility and prevention – Report of the Secretary-General*, UN document A/67/929-S/2013/399 of 9 July 2013; *Study by the Office of the United Nations High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the United Nations system* E/CN.4/2006/93 of 7 February 2006; *Human rights and transitional justice – Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/4/87 of 23 December 2006; *Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General – Office of the United Nations High Commissioner for Human Rights analytical study on human rights and transitional justice – Addendum: Inventory of human rights and transitional justice aspects of recent peace agreements*, A/HRC/12/18/Add.1, of 21 August 2009; and *Office of the United Nations High Commissioner for Human Rights, Rule-of-law tools for post-conflict States – Vetting: an operational framework*, United Nations, New York and Geneva, 2006, index HR/PUB/06/5.

¹⁷¹ See, *inter alia*, Statements by the President of the Security Council: "Justice and the Rule of Law: the United Nations Role," S/PRST/2003/15 of 24 September 2003; "Post-conflict national reconciliation: role of the United Nations," S/PRST/2004/2 of 26 January 2004; "Justice and the Rule of Law: the United Nations Role," S/PRST/2004/34 of 6 October 2004; "Post-conflict peacebuilding," S/PRST/2005/20, 26 May 2005; "Maintenance of international peace and security: the role of the Security Council in humanitarian crises – challenges, lessons learned and the way ahead," S/PRST/2005/30 of 12 July 2005; "Strengthening international law: rule of law and maintenance of international peace and security," S/PRST/2006/28 of 22 June 2006; "Post-conflict peacebuilding," S/PRST/2009/23 of 22 July 2009; "Promotion and strengthening of the rule of law in the maintenance of international peace and security," S/PRST/2010/11 of 29 June 2010; "Promotion and strengthening of the rule of law in the maintenance of international peace and security," S/PRST/2012/1 of 19 January 2012; "Post-conflict peacebuilding," S/PRST/2012/29 of 20 December 2012; and "Promotion and strengthening of the rule of law in the maintenance of international peace and security," S/PRST/2014/5 of 21 February 2014.

¹⁷² See, *inter alia*: Resolution 62/70, "The rule of law at the national and international levels," of 6 December 2007; and the *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, adopted through Resolution No. 67/1 of 24 September 2012.

¹⁷³ See, *inter alia*, Resolution No. 2005/70, *Human rights and transitional justice*, of 20 April 2005.

Human Rights Council¹⁷⁴ would also be actors in this process, adopting successive resolutions and declarations of transcendent importance.

In its first report in 2004, the Secretary-General indicated that the concepts of “‘justice,’ ‘the rule of law’ and ‘transitional justice’ are essential to understanding the international community’s efforts to enhance human rights, protect persons from fear and want, address property disputes, encourage economic development, promote accountable governance and peacefully resolve conflict.”¹⁷⁵ The Secretary-General would also emphasize that “[t]he normative foundation for our work in advancing the rule of law is the Charter of the United Nations itself, together with the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law. This includes the wealth of United Nations human rights and criminal justice standards developed in the last half-century. These represent universally applicable standards adopted under the auspices of the United Nations and must therefore serve as the normative basis for all United Nations activities in support of justice and the rule of law.”¹⁷⁶

In accordance with these principles, the Secretary-General stated that “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.”¹⁷⁷ The Secretary-General would make various recommendations to the Security Council on the subject of peace accords and the mandates of this body, among which it is worth emphasizing:

“a) Give priority attention to the restoration of and respect for the rule of law, explicitly mandating support for the rule of law and for transitional justice, particularly where United Nations support for judicial and prosecutorial processes is required;

¹⁷⁴ See, *inter alia*: Decision No. 4/102, *Transitional justice*, 23 March 2007; Resolution No. 9/10, *Human rights and transitional justice*, 24 September 2008; Resolution No. 12/11, *Human rights and transitional justice*, 12 October 2009; and Resolution No. 21/15, *Human rights and transitional justice*, 27 September 2012.

¹⁷⁵ *The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616 of 3 August 2004, para. 5.

¹⁷⁶ *Ibid.*, para. 9.

¹⁷⁷ *Ibid.*, para. 10.

"b) Respect, incorporate by reference and apply international standards for fairness, due process and human rights in the administration of justice;

"c) Reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court; [...]

"e) Require that all judicial processes, courts and prosecutions be credible, fair, consistent with established international standards for the independence and impartiality of the judiciary, the effectiveness, impartiality and fairness of prosecutors and the integrity of the judicial process;

"f) Recognize and respect the rights of both victims and accused persons, in accordance with international standards, with particular attention to groups most affected by conflict and a breakdown of the rule of law, among them children, women, minorities, prisoners and displaced persons, and ensure that proceedings for the redress of grievances include specific measures for their participation and protection."¹⁷⁸

"The Security Council reiterates the importance it attaches to the promotion and urgent restoration of justice and the rule of law in post-conflict societies and in promoting national reconciliation, democratic development, and human rights. The Council recognizes that ending impunity is important in peace agreements, and can contribute to efforts to come to terms with past abuses and to achieve national reconciliation to prevent future conflict. The Security Council recalls that it has repeatedly emphasized the responsibility of States to end impunity and bring to justice those responsible for genocide, war crimes, crimes against humanity and serious violations of international humanitarian law."

Statement by the President of the Security Council, *Maintenance of international peace and security: the role of the Security Council in humanitarian crises – challenges, lessons learned and the way ahead*¹⁷⁹

The report and the recommendations of the Secretary-General were taken up by the Security Council, which adopted a

¹⁷⁸ *Ibid.*, para. 64.

¹⁷⁹ S/PRST/2005/30 of 12 July 2005.

Declaration stressing “the importance and urgency of the restoration of justice and the rule of law in post-conflict societies, not only to come to terms with past abuses, but also to promote national reconciliation and to help prevent a return to conflict in the future. [...]The Security Council emphasizes that ending the climate of impunity is essential in a conflict and post-conflict society’s efforts to come to terms with past abuses, and in preventing future abuses. The Council draws attention to the full range of transitional justice mechanisms that should be considered, including national, international and ‘mixed’ criminal tribunals, truth and reconciliation commissions, and underlines that those mechanisms should concentrate not only on individual responsibility for serious crimes, but also on the need to seek peace, truth and national reconciliation.”¹⁸⁰

In his 2004 report, the Secretary-General defined transitional justice in broad terms, describing it as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”¹⁸¹ The Secretary-General specified that these mechanisms should include “individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof. [...] Where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof.”¹⁸²

The High Commissioner for Human Rights’ reports would come to round out and specify the notion of transitional justice, by defining it as the set of procedures and mechanisms, both judicial and extra-judicial, for the prosecution and punishment of the perpetrators of grave human rights violations, integral reparations for the victims, the pursuit for the truth, institutional reforms, and

¹⁸⁰ Statement by the President of the Security Council, “Justice and the Rule of Law: the United Nations Role,” S/PRST/2004/34 of 6 October 2004.

¹⁸¹ *The rule of law and transitional justice in conflict and post-conflict societies – Report of the Secretary-General*, S/2004/616 of 3 August 2004, para. 8.

¹⁸² *Ibid.* paras. 8 y 26.

administrative vetting of state agents implicated in serious violations of human rights.¹⁸³

"In all processes of transition toward a fully democratic government, one in which individual rights and the rights granted by society as a whole are guaranteed are respected, it is necessary to adopt a series of measures that are not always easily to implement. This does not imply that they should be impossible to achieve. [...] The first step that should be taken is re-establishing the judiciary's integrity and independence. [...] [I]n cases of serious violations of human rights committed by State agents, it is essential that the civilian justice system (la justicia civil) should have an absolute monopoly over the exercise of the State's punitive power. [...] With regards to impunity, it is urgent to avoid it through society's reconciliation with the past, recognition and implementation of the rights to truth and to justice. The first step for avoiding impunity is to have memory. Refusing to fall into collective amnesia, into oblivion. It is necessary to remember what has happened; it should not be hidden. [...] Amnesia or oblivion only divide society, between those who have been victims of violations of their human rights, who are not living in democracy who have reached a new legal remedy – that hadn't existed during authoritarian governments – and those who during those authoritarian regimes committed or, in a way, participated while protected by authoritarian governments, in violation of the human rights of the citizens they should have protected. [...] Once the truth is known, and the perpetrators and participants in human rights violations are known and identified, they should be tried and the victims should receive reparation."

Robert Goldman¹⁸⁴

¹⁸³ See, in particular: *Study by the Office of the United Nations High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the United Nations system*, E/CN.4/2006/93 of 7 February 2006; *Human rights and transitional justice – Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/4/87 of 23 December 2006; *Annual report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General – Analytical study on human rights and transitional justice*, A/HRC/12/18, of 6 August 2009; *Rule of law tools for post-conflict states – Amnesties*, New York and Geneva, 2009, index HR/PUB/09/1; *Rule of law tools for post-conflict states – Vetting processes: operational framework*, United Nations, New York and Geneva, 2006, index HR/PUB/06/5; *Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to truth*, A/HRC/17/21 of 14 April 2011.

¹⁸⁴ "La aplicación de la justicia en contextos transicionales. La efectividad y necesidad de judicializar los casos de violaciones de los derechos humanos" [Applying transitional justice. The effectiveness and necessity of prosecuting human

The successive reports by the Secretary-General and the High Commissioner would address and develop various aspects of transitional justice and of the fight against impunity. They would also highlight the adoption of the *Principles on Reparation*.¹⁸⁵

Thus, the notion of “transitional justice” developed by the United Nations is based on a holistic focus on processes of transition, oriented both toward overcoming the crimes of the past and laying the foundations for a State that acts as a guarantor of human rights, founded on the principles of the rule of law and in which all persons may exercise their fundamental liberties without fear of being victimized.

“[V]etting office holders for past violations is an important complement to prosecutions, for victims will have little reason to trust institutions that continue to be largely populated by rights abusers even if a few have been prosecuted. But vetting without substantive measures of corrective justice, consisting in a mere dismissal, will be unlikely to be seen as a significant contribution to justice given the magnitude of the violations that trigger it.”

Pablo de Greiff, UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.”¹⁸⁶

Transitional justice also points toward preventing the resurgence of human rights violations in the future. Hence, in the transitional justice framework, the United Nations has placed greater and greater emphasis on the need for institutional reforms and administrative vetting proceedings, particularly in the security sector. As Juan Méndez has stated: “preventative measures for the future, as part of a comprehensive transitional justice policy, demonstrate that the purpose of such policy is genuine national reconciliation. The vocation of reconciliation should be shown through the will to change the structural causes that in turn allowed the levees of contention to break and the consequent human tragedies reflected in disappearances, massacres of

rights violations], in *Democracia y derechos humanos en el Perú: del reconocimiento a la acción*, Fondo Editorial de la Pontificia Universidad Católica del Perú, Lima, 2005 pags. 32 et seq. (Original in Spanish, free translation).

¹⁸⁵ See, for example, *Uniting our strengths: Enhancing United Nations support for the rule of law – Report of the Secretary-General*, A/61/636–S/2006/980, of 14 December 2006, para. 25.

¹⁸⁶ *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff, A/HRC/21/46 of 9 August 2012, para. 24.

peasants, and extrajudicial executions. In order for peace to mean something more than the silence of arms and of tombs, it is necessary to pay attention to the conditions necessary for a lasting peace.”¹⁸⁷

The set of processes and mechanisms for transitional justice complement each other and form part of a holistic, coherent, and comprehensive focus. Likewise, transitional justice measures are founded on the State's compliance with its international obligations regarding: repressing of crimes under international law; effectively guaranteeing the rights of victims and their relatives to justice, truth and reparations; and guarantees of non-repetition, including institutional reforms and administrative vetting of institutions. Thus, the concept of “transitional justice” is not synonymous with exonerating the State of its international obligations, nor is it a *carte blanche* for impunity.

Nonetheless, initiatives occasionally appear in political or academic circles that seek to interpret the concept of transitional justice in such a way as to leave it empty and distorted, while also favoring impunity and non-compliance with the States' international obligations, both under treaties and customary international law. For example, invoking the circumstances of a transition, authorities in Colombia have promoted a *sui generis* vision of “transitional justice,” adopting a series of legal measures that promote impunity and the absence of institutional reforms and vetting of the armed forces.¹⁸⁸ Several of these measures have already been strongly criticized by human rights treaty bodies due

¹⁸⁷ “Reformas institucionales en procesos de transición y fortalecimiento democrático” [Institutional reforms in processes of transition and strengthening democracy], in *Democracia y derechos humanos en el Perú: del reconocimiento a la acción*, Fondo Editorial de la Pontificia Universidad Católica del Perú, Lima, 2005 pag. 53. (Original in Spanish, free translation).

¹⁸⁸ To cite some measures: Decree 128 of 2003, benefitting over 20,000 paramilitaries with impunity; Law 975 of 2005, on “Justice and Peace,” described as *de facto* amnesty by the Committee against Torture (*Concluding observations of the Committee against Torture: Colombia*, CAT/C/COL/CO/4 of 4 May 2010, paras. 13 and 14); the expansion of military jurisdiction, through Legislative Act No. 02 of 2012, which was declared unconstitutional by the Constitutional Court [*Corte Constitucional*]; Law No. 1448 of 2011, or “Law on Victims,” which expressly excludes guarantees of non-repetition, all review or modification of military doctrine, jurisdiction and functions of the Armed Forces (Art. 3.5); and the “Legal Framework for Peace” [*Marco jurídico para la paz*] - Legislative Act No. 01 of 2012 -, through which the State may abdicate its duty to investigate, prosecute and punish the perpetrators of war crimes, crimes against humanity and genocide.

to their incompatibility with the Colombian State's international obligations.¹⁸⁹ As Todd Howland, *Representative of the Office of the United Nations High Commissioner for Human Rights to Colombia*, rightfully said, "[t]he notion that is held or disseminated in Colombia about transitional justice is equally problematic. Frequently, transitional justice is spoken about as though it were a fantastic source of benefits for human rights violators. However, transitional justice is not a formula to be used to avoid going to jail. It isn't the sack of gifts that Santa Claus brings to human rights violators when there is a peace agreement; nor is it a magical cure for the bad things that have happened. Post-conflict justice emerges as an option for doing justice and restoring a sense of fairness in terms of the victims of human rights violations, not the victimizers."¹⁹⁰

Another example of efforts to reinterpret the concept of transitional justice is the adoption of the "Belfast Guidelines on Amnesty and Responsibility" by a group of academics and lawyers.¹⁹¹ Invoking "transitional justice" and based on a peculiar re-reading of international law, which does not appear to recognize the evolution over the past decades, they formulate criteria that are permissive of amnesties for grave human rights violations. It is worth emphasizing, however, that this approach was clearly rejected by the European Court of Human Rights, in a case seeking to validate these "Guidelines." In effect, the European Court reiterated that in accordance with the evolution of international law – customary norms of international law, human rights treaties, decisions of international and regional courts, and the development of state practice – amnesties are generally

¹⁸⁹ See, *inter alia*, *Concluding observations of the Human Rights Committee: Colombia*, CCPR/C/79/Add.76, of 5 May 1997 para. 32; *Concluding observations of the Committee against Torture: Colombia*, CAT/C/COL/CO/4 of 4 May 2010, paras. 13 and 14; *Concluding observations of the Human Rights Committee: Colombia*, CCPR/C/COL/CO/6, of 6 August 2010, paras. 9 and 10; Committee on the Rights of the Child, *Concluding observations: Colombia*, CRC/C/OPAC/COL/1, of 21 June 2010, paras. 30; Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined seventh and eighth periodic reports of Colombia*, CEDAW/C/COL/CO/7-8, of 29 October 2013, paras. 17 and 18.

¹⁹⁰ Todd Howland, "Aunque hay muchos desafíos, la paz con justicia es posible en Colombia" ["Although there are challenges peace with justice is possible in Colombia"], in *Revista Semana*, Bogotá, Edition: 12 November 2013 (Original in Spanish, free translation).

¹⁹¹ Published in *The Belfast Guidelines on Amnesty and Accountability*. (2013). Belfast: Ed. Transitional Justice Institute, University of Ulster.

incompatible with the State obligations to investigate and punish grave violations of human rights and international crimes.¹⁹²

"[N]o national project can be founded on the destruction of life, and that every social ideal should be affirmed in manifest violence is a fundamental misunderstanding and, in reality, contributes neither to justice nor to peace. [...] [A] society cannot learn to coexist in peace and justice if it is unable to recognize its wounds and its pain, if it does not return to its past in search of lessons. [...] The 'page,' due to moral cowardice or political calculations, cannot be 'turned' in our recent history without complying with the painful duty to read it and learn from it, as much for the moral commitment to dignify the victims as for reasons of political utility, center in the prevention of new violent acts. [...] It is necessary, then, to restore, or truly establish, justice in our society. [...] Justice is above all else an *ethical principle* regulating our social and political life, which expresses an ideal of human coexistence in which fundamental rights like the dignity and inviolability of the human being, individual freedom, equality in rights and opportunities, equity and solidarity, are respected and constitutionally guaranteed. Today, these principles and rights [...] are universally recognized and belong to our ethical patrimony and to the international legal order. [...] [I]n a judicial sense, establishing justice means that all possible efforts shall be taken to prosecute and punish the perpetrators of human rights violations and acts of violence. [...] In its restorative sense, establishing justice means all possible efforts shall be taken to directly compensate the victims of violence for the damages they have suffered. [...] In its political and social sense, establishing justice means that all possible efforts shall be taken to reform society's institutions in order to ensure that a similar national tragedy is not repeated. [...] If the truth is a precondition to reconciliation, justice is at once its condition and its result. [...] What is certain is that a democratic transition that gives up on reckoning with its past and establishing responsibility, has a profound deficit of legitimacy. [...] [M]aintaining impunity denies fundamental principles of democracy, since it retroactively permits crime, and establishes odious differentiations between persons who should be equals before the law. Examining the past, doing justice, repairing the victims and committing to a program of profound institutional and social transformations [...] is the only certain guarantee for laying the foundations for citizens' loyalty toward the democratic

¹⁹² First Section of the European Court, Judgment of 13 November 2012, Application No. 4455/10, Case of *Marguš v. Croatia*; and Grand Chamber of the European Court, Judgment of 22 May 2014, Application No. 4455/10, Case of *Marguš v. Croatia*.

regime, in order to develop and modernize the Judiciary and to promote effective participation in civic life by broad sectors of the population who have been marginalized for centuries.”

Truth and Reconciliation Commission of Peru (*Final Report*, Lima, 2003, excerpts from the “Introduction” – Original ins Spanish, free translation).

CHAPTER II: GROSS HUMAN RIGHTS VIOLATIONS AND CRIMES UNDER INTERNATIONAL LAW

1. Preliminary considerations

The question of impunity is intrinsically linked to the question of serious human rights violations and crimes under international law. In this regard, it is worth mentioning that the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Principles against Impunity)* stipulate that “[a]s used in these principles, the phrase ‘serious crimes under international law’ encompasses grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery.”¹⁹³

In this same vein, the *Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Principles on Reparation)* refer to “gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, [and with respect to which] 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.”¹⁹⁴ Hence the importance of clarifying the scope of the notions “serious violations of human rights,” “gross violations,” and “crimes under international law” (See Annex II).

2. Gross violations of human rights

International norms and standards, as well as case law and doctrine, indistinctly employ the terms “grave,” “serious,” “flagrant,” or “gross,” regarding human rights violations. For its part, case law and doctrine are consonant in that, even if they are indistinctly used, these notions all refer to the same phenomenon: grave human rights violations.

¹⁹³ Definition “B. Serious crimes under international law.”

¹⁹⁴ Article 4.

International law holds that, among other acts, torture, extrajudicial execution, enforced disappearance, sexual violence, and slavery are gross human rights violations. The UN General Assembly, on repeated occasions, has recalled that extrajudicial executions, torture, and enforced disappearances constitute gross human rights violations.¹⁹⁵ International human rights bodies' case law is consistent on this matter. The Human Rights Committee has repeatedly described, among other acts, torture, extrajudicial executions, and enforced disappearances as gross human rights violations.¹⁹⁶ This same description has been reiterated by Prof. Theo van Boven, Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, in his work drafting the *Principles on Reparation*.¹⁹⁷ The Special Rapporteur on Torture has considered that rape or other forms of sexual assault against women in detention settings constitute a particularly ignominious injury to the inherent dignity of the human being and to the right to her physical integrity, and constitute acts of torture.¹⁹⁸ The Special Rapporteur has also enumerated sexual

¹⁹⁵ See, for example, Resolutions No. 53/147 of December 1998, 55/11 of December 4, 2001, and 67/168 of December 20, 2012 (Extrajudicial, summary or arbitrary executions); Resolution No. 55/89 of February 22, 2001 (Torture and other cruel inhuman or degrading treatment or punishment); and Resolutions No. 49/193 of December 23, 1994, 51/894 of December 12, 1996, and 53/150 of December 9, 1998 (Enforced disappearance). For decades, numerous UN bodies have issued statements in this sense. For example, in relation to torture, see Resolution No. 7 (XXVII) of August 20, 1974 from the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.

¹⁹⁶ See, for example, Views of March 29, 1982, Communication No. 30/1978, Case of *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*; Views of March 31, 1982, Communication No. 45/1979, Case of *Pedro Pablo Camargo v. Colombia*; General Comment No. 31, *Nature of the General Legal Obligation on States Parties to the Covenant*; Views of October 27, 1995, Communication No. 563/1993, Case of *Nydia Erika Bautista v. Colombia*; Views of July 29, 1997, Communication No. 612/1995, Case of *José Vicente and Amado Villafañe Chaparra et al v. Colombia*; and *Concluding observations of the Human Rights Committee: Burundi*, August 3, 1994, CCPR/C/79/Add.41, para. 9.

¹⁹⁷ See UN Docs.: E/CN.4/1997/104, E/CN.4/Sub.2/1996/17 and E/CN.4/Sub.2/1993/8.

¹⁹⁸ Summary Record of the 21st Session of the UN Commission on Human Rights, UN Doc. E/CN.4/1992/SR.21, para. 35. See also UN Docs. E/CN.4/1995/34 and A/55/290.

assault among acts that entail grave suffering and that are sufficient to constitute torture.¹⁹⁹

The elements that characterize gross human rights violations are: i) the inderogable nature of the human rights affected and/or the violation of imperative norms of international law (*jus cogens*); and ii) the obligation that international law imposes to codify the absolute prohibition of these behaviors by making them crimes in national legislation, as well as to criminally try and punish the responsible parties for such acts.

The inderogable nature of certain human rights, or their intangible character, refers to the absolute prohibition, both in times of peace and states of emergency (for example in the case of armed conflict), of committing acts that imply the violation of these rights. The inderogability of certain human rights is enshrined both in international treaties and through *jus cogens* norms. For example, the *International Covenant on Civil and Political Rights* (ICCPR) and the *American Convention on Human Rights* (ACHR) establish the inderogability, *inter alia*, of the rights to not be arbitrarily deprived of life; to not be subjected to slavery or involuntary servitude; and to not be subjected to torture or inhuman treatment. The *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED) reaffirms the inderogable nature of the right to not be subjected to enforced disappearance. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*²⁰⁰ and the *Inter-American Convention to Prevent and Punish Torture*²⁰¹ prohibit torture at all times and in all circumstances.

Among the *jus cogens* norms are the prohibitions against torture and inhuman treatment,²⁰² enforced disappearance,²⁰³ extrajudicial

¹⁹⁹ See *Torture and other cruel, inhuman or degrading treatment or punishments, Report of the Special Rapporteur, Mr. P. Kooijmans, designated under Resolution 1985/33, E/CN.4/1986/15*, February 19, 1986.

²⁰⁰ Article 2.

²⁰¹ Article 5.

²⁰² See, *inter alia*: International Criminal Tribunal for the former Yugoslavia, Judgment of 10 December 1998, *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, para. 154; Judgment of 16 November 1998, *The Prosecutor v. Delalic and others*, Case No. IT-96-21-T, para. 454; and Judgment of 22 February 2001, *The Prosecutor v. Kunarac*, Cases No. IT-96-23-T and IT-96-23/1-T; Resolution No. 59/183 of the UN General Assembly; Resolution No. 2005/39 of the UN Commission on Human Rights; Committee against Torture, *General Comment No. 2, Implementation of Article 2 by States Parties*, CAT/C/GC/2 of 24 January 2008,

executions,²⁰⁴ taking hostages,²⁰⁵ sexual violence,²⁰⁶ and collective punishments.²⁰⁷ The Inter-American Court of Human Rights asserted that serious violations of human rights were “[actions] 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

para. 1; *Report of the United Nations Special Rapporteur on Torture*, United Nations document E/CN.4/1986/15, of 19 February 1986, para. 3; Inter-American Court of Human Rights, Judgment of July 8, 2004, Case of the *Brothers Gómez Paquiyauri v. Peru*, Series C No. 110, para. 111; Judgment of November 27, 2003, Case of *Maritza Urrutia v. Guatemala*, Series C No. 103, para. 89; and Judgment of August 18, 2000, Case of *Cantoral Benavides v. Peru*, Series C No. 69, para. 95; and Inter-American Commission on Human Rights, *Report on terrorism and human rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., of October 22, 2002, para. 155.

²⁰³ See, *inter alia*: Inter-American Court of Human Rights, Judgment of July 29, 1988, Case of *Velásquez Rodríguez v. Honduras*, Series C No. 4; Judgment of September 22, 2006, Case of *Goiburú and others v. Paraguay*, Series C No. 153; Judgment of November 22, 2005, Case of *Gómez Palomino v. Perú*, Series C No. 136; and Judgment of July 5, 2004, Case of *19 Tradesmen v. Colombia*, Series C No. 109. See also, International Criminal Tribunal for the former Yugoslavia, Judgment of 14 January 2000, Case of *The Prosecutor v. Zoran Kpreskic and others*, Case No. IT-95-16-A, para. 566.

²⁰⁴ See, *inter alia*: Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1980), Resolution No. 5 regarding “Extra-legal executions,” paras. 2 and 5, United Nations document A/CONF.87/14/Rev.1 (1981); Inter-American Court of Human Rights, Judgment of March 14, 2001, Case of *Barrios Altos v. Peru*, Series C No. 75; Judgment of May 11, 2007, Case of the *Massacre of la Rochela v. Colombia*, Series C No. 163; Judgment of September 26, 2006, Case of *Almonacid Arellano and others v. Chile*, Series C No. 154; and Judgment of October 25, 2012, Case of the *Massacres of El Mozote v. El Salvador*, Series C No. 252; and Inter-American Commission on Human Rights, *Recommendations on Asylum and International Crimes*, October 20, 2000, OEA/Ser.L/V/II.111, doc. 20 rev. 16.

²⁰⁵ See, *inter alia*: Human Rights Committee, *General Comment No. 29, States of Emergency (article 4)*, of 24 July 2001, United Nations document CCPR/C/21/Rev.1/Add.11, para. 11.

²⁰⁶ See, *inter alia*: Committee against Torture, *General Comment No. 2, Implementation of article 2 by States Parties*, Op. Cit.; Inter-American Court of Human Rights, Judgment of August 30, 2010, Case of *Fernández Ortega and others v. Mexico*, Series C No. 215; and Judgment of August 31, 2010, Case of *Rosendo Cantú and other v. Mexico*, Series C No. 216; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., of October 22, 2002; and International Criminal Tribunal for the former Yugoslavia, Judgment of 22 February 2001, *The Prosecutor v. Kunarac and others*, Case No. IT-96-22 and IT-96-23/1.

²⁰⁷ *Ibid.*, para. 11, and Rules No. 103 y 156, in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Ed. ICRC, Cambridge University Press.

law.”²⁰⁸ As the UN Human Rights Committee has emphasized, “States parties may in no circumstances invoke article 4 of the Covenant [ICCPR] as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty [...]”²⁰⁹ The Committee has indicated that under no circumstance may acts such as kidnapping, unacknowledged detention, deportation or forced transfer of the population, and apology to national, racial or religious hatred constituting incitement to discrimination, hostility or violence be committed without grounds permitted by international law.²¹⁰

The high courts of justice in Latin America have adopted decisions in the same vein. For example, the Peruvian Constitutional Court (*Tribunal Constitucional de Perú*) has indicated that “the obligations assumed by the Peruvian State through the ratification of human rights treaties include the duty to guarantee the rights that are inderogable under international law and the violation of which the State has assumed the international obligation to sanction. In response to the mandate contained in the [...] Code of Constitutional Procedure, we turn to the treaties that have crystallized the absolute prohibition of the crimes that, in accordance with international law, cannot be subject to amnesties, insofar as they breach the minimum standards for protecting the dignity of the human person.”²¹¹ For its part, the Supreme Court of Justice of Colombia (*Corte Suprema de Justicia de Colombia*) has indicated that “the rules related to human rights form part of a large group of provisions of general international law, which are recognized of *jus cogens* norms. For this reason, they are inderogable, peremptory [...] and indispensable.”²¹²

²⁰⁸ Judgment of 14 March 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, para. 41. In the same sense, see, *inter alia*: Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 152; and Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 225.

²⁰⁹ *General Comment No. 29, States of Emergency (article 4)*, of 24 July 2001, para. 11.

²¹⁰ *Ibid.*, paragraph 13 (b), (d) and (e).

²¹¹ Judgment of 2 March 2007, *Case of Santiago Martín Rivas*, Recurso de agravio constitucional [*constitutional tort action*], Case File No. 679-2005-PA/TC, para. 30 (Original in Spanish, free translation).

²¹² Judgment of 13 May 2010, View No. 156, *Case of the Massacre of Segovia*, pag. 68 (Original in Spanish, free translation).

The second element that characterizes gross violations of human rights, derived from the *jus cogens* prohibition of committing such acts, is the obligation that international law imposes on the States to curb these behaviors through the use of its criminal jurisdiction. Various international treaties²¹³ and instruments²¹⁴ specifically impose such an obligation. This obligation has been reiterated by the UN General Assembly with regards to sexual violence,²¹⁵ torture and other cruel, inhuman or degrading treatment or punishment,²¹⁶ extrajudicial executions;²¹⁷ and enforced disappearance.²¹⁸

In this regard, the Inter-American Court of Human Rights has specified that “faced with the gravity of certain offenses, the norms of international customary and treaty-based law establish the obligation to prosecute those responsible.”²¹⁹

Thus, torture, extrajudicial executions and enforced disappearances, among other gross human rights violations,

²¹³ See, *inter alia*: *Convention against Torture and other cruel, inhuman or degrading treatment or punishment* (Art. 4); *International Convention for the Protection of All Persons from Enforced Disappearance* (Arts. 7 and 25); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (Art. 3); *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (Art. 4); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (Art. 5); *Inter-American Convention to Prevent and Punish Torture* (Art. 6); *Inter-American Convention on Forced Disappearance of Persons* (Art. III); and *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (Art. 7).

²¹⁴ See, *inter alia*: *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 1); *Declaration on the Elimination of Violence against Women* (Art. 4); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 4); *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 7); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principle 7).

²¹⁵ See, for example, Resolution No. 62/134, “Eliminating rape and other forms of sexual violence in all their manifestations, including in conflict and related situations,” of 18 December 2007, paras. 9, 14 and 16.

²¹⁶ See, for example, Resolution No. 65/205, “Torture and other cruel, inhuman or degrading treatment or punishment,” of 21 December 2010, para. 2.

²¹⁷ See, for example, Resolution No. 61/173, “Extrajudicial, summary or arbitrary executions,” of 19 December 2006, para. 3.

²¹⁸ See, *inter alia*, Resolution No. 47/133 of 18 December 1992.

²¹⁹ Judgment of September 22, 2006, *Case of Goiburú and others v. Paraguay*, Series C No. 153, para. 128.

constitute crimes under international law. As international crimes, their legal status is prescribed by both treaty and customary international law.

3. Crimes against humanity

The creation of the International Military Tribunal at Nuremberg contributed the first definition of a crime against humanity. François de Menthon, Attorney General of France in the Nuremberg trials, defined them as crimes against the human condition, as a capital crime against the conscience that today's human beings have as their own condition.²²⁰ The Charter of the Nuremberg Tribunal classified as crimes against humanity: murders, extermination, slavery, deportation and other inhuman acts committed against any civilian population, before or during World War II and persecution for political, racial or religious reasons in the commission of any other crime under the jurisdiction of the Tribunal or related to the same. The notion of crimes against humanity responds to the international community's need to recognize that "there are 'elementary dictates of humanity' to be recognized under all circumstances"²²¹ and today they form part of the principles accepted by international law. The UN General Assembly confirmed it as such on 11 December 1946, through Resolution 95 (I).

"[M]ost norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character."

International Criminal Tribunal for the former Yugoslavia²²²

The notion of crimes against humanity seeks to preserve, through international criminal law, a nucleus of fundamental rights whose safeguarding constitutes a peremptory norm of international law, since "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are

²²⁰ Dobkine, Michel, *Crimes et humanité - extraits des actes du procès de Nuremberg - 18 octobre 1945/ 1er. Octobre 1946*, Ediciones Romillat, Paris 1992, p. 49-50.

²²¹ *Final Report of the Commission of Experts Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674, of 27 May 1994, para. 73.

²²² Judgement of 14 January 2000, *The Prosecutor v. Kupreskic et al* ("Lasva Valley" Case), Case IT-95-16, para. 520.

obligations *erga omnes*.²²³ This means that these obligations are the minimum required of all States and by all States. As the International Criminal Tribunal for the former Yugoslavia stated: "Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity."²²⁴

The Charter of the Nuremberg Tribunal tied the notion of crimes against humanity to the existence of an armed conflict. This restraining condition has now been permanently removed, and today international law does not require this link to armed conflict in order for acts to constitute crimes against humanity. Thus, in accordance with international law, crimes against humanity may be committed both in peacetime and emergencies, and in wartime or internal armed conflict. This has been amply reiterated by normative international law instruments,²²⁵ as well as by the case law of the international criminal tribunals for Rwanda and the former Yugoslavia. As the International Criminal Tribunal for the Former Yugoslavia has specified: "customary international law no longer requires any nexus between crimes against humanity and armed conflict. [...] It is by now a settled rule of customary international law that crimes against humanity do not require a

²²³ International Court of Justice, Judgment of 5 February 1970, *Case concerning Barcelona Traction Light and Power Company, Limited*, para. 33, in *Reports of Judgments, Advisory Opinions and Orders - 1970*.

²²⁴ Judgement of 29 November 1996, *The Prosecutor v. Erdemovic*, Case No. IT-96-22-T.

²²⁵ See, *inter alia*: the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (Art. 1.b); the *Convention on the Prevention and Punishment of Genocide* (Art. 1); the *Rome Statute of the International Criminal Court* (Art. 7); the *Statute of the International Criminal Tribunal for Rwanda* (Art. 3); the *Statute of the Special Court for Sierra Leone* (Art. 2); and the "Elements of crimes", "Article 7 Crimes against humanity, Introduction," para. 3, in *Assembly of States Parties to the Rome Statute of the International Criminal Court, First period of sessions New York, 3 to 10 September 2002 Official documents*, Doc. ICC-ASP/1/3, p. 120.

connection to international armed conflict.”²²⁶ The UN Secretary-General has also specified that “[c]rimes against humanity [...] are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.”²²⁷ The International Criminal Tribunal for the former Yugoslavia has likewise specified that a crime against humanity can be committed both against a civilian population, whichever it be, and against members of the parties to an armed conflict.²²⁸

It should be noted that crimes against humanity are crimes under international law. As the UN International Law Commission indicated, “a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*,”²²⁹ is an international crime, which is governed by peremptory norms of international law. This means that its content, its nature and the conditions for showing responsibility for it are established by international law, independent of what may be established in the domestic law of the States. In this sense, it is legally impossible for the perpetrators of violations of the most fundamental human rights, which are breached through crimes against humanity, to not be brought to trial and punished. Accordingly, a State’s international obligation to prosecute and punish the perpetrators of crimes against humanity is a peremptory norm of international law pertaining to *jus cogens*. The Inter-American Court of Human Rights has indicated that the “prohibition to commit crimes against humanity is a *jus cogens* rule and the punishment of such crimes is obligatory pursuant to the general principles of international law,”²³⁰ and that “[c]rimes against humanity give rise to the violation of a series of undeniable

²²⁶ Judgement on preliminary objections (Jurisdiction) of 2 October 1995, *The Prosecutor v. Tadić*, Case No. IT-94-1 (“Prijedor” Case), paras. 78 and 141.

²²⁷ *Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) and its annexes*, United Nations document S/25704, para. 47.

²²⁸ Judgment of 7 May 1997, *The Prosecutor v. Tadić*, IT-94-1 (“Prijedor”), para. 640. See also: Judgment 13 April 1996, *The Prosecutor v. Mile Mskic, Miroslav Radic and Veselin Slivjancanin* (“Vukovar Hospital” Case), Case No IT-95-13-R61, paras. 20 and 32.

²²⁹ International Law Commission, *Yearbook of the International Law Commission*, 1976, Vol. II, Part Two, p. 75.

²³⁰ Judgment of September 26, 2006, *Case of Almonacid Arellano and others v. Chile*, Series C No. 154, para. 100.

rights that are recognized by the American Convention, which [] cannot remain unpunished.”²³¹

Although the legal instruments arising after the Nuremberg Charter and Trials have delved deeper into the definition of crimes against humanity, there is general agreement regarding the types of inhuman acts that constitute crimes against humanity, which essentially are the same ones that were recognized nearly eighty years ago. In light of the current development of international law, as much customary as treaty-based, genocide, apartheid and slavery constitute crimes against humanity. Also, the systematic or widespread practice of murder, torture, enforced disappearance, prolonged arbitrary detention, enslavement, political, racial, religious or ethnic persecution, rape and other forms of sexual abuse, and arbitrary deportation or forcible transfer of populations have been considered crimes against humanity. A number of these crimes against humanity have been the subject of international conventions including, among others, the *International Convention on the Suppression and Punishment of the Crime of Apartheid* and the *Convention on the Prevention and Punishment of the Crime of Genocide*.

Unlike the definition of Genocide and the crime of *Apartheid*, the definition of crimes against humanity appears in diverse instruments and has undergone modifications, reflecting the evolution of international law. The systematic practice of enforced disappearance of persons has been considered a crime against humanity under the *Declaration on the Protection of All Persons from Enforced Disappearance* (DED) and the *Inter-American Convention on Forced Disappearance of Persons* (IACFDP). For its part, the *International Convention for the Protection not all Persons from Enforced Disappearance* (ICPED) stipulates that “[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall affect the consequences provided for under such applicable international law.”²³²

In light of the current development of international law, both customary and treaty-based, in addition to genocide and the crime of *apartheid*, the following acts, when committed as part of a

²³¹ *Ibid.*, para. 111.

²³² Article 5.

widespread or systematic practice or as part of a large-scale or systematic attack against the civilian population, constitute crimes against humanity:

- Murder;
- Extermination;
- Torture;
- Inhuman acts;
- Enforced disappearance;
- Prolonged arbitrary detention;
- Slavery and reduction to a state of bondage or forced labour;
- Persecution for political, racial, religious or ethnic reasons;
- Rape and other forms of sexual abuse; and
- Arbitrary deportation or forcible transfers of populations.

Although some international instruments that define crimes against humanity refer to their commission as “part of an attack against the civilian population,” this does not mean that only civilians can be victims of this type of crime under international law. In effect, the International Criminal Tribunal for the former Yugoslavia has specified that a crime against humanity can be committed both against a civilian population, whichever population it may be, and against the members of the parties to an armed conflict.²³³

Likewise, it is worth mentioning that although the international instruments refer to the concepts of “widespread or systematic practice” or of “large-scale or systematic attack,” international case law has established that a single act may constitute a crime against humanity if it occurs within such a practice or attack. The International Criminal Tribunal for the former Yugoslavia has indicated as much: “a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable.”²³⁴ The Inter-American Court has decided the same

²³³ Trial Chamber, Judgement of 7 May 1997, *The Prosecutor v. Tadić* (“Prijeđor”), Case No. IT-94-1, paras. 640 *et seq*; Trial Chamber, Judgement of 13 April 1996, *The Prosecutor v. Mile Mskic, Miroslav Radic and Veselin Slivjancanin*, (“Vukovar Hospital”), Case No. IT-95-13-R61, paras. 20 and 32.

²³⁴ Judgement of 7 May 1997, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T. See also: Judgement of 14 January 2000, *The Prosecutor v. Kupreski et al*, Case No. IT-95-16-T; and Judgement of 26 February 2001, *Case of The Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T.

way.²³⁵ In this regard, the United Nations International Law Commission specified that the concept of systematic "excludes a random act which was not part of a broader plan or policy."²³⁶

4. Genocide

Historically, genocide has been considered a special category of crimes against humanity.²³⁷ Even if the British Prime Minister Winston Churchill had referred to it as an "unnamed crime," the Charter of the Nuremberg Tribunal did not expressly include genocide in its catalogue of crimes. Nonetheless, in the Count 3 of the Indictment of the Nuremberg Trial, various Nazi leaders were accused of "systematic genocide," for the "extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others."²³⁸ Although the Nuremberg Tribunal did not reference the concept of genocide, in its judgment it classified the facts alleged by the prosecution by way of "genocide" as "other inhuman acts," in accordance with Article 6(c) of the Nuremberg Charter.²³⁹

The UN General Assembly's Resolution 96 (I), of 11 December 1946, put an end to the lack of a definition. The General Assembly declared that "genocide [...] is contrary to the moral law and to the spirit and aims of the United Nations",²⁴⁰ and is "a crime under

²³⁵ Judgment of September 26, 2006, *Case of Almonacid Arellano and others v. Chile*, Series C No. 154, para. 96.

²³⁶ *Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996*, A/51/10, pag. 100.

²³⁷ *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, (Article I.b); *Fourth report on the Draft Code of Crimes against the Peace and Security of Mankind*, by Mr. Doudou Thiam, of the United Nations International Law Commission, in UN document A/CN.4/398, of 11 March 1986, pages. 10 *et seq*; David, Eric, *Principes de droit des conflits armés [Principles of the law of armed conflicts]*, Editions Bruylant, Bruxelles 1994, pages. 601 *et seq*; Bassiouni, Cherif, *Derecho Penal Internacional [International Criminal Law]*, Editorial Técnos, Madrid 1984, pag. 126; and Quintano Ripollés, Antonio, *Tratado de Derecho Penal Internacional e Internacional Penal [Treatise on International Criminal Law]*, Instituto "Francisco de Vitoria", Madrid, 1955, Tomo I, pag. 643.

²³⁸ See, Count 3 of the Indictment in: <http://avalon.law.yale.edu/imt/count3.asp>.

²³⁹ Schabas, William A. "Le génocide", in Hervé Asencio, Emmanuel Decaux et Alain Pellet, *Droit international pénal*, Editions A. Pedone, Paris, 2000, pag.319, para. 1.

²⁴⁰ Resolution 96 (I), "The Crime of Genocide", 11 December 1946. The official translations are in French and English. The French version uses the term "droit des gens", while the English one uses "international law."

international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable.”²⁴¹ Later, genocide was defined as a specific and autonomous crime in the *Convention on the Prevention and Punishment of the Crime of Genocide* in 1948. As the International Court of Justice explained: “it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946).”²⁴²

The *Convention for the Prevention and Punishment of the Crime of Genocide* defined this crime as the commission of various acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”²⁴³ This definition has been taken up verbatim in the Statutes of all the international criminal tribunals.²⁴⁴

Genocide is an international crime, under treaty-based international law,²⁴⁵ under customary international law,²⁴⁶ as has

²⁴¹ *Ibidem*.

²⁴² International Court of Justice, Advisory Opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.

²⁴³ Article 2 of the Convention establishes that “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.”

²⁴⁴ Statutes of the International Criminal Tribunal for the former Yugoslavia (Art. 4), of the International Criminal Tribunal for Rwanda (Art. 2) and of the International Criminal Court (Art. 6).

²⁴⁵ The *Convention for the Prevention and Punishment of the Crime of Genocide* and the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (Art. 1).

²⁴⁶ The *Statute of the International Criminal Tribunal for the former Yugoslavia* (Art. 4); the *Statute for the International Criminal Tribunal for Rwanda* (Art. 2) and the *Rome Statute of the International Criminal Court* (Art. 6).

recalled since 1951 by the International Court of Justice,²⁴⁷ international case law,²⁴⁸ and national jurisprudence.²⁴⁹

Although historically, genocide has been considered a special category of crime against humanity,²⁵⁰ it has been defined as an autonomous crime, which is characterized by its subjective element, or its specific intent, meaning the intent to destroy a particular human group in whole or in part.²⁵¹ As the Attorney General of Warsaw pointed out, in the *VIII Conference for the Unification of Penal Law* (Brussels 1947), genocide is “a qualified form, the most brutal and dangerous, of the crime against humanity.”²⁵² The Special Rapporteur in charge of the draft *Code of Crimes against the Peace and Security of Mankind* considered that genocide was a specific modality of the crime against humanity, which is characterized by its subjective element, or its

²⁴⁷ International Court of Justice, Advisory opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.

²⁴⁸ See, *inter alia*: International Criminal Tribunal for Rwanda, Judgment of 2 October 1998, *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, para. 495, and Judgment of 21 May 1999, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, para. 88; and International Criminal Tribunal for the former Yugoslavia, Judgment of 2 August 2001, *The Prosecutor v. Radislav Krstic* (“Srebrenica” Case), Case No. IT-98-33, para. 541.

²⁴⁹ Supreme Court of Israel, Judgment of 29 May 1962, *Case of Attorney General of Israel v. Eichmann*, published in *International Law Reports*, Volume N° 36; National Court of Spain (*Audiencia Nacional de España*), Criminal Chamber, 4 November 1998, Appeal 84/98 – Third Section – Case 19/97 “Genocide and terrorism,” and Order of 5 November 1998, Appeal 173/98– First Section – Case 1/98.

²⁵⁰ Although in 1948 the UN General Assembly adopted the *Convention for the Prevention and Punishment of the Crime of Genocide*, the crime of genocide continued to be considered a modality of the crime against humanity. Thus the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, adopted in 1968, included the crime of genocide among the crimes against humanity (Article I.b). The UN International Law Commission, in its work on the *Draft Code of Crimes against the Peace and Security of Mankind*, embodied the same perspective.

²⁵¹ See, *inter alia*: Quintano Ripollés, Antonio, *Tratado de Derecho Penal Internacional e Internacional Penal*, Instituto “Francisco de Vitoria”, Madrid, 1955, Tomo I pag. 627; *Fourth report on the Draft Code of Crimes against the Peace and Security of Mankind*, by Mr. Doudou Thiam, of the UN International Law Commission, in UN Doc. A/CN.4/398, of 11 March 1986, p. 10 *et seq*; and International Criminal Tribunal for Rwanda, Judgment of 21 May 1999, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, para. 89.

²⁵² See Quintano Ripollés, Antonio, *Tratado de Derecho Penal Internacional e Internacional Penal [Treatise on International Criminal Law]*, Instituto “Francisco de Vitoria”, Madrid, 1955, Tomo I, pag. 643.

specific intent.²⁵³ In 1955, the scholar Quintano Ripollés rightly pointed out that: “[t]he crime of genocide is made up of various acts, all of them subordinate to the specific intent to destroy a human group.”²⁵⁴ Subsequently, the International Criminal Tribunal for Rwanda would define it the same way, indicating that “[g]enocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in ‘the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’.”²⁵⁵

“The definition of the crime of genocide was based upon that of crimes against humanity, that is, a combination of ‘extermination and persecutions on political, racial or religious grounds’ and it was intended to cover ‘the intentional destruction of groups in whole or in substantial part’ [...]. The crime of genocide is a type of crime against humanity. Genocide, however, is different from other crimes of humanity. The essential difference is that genocide requires the aforementioned specific intent to exterminate a protected group (in whole or in part) while crimes against humanity require the civilian population to be targeted as part of a widespread or systematic attack.”

International Criminal Tribunal for Rwanda²⁵⁶

If the Nuremberg Charter linked the notions of crimes against humanity – and implicitly, genocide – to the existence of an armed conflict, that link has now been removed, and today international law does not require this link to constitute genocide, nor is it required for crimes against humanity. The case law on this matter is abundant, but it has also been confirmed by international

²⁵³ Ver, entre otros, *Cuarto Informe del Relator Especial sobre el Proyecto de Código de Crímenes contra la Paz y la Seguridad de la Humanidad*, Sr. Doudou Thiam, de la Comisión de Derecho Internacional de las Naciones Unidas, en documento A/CN.4/398, de 11 de March de 1986, págs. 10 y siguientes.

²⁵⁴ Quintano Ripollés, Antonio, *Tratado de Derecho Penal Internacional e Internacional Penal [Treatise on International Criminal Law]*, Instituto “Francisco de Vitoria”, Madrid, 1955, Tomo I pag. 627.

²⁵⁵ Judgment of 2 September 1998 of the First Chamber of the International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, para. 498.

²⁵⁶ Trial Chamber II of the International Criminal Tribunal for Rwanda, Judgment of 21 May 1999, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, para. 89.

treaties. Article I of the *Convention on the Prevention and Punishment of the Crime of "confirm[s] that genocide, whether committed in time of peace or in time of war, is a crime under international law."* Likewise, the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* refers to the crime of genocide as "committed in time of war or in time of peace."²⁵⁷

The International Court of Justice has reaffirmed genocide's nature as a breach of customary international law, indicating that the *Convention for the Prevention and Punishment of the Crime of Genocide* is based on principles "which are recognized by civilized nations as binding on States, even without any conventional obligation."²⁵⁸ Its character as *crimen juris gentium* was also ratified early on by national courts,²⁵⁹ the International Criminal Tribunal for Rwanda,²⁶⁰ and the International Criminal Tribunal for the former Yugoslavia.²⁶¹ The *Convention for the Prevention and Punishment of the Crime of Genocide* in 1948 and subsequent international instruments did not include political groups as one of the passive subjects of the crime of genocide. Nonetheless, in Resolution 96 (I) of 11 December 1946, the United Nations General Assembly did include it. The Assembly General expressly referred to the "crimes of genocide [that] have occurred when political [...] groups have been destroyed, entirely or in part." Likewise, in this Resolution, the General Assembly "[a]ffirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public official or statesmen, and whether the crime is committed on [...] political [...] or any other grounds – are punishable." (Emphasis added.) It is worth emphasis that, when defining genocide in their domestic criminal laws, various countries have incorporated political motives

²⁵⁷ Article I.

²⁵⁸ Advisory opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pag. 24.

²⁵⁹ See, for example: Supreme Court of Israel, Judgment of 29 May 1962, Case of *Attorney General of Israel v. Eichmann*, published in *International Law Reports*, Volume No. 36, London, 1968.

²⁶⁰ Judgment of 2 October 1998, *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, para. 495; and Judgment of 21 May 1999, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, para. 88.

²⁶¹ Judgment of 2 August 2001, *The Prosecutor v. Radislav Krstic ("Srebrenica" Case)*, Case No. IT-98-33, para. 541.

among the motives for the commission of the crime (specific intent) against political groups as the passive subject of the crime.²⁶² Other countries have expanded the spectrum of protected groups under the Convention.²⁶³ For example, the crime of genocide in several countries expressly includes other “similar” groups or groups “determined by arbitrary criteria.”²⁶⁴ Legal doctrine has considered that political groups fit within these categories.

In some countries, criminal cases have been opened for political genocide, whether invoking Resolution 96 (I) of the General Assembly or invoking domestic criminal laws. In the case of the crimes of the Argentine dictatorship, the National Court of Spain (*Audiencia Nacional de España*) considered that although the *Convention for the Prevention and Punishment of the Crime of Genocide* did not include political groups, “silence is not equivalent to unfailing exclusion. [...] The prevention and punishment of genocide as genocide itself – that is, as an international crime – [...] cannot exclude, without a reason to do so within the logic of the system, certain distinct national groups, discrimination against them for others.”²⁶⁵ Invoking UN General Assembly Resolution 96 (I), the Spanish National Court concluded that persecution and crimes committed against those who formed a “distinct human group” opposed to the military regime or “who did not fit within the project of national reorganization” of the dictatorship

²⁶² See, for example: Angola (Art. 164 of Criminal Code of 2002); Bangladesh (Act on International Crimes of 1973 -Act No. XIX of 1973); Colombia (Law 589 of 2000, Arts. 101 y 102); Cote d’Ivoire (Art. 137 of Criminal Code of 1981); Ethiopia (Art. 281 of Criminal Code of 1957 and Art. 257 of Criminal Code of 2004); Nicaragua (Art. 484 of Criminal Code); Poland (Art. 118 of Criminal Code of 1997); and Uruguay (Art. 16 of Law 18.026 of 2006) .

²⁶³ For example, the Criminal Code of Estonia (Art. 90) includes groups that fight against foreign occupation; the Criminal Code of Canada (Art. 318) includes identifiable groups que are differentiated due to their sexual orientation; and the criminal codes of Estonia (Art. 90), Lithuania (Art. 71) and Paraguay (Art. 319) refer to other social groups.

²⁶⁴ See, for example: Burkina Faso, Law No. 052 of 2009; Congo, Art. 1 of Law 8-98 of 1998; Philippines, Criminal Code; Finland, Criminal Code; France, Art. 211-1 of Criminal Code; Georgia, Art. 407 of Criminal Code of 2000; Niger, Art. 208.1 of Criminal Code; Czech Republic, Art. 400 of Criminal Code of 2009; and Senegal, Art. 231-1 of Criminal Code, reformed in 2007.

²⁶⁵ National Court (*Audiencia Nacional*), Criminal Chamber (*Sala de lo Penal*), Decision of 4 November 1998, Files Appeal No. 84/98 – Section 3– Case (*Sumario*) No. 19/97 – Central Examining Magistrate No. 5 (*Juzgado Central de Instrucción Número Cinco*) (Original in Spanish, free translation).

constituted the crime of genocide. In Colombia, in deciding on the constitutionality of the law that established the crime of genocide, including against political groups,²⁶⁶ the Constitutional Court considered "that no objection can be made to the expansion of protection from genocide against political groups, [...] since it is known that the regulations contained in international treaties and covenants establishes a minimum parameter of protections, such that nothing stands in the way of the States establishing a higher level of protection through their domestic legislation. [...] Thus, there is no obstacle to keep national laws from adopting a broader concept of genocide, so long as they preserve the essence of the crime, which is the systematic and deliberate destruction of a human group, which has a defined identity. And undoubtedly a political group has it."²⁶⁷

Nonetheless, beyond the question of genocide against political groups or for political motives, massive and systematic persecution for political motives or reasons constitute a crime against humanity.²⁶⁸ The International Criminal Tribunal for the former Yugoslavia has stated that instances of persecution for political motives – where there are massive or systematic violations of fundamental rights, or the commission of inhuman acts or acts that affect the physical or mental integrity of persons, for political reasons – constitute crimes against humanity.²⁶⁹

²⁶⁶ Ley No. 589, "Por medio de la cual se tipifica el genocidio, la desaparición forzada, el desplazamiento forzado y la tortura; y se dictan otras disposiciones", de 24 de July de 2000.

²⁶⁷ Judgment C-177/01 of 14 February 2001, Case File D-3120 (Original in Spanish, free translation).

²⁶⁸ See, *inter alia*: Principle VI (c) of *Principles of International Law Recognized in the Charter of Nürnberg Tribunal and in the Judgment of the Tribunal*, adopted by the UN International Law Commission; Article 18 (e) of the *Draft Code of Crimes against the Peace and Security of Mankind*, of the UN International Law Commission; Article 3 (h) of the *Statute of the International Tribunal for Rwanda* ; Article 5 (g) of the *Statute of the International Tribunal for the Former Yugoslavia* ; Article 7 (1,h y 2,g) of the *Rome Statute of the International Criminal Court* ; and Article 2 (g) of the *Statute of the Special Court for Sierra Leona*.

²⁶⁹ Judgment of 14 January 2000, *The Prosecutor v. Kupreskic et al*, Case No. IT-95-16-T, para. 605; Judgment of 3 March 2000, *The Prosecutor v. Blaskic*, Case No. IT-95-15-T, para. 220; Judgment of 26 February 2001, *The Prosecutor v. Kordic and Cerkec*, Case No. IT-95-14/2-T, para. 198; Judgment of 2 August 2001, *The Prosecutor v. Kstic*, Case No. IT-98-33-T, paras. 533-538; Judgment of 3 March 2000, *The Prosecutor v. Kvočka et al*, Case No. IT-98-30/1-T, paras. 184-205; and Judgment of 15 March 2002, *The Prosecutor v. Krnojelac*, Case No. IT-95-15-T, para. 433.

5. Grave Breaches of international humanitarian law and war crimes

Common Article 3 of the four Geneva Conventions of 12 August 1949 and the *Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II) define breaches of international humanitarian law in the context of internal armed conflicts. Also, in addition to these treaty-based norms there are customary norms applicable to internal conflicts, mainly collected under what is commonly known as “the laws and customs of war.”

The concept of “grave breaches” (or “serious violations”) of international humanitarian law – equivalent to “war crimes” – was originally limited to international conflicts. As Thomas Graditzky points out, “[i]n 1949 it was generally considered that an extension of the system of grave breaches to cover internal conflicts would be viewed as an unacceptable encroachment on State sovereignty. When the Protocols additional to the Geneva Conventions were adopted, on 8 June 1977, States had not changed their stance in this respect.”²⁷⁰ Certainly “the treaty law applicable in non-international armed conflicts does not make any specific provision for the prosecution of serious violations of its rules. Common Article 3 has nothing to say in this respect, and Protocol II does not provide for any system similar to the mechanism for dealing with grave breaches established by the 1949 Conventions and supplemented by Protocol I.”²⁷¹ The notion of a grave breach of international humanitarian law or of a war crime implies a special legal system under international law, namely the application of the of the principles of universal jurisdiction and the non-applicability of statutes of limitations, among others. However, this does not mean that breaches of international humanitarian law and of “the laws and customs of war” committed within an armed conflict escape the State’s judicial control. As the International Criminal Tribunal for the former Yugoslavia has stated, “it is universally acknowledged that the acts

²⁷⁰ Thomas Graditzky “International criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts,” in *International Review of the Red Cross*, No. 145, March 1998. See the ICRC web page: <http://www.icrc.org/eng/resources/documents/misc/57jp41.htm>.

²⁷¹ *Ibid.*

enumerated in common Article 3 are wrongful and shock the conscience of civilized people.”²⁷²

Today, in accordance with the current development of international law, the concept of “grave breaches” or “serious violations” of humanitarian law and of “the laws and customs of war” include those prohibited behaviors that are committed within an internal armed conflict and, thus, are considered war crimes. After analyzing the evolution of international law on the subject, the UN Security Council resolutions,²⁷³ as well as national practices, the International Criminal Tribunal for the former Yugoslavia considered that “customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife. [...] [T]he notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity.”²⁷⁴ The *Rome Statute of the International Criminal Court* confirms this, by defining grave breaches of Common Article 3 of the Geneva Convention and the “laws and customs” of war as war crimes.²⁷⁵

The International Committee of the Red Cross (ICRC) has concluded that it is a norm of customary international humanitarian law, applicable both to international and internal armed conflicts, that “serious violations of international humanitarian law constitute war crimes.”²⁷⁶

²⁷² Appeals Chamber, Judgement of 20 February 2001, *The Prosecutor v. Mucic et al* (“*Elebici*” Case), Case No. IT-96-21, para. 173.

²⁷³ En particular las resoluciones 794, de 3 de December de 1992, y 814, de 26 de March de 1993, sobre Somalia.

²⁷⁴ Judgement on preliminary objections (Jurisdiction) of 2 October 1995, *The Prosecutor v. Tadić* (“*Prijedor*” Case), Case No. IT-94-1, paras. 134 y 135. See also: Appeals Chamber, Judgement of 20 February 2001, *The Prosecutor v. Mucic et al* (“*Elebici*” Case), Case No. IT-96-21.

²⁷⁵ Article 8, paragraph 2°, letras c), d), e) y f) of the *Rome Statute of the International Criminal Court*.

²⁷⁶ Rule 156, in *Customary International Humanitarian Law, Volume I: Rules*, Doc. Cit., . 568.

Today, international law considers that the notion of war crimes applies to grave breaches committed during internal conflicts, despite the fact that normally, in treaty-based law, they are only admitted in international armed conflicts. That is to say, serious violations of international humanitarian law committed within an internal armed conflict are subject to the principle of universal jurisdiction and are not subject to statutes of limitations. Deliberate homicide; mutilations; torture; cruel, humiliating or degrading treatment; recruitment of child soldiers under 15 years of age or their active use in the conflict; hostage-taking; rape, sexual slavery and forced prostitution during an armed conflict or instigated by one of the parties to the conflict; and attacks against the civilian population, as such, are some of the grave breaches of Common Article 3 of the Geneva Conventions and of “the laws and customs” of war that constitute war crimes under international law. It goes without saying that serious violations of international humanitarian law also address numerous behaviors and methods of war prohibited by Protocol II.

6. The autonomy of international crimes

International law establishes the system of criminal responsibility for and prosecution of grave human rights violations constituting international crimes, crimes against humanity, genocide and war crimes, independent of what the domestic law of the States may establish. For example, the Argentine Supreme Court of Justice (*Corte Suprema de Justicia de la Nación*) indicated “that the category of crimes against humanity does not depend on the will of the requesting or requested States in the extradition process, but rather on the *jus cogens* principles of international law.”²⁷⁷ In the prevention and punishment of international crimes, the States are bound to observe the legal regime established by international law, both treaty-based and customary.

The principles of legality of crimes – *nullum crimen sine lege* – and of individual criminal responsibility are applicable under international law. Both constitute general criminal law principles and principles of international criminal law.²⁷⁸ The principle of

²⁷⁷ Judgment of 2 November 1995, Case of *Priebke, Eric in re Extradition*, Case No. 16.063/94 (Original in Spanish, free translation).

²⁷⁸ See, *inter alia*: Articles 25 and 30 of the *Rome Statute of the International Criminal Court*; Inter-American Court of Human Rights, Judgment of May 30, 1999, *Case of Castillo Petruzzi and others v. Peru*, Series C No. 52, paras. 119-121; and

individual criminal responsibility and the prohibition of criminal liability without *mens rea* is a *jus cogens* norm.²⁷⁹

The legal regime established under international law for grave violations of human rights, genocide and war crimes can be synthesized as follows:

- The State has the obligation to prosecute and punish the perpetrators of these crimes and to abstain from adopting measures that may impede or undermine this obligation (see Chapter VI “The obligation to prosecute and punish” and VIII “Amnesties and other similar measures”).
- The fact that the State does not define a behavior constituting an international crime under international law as a crime in its national legislation does not exempt the person who committed it from liability, nor does it exonerate the State of its obligation to prosecute and punish this crime.²⁸⁰
- These crimes cannot be categorized as political crimes, even if their perpetrators have had political or ideological motivations for committing them, and the consequences established under international law for political crimes are not applicable to them, especially in matters of extradition, or of asylum and refuge. For effects of extradition, international law expressly prohibits considering serious human rights violations, crimes against humanity, genocide and war crimes as political crimes.²⁸¹
- International law authorizes the States to exercise extra-territorial criminal jurisdiction, in application of the principle of universal jurisdiction.

Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Op. Cit., para. 227.

²⁷⁹ See, *inter alia*, Article 25 of the *Rome Statute of the International Criminal Court*; Article 7 of the *Statute of the International Criminal Court for the former Yugoslavia*; Article 6 of the *Statute of the International Criminal Tribunal for Rwanda*; Article 75 (4,b) of Protocol I to the Geneva Conventions; and Article 6 (2,b) of Protocol II to the Geneva Conventions.

²⁸⁰ See, for example, Principle II of the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*.

²⁸¹ See, *inter alia*: *Convention for the Prevention and Punishment of the Crime of Genocide* (Article VII); *Inter-American Convention on Forced Disappearances* (Article V); *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 13); *United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* (Article 8); and *Recommendations on Asylum and International Crimes*, by the Inter-American Commission on Human Rights, of October 20, 2000.

- The State in whose territory the alleged perpetrator of one of these crimes is found – independent of the nationalities of the alleged perpetrator and of the victim as well as the place the crime was committed – has the obligation to prosecute or extradite him or her (*aut dedere aut judicare*).²⁸²
- Hierarchical superiors, civilians or military members, are criminally liable for the crimes committed by their subordinates under their authority and effective control, if they had or should have had knowledge that the criminal conduct was going to be committed, was being committed or had been committed, and they did not taken the necessary measures to impede it, make it cease, or have its authors punished. This principle of commanding superiors' criminal liability is established by international law,²⁸³ has been widely reiterated by international case law²⁸⁴ and is a norm of customary international law²⁸⁵.

²⁸² See, *inter alia*: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7); International Convention for the Protection of all Persons from Enforced Disappearance (Arts. 9 and 11); Inter-American Convention to Prevent and Punish Torture (Art. 12); Inter-American Convention on the Forced Disappearance of Persons (Art. IV); Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 18); and Inter-American Commission on Human Rights, Resolution No. 1/03 on Trial for International Crimes, of October 24, 2003.

²⁸³ *Draft Code of Crimes against the Peace and Security of Mankind* (1996), of the UN International Law Commission (Art. 6); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I) (Art. 86); *Statute of the International Tribunal for Rwanda* (Art. 6); *Statute of the International Tribunal for the Former Yugoslavia* (Art. 7); *Statute of the International Criminal Court* (Art. 28); *Statute of the Special Court for Sierra Leone* (Art. 6); *Regulation No. 2000/15 of 6 June 2000 on the Establishment of Panel with Exclusive Jurisdiction over Serious Criminal Offenses*, of the UN Transitional Administration in East Timor (Art. 16); *Statute of the Special Tribunal for Lebanon* (Art. 3); *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 6); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 19); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principle 24); and *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (Principle 27).

²⁸⁴ See, *inter alia*: International Criminal Tribunal for the former Yugoslavia (Judgement of 16 November 1998 and Judgement of 20 July 2000, *The Prosecutor v. Zoran Delalic et al*, Case No. IT-96-21-T); International Criminal Tribunal for Rwanda (Judgment of September 1998, *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T); International Criminal Court (Pre-Trial Chamber II, Decision of 15 June 2009, *The Prosecutor v. Jean Pierre Bemba Gombo*, Case No. ICC-01/05-01/08); and the Committee against Torture, *General Comment No. 2*:

- Due obedience, as a cause for exoneration from criminal liability or justification, is inapplicable for these crimes and no order or instruction coming from any public authority, be it civilian, military or otherwise, may be invoked to justify the commission of a crime under international law. This principle has been repeated in international instruments²⁸⁶ and in international jurisprudence.²⁸⁷ The fact that the perpetrator of the crime has acted following a superior's orders does not excuse him or her from criminal liability, but may be considered as cause for reduction of the sentence.
- The fact that the perpetrator of these crimes has acted as a Head of State, Head of Government, member of a government or parliament, elected official, government official or other official function will in no way excuse the person of criminal liability and will not constitute grounds for the reduction of the sentence or an attenuating circumstance.²⁸⁸

Implementation of Article 2 by States Parties", para. 26, CAT/C/GC/2 of 24 January 2008.

²⁸⁵ Rule No. 153, in *Customary International Humanitarian Law, Volume No. 1, Rules*, Doc. Cit.. 558 et seq.

²⁸⁶ See, *inter alia*: *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 2 (3)); *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 6); *Declaration on the Protection of All Persons from Enforced Disappearance* (Article 6); *Code of Conduct for Law Enforcement Officials* (Article 5); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 19); *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (Principle 27); *Inter-American Convention to Prevent and Punish Torture* (Article 4); *Inter-American Convention on Forced Disappearance of Persons* (Article VIII); *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (Principle IV); UN General Assembly Resolution 95 (I) of 1946; *Statute of the International Criminal Tribunal for the former Yugoslavia* (Article 7.4), *Statute for the International Criminal Tribunal for Rwanda* (Article 6.4); and *Rome Statute of the International Criminal Court* (Article 33).

²⁸⁷ See, *inter alia*: Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*; Inter-American Court of Human Rights, Judgment of 14 March 2001, *Case of Barrios Altos (Chumbipuma Aguirre and others) v. Perú*, Series C No. 15; UN International Law Commission, *Report of the International Law Commission on the work of its 48th session - 6 May - 26 July 1996*, Supplement No. 10 (A/51/10), Commentaries on Article 12 of the Draft Code.

²⁸⁸ See, *inter alia*: *Charter of the International Military Tribunal of Nuremberg* (Art. 7); *Principles of International Law Recognized in the Charter of Nuremberg Tribunal and in the Judgment of the Tribunal* (Principles I and III); Resolution 95 (I) of 1946, UN General Assembly; *Statute of the International Tribunal for the Former*

International law also regulates other aspects, such as amnesties or the regime for statutes of limitation, which are addressed in other chapters of this Guide.

7. Crimes under international law and the plurality of definitions

If gross human rights violations constitute crimes *per se* under international law, when they are committed in certain circumstances they may constitute other international crimes, such as crimes against humanity, genocide, or war crimes. As Françoise Hampson, Expert for the former United Nations Sub-Commission on the Promotion and Protection of Human Rights, one must differentiate questions regarding the categorization of a behavior as a from its classification under international law, and from the modalities for prosecuting it.²⁸⁹ For example, extrajudicial execution can be prosecuted, depending on the circumstances in which it is committed, as a crime *per se*; as a crime against humanity, when it is committed as part of a massive or systematic practice; as a war crime, when it is committed by actors in an armed conflict, within the same; or as genocide, when it is committed with the intent of destroying, in whole or in part, “a national, ethnic, racial or religious group, as such.” In this sense, the UN General Assembly has repeatedly recalled that extrajudicial executions “may under certain circumstances amount to genocide, crimes against humanity or war crimes, as defined in international law”²⁹⁰ and that “acts of torture can constitute crimes against humanity and, when committed in a situation of armed conflict, constitute war crimes.”²⁹¹ The foregoing has consequences with respect to the applicable legal regime and, especially, with regards to the non-applicability of statutes of limitations, insofar as the

Yugoslavia (Art. 7,2); *Statute of the International Tribunal for Rwanda* (Art. 6,2); the *Rome Statute of the International Criminal Court* (Art. 27); *Statute of the Special Court for Sierra Leone* (Art. 6,2); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 16); *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (Principle 27,c); and *Inter-American Convention on Forced Disappearance of Persons* (Art. IX).

²⁸⁹ UN Doc. E/CN.4/Sub.2/2004/12 of 20 July 2004.

²⁹⁰ Resolution No. 65/208, “Extrajudicial, summary or arbitrary executions,” of 21 December 2010.

²⁹¹ Resolution No. 65/205, “Torture and other cruel, inhuman or degrading treatment,” of 21 December 2010.

same is only established with regards to crimes against humanity, genocide and war crimes (In this regard, see Chapter X).

An important aspect in international law is the acceptance of the simultaneous existence of various definitions of the same crime. Certainly in international law there are various definitions or typifications of certain crimes. The *Declaration on the Protection of All Persons against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,²⁹² the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,²⁹³ the *Inter-American Convention to Prevent and Punish Torture*,²⁹⁴ and the *Rome Statute of the International Criminal Courts*²⁹⁵ define the crime of torture in different ways. The definition established by the International Criminal Tribunal for the

²⁹² Article 1 (1): "For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."

²⁹³ Article 1 (1): "For the purposes of this Convention, the term 'torture' means 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."

²⁹⁴ Article 2: "For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article."

²⁹⁵ Article 7 (2.e): "'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions".

former Yugoslavia must be added to these. In effect, upon examining the different international instruments that provide a definition of torture, the Tribunal opted for a definition under customary international law.²⁹⁶

The same situation occurs with enforced disappearance. The definitions of this crime established in the *Inter-American Convention on Forced Disappearance of Persons*,²⁹⁷ the *Rome Statute of the International Criminal Court*²⁹⁸ and the *International Convention for the Protection of All Persons from Enforced Disappearance*²⁹⁹ are different. The definition is established by these three instruments coincide – with some nuances – in terms of two characteristic behaviors that are part of enforced disappearances: deprivation of liberty followed by concealment of the fate or whereabouts of the disappeared. However, the two conventions differ from the Rome Statute, which incorporated two additional elements. In effect, the Rome Statute's definition contains an additional subjective element – “with the intention of removing them from the protection of the law” – and a temporal

²⁹⁶ See: Judgement of 16 November 1998, *The Prosecutor v. Delalic et al*, Case No. IT-96-21-T, para. 59 *et seq*; Judgement of 10 December 1998, *The Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, para. 159; Trial Chamber II, Judgement of 22 February 2001, *The Prosecutor v. Kunarac et al*, Cases No. IT-96-22 and IT-96-23/1, para. 473 *et seq*; and Appeals Chamber, Judgement of 12 June 2002, *The Prosecutor v. Kunarac et al*, Cases No. IT-96-22 and IT-96-23/1), para. 148.

²⁹⁷ Article II: “For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.”

²⁹⁸ Article 7 (2, i): “‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

²⁹⁹ Article 2 (1): “For the purposes of this Convention, ‘enforced disappearance’ is considered to be 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.”

element – “for a prolonged period of time.” The purpose of incorporating these two elements into the Statute of Rome’s definition responded to the need to provide two criteria to distinguish the crime of enforced disappearance from other forms of deprivation of liberty that do not constitute enforced disappearance, such as *incommunicado* detention and certain forms of arbitrary detention. Thus, the reference to removal from the protection of the law in the Rome Statute is regulated in different terms from the regulation of the *Inter-American Convention on the Forced Disappearance of Persons* and the *International Convention for the Protection of All Persons from Enforced Disappearance*. While both Conventions incorporate this topic as a material element of the crime, the Rome Statute incorporates it as a subjective or intentional element (specific intent). The second element – “for a prolonged period of time” – certainly is vague. The notion of “prolonged period” should be seen in relation to the period of time that must elapse between being deprived of liberty and being put before a judge or other competent authority. This period of time is not defined, in terms of concrete deadlines, by international standards. International norms for the protection of human rights prescribe that all persons deprived of liberty should be brought before a judge or competent authority “without delay.” The jurisprudence of international human rights bodies is not homogeneous, nor is it precise, in defining this phrase in terms of deadlines. The formula used by the Rome Statute is imprecise and unfortunate, and may have the direct impact of reducing the threshold of protection from the crime of enforced disappearance. In this regard, the UN Working Group on Enforced or Involuntary Disappearances has recommended that “the definition of enforced disappearance provided for by the Rome Statute be interpreted by the national authorities in line with the more adequate definition provided for in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.”³⁰⁰

There also exist different definitions of crimes against humanity under international law. The definitions of crimes against humanity contained in the *Charter of the International Military Tribunal of*

³⁰⁰ *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3, 28 December 2010, para. 15.

Nuremberg,³⁰¹ the statutes for the tribunals for the former Yugoslavia,³⁰² for Rwanda,³⁰³ and for Sierra Leone,³⁰⁴ and in the *Rome Statute of the International Criminal Court*³⁰⁵ are all different. It is also worth highlighting that the *Inter-American Convention on the Forced Disappearance of Persons*³⁰⁶ and the *Declaration on the Protection of All Persons from Enforced Disappearance*³⁰⁷ characterize forced disappearance as a crime against humanity when it is committed as part of a systematic practice, while the *International Convention for the Protection of All Persons from Enforced Disappearance* stipulates that "the generalized or systematic practice of enforced disappearance constitutes a crime against humanity."³⁰⁸ It is worth recalling that the principles articulated in the Charter and Judgment of the Nuremberg Tribunal were recognized as principles of international law by the UN General Assembly in 1946³⁰⁹ and that in 1993 the UN Secretary-General concluded that the Nuremberg Charter was part of customary international law.³¹⁰

This plurality of indictments and definitions is accepted by the international instruments themselves. In this sense, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* prescribes that the definition established by that treaty "[...] is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."³¹¹ In this same vein, Article 10 of the *Rome Statute of the International Criminal Court* establishes that "Nothing in this Part [regarding the definitions of crimes subject to the Court's jurisdiction] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Likewise,

³⁰¹ Article 6 of the Charter.

³⁰² Article 5 of the Statute.

³⁰³ Article 3 of the Statute.

³⁰⁴ Article 5 of the Statute.

³⁰⁵ Article 7 of the Rome Statute.

³⁰⁶ Preamble, paragraph 6: "Reaffirming that the systematic practice of the forced disappearance of persons constitutes a crime against humanity".

³⁰⁷ Preamble, paragraph 4: "Considering that the forced disappearance of persons violates numerous essential human rights [...]."

³⁰⁸ Artículo 5.

³⁰⁹ Resolution 95 (I) of 11 December 1946.

³¹⁰ *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, S/25704, de 3 May de 1993, para. 35.

³¹¹ Article 1 (2).

its Article 22(3) establishes that “[t]his article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.”

Faced with this plurality of definitions, international jurisprudence is of vital importance, insofar as it systematizes the development of international law with respect to these crimes, providing customary definitions for them. With regards to the crime of torture, the case law of the International Criminal Tribunal for the former Yugoslavia is particularly important. This Statute³¹² – like the Statute for the International Criminal Tribunal for Rwanda³¹³ and the Statute for the Special Court for Sierra Leone³¹⁴ – while punishing torture, does not establish a definition for this crime. The International Criminal Tribunal for Rwanda opted for using the definition in Article 1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.³¹⁵ Based on the different international instruments that provide a definition of torture, the International Criminal Tribunal for the former Yugoslavia opted for a definition provided by customary international law. During a first stage, in the *Delalic* case, the Tribunal assumed as its definition Article 1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, insofar as it considered it reflected the development of customary international law.³¹⁶ Subsequently, in the *Furundzija* case, the Tribunal emphasized that the Convention’s definition was for the effects of that treaty and considered that, “[a]n extra-conventional effect may however be produced to the extent that the definition at issue codifies, or contributes to developing or crystallising customary international law.”³¹⁷

However, later the International Criminal Tribunal for the former Yugoslavia abandoned this definition in the *Kunarac* case and decided to prosecute rape under the crime of torture. Thus, the

³¹² Article 5.

³¹³ Article 4, f).

³¹⁴ Article 2, f).

³¹⁵ Judgement of 2 September 1998, *The Prosecutor v. Jean-Paul Akayesu*, Case No. TPIR-96-4-T.

³¹⁶ Judgement of 16 November 1998, *The Prosecutor v. Delalic et al*, Case No. IT-96-21-T, para. 459.

³¹⁷ Judgment of 10 December 1998, *The Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, para. 159.

Tribunal considered that the definition in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, as established in its Article 1 (2), should be understood "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application". The Tribunal therefore considered that "insofar as other international instruments or national laws give the individual broader protection, he or she shall be entitled to benefit from it"³¹⁸. In this sense, the Tribunal noted that the *Inter-American Convention to Prevent and Punish Torture* provided a broader definition and was more protective of individuals. However, the Tribunal determined that: "[t]hree elements of the definition of torture contained in the Torture Convention are, however, uncontested and are accepted as representing the status of customary international law on the subject: (i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) This act or omission must be intentional; (iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal."³¹⁹ The Tribunal also considered that "[t]here is no requirement under customary international law that the conduct must be solely perpetrated for one of the prohibited purposes. [...] [T]he prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose."³²⁰ The Tribunal concluded that rape, which necessarily involves the existence of said pain or suffering, was characterized as an act of torture.

With regards to the definition of enforced disappearance, international human rights jurisprudence is essential for delineating this crime. The Inter-American Court of Human Rights, based on the doctrine of the UN Working Group on Enforced or Involuntary Disappearance³²¹ and on the *Inter-American*

³¹⁸ Judgment of 22 February 2001, *The Prosecutor v. Kunarac et al*, Cases No. IT-96-22 and IT-96-23/1, para. 473.

³¹⁹ *Ibid.*, para. 483.

³²⁰ *Ibid.*, para. 486.

³²¹ The UN Working Group on Enforced or Involuntary Disappearance of Persons has indicated the elements that make up enforced disappearance. In 1988, the Working Group adopted an operative and descriptive definition of enforced disappearance: "A typical example of an enforced or involuntary disappearance can generally be described in the following way: a person clearly identified as detained against his or her will by officials of any branch or level of government or by organized of

Convention on the Forced Disappearance of Persons and the *International Convention for the Protection of All Persons from Enforced Disappearance*, has identified the elements that make up the international crime of enforced disappearance. The Court established that the “concurring and constituting elements of the crime of forced disappearance [are]: a) deprivation of liberty; b) direct involvement of governmental officials or by acquiescence, and c) refusal to acknowledge the deprivation of liberty and to disclose the fate and whereabouts of the person concerned.”³²² The Human Rights Committee³²³ and the European Court of Human Rights³²⁴ have coincided on this characterization of the elements of enforced disappearance. Various courts in Latin America have reaffirmed these elements, with the exception of the intervention of state officials.³²⁵ In any case, neither international jurisprudence, nor national jurisprudence, nor even the criminal offenses codified in national laws adopted in Latin America,³²⁶ have

particular groups that claim to be acting in the name of the Government or with its support, permission or acquiescence. Then these forces hide the whereabouts of this person and refuse to reveal his or her destiny or to acknowledge that the person is detained.”³²¹ The Working Group has identified the following elements that characterize enforced disappearance and that should be present in any definition of the crime of enforced disappearance: “a) deprivation of liberty against the will of the person concerned; b) involvement of governmental officials, at least indirectly by acquiescence; and c) refusal to disclose the fate and whereabouts of the person concerned” (*Report of the UN Working Group on Enforced or Involuntary Disappearance. General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance*, UN Document E/CN. 4/1996/38, of 15 January 1996, para.55).

³²² Judgment of 22 September 2009, *Case of Anzualdo Castro v. Perú*, Series C No. 202, para. 60. See also: Judgment of 22 November 2005, *Case of Gómez Palomino v. Perú*, Series C No. 136, para. 94 *et seq.*; Judgment of 27 November 2008, *Case of Ticona Estrada v. Bolivia*, Series C No. 191, para. 55; and Judgment of 26 November 2013, *Case of Osorio Rivera v. Perú*, Series C No. 274, para. 113.

³²³ See, *inter alia*: Views of 2 November 2005, *Case of Norma Yurich v. Chile*, Communication No. 1078/2002; Views of 10 July 2007, *Case of Messaouda Grioua and Mohamed Grioua v. Algeria*, Communication No. 1327/2004; View of 28 October 2008, *Case of Yasoda Sharma and Surya Prasad Sharma v. Nepal*, Communication No. 1469/2006; and Views of 27 October 1995, *Case of Nydia Erika Bautista de Arellana v. Colombia*, Communication No. 563/1993.

³²⁴ See, *inter alia*, Judgment of 25 May 1998, *Case of Kurt v. Turkey*, Communication No. 24276/94.

³²⁵ Due to the fact that some criminal laws defining enforced disappearance also include private individuals as active subjects of the crime.

³²⁶ Bolivia (Art. 292 *bis* of Criminal Code); Colombia (Art. 165 of Criminal Code); El Salvador (Art. 364 of Criminal Code); Guatemala (Art. 201 *ter* of Criminal Code); Mexico (Art. 215-A of Criminal Code); Nicaragua (Article 488 of Criminal Code); Paraguay (Art. 236 of Criminal Code); Peru (Art. 320 of Criminal Code); Uruguay

retained the subjective and temporal elements stipulated in the *Rome Statute of the International Criminal Court*.

(Art. 21 of Law No. 18026, of 4 October 2006); and Venezuela (Art. 180-A of Criminal Code).

CHAPTER III: STATE DUTIES AND IMPUNITY

"The elimination of impunity, by all legal means available, is fundamental for the eradication of extrajudicial executions, torture and other grave human rights violations."

Inter-American Court of Human Rights³²⁷

1. General considerations

Impunity has been defined by the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Principles against Impunity)* as a breach of the obligations States have to investigate grave human rights violations, try and punish the perpetrators, guarantee victims' rights to an effective remedy, to reparations, and to know the truth, adopt the appropriate measures with regards to their perpetrators, and to act to avoid repetition of these violations.³²⁸ This, the question of impunity necessarily refers to the State's international human rights obligations.

International human rights law imposes two broad categories of obligations on the State: i) a duty to respect human rights; and ii) a duty to guarantee these rights. The former is made up of obligations that directly deal with the State's duty to abstain from violating human rights by action or omission, as well as the obligation to guarantee the enjoyment of these rights through the adoption of necessary measures. The latter refers to the State's obligations to prevent human rights violations, investigate them, prosecute and punish the perpetrators and repair the damages that have been caused. The State is thus placed in the legal position of a guarantor of human rights, under which fundamental obligations for the protection and safeguard of these rights arise. Building upon this foundation, case law and doctrine have elaborated upon the concepts of the duty to respect and the duty to guarantee, as the core concept of the legal position of the State vis-a-vis human rights.

³²⁷ Judgment of October 25, 2012, *Case of the Massacres of El Mozote v. El Salvador*, Series C No. 252, para. 244.

³²⁸ Principle 1.

"[The] protection of human rights means more than merely recognizing these rights. It also requires finding the formulas for the treatment due to those who while exercising State power, violate fundamental rights. It entails satisfying the needs of the victims of abuse and of their family members, including knowing the truth about the reasons for which the violations were committed. Keeping new violations from happening demands that the governments take the measures necessary to make them impracticable."

Wilder Tayler³²⁹

In this regard, the Inter-American Commission on Human Rights (IACHR) has established that "[t]hese duties of the States, to respect and to guarantee, form the cornerstone of the international protection system since they comprise the States' international commitment to limit the exercise of their power, and even of their sovereignty, vis-à-vis the fundamental rights and freedoms of the individual. The duty to respect entails that the States must ensure the effectiveness of all the rights contained in the Convention by means of a legal, political and institutional system appropriate for such purposes. The duty to guarantee, for its part, entails that the States must ensure the effectiveness of the fundamental rights by ensuring that the specific legal means of protection are adequate either for preventing violations or else for reestablishing said rights and for compensating victims or their families in cases of abuse or misuse of power. These obligations of the States are related to the duty to adopt such domestic legislative provisions as may be necessary to ensure exercise of the rights specified in the Convention (Article 2). As a corollary to these provisions, there is the duty to prevent violations and the duty to investigate any that occur since both are obligations involving the responsibility of the States."³³⁰

2. The duty to respect

The duty to respect human rights has its legal justification both in customary international law and in treaty-based international law. This duty is established in the *Charter of the United Nations*³³¹ and

³²⁹ Tayler, Wilder, "La problemática de la impunidad y su tratamiento en las Naciones Unidas" ["The problem of impunity and its treatment in the United Nations"], in *Revista IIDH/ Instituto Interamericano de Derechos Humanos*, Vol. 24, July-December 1996, San José, Costa Rica, 1996, p. 188 (Original in Spanish, free translation).

³³⁰ Report No. 1/96, Case 10.559, *Chumbivilcas* (Peru), 1 March 1996.

³³¹ Article 1.

in the *Charter of the Organization of American States*.³³² This duty is also set forth in article 1 of the *American Convention on Human Rights* (ACHR) and in articles 2(1) and 3 of the *International Covenant on Civil and Political Rights* (ICCPR), among other treaties. By virtue of this legal duty, the State must not only abstain from violating human rights, but also must guarantee the effective enjoyment of these rights and keep them from being violated.

The Human Rights Committee (HRC) has indicated that, under article 2 of the ICCPR, “[a] general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction [...] [and that this legal obligation] is both negative and positive in nature.”³³³ Thus, the State should prevent human rights violations and abstain from violating them, as well as adopting measures to guarantee the effective enjoyment of fundamental rights and freedoms. The HRC has indicated in particular that this duty to respect is not limited to violations attributable to state agents – whether *de jure* or *de facto* – but that the duty also exists for “acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”³³⁴

The Inter-American Court of Human Rights has indicated that the first obligation under the *American Convention on Human Rights*, in article 1, is “respecting the rights and freedoms” recognized in the Convention, which necessarily includes “the notions of limitations to the exercise of the power of the State.”³³⁵ Likewise, the Court has indicated that the duty to respect “entails the positive obligation of the State to adopt a series of conducts,

³³² Articles 3, 17 and 45.

³³³ *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, of 29 March 2004, paras. 3 y 6.

³³⁴ *Ibid.*, para. 8.

³³⁵ Judgment of 16 November 2009, *Case of González and Others* (“*Campo Algodonero*”) v. Mexico, Series C No. 205, para. 235.

depending on the specific substantive right that must be guaranteed and the specific situation in question.”³³⁶

3. The duty to guarantee

The duty to guarantee finds its legal justification both in customary international law and in treaty-based international law. The duty to guarantee is expressly reaffirmed in numerous human rights treaties³³⁷ and declarations.³³⁸

When analyzing Article 1(1) of the ACHR, the Inter-American Court of Human Rights recalled that the States parties have assumed the general obligation to protect, to respect and to guarantee every one of the rights in the Convention, which means “the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation. [...] The State [also] has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”³³⁹

The Inter-American Court of Human Rights has also established that “the duty to prevent covers all juridical, political, administrative, and cultural measures that promote the safeguarding of human rights.”³⁴⁰ Likewise, the Court has indicated that “[t]he obligation that arises pursuant to international law to try, and, if found guilty, to punish the perpetrators of certain

³³⁶ Judgment of 27 February 2012, *Case of Narciso González Medina v. Dominican Republic*, Series C No. 240, para. 127.

³³⁷ See *inter alia*: *International Covenant on Civil and Political Rights* (Art. 2); *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 2); *International Convention for the Protection of All Persons from Enforced Disappearance*; *American Convention on Human Rights* (Art. 1,1); *Inter-American Convention on Forced Disappearance of Persons* (Art. 1) and *Inter-American Convention to Prevent and Punish Torture* (Art. 1).

³³⁸ See *inter alia*: *Declaration on the Protection of All Persons from Enforced Disappearance and Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*.

³³⁹ Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, paras. 166 y 174.

³⁴⁰ Judgment of 26 de agosto de 2011, *Caso Torres Millacura y Otros V. Argentina*, Series C No. 229, para. 99.

international crimes, among which are crimes against humanity, is derived from the duty of protection embodied in Article 1(1) of the American Convention.³⁴¹

"[T]he obligation to ensure rights [...] involves the States' obligation to organize the entire government apparatus and, in general, all the structures through which public power is exercised, so that they are capable of ensuring legally the free and full exercise of human rights. [...] [L]a obligación de garantía [...] implica el deber de los Estados de organizar todo el aparato gubernamental y, en general, todas las estructuras a través de las cuales se manifiesta el ejercicio del poder público, de manera tal que sean capaces de asegurar jurídicamente el libre y pleno ejercicio de los derechos humanos.[...] Similarly, this obligation entails the removal of all obstacles de jure and de facto that prevent the investigation and prosecution of the facts and, as appropriate, the punishment of all those responsible for the violations declared, as well as the search for the truth. Indeed, if the State apparatus acts in such a way that the violation goes unpunished and it does not restore to the victims, insofar as possible, all their rights, it can be said that it has failed to comply with its obligation to guarantee the free and full exercise of these rights to the persons subject to its jurisdiction."

Inter-American Court of Human Rights³⁴²

For its part, the HRC, while examining the nature of the obligation contained in Article 2 of the ICCPR, has recalled that the States have the obligation to investigate grave human rights violations, bring the perpetrators to justice, and provide reparations to the victims of these violations.³⁴³ The HRC has indicated that failure to investigate grave human rights violations or "the failure to bring [them] to justice [...] could in and of itself give rise to a separate breach of the Covenant."³⁴⁴

The notion of the duty to guarantee has been incorporated by the UN missions as an essential guide in its human rights observing work in countries across the world. For example, *the United Nations Observer Mission in El Salvador* (ONUSAL) synthesized the duty to guarantee as "a duty to prevent illegal conduct and, where

³⁴¹ Judgment of 26 de septiembre de 2006, *Caso Almonacid Arellano y otros V. Chile*, Series C No. 154, para. 110.

³⁴² Judgment of October 25, 2012, *Case of the Massacres of El Mozote v. El Salvador*, Series C No. 252, paras. 144 y 249.

³⁴³ *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, Doc. Cit.

³⁴⁴ *Ibid.*, para. 18.

such conduct occurs, to investigate it, to bring to justice and punish the perpetrators, and to indemnify the victims."³⁴⁵

The jurisprudence of international tribunals and human rights bodies is consistent in establishing that this duty to guarantee is made up of six essential obligations that the State must honor:

- The obligation to prevent human rights violations;
- The obligation to investigate human rights violations;
- The obligation to bring to justice and punish those responsible for these abuses;
- The obligation to provide an effective remedy to the victims of human rights violations;
- The obligation to provide just and adequate reparations to the victims and their family members; and
- The obligation to establish the truth about what happened.

The obligations that make up the duty to guarantee have a complementary nature and are not alternatives to or substitutes for each other. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has thus stated: "[t]he recognition of the duty to compensate victims of human rights violations, and the actual granting of compensation to them, presupposes the recognition by the Government of its obligation to ensure effective protection against human rights abuses on the basis of the respect for the fundamental rights and freedoms of every person. [...] Granting compensation presupposes compliance with the obligation to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation."³⁴⁶

Certainly, the obligations that make up the duty to guarantee are interdependent. The obligation to prosecute and punish the perpetrators of human rights violations is closely related to the duty to investigate the facts. Nonetheless, "it is not possible for

³⁴⁵ *Third Report of the United Nations Mission in El Salvador – Report of the Director of the Human Rights Division*, UN Doc. A/46/876-S/23580, 19 February 1992, para. 28.

³⁴⁶ *Report by the Special Rapporteur on Extrajudicial, summary or arbitrary executions*, United Nations document E/CN.4/1994/7, paras. 688 and 711.

the State to choose which of these obligations it must comply with.”³⁴⁷ Since these obligations must be complied with separately from each other, the State is thus not relieved of its obligation to comply with every single one of them. The Inter-American Court has reiterated the autonomous nature of each one of the obligations that makes up the duty to guarantee. The Court has indicated that a withdrawal of the victim of human rights violations from receiving due compensation does not exonerate the State of its obligation to investigate the facts, and to prosecute and punish the perpetrators. The Court has likewise considered that “even though the aggrieved party may pardon the author of the violation of his human rights, the State is nonetheless obliged to sanction said author [...]. The State’s obligation to investigate the facts and punish those responsible does not erase the consequences of the unlawful act in the affected person. Instead, the purpose of that obligation is that every State party ensure, within its legal system, the rights and freedoms recognized in the Convention.”³⁴⁸

The Inter-American Commission on Human Rights (IACHR) has repeatedly stated that measures of reparation given to victims and their family members, as well as the creation of “Truth Commissions,” do not under any circumstance exonerate the State of its obligation to bring the perpetrators of the human rights violations to justice and punish them.³⁴⁹ In the case of Chile, the IACHR considered that “[t]he Government’s recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation are not enough, in themselves, to fulfil its obligations under the Convention. According to the provisions of Article 1.1, the State has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and

³⁴⁷ Méndez, Juan, “Derecho a la Verdad frente a las graves violaciones a los derechos humanos” [“The Right to Truth for grave violations of human rights”], in *La aplicación de los tratados de derechos humanos por los tribunales locales*, CELS, editors Martín Abregú - Christian Courtis, Editores del Puerto s.r.l, Buenos Aires, 1997, pag. 526. (Original in Spanish, free translation)

³⁴⁸ Judgment of 27 August 1998, *Case of Garrido and Baigorria v. Argentina*, Series C No. 39, para. 72.

³⁴⁹ Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), 2 October 1992, para. 52.

ensuring adequate reparations for the victims.”³⁵⁰ In the case of El Salvador, the IACHR recalled that notwithstanding the importance that the Truth Commission had in establishing the material facts related with the most serious violations and in promoting national reconciliation, this type of Commissions “the institution of a Truth Commission [nevertheless cannot] be accepted as a substitute for the State’s obligation, which cannot be delegated, to investigate violations committed within its jurisdiction, and to identify those responsible, punish them, and ensure adequate compensation for the victim [...] all within the overriding need to combat impunity.”³⁵¹

The State’s obligation to guarantee the right of victims of human rights violations to an effective remedy also continues independent of the obligation to investigate, prosecute and punish the perpetrators of these violations. The Inter-American Court of Human Rights has thus recalled that the obligation to investigate “must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.”³⁵²

In cases of enforced disappearance, for example, the Inter-American Court has reiterated that “whenever there are reasonable grounds to suspect that a person has been subjected to enforced disappearance, a criminal investigation must be opened. This obligation is irrespective of whether a complaint has been filed because, in cases of enforced disappearance, international law and the general obligation of guarantee impose the obligation to investigate the case *ex officio*, immediately, and in a genuine, impartial and effective manner; hence, it does not depend on the procedural initiative of the victim or his next of kin or on the

³⁵⁰ Report No. 36/96, Case 10.843 (Chile), 15 October 1996, para. 77. See also: Report No. 34/96, Cases 11.228, 11.229, 11.231 and 11.282 (Chile), 15 October 1996, para. 76; and Report No. 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), 7 April 1998, para. 50.

³⁵¹ Report No. 136/99, Case 10.488 *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, para. 230.

³⁵² Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 177.

provision of probative elements by private individuals. [...] [T]he authorities must conduct the investigation as an inherent legal obligation, and not cause this burden to fall on the initiative of the next of kin."³⁵³

4. The obligation for States to adapt their legislation and state's apparatus

Both customary and treaty-based international law imposes the obligation on the States to adapt their domestic legislation to ensure compliance with its international obligations. This obligation also means that the States have the obligation to organize their governmental structures in order to comply with its duties to respect and guarantee human rights. This reorganization of governmental apparatus must be compatible with the State's international obligations, be they express or inherent.

Articles 1 and 2 of the *American Convention on Human Rights* and Article 2 of the *International Covenant on Civil and Political Rights*, among other treaties, repeat this obligation. The Inter-American Court of Human Rights has indicated "[u]nder the law of nations, customary law prescribes that a State that has signed an international agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken. This principle is universally valid and has been characterized in case law as an evident principle [...]. [...] This principle is contained in Article 2 of the Convention, which sets forth the general duty of each State Party to adjust its domestic law to the provisions thereof to guarantee the rights enshrined therein, which implies that the domestic law measures must be effective pursuant to the *effet utile* principle."³⁵⁴ Likewise, the Court has established that "the protection of human rights

³⁵³ Judgment of 26 November 2013, *Case of Osorio Rivera and family v. Peru*, Series C No. 274, para. 178.

³⁵⁴ Judgment of September 26, 2006, *Case of Almonacid Arellano v. Chile*, Series C No. 154, para. 117. See also: Judgment of 27 August 1998, *Case of Garrido and Baigorria v. Argentina*, Series C No. 39, para. 68; Judgment of February 2, 2001, *Case of Baena Ricardo and others v. Panama*, Series C No. 72, para. 179; and Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, paras. 170 and 171.

must necessarily comprise the concept of the restriction of the exercise of state power.³⁵⁵

"[The] duty [to adapt its domestic law] entails the adoption of two types of measures. On the one hand, the elimination of norms and practices of any nature that result in the violation of the guarantees established in the Convention and, on the other, the enactment of laws and the implementation of practices leading to the effective observance of the said guarantees."
Inter-American Court of Human Rights³⁵⁶

In this legal context, the State's margin of discretion is not absolute and it must organize its governmental apparatus in such a way as to make it compatible with its obligation to respect and guarantee internationally recognized human rights. The obligation is not limited to the formal adoption of legislative, administrative, or judicial measures, but also to act – in practice – in accordance with this duty. The Inter-American Court of Human Rights has recalled this, indicating that "[t]he obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation – it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights."³⁵⁷

This obligation also implies abstaining from adopting legislative, administrative or judicial measures that run contrary to international obligations. The Court has established that "[a] State may violate an international treaty and, specifically, the Convention, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2 [of the *American Convention on Human Rights*]. Likewise, it may adopt provisions which do not conform to the obligations under the Convention. Whether those norms have been adopted in conformity with the internal juridical order makes no difference for

³⁵⁵ *Advisory Opinion OC-6/86, The Word "Laws" in Article 30 of the American Convention on Human Rights*, of May 9, 1986, Series A No. 6, para. 21.

³⁵⁶ Judgment of October 24, 2012, *Case of Nadege Dorzema et al. v. Dominican Republic*, Series C No. 251, para. 207.

³⁵⁷ Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 167, and Judgment of January 20, 1989, *Case of Godínez Cruz v. Honduras*, Series C No. 5, para. 176.

these purposes.”³⁵⁸ The Court has established that “[c]ertainly, Article 2 of the Convention fails to define which measures are appropriate to adjust the domestic law to it; obviously, this is so because it depends on the nature of the rule requiring adjustment and the circumstances of each specific case. Therefore, [...] such adjustment implies adopting two sets of measures, to wit: (i) repealing rules and practices of any nature involving violations to the guarantees provided for in the Convention or disregarding the rights enshrined therein or hamper the exercise of such rights, and (ii) issuing rules and developing practices aimed at effectively observing said guarantees. [...] [T]he first set of duties is breached while the rule or practice running counter to the Convention remains part of the legal system, and is therefore satisfied by modifying, repealing, or otherwise annulling, or amending, such rules or practices, as appropriate.”³⁵⁹

Under Article 2 of the ACHR, the Inter-American Court has repeatedly stated that the States must codify the crime of enforced disappearance and other gross human rights violations in their criminal laws, and derogate any measures – such as amnesties – that impede the investigation of these human rights violations and/or the prosecution and punishment of the perpetrators.³⁶⁰ When dealing with military courts’ jurisdiction, the Court has established that “[r]egarding the obligation to adopt legislative or other measures to guarantee the full exercise and enjoyment of the human rights established in the Convention, [...] it is not enough that domestic law determine the proceedings and competences of the military courts; but that, over and above this provision, the laws must define clearly who are soldiers, what are the criminal offenses that pertain to the military jurisdiction, determine the illegality of the unlawful conduct by describing the

³⁵⁸ *Advisory Opinion OC-13/93, July 16, 1993, "Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)," Series A No. 13, para. 26.*

³⁵⁹ Judgment of 29 November 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 172. See also: Judgment of July 4, 2006, *Case of Ximenes Lopes v. Brazil*, Series C No. 149, para. 83; Judgment of 22 November 2005, *Case of Palamara Iribarne v. Chile*, Series C No. 135, para. 89; Judgment of 24 November 2010, *Caso Gomes Lund y otros (Guerrilha do Araguaia) v. Brazil*, Series C No. 220, para. 173; Judgment of 27 February 2012, *Case of González Medina and Family Members v. Dominican Republic*, Series C No. 240, para. 243.

³⁶⁰ Judgment of 27 February 2012, *Case of González Medina and Family Members v. Dominican Republic*, Series C No. 240, para. 244.

harm or jeopardy to military rights seriously affected, and must justify the exercise of military punitive power, and specify the corresponding sanction.”³⁶¹

For its part, the HRC has indicated that the State obligation to adapt its legislation and its governmental structure is of a contractual nature, based on the ICCPR itself, and more specifically on its Article 2(2).³⁶² The HRC has established that States must adopt “legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.”³⁶³ The HRC has also stated that, in view of this obligation, the State must eliminate amnesties and grounds from exemption from criminal responsibility for grave human rights violations, as well as “[o]ther impediments to the establishment of legal responsibility [...], such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable.”³⁶⁴ Thus, for example, the HRC has considered the adoption of measures to exonerate agents of security forces from criminal responsibility for extrajudicial executions committed during government operations as incompatible with the States’ obligation, under Articles 2 and 6 of the ICCPR, to adopt necessary legal reforms or other measures to guarantee the effective enjoyment of the right to life.³⁶⁵

5. Pacta sunt servanda

A universally-recognized general principle of international law is that the States must undertake compliance with treaties and the international obligations arising under them, in good faith. This principle is applicable a fortiori to the obligations arising under customary international law and, in particular, under peremptory norms of international law (*jus cogens*). As a corollary to this general principle of international law, the authorities of a country may not allege obstacles under their domestic law in order to get out of their international commitments. Constitutional, legislative or regulatory norms may not be invoked in order to fail to execute

³⁶¹ Judgment of October 24, 2012, *Case of Nadege Dorzema et al. v. Dominican Republic*, Series C No. 251, para. 206.

³⁶² *General Comment No. 2, Reporting guidelines*, para. 2.

³⁶³ *General Comment No. 31, Op. Cit.*, para. 7.

³⁶⁴ *Ibid.*, para. 18.

³⁶⁵ Views of 31 March 1982, *Case of María Fanny Suárez de Guerrero v. Colombia*, Communication No. 45/1979, para. 13.1.

international obligations or to modify their compliance. This is a general principle of the law of nations, recognized by international jurisprudence.³⁶⁶ International case law has also reiterated that, in accordance with this principle, national courts' judgments may not be wielded as an impediment to compliance with international obligations.³⁶⁷ The *pacta sunt servanda* principle and its corollary have been codified in Articles 26 and 27 of the *Vienna Convention on the Law of Treaties*.

International human rights law is no stranger to the *pacta sunt servanda* principle and its corollary. The Inter-American Court of Human Rights has affirmed as much, indicating that "[p]ursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions."³⁶⁸ In the same sense, the Human Rights Committee has recalled that "[p]ursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith."³⁶⁹

The *pacta sunt servanda* principle also means that a State may not invoke its domestic laws in order to avoid compliance with its international obligations, both treaty-based and customary. In this regard, the Inter-American Court of Human Rights has held that "no law or provision of domestic legislation may prevent a State

³⁶⁶ Permanent Court of International Justice, Advisory Opinion of 4 February 1932, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Series A/B No. 44 and Advisory Opinion of 31 July 1930, *Greco-Bulgarian «Communities»*, Series B No. 17; International Court of Justice, Advisory Opinion of 26 April 1988, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Judgment of 28 November 1958, *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 6 April 1955, *Nottebohm (2e. Phase) (Lichtenstein/Guatemala)*; and Arbitration settlement *S.A Bunch, Montijo (Colombia v. United States of America)*, of 26 July 1875.

³⁶⁷ Permanent Court of International Justice, Judgment of 25 May 1923, *Certain German Interests in Polish Upper Silesia*, Series A No. 7; and Judgment of 13 September 1928, *Factory in Chorzow (Germany / Poland)*, Series A No. 17.

³⁶⁸ Advisory Opinion OC-14/94 of December 9, 1994, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Series A No. 14, para. 35.

³⁶⁹ *General Comment No. 31, Doc. Cit.*, para. 3.

from complying with the obligation to investigate and punish those responsible for human rights violations. A State cannot grant direct or indirect protection to those prosecuted for crimes that involve serious human rights by unduly applying legal mechanisms that undermine the pertinent international obligations."³⁷⁰

In reference to the Peruvian amnesty law, the Inter-American Court of Human Rights held that "States [...] may not invoke existing provisions of domestic law, such as the Amnesty Law in this case, to avoid complying with their obligations under international law. In the Court's judgment, the Amnesty Law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru's argument that it cannot comply with the duty to investigate the facts that gave rise to the present Case must be rejected."³⁷¹ In the same vein, and in reference to Peru's amnesty laws number 26,479 and 26,492, the HRC has stated that "domestic legislation cannot modify a State party's international obligations under the Covenant."³⁷² Likewise, in reference to the amnesty passed by General Augusto Pinochet Ugarte's regime (Decree Law No. 2191), the IACHR has reiterated this principle by holding that this legislation is incompatible with Chile's obligations under the ACHR and that "the Chilean State cannot justify its failure to comply with the Convention by alleging that self-amnesty was decreed by the previous government or that the abstention and omission of the Legislative Power in regard to the rescinding of that Decree Law, or [...] the acts of the Judiciary which confirm the application of that decree [...], inasmuch as Article 27 of the Vienna Convention on the Law of Treaties establishes that a State Party shall not invoke the provisions of domestic law as a justification for failure to comply with a treaty."³⁷³

³⁷⁰ Judgment of May 26, 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, para. 166. In the same sense see, inter alia: Judgment of November 27, 1998, *Case of Loayza TaMay v. Peru*, Series C No. 42, para. 168; Judgment of November 27, 1998, *Case of Castillo Páez v. Peru*, Series C No. 43, para. 105; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, paras. 125 and 182; Judgment of November 24, 2009, *Case of Massacre of las Dos Erres v. Guatemala*, Series C No. 211, para. 129.

³⁷¹ Judgment of November 27, 1998, *Case of Loayza TaMay v. Peru*, Series C No. 42, para. 168.

³⁷² Documento de las Naciones Unidas CCPR/C/79/Add.67, para. 10.

³⁷³ Report No. 34/96, Cases 11.228, 11.229, 11.231 and 11282 (Chile), of October 15, 1996, para. 84.

The State's responsibility is compromised the moment that any one of its bodies violates an international obligation, whether by action or omission. This is a principle of customary international law,³⁷⁴ widely recognized under international jurisprudence. International human rights law is no stranger to this principle. So it has been held by the Inter-American Court of Human Rights,³⁷⁵ the European Court of Human Rights³⁷⁶ and the HRC.³⁷⁷ In this regard, the IACHR has recalled that "[w]hile internally the executive, legislative and judicial powers are separate and independent, the three branches of the state form a single indivisible until of the State [...], which—in the international plane—refuses to admit separate treatment and, as a result, [the State] is internationally responsible for the acts of its organs of public power which infringe the international commitments stemming from international treaties."³⁷⁸

The courts thus must comply with the State's international obligations, which within the framework of their jurisdiction is incumbent upon them. These obligations are: to administer justice independently and impartially, in observance of judicial guarantees; to investigate, prosecute and punish the perpetrators of human rights violations; and to guarantee the rights to justice, to an effective remedy, to the truth and to reparations for the victims of grave human rights violations and their next of kin. If a court's performance is incompatible with these obligations, whether by action or omission, it constitutes a denial of justice and a breach of the State's international obligations, thus compromising its international responsibility.

Moreover, as noted by the Inter-American Court of Human Rights, "when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not

³⁷⁴ Ago, Robert, "Third report on State responsibility," in *Yearbook of the International Law Commission*, 1971, Vol. II, Part 1, A/CN.4/SER.A/1971/Add.I (Part 1).

³⁷⁵ Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 177, para. 151.

³⁷⁶ See, for example, Judgments in *Tomasi v. France*, of 27 August 1992; and *Fr. Lombardo v. Italy*, of 26 November 1992.

³⁷⁷ *General Comment No. 31*, Op. Cit.

³⁷⁸ Report No. 36/96, Case 10.843 (Chile), of October 15, 1996, para. 84.

adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of 'conventionality control' between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights."³⁷⁹

³⁷⁹ Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154, para. 124.

CHAPTER IV: THE RIGHTS TO AN EFFECTIVE REMEDY AND TO REPARATION

“Judicial protection [...] has two dimensions. On the one hand, it is a result of the right of the victims of human rights violations to achieve truth, justice and reparation as a consequence of the abuses they have suffered. On the other hand, it explicitly entails the obligation of the authorities of jurisdiction to develop the judicial proceedings under their responsibility under strict security measures, and determining the criminal offenses in terms of the applicable provisions of international law.”

Constitutional Tribunal of Peru³⁸⁰

1. General Considerations

The rights to an effective remedy and to reparation are core elements of international human rights law. Both rights, which are closely linked and constitute fundamental rights of victims, are reaffirmed in numerous international treaties and instruments. International courts and human rights bodies have developed extensive case law regarding the content and scope of these rights.³⁸¹ In effect, as established in the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Principles against Impunity)*, “[i]mpunity arises from a failure by States [...] to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered.”³⁸²

2. The right to an effective remedy

Under international law, every person has the right to an effective remedy before an independent and impartial authority, in the case that their human rights have been violated, such that they may obtain reparations and know the truth about the circumstances,

³⁸⁰ Judgment of 9 December 2004, *Recurso Extraordinario - Gabriel Orlando Vera Navarrete*, Case No. 2798-2004-HC/TC.

³⁸¹ See, in this regard, International Commission of Jurists, *The right to a remedy and to reparation for gross human rights violations – Practitioners’ Guide Series No. 2*, Ed. ICJ, Geneva, 2006.

³⁸² Principle 1.

motives and perpetrators of the violation. The right to an effective remedy guarantees, above all, the right of every person to defend their rights before an independent and impartial body, in order to obtain recognition of the violation, cessation of the violation if it continues, and adequate reparation. The right to a remedy is closely related to the rights to reparation and to the truth.

"The State has a responsibility and obligation to the victims, [...] to their family members and to society as a whole: to provide reparations, guarantee the access to justice and the right to know, and to strengthen the policies of memory. [...] It is not about revenge or hatred, but rather it is about the fight against impunity and forgetting, and about guaranteeing just compensation for all the victims. In a democratic society, nothing legitimizes authority more than its permanent zeal for ensuring the recognition of the rights of others, building an inclusive and just country free from all forms of discrimination, fostering the values of equality, respect and tolerance. This is the way forward. This is the effort we should all bet on."

Ombudsman of Peru (*Defensoría del Pueblo de Perú*)³⁸³

The Inter-American Court has held that the right to an effective remedy and to judicial protection "incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights."³⁸⁴ The Court has also indicated that "the right to effective recourse to a competent national court or tribunal is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention."³⁸⁵ Likewise, the Court has emphasized that "protection of the individual against arbitrary exercise of public authority is a fundamental objective of international human rights protection. In this regard, non-existence of effective domestic remedies places the individual in a

³⁸³ *Resumen Ejecutivo - Informe Defensorial No. 162: A diez años de verdad, justicia y reparación. Avances, retrocesos y desafíos de un proceso inconcluso*, Lima, agosto de 2013, pp. 8, 9 y 10 (Original in Spanish, free translation).

³⁸⁴ Advisory Opinion OC-9/87 of October 6, 1987, *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 of the American Convention on Human Rights)*, Series A No 9, para. 24.

³⁸⁵ Judgment of November 3, 1997, *Case of Castillo Páez v. Peru*, Series C No. 34, para. 82.

state of defenselessness.”³⁸⁶ For its part, the European Court of Justice has held that the possibility for a person, injured in their rights, to access judicial proceedings to enforce their rights is “a principle which underlies the constitutional traditions common to the Member States.”³⁸⁷ Likewise, the Inter-American Commission on Human Rights (IACHR) has emphasized that “the availability of recourse to an effective and independent legal system to evaluate and enforce these obligations serves as a crucial fortification for the protection of human rights.”³⁸⁸

The doctrine considers that with regards to cases of intangible human rights violations there is a specific right to justice.³⁸⁹ This refers to access to independent and impartial courts. As stated by Professor Victoria Abellán Honrubia: “under the Universal Declaration on Human Rights and the international agreements on the matter [...] access to justice as the set of domestic legal guarantees for safeguarding human rights is internationally recognized as a fundamental human right. This right does not only affect every person who holds it, but it also directly commits the domestic organization of the State and the inner workings of the justice system itself. This means the international recognition of the human right to justice brings with it the logical need to affirm that the organization and workings of the state institutions for the administration of justice are not a discretionary faculty of the State but that there is a limit: ensuring the right to justice in the way in

³⁸⁶ Judgment of September 7, 2004, Case of *Tibi v. Ecuador*, Series C No. 114, para. 130.

³⁸⁷ Judgment of 15 May 1986, Case of *Johnston*, Case No. 222/84, cited in Guy Braibant, *La Charte des droits fondamentaux de l'Union européenne*, Edition du Seuil, Paris, 2001, pag. 236 (Original in French, free translation).

³⁸⁸ *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. of October 22, 2002, para. 340.

³⁸⁹ Abellán Honrubia, Victoria, “Impunidad de violación de los derechos humanos fundamentales en América Latina: Aspectos jurídicos internacionales”, in *Jornadas iberoamericanas de la Asociación española de profesores de derecho internacional y relaciones internacionales - La Escuela de Salamanca y el Derecho Internacional en América, del pasado al futuro*, Universidad de Salamanca, Salamanca, 1993; Mattarollo, Rodolfo, “La problemática de la impunidad”, in *Cuadernos Centroamericanos de Derechos Humanos*, N° 2, Ed. Codehuca, San José, Costa Rica, 1991; Méndez, Juan, “Accountability for Past Abuses”, in *Human Rights Quarterly*, Volume 19, No. 2, 1997; Senese, Salvatore, “Pouvoir judiciaire, droit à la justice et impunité” in *Impunity, Impunidad, Impunité*, ed. Lidlip, Ginebra 1993; and Valiña, Liliana, “Droits intangibles dans le cadre du système interaméricain des droits de l’homme”, in *Droits intangibles et états d’exception*, Ed. Bruylant, Bruxelles, 1996.

which it is recognized by international law.”³⁹⁰ The IACHR and the Inter-American Court have held that the right to justice is protected by the *American Convention on Human Rights* (ACHR). The Inter-American Court has thus established that “the American Convention guarantees access to justice to all persons in order to protect their rights and that the States Parties have the obligation to prevent, investigate, identify and punish the perpetrators of or accessories to human rights violations. In other words, any human right violation entails the State’s obligation to make an effective investigation in order to identify those responsible for the violations and, when appropriate, punish them.”³⁹¹

The right to an effective remedy is established under numerous treaties,³⁹² as well as in other international human rights instruments³⁹³ (see Annex III). This obligation has been upheld by 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*³⁹⁴ (*Principles on Reparation*).

³⁹⁰ Abellán Honrubia, Victoria, Doc. Cit., p. 203 (Original in Spanish. Free translation).

³⁹¹ Judgment of February 27, 2002, Case of *Trujillo Oroza v. Bolivia*, Series C No. 92, para. 99.

³⁹² At the UN level it is worth highlighting: International Covenant on Civil and Political Rights (Art. 2); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 13); International Convention on the Elimination of All Forms of Racial Discrimination (Art. 6); International Convention for the Protection of All Persons from Enforced Disappearance (Arts. 8, 12, 17.2. f and 20.2); and Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Art. 6.2). At the regional level, it is worth highlighting: American Convention on Human Rights (Arts. 24 and 25); Inter-American Convention on Forced Disappearance of Persons (Art. X); and Inter-American Convention to Prevent and Punish Torture (Art. 8).

³⁹³ *Universal Declaration of Human Rights* (Art. 8); *Declaration on the Protection of All Persons from Enforced Disappearance* (Arts. 8 y 13); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principles 4 and 16); *Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (Art. 9); *American Declaration on the Rights and Duties of Man* (Art. XVIII); *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Principles 4 to 7); *Vienna Declaration and Programme of Action* (Art. 27); and *Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (Arts. 13, 160-162 and 165).

³⁹⁴ UN General Assembly Resolution No. 60/147 of 16 December 2005.

a. The obligation to provide an effective remedy

Every violation of a human right gives rise to the obligation for the State to provide and guarantee an effective remedy to the victims and their next of kin. As the *Principles on Reparation* recall: “[t]he obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: [...] d) Provide effective remedies to victims, including reparation [...]”.³⁹⁵ The *Principles on Reparation* also establish that “[o]bligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws.”³⁹⁶

The Inter-American Court of Human Rights has repeatedly held that “base don the protection granted by Articles 8 and 25 of the Convention, States are obliged to provide effective judicial remedies to the victims of human rights violations.”³⁹⁷ The Court has also established that the right to judicial protection or to an effective remedy (Article 25 of the Convention) “is closely linked to the general obligation set forth in Article 1(1) of the same Convention, which give the States Party the obligation to respect rights under domestic law, entailing the States’ responsibility to design and legally establish an effective recourse, as well as to ensure due application of said recourse by its judicial authorities.”³⁹⁸ Additionally, the Court has indicated that “[a]rticle 2 of the American Convention places the States Party under the obligation to establish, in accordance with their Constitutional procedures and the provisions of this Convention, such legislative or other measures as may be necessary for effective exercise of the rights and freedoms protected by this same Convention. Therefore, it is necessary to reaffirm that the obligation to adapt domestic legislation is, by its very nature, one that must be reflected in actual results.”³⁹⁹

³⁹⁵ Article 3.

³⁹⁶ Article 12.

³⁹⁷ Judgment of February 27, 2012, *Case of Narciso González Medina and family v. Dominican Republic*, Series C No. 240, para. 207.

³⁹⁸ Judgment of June 17, 2005, *Case of the Indigenous Community of Yakye Axa v. Paraguay*, Series C. No. 125, para. 99.

³⁹⁹ *Ibid.*, para. 100.

"All the States party to the American Convention have the duty to investigate human rights violations and to punish the perpetrators and accessories after the fact in said violations. And any person who considers himself or herself to be a victim of such violations has the right to resort to the system of justice to attain compliance with this duty by the State, for his or her benefit and that of society as a whole."

Inter-American Court of Human Rights⁴⁰⁰

The HRC has highlighted that the obligation to guarantee an effective remedy constitutes "a treaty obligation inherent in the [International] Covenant [on Civil and Political Rights] as a whole [...] [even] during a state of emergency, [...] the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective."⁴⁰¹ The Committee against Torture has held that "[t]o give effect to article 14 [of the Convention against Torture], States parties shall enact legislation specifically providing a victim of torture and ill-treatment with an effective remedy [...]. Such legislation must allow for individuals to exercise this rights and ensure their access to a judicial remedy."⁴⁰² The Committee against Torture has established that "States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to Access their rights to remedy and to obtain redress."⁴⁰³

b. Concept of an effective remedy

The right to an effective remedy implies the right to defender one's own rights before an independent and impartial body, in order to obtain recognition of the violation, the cessation of the violation if it continues and adequate reparation. The effectiveness of the remedy means that it should "give results or responses to the violations of rights established in the Convention"⁴⁰⁴ and, therefore, "it should be really ideal to determine whether a

⁴⁰⁰ Judgment of August 29, 2002, *Case of the Caracazo v. Venezuela*, Series C No. 95, para. 115.

⁴⁰¹ *General Comment No. 29, States of Emergency (article 4)*, para.14.

⁴⁰² *General Comment No. 3 (2012): Implementation of article 14 by States parties*, CAT/C/GC/3 of 13 December 2012, para. 20.

⁴⁰³ *Ibid.*, para. 40.

⁴⁰⁴ Inter-American Court of Human Rights, Judgment of December 6, 2001, *Case of Las Palmeras v. Colombia*, Series C No. 90, para. 58.

violation of human rights had been committed and do whatever it takes to solve it.”⁴⁰⁵ This means, as stated in the *Principles on Reparation*, “equal and effective access to justice.”⁴⁰⁶ When dealing with grave human rights violations, the Inter-American Court of Human Rights has established that the remedy must achieve “that among other things, those responsible for human rights violations will be tried”⁴⁰⁷ and “confers to victims’ relatives the right to investigate their disappearance and death by State authorities, to carry out a process against the liable parties of unlawful acts, to impose the corresponding sanctions, and to compensate damages suffered by their relatives.”⁴⁰⁸

International case law has held that in order for a remedy to be effective “it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.”⁴⁰⁹ The Inter-American Court of Human Rights has established that the remedies that do not have this vocation, even when they are established in the domestic legal order, are illusory and cannot be considered effective remedies. Thus, the Court has repeatedly held that “[a] remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary

⁴⁰⁵ Inter-American Court of Human Rights: Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 102; Judgment of August 18, 2000, *Case of Cantoral Benavides v. Peru*, Series C No. 69, para. 164; Judgment of February 6, 2001, *Case of Ivcher Bronstein v. Peru*, Series C No. 74, para. 136; and Judgment of August 31, 2001, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Series C No. 79, para. 113.

⁴⁰⁶ Article 11.

⁴⁰⁷ Judgment of January 22, 1999, *Case of Nicholas Blake v. Guatemala*, Series C No. 36, para. 63.

⁴⁰⁸ Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 130.

⁴⁰⁹ Advisory Opinion OC-9/87 of October 6, 1987, “*Judicial Guarantees in States of Emergency*” (Arts. 27.2, 25 and 8 of the American Convention on Human Rights), Series A No. 9, para. 24. See also, inter alia: Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 144; Judgment of July 5, 2004, *Case of 19 Tradersmen v. Colombia*, Series C No. 109, para. 192; and Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154, para. 111.

independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy."⁴¹⁰ Likewise, the Court has held that "[remedies] are illusory when it is shown that they are ineffective in practice, when the Judiciary lacks the necessary independence to take an impartial decision, or in the absence of ways of executing the respective decisions that are delivered. They are also illusory when justice is denied, when there is an unjustified delay in the decision and when the alleged victim is impeded from having access to a judicial recourse."⁴¹¹

For its part, the IACHR has held that the "theoretical possibility" that a remedy could repair the damaged caused by the State to the private individuals, "suggested by a collection of doctrines" but never developed by the laws or jurisprudence of the highest national courts, cannot be considered an available remedy.⁴¹²

"In order for a criminal investigation to be an effective recourse in order to ensure the right to access to justice of the alleged victims, as well as to guarantee the rights that have been abridged in the instant case, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof."

Inter-American Court of Human Rights⁴¹³

c. Intangible and non-derogable nature of the right to an effective remedy

Although the right to a remedy is not specifically mentioned in several international treaties as a non-derogable right,⁴¹⁴ it is one of the essential rights for the effective protection of all other

⁴¹⁰ *Ibid.*

⁴¹¹ Judgment of February 6, 2001, *Case of Ivcher Bronstein v. Peru*, Series C No. 74, para. 137.

⁴¹² Report No. 65/08 of July 25, 2008, Petition No. 460-00, *Victorio Spoltore - Argentina*, para. 31.

⁴¹³ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 123.

⁴¹⁴ See, for example, Article 4 of the *International Covenant for Civil and Political Rights*.

human rights and should be guaranteed even in states of emergency.⁴¹⁵ Furthermore, the ACHR prohibits the suspension of judicial guarantees that are essential for the protection of non-derogable rights⁴¹⁶ and the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED) establishes that the writ of habeas corpus is not derogable.⁴¹⁷

The HRC has held that the legal duty to provide remedies for any breach of the rights protected under the ICCPR "constitutes a treaty obligation inherent in the Covenant as a whole"⁴¹⁸ and, therefore, is non-derogable. The HRC established that "[e]ven if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective."⁴¹⁹

The Inter-American Court of Human Rights has reiterated that judicial remedies to protect non-derogable rights cannot be subject to any suspension and that "the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking."⁴²⁰ In this same vein, the IACHR has indicated that "the requirement that states respect and ensure fundamental human rights through judicial protection without discrimination is non-derogable. [...] [T]he right to judicial protection, and with it the obligation to respect and ensure fundamental human rights

⁴¹⁵ See: Human Rights Committee: *General Comment No. 29, States of Emergency* (article 4), CCPR/C/21/Rev.1/Add.11, of 31 August 2001, para. 14; UN Commission on Human Rights, Resolution No. 1992/35, *Habeas corpus*, of 28 February 1992, para. 2; European Court of Human Rights, Judgment of 18 December 1996, *Case of Aksoy v. Turkey*, Application No. 21987/93, para. 83; and Inter-American Court of Human Rights, Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations* (arts. 27.2, 25.1 and 7.6 of the American Convention on Human Rights), of 30 January 1987, Series A No. 8, para. 42, and Advisory Opinion OC-9/87, Doc. Cit., operative paragraphs 2 and 3.

⁴¹⁶ Article 27.

⁴¹⁷ Article 17 (2, f).

⁴¹⁸ *General Comment No. 29*, Doc. Cit., para. 14.

⁴¹⁹ *Ibidem*.

⁴²⁰ Advisory Opinion OC-9/87 of October 6, 1987, *Doc. Cit.*, para. 24.

without discrimination, may not be suspended under any circumstances"⁴²¹.

d. Judicial nature of the remedy

Under the ICCPR,⁴²² the nature – judicial, administrative or otherwise – of the remedy is as much a function of the nature of the right that is breached as it is of the effectiveness of the remedy. Under the ACHR,⁴²³ in the case of violations of fundamental rights, the remedy must be judicial in nature. Despite these diverse rules in international instruments, which entail finding a criminal infraction, case law is unanimous regarding the judicial nature of effective remedies. This is been reaffirmed by the *Principles on Reparation*, which stipulate that "[a] victim of a gross violation of international human rights law or a serious violations of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law."⁴²⁴

The HRC has considered that "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life."⁴²⁵ When dealing with gross human rights violations – such as extrajudicial execution, enforced disappearance or torture – the HRC has repeatedly indicated that remedies should be essentially judicial. Also, judicial remedies that only allow the victims and/or their family members to obtain economic compensation for the damage they suffered, as happens in suits for reparations before contentious administrative jurisdiction, cannot be considere an effective remedy.⁴²⁶ The Committee

⁴²¹ *Study on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. October 22, 2002, para. 343.

⁴²² Article 2(3) of the *Internaitonal Covenant on Civil and Political Rights*. In the same sense, see article 13 of the *European Charter on Human Rights*.

⁴²³ Article 25.

⁴²⁴ Article 12.

⁴²⁵ Views of 13 November 1995, *Case of Nydia Erika Bautista v. Colombia*, Communication No. 563/1993, para. 8.2. See also: Views of 29 July 1997, *Case of José Vicente and Amado Villafañe Chaparro et al v. Colombia*, Communication No. 612/1995, para. 8.2; and Decision on Admissibility, Views of 13 October 2000, Communication No. 778/1997, *Case of Coronel et al v. Colombia*, para. 6.4.

⁴²⁶ *Ibidem*.

against Torture has decided in the same way, establishing that “[d]isciplinary action alone shall not be regarded as an effective remedy within the meaning of article 14 [... and that] [j]udicial remedies must always be available to victims, irrespective of what other remedies may be available.”⁴²⁷

“It is not possible to guarantee the right to truth, nor any other right, if there is no effective judicial protection. The right to effective judicial protection, recognized by our Constitution in its article 139.3, holds special relevance before the cases of human rights violations, given their nature as a means of protection of rights and of impunity. [...] [T]he subjective rights need mechanisms in charge of defending them.”

Constitutional Tribunal of Peru⁴²⁸

Although the ACHR establishes the judicial nature of the remedy, it is important to highlight that the Inter-American Court of Human Rights has considered that the disciplinary proceedings, by their very nature, do not constitute an effective remedy. The Inter-American Court has thus established that disciplinary proceedings are carried out through administrative bodies; their object is to determine the individual responsibility of public servants for compliance with their job duties as a function of the services they should provide; and their purpose is to protect administrative functions and to correct and control government employees.⁴²⁹ In effect, disciplinary action and disciplinary proceedings’ object and purpose is not to protect the rights of victims facing crimes attributable to State agents, nor do they award redress. In Colombian cases, the Inter-American Court has also established that administrative disciplinary venues “can only complement, but not totally substitute the function of the criminal jurisdiction in cases of serious human rights violations, since it does not constitute a complete investigation into the facts, and bearing in mind the inherent limitations of this type of proceedings – owing to the nature of the type of offenses investigated and the purpose

⁴²⁷ *General Comment No.3*, Doc. Cit., paras. 26 and 30.

⁴²⁸ Judgment of March 18, 2004, Case File No. 2488-2002-HC/TC Piura, *Caso Genaro Villegas Namuche*, paras. 21 and 22 of Legal Basis (Original in Spanish, free translation).

⁴²⁹ Judgment of January 31, 2006, *Case of the Massacre of Pueblo Bello v. Colombia*, Series C No. 140, para. 203; and Judgment of July 1, 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148, para. 333.

of the body in charge of them.”⁴³⁰ Likewise, the Court has held that contentious administrative proceedings, set up to obtain the payment of compensation, “do not constitute per se an effective and adequate recourse to redress such [human rights] violations comprehensively.”⁴³¹

For its part, the European Court of Human Rights has held that the notion of an effective remedy implies, in addition to the payment of compensation when appropriate, profound and effective investigations leading to the identification and punishment of the perpetrators, and entails the complainant's effective access to investigative proceedings.⁴³²

In terms of gross human rights violations, there is no doubt that the right to an effective remedy must be a judicial remedy before an independent and impartial tribunal, established by law.⁴³³ Given these gross human rights violations' nature as criminal offenses, the right to access to a court of criminal jurisdiction is a fundamental element – although that the only one – of the right to an effective remedy. In effect, although the right to redress may be satisfied by other means, the rights to justice and to truth require criminal prosecution. The Inter-American Court has thus established that “[t]he right to access justice implies the effective determination of the facts under investigation and, if applicable, of the corresponding criminal responsibilities in a reasonable time.”⁴³⁴ Likewise, the Court has held that “to exercise their rights

⁴³⁰ Judgment of July 1, 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148, para. 334.

⁴³¹ Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 220.

⁴³² Judgment of 18 December 1996, *Case of Aksoy v. Turkey*, Communication No. 21987/93, para. 98; and Judgment of 24 April 1998, *Case of Aydin v. Turkey*, Communication No. 23178/94, para. 103.

⁴³³ See, *inter alia*, Human Rights Committee: View of 29 November 1989, *Case of F. Birindwa ci Bithashwiwa and E. Tshisekedi wa Mulumba v. Zaire*, Communication No. 241/198, para. 14; Views of 13 November 1995, *Case of Nydia Erika Bautista v. Colombia*, Communication No. 563/1993, para. 8.2; Views of 29 July 1997, *Case of José Vicente y Amado Villafañe Chaparro et al v. Colombia*, Communication No. 612/1995, para. 8.2; Committee on the Elimination of Discrimination against Women, *General Comment No. 19 regarding violence against women*, 29 January 1992, A/47/38, para. 24; and African Commission on Human and Peoples Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle C (a).

⁴³⁴ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 124.

to and to justice [...]. The victims of the violations of human rights and their next of kind have the right to have said violations heard and resolved by a competent [civil, and not military,] tribunal, pursuant [to] the due process of law and the right to a fair trial."⁴³⁵

e. Effective remedy and rights of the victims in criminal proceedings

Traditionally, international law focused on the question of criminal proceedings from a perspective centered on their repressive and dissuasive functions, as well as from the perspective of the judicial rights and guarantees of the accused. Historically the notion of the right to due process (or right to a fair trial) was built up and developed regarding the judicial guarantees of the accused. The question of the victims of grave human rights violations was fundamentally focused toward their need for protection, their need to receive information about the proceedings and, in a limited sense, to expose their points of view and concerns before the justice system. This traditional vision implicitly entailed a "paternalistic" vision of the victims and, thus, assigned them a restricted role in criminal proceedings. It was not based on a concept anchored in victims' rights, nor did it consider criminal justice scenarios as a forum to fulfillment and satisfaction of these rights. The United Nations' *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*⁴³⁶ reflects this traditional focus.

However, since the late 1980s a strong tendency in international law regarding the recognition of the legal condition and the rights of the victims of gross human rights violations began to be developed. It has been the result of the development of the international case law and doctrine of courts and international and regional human rights bodies, as well as the evolution of international criminal law regarding victims' rights to justice, truth and reparation.

This tendency has been crystallized in various international instruments, both in human rights and in criminal law, which have

⁴³⁵ Judgment of November 23, 2009, *Case of Radilla Pacheco v. Mexico*, Series C No. 209, para. 275.

⁴³⁶ Adopted by the UN General Assembly, through Resolution No. 40/34 of 29 November 1985.

incorporated express clauses regarding the participation of victims in criminal proceedings. It is worth highlighting: the *Rome Statute of the International Criminal Court*;⁴³⁷ the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*;⁴³⁸ the *Protocol to Prevent, Suppress and punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*⁴³⁹ and, more recently, the *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*⁴⁴⁰. This also has been expressed in the framework of international criminal jurisdictions.⁴⁴¹ At the regional level, several instruments have been adopted to address the issue of the rights of victims of crime, including grave human rights violations, through criminal proceedings.⁴⁴² But, particularly, the *Principles on Reparation* and the *Principles against Impunity* reflect this tendency at the UN level. So, increasingly, international law began to establish a legal framework with respect to gross human rights violations and criminal proceedings, in which the victims went from being the object of the law to being the subjects of law, giving full meaning to the right to an effective remedy.

From the perspective of international human rights law, victims' rights in relation to criminal proceedings are legally based on four essential internationally-protected rights:

- The right to an effective remedy, which includes, inter alia, the right to an investigation;

⁴³⁷ Articles 68(3) and 75 of the *Rome Statute of the International Criminal Court* recognize a certain level of victim participation in proceedings. The rules of procedure and evidence allow the participation of the victim in proceedings before the Court.

⁴³⁸ See in particular article 8.

⁴³⁹ See in particular article 6(2).

⁴⁴⁰ Adopted by the UN General Assembly, through Resolution No. 67/187 of 20 December 2012.

⁴⁴¹ See, *inter alia*: the *Rules of procedure and evidence of the International Criminal Court*; the *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia* (Rule 23); and the *Statute of the Special Tribunal for Lebanon* (articles 17 and 28).

⁴⁴² See, *inter alia*, Recommendation (85) 11 E, *on the position of the victim in the framework of criminal law and procedure*, of the Committee of Ministers of the Council of Europe (1985); the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* by the African Commission on Human and Peoples' Rights (2003); and the *Council Framework Decision on the standing of victims in criminal proceedings*, of the Council of the European Union (2001).

- The right of every person to a fair and public hearing with due guarantees by a independent, impartial and competent tribunal, established by law, for the determination of their rights⁴⁴³;
- The right to reparation; and
- The right to truth.

In order to consider their rights to justice and to truth, the victims of gross human rights violations and other crimes under international law have the right to a fair trial before a competent, independent and impartial tribunal. This right is closely linked to the State's international obligation to prosecute and punish the perpetrators of human rights violations, as the Inter-American Court of Human Rights has held.⁴⁴⁴ Given gross human rights violations' nature as criminal offenses, the criminal justice system plays an important role in the fulfillment of the right to truth, which implies knowing the identity and responsibility of the perpetrators of the crime, since only a criminal court may determine the individuals' guilt.

Thus, access to criminal justice – that is, before an independent, impartial and competent tribunal – for every victim of a gross human rights violation, and their next of kin, is an essential element of the the right to an effective remedy. The Inter-American Court of Human Rights has established that “based on article 8 of the Convention it is understood that victims of violations of human rights, or their relatives, must be able to be Heard and act on their respective proceedings, both looking for the clarification of facts and the punishment of the liable parties and a proper compensation.”⁴⁴⁵ Likewise, the *UN Principles and*

⁴⁴³See: the *Universal Declaration of Human Rights* (Art. 10); the *International Covenant on Civil and Political Rights* (Art. 14.1); the *American Declaration on the Rights and Duties of Man* (Art. XXVI) and the *American Convention on Human Rights* (Art. 8.1).

⁴⁴⁴ See, e.g.: Judgment of July 21, 1989, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 7, paras. 32 and 34; Judgment of July 21, 1989, *Case of Godínez Cruz v. Honduras*, Series C No. 8, paras. 30 and 3; Judgment of December 8, 1995, *Case of Caballero Delgado and Santana v. Colombia*, Series C No. 22, para. 69 and Op. Para. 5; Judgment of September 14, 1996, *Case of El Amparo v. Venezuela*, Series C No. 28, para. 61 and Op. Para. 4; Judgment of November 3, 1997, *Case of Castillo Páez v. Peru*, Series C No. 34, para. 90; Judgment of November 12, 1997, *Case of Suárez Rosero v. Ecuador*, Series C No. 35, para. 107 and Op. Para. 6; and Judgment of January 24, 1998, *Case of Nicholas Blake v. Guatemala*, Series C No. 36, para. 97.

⁴⁴⁵ Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 129.

Guidelines on Access to Legal Aid in Criminal Justice Systems stipulate various provisions in order to “protect and safeguard the rights of victims [...] in the criminal justice process.”⁴⁴⁶ The Principles and Guidelines establish that “[w]ithout prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime”⁴⁴⁷ and “[a]ppropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization.”⁴⁴⁸

Along these lines, it is worth highlighted that the *Principles against Impunity* stipulate that: “[a]lthough the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein.”⁴⁴⁹

Although the *Principles against Impunity*, as well as some international criminal law instruments⁴⁵⁰ and European Union Instruments⁴⁵¹ expressly refer to the “civil parties” (*parties civiles*), international norms – whether treaty-based or declarative in nature – do not expressly regulate this procedural figure. This is because, on the one hand, international norms – whether regional or universal – establish and regulate obligations for States with different legal systems and, therefore, different procedural institutions. Thus, the legal concept of a “civil party” in criminal proceedings, even when it exists in the legal systems of the vast majority of countries, is not a procedural institution known to all legal systems in the world. Nonetheless, it is important to

⁴⁴⁶ Paragraph 3.

⁴⁴⁷ Principle 4.

⁴⁴⁸ Guideline 7 (a).

⁴⁴⁹ Principle 19 (2).

⁴⁵⁰ See: the *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia* (Rule 23) and the *Statute of the Special Tribunal for Lebanon* (articles 17 and 28).

⁴⁵¹ See, inter alia: *Framework Decision on the standing of victims in criminal proceedings* of the European Union.

emphasize that in the last two decades there are increasingly more States that, without having the legal tradition of this procedural institution, have incorporated the figure of the “civil party” in their laws of criminal procedure.⁴⁵² On the other hand, international norms – and particularly those on human rights – address the issue of the rights and legal status of victims in criminal proceedings from the general perspective of the rights to an effective remedy, to justice, to truth and to reparation, without specifying the type of procedural institution through which these rights should be satisfied.

Within this context, the Inter-American Court of Human Rights has established that in all stages of criminal proceedings (both the investigation and the trial) courts should guarantee that the victims and/or their family members have full access, capacity to act and ample procedural opportunities to formulate their claims and to present evidence, in clarifying the facts and in punishing the responsible parties, and in seeking just compensation.⁴⁵³ Likewise, the Court has held that the claims formulated by the victims and/or their family members, as well as the evidence provided in criminal proceedings, must be analyzed completely and seriously by the judicial authorities before issuing a decision on the facts, liabilities, penalties and reparations.⁴⁵⁴

For its part, the IACHR has held that “where a domestic judicial system allows the victim or his family members to act within the proceedings in the role of civil party, that opportunity becomes a

⁴⁵² See, for example, the Article 36 Report of the Committee to the Coreper of the Council of the European Union, *Draft report on the implementation of the Framework Decision of 15 March 2001, on the standing of victims in criminal proceedings*, Document 14830/1/04 REV 2 of 15 December 2004.

⁴⁵³ See, *inter alia*: Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 129; Judgment of July 1, 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148, para. 296; Judgment of 19 November 1999, *Case of the “Street Children” (Villagrán Morales et al) v. Guatemala*, Series C No. 63, para. 227; Judgment of December 6, 2001, *Case of Las Palmeras v. Colombia*, Series C No. 90, para. 59; Judgment of June 7, 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 186; Judgment of March 1, 2005, *Case of Serrano Cruz Sisters v. El Salvador*, Series C No. 120, para. 63; Judgment of July 4, 2006, *Case of Ximenes Lopes v. Brazil*, Series C No 149, para. 193; and Judgment of February 27, 2012, *Case of Narciso González Medina and family v. Dominican Republic*, Series C No. 240, para. 207.

⁴⁵⁴ Judgment of July 4, 2006, *Case of Ximenes Lopes v. Brazil*, Series C No 149 para. 193 and Judgment of July 1, 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148, para. 296.

fundamental right which is crucial to the criminal process. [...] [I]n such cases, the right of the civil party to participate must be observed and protected in full. The authorities must consider and respond to the petitions of the civil party."⁴⁵⁵ The IACHR has also considered that judicial authorities' failure to respond to the civil party's claims constitutes a violation of the rights of the family members to be heard and to have access to an effective legal remedy through the criminal proceedings.⁴⁵⁶

Likewise, the UN Special Rapporteur on the administration of justice through military tribunals has indicated that to "conduct inquiries and prosecute and try those charged with [grave human rights violations,] the authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings."⁴⁵⁷

Thus, to effectively guarantee the right to an effective judicial remedy, States must guarantee that the victims and/or their family members have broad procedural standing in criminal proceedings. Independent of the legal figure used for standing in criminal proceedings – such as, for example, "civil party," "private accusation," or "popular action" – it should enable the victims and/or their family members to act as a party to the proceedings and to be able, *inter alia*, to:

- Present and request evidence;
- Present, request and obtain witnesses' testimony;
- Have access to documentation and evidence;
- Interrogate their witnesses and the opposing party's witnesses;
- Question or challenge the evidence and witnesses presented by the defense;
- Involve expert witnesses; and
- Challenge and appeal the decision of the judge or the court, including judgments or final decisions.

The effect remedy must be substantiated in accordance with the rules of due process or law and the requirements of a fair trial.

⁴⁵⁵ Report No. 3/98 of April 7, 1998, Case No. 11.221, *Tarcisio Medina Charry (Colombia)*, para. 102. See also: Report No. 29/92 (Uruguay), October 2, 1992, para. 41.

⁴⁵⁶ *Ibidem*.

⁴⁵⁷ *The administration of justice through military tribunals – Report presented by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux*, E/CN.4/2006/58 of 13 January 2006, para. 32.

This has been repeatedly held by the Inter-American Court of Human Rights.⁴⁵⁸ The Court has specified that “[t]he right to access justice implies the effective determination of the facts under investigation and, if applicable, of the corresponding criminal responsibilities in a reasonable time; therefore, considering the need to guarantee the rights of the injured parties, a prolonged delay may constitute, in itself, a violation of the right to a fair trial.”⁴⁵⁹

“It will not be posible to build a democratic nation that respects fundamental rights if, after a painful period of violence and gross human rights violations, the State and society do not take up the effort needed to guarantee victims’ rights to have access to justice and to obtain comprehensive reparations”.

Office of the Ombudsman of Peru⁴⁶⁰

3. The right to reparation

The right to redress for the victims of human rights violations and their next of kin, and the related State obligation to provide reparation, are established in human rights treaties⁴⁶¹ and international instruments⁴⁶² (see Annex III). Although the ICCPR

⁴⁵⁸ See, *inter alia*: Judgment of April 6, 2000, *Case of Baldeón García v. Peru*, Series C No. 147, para. 143; Judgment of 10 July 2007, *Case Cantoral Huamaní and García Santa Cruz v. Peru*, Series C No. 167, para. 124; and Judgment of November 25, 2006, *Case of the Miguel Castro Castro Prison v. Peru*, Series C No. 160, para. 381.

⁴⁵⁹ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 124.

⁴⁶⁰ *Informe Defensorial No. 128: El Estado frente a las víctimas de la violencia. ¿Hacia dónde vamos en políticas de reparación y justicia?*, Lima, December 2007, p. 13 (Original in Spanish, free translation).

⁴⁶¹ For example: International Covenant on Civil and Political Rights (Arts. 2.3, 9.5 y 14.6); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 13 y 14); International Convention for the Elimination of Racial Discrimination (Art. 6); International Convention for the Protection of All Persons from Enforced Disappearance (Art. 24); International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (Arts. 15, 16, 18 y 22); American Convention on Human Rights (Arts. 25, 68 y 63,1); Inter-American Convention to Prevent and Punish Torture (Art. 9); Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Art. 7, g); and Inter-American Convention against All Forms of Discrimination and Intolerance (Art. 10).

⁴⁶² For example: *Universal Declaration of Human Rights* (Art. 8); *Declaration on the Protection of All Persons against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 11); *Set of Principles for the protection of all persons subject to any form of detention or prison* (Art. 35); *United Nations*

only expressly refers to reparation in cases of arbitrary deprivation of liberty and judicial error,⁴⁶³ the Human Rights Committee has held that the obligation to provide redress flows from the general obligation to ensure an effective remedy⁴⁶⁴ and extends to all the rights protected under the treaty.⁴⁶⁵ The Committee specified that "[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged."⁴⁶⁶ Likewise, under international humanitarian law, the State has the obligation to repair the damages caused by war crimes that are attributable to it.⁴⁶⁷

a. Nature of the obligation to provide redress

International jurisprudence and doctrine have reiterated that the obligation to provide reparation for serious violations of human rights and international humanitarian law constitutes a customary international law norm. The Inter-American Court of Human Rights has held that the obligation to provide reparation is "an unwritten law that is one of the basic principles of contemporary

Rules for the Protection of Juveniles Deprived of Liberty (Rule 7); Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Principle 20); Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Principle 1, c); Declaration of basic principles of justice for victims of crime and abuse of power (Principle 19); Declaration on the Protection of All Persons from Enforced Disappearance (Art. 19); Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Art. 9); United Nations Declaration on the rights of indigenous people (Arts. 10 y 28); Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (Principle 9 and Guidelines 2, 7 y 11); 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; and Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (Principle 31 et seq).

⁴⁶³ Articles 9 (5) y 14 (6).

⁴⁶⁴ Article 2 (3).

⁴⁶⁵ *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, of 29 March 2004, para. 16.

⁴⁶⁶ *Ibidem*.

⁴⁶⁷ Rule 150 ("A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused"), in *Customary International Humanitarian Law, Volume I: Rules*, Op. Cit. p. 537; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law*; and the *Rome Statute of the International Criminal Court*.

international law regarding the responsibility of States. Thus, when an illicit fact occurs that is attributable to a State, there immediately arises an international responsibility of that State due to the violation of an international rule, with the consequent duty to redress and to make cease the consequences of the violation."⁴⁶⁸ The UN Independent Expert on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Prof. Theo Van Boven, has concluded that "the issue of State responsibility comes into play when a State is in breach of the obligation to respect internationally recognized human rights. Such obligation has its legal basis in international agreements, in particular international human rights treaties, and/or in customary international law, in particular those norms of customary international law which have a peremptory character (jus cogens)."⁴⁶⁹ The International Committee of the Red Cross (ICRC) has held that the State obligation to provide reparation for violations of international humanitarian law is "a norm of customary international law applicable in both international and non-international armed conflicts."⁴⁷⁰

The obligation to provide reparation for damages caused by grave human rights violations is international in nature. That means, as the Inter-American Court of Human Rights has stated, that "[t]he obligation to make reparations is governed by International Law and must not be modified or unfulfilled by the State by resorting to its domestic laws,"⁴⁷¹ and "all aspects of which (scope, nature, methods and determination of the beneficiaries) are regulated by international law."⁴⁷² The Court has also specified that "in cases of

⁴⁶⁸ Judgment of August 29, 2002, *Case of the Caracazo V. Venezuela*, Series C No. 95, para. 76. See also, *inter alia*: Judgment of March 3, 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, para. 87; Judgment of September 7, 2004, *Case of Tibi v. Ecuador*, Series C No. 114, para. 223; Judgment of June 17, 2005, *Case of the Yake Axa Indigenous Community v. Paraguay*, Series C No. 125, para. 180; and Judgment of April 6, 2000, *Case of Baldeón García v. Peru*, Series C No. 147, para. 175.

⁴⁶⁹ *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN Doc. E/CN.4/Sub.2/1993/8, of 2 July 1993, para. 41.

⁴⁷⁰ *Customary International Humanitarian Law, Volume I: Rules*, Op. Cit., pag. 537.

⁴⁷¹ Judgment of April 6, 2000, *Case of Baldeón García v. Peru*, Series C No. 147, para. 175.

⁴⁷² Judgment of March 3, 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, para. 88.

human rights violations, the State has the duty to provide reparations. This duty implies that while the victims or their next of kin should have ample opportunity to seek just compensation under domestic law, the State's obligation cannot rest exclusively on their procedural initiative or on the submission of probative elements by private individuals."⁴⁷³

Likewise, under international law, awarding compensation to the victims does not exempt the State from complying with its obligations to investigate, prosecute and punish. The Inter-American Court of Human Rights has established, in this regard, that "the fundamental obligations that the American Convention embodies to protect the rights and freedoms enumerated in its Articles 3 to 25, is to adapt domestic laws to conform to the Convention and to make reparation, and thereby guarantee all the rights and freedoms therein upheld. [...] These obligations are of equal importance. The obligation to guarantee and ensure effective exercise is independent of and different from the obligation to make reparation."⁴⁷⁴

For his part, the UN Special Rapporteur on Extrajudicial, summary or arbitrary executions has indicated that "[t]he recognition of the duty to compensate victims of human rights violations, and the actual granting of compensation to them, presupposes the recognition by the Government of its obligation to ensure effective protection against human rights abuses on the basis of the respect for the fundamental rights and freedoms of every person. [...] Granting compensation presupposes compliance with the obligation to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation."⁴⁷⁵

⁴⁷³ Judgment of May 11, 2007, *Case of the Massacre of la Rochela v. Colombia*, Series C No. 163, para. 220.

⁴⁷⁴ Judgment of 27 August 1998, *Case of Garrido and Baigorria v. Argentina*, Series C No. 39, paras. 71 y 72.

⁴⁷⁵ *Extrajudicial, summary or arbitrary executions - Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolution 1993/71, E/CN.4/1994/7, 7 December 1993, paras. 688 and 711.*

b. The *corpus juris* on reparation

As previously stated, the right to reparation for victims of human rights violations and their next of kin, and the State obligation to provide reparation, are established in numerous international human rights treaties and instruments, as well as in international humanitarian law. The international human rights bodies have also developed an immense jurisprudential framework on the right to reparation and the obligation to repair. This international *corpus juris* on reparation has been systematized and codified in the *Principles on Reparation*, adopted unanimously by the UN General Assembly.⁴⁷⁶ The Preamble of these *Principles* expressly stipulates that “the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms”.

Likewise, the *Principles against Impunity* constitute another legal guide on the matter. Principle 31 recalls that “[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”

c. Content and modalities of the reparation

The Inter-American Court of Human Rights has held that “[r]eparations are measures tending to eliminate the effects of the violations committed. Their nature and amount depend on the characteristics of the violation and, at the same time, on the pecuniary and non pecuniary damage caused.”⁴⁷⁷ The IACHR has likewise established that “[r]eparations should consist of measures that tend to make the effects of the violations committed disappear. Their nature and amount will depend on the damage caused both at the pecuniary and non-pecuniary levels.”⁴⁷⁸

⁴⁷⁶ Resolution No. 60/147 of 16 December 2005.

⁴⁷⁷ Judgment of April 6, 2000, *Case of Baldeón García v. Peru*, Series C No. 147, para. 177.

⁴⁷⁸ *Principal Guidelines for a Comprehensive Reparations Policy*, OEA/Ser/L/V/II.131 Doc. 1 of 19 February 2008, para. 1.

The reparation should be integral. This means that all damages caused by the human rights violations and/or crime under international law should be repaired: this includes both material and moral damages. Reparation includes: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (see Principles 18 to 23 of Principles on Reparation in Annex III). As the Inter-American Court has established, “[r]eparations is a generic term that covers the various ways a State may make amends for the international responsibility it has incurred (restitutio in integrum, payment of compensation, satisfaction, guarantees of non-repetitions among others).”⁴⁷⁹

“[T]he reparations given to torture victims should be addressed to comprehensively seeking restitution for the right that was breached. In this sense, the amount that is awarded for this concept should allow the victims to attain not only compensation for the damage caused, but also the means for rehabilitation including medical and psychological attention.”

Ombudsman of Peru⁴⁸⁰

The HRC⁴⁸¹, the Committee against Torture⁴⁸², the Inter-American Court and the IACHR⁴⁸³ have reiterated that the right to reparation includes different modalities. These modalities are not exclusive and, generally, are cumulative. Indeed, the reparation should be adequate and fair, according to the nature and seriousness of the violations, the harm suffered and the affected human group. Therefore, several modalities of reparation are required.⁴⁸⁴ For example, in cases of enforced disappearance, the right to reparation entails the right to know the fate and/or the

⁴⁷⁹ Judgment of November 27, 1998, *Case of Loayza TaMay v. Peru*, Series C No 42, para. 85.

⁴⁸⁰ *Informe Defensorial No. 112: El difícil camino de la reconciliación. Justicia y reparación para las víctimas de la violencia*, Lima, December 2006 (Original in Spanish, free translation).

⁴⁸¹ *General Comment No. 31*, Doc. Cit., para. 16.

⁴⁸² *General Comment No. 3*, Doc. Cit., para. 2.

⁴⁸³ *Principles Guidelines for a Comprehensive Reparations Policy*, OEA/Ser/L/V/II.131 Doc. 1 of 19 February 2008.

⁴⁸⁴ Article 15 of 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*; Principle 34 of *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*; and paragraph 1 of *Principal Guideline for a Comprehensive Reparations Policy*, OEA/Ser/L/V/II.131 Doc. 1, of 19 February 2008.

whereabouts of the disappeared person and, in case of death, to the identification and restitution of the body of the victim.⁴⁸⁵

Although not all forms of redress are necessary in all cases, the States may not choose to award only one form of reparation to the detriment of others. In this sense, the Inter-American Court of Human Rights has established that "the comprehensive reparation of a right protected by the Convention cannot be reduced to the compensation to the next of kin of the victim. [...] Adequate redress, understood within the framework of the Convention, includes measures of rehabilitation and satisfaction and guarantees of non-repetition."⁴⁸⁶ In this same vein, the IACHR has indicated that an administrative reparations program "ought not to preclude other judicial avenues to access comprehensive reparations, and victims should be able to choose the avenue that they consider best to ensure, in the end, that they receive reparations."⁴⁸⁷ The Committee against Torture has also held that "[w]hile collective reparation and administrative reparation programmes may be acceptable as a form of redress, such programmes may not render ineffective the individual right to a remedy and to obtain redress."⁴⁸⁸

d. Persons entitled to the right to reparation

The holders of the right to reparation are the victims. The *Principles on Reparation* define who is a victim, and in particular in terms of reparation, in the following terms: "victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where

⁴⁸⁵ See, inter alia: article 22 (g) of 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*; Principle 34 from the *updated Set of collected principles*; *Annual Report of the Inter-American Commission on Human Rights 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev 1, of September 28, 1986, pág. 205; and the Inter-American Commission of Human Rights, Report No. 136/99, of December 22, 1999, Case 10.488 - *Ignacio Ellacuría et al*, para. 224.

⁴⁸⁶ Judgment of May 11, 2007, *Case of the Massacre de la Rochela v. Colombia*, Series C No. 163, paras. 219 y 221.

⁴⁸⁷ *Principal Guidelines for a comprehensive reparations policy*, OEA/Ser/L/V/II.131 Doc. 1 of 19 February 2008, para. 5.

⁴⁸⁸ *General Comment No. 3*, Doc. Cit., para. 20.

appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."⁴⁸⁹

Both indirect and direct victims are holders of the right to reparation. This criteria has been broadly reaffirmed by international case law and instruments. The *International Convention for the Protection of All Persons against Enforced Disappearance* stipulates that "'victim' means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance."⁴⁹⁰ Consequently, the family members of the victims of grave human rights violations crimes against humanity, genocide and war crimes, as well as persons who have suffered harm by intervening to assist victims in danger or to impede their victimization all have the right to reparation. The concept of the holder of the right to reparation also encompasses combatants from the members of armed opposition groups, victims of acts and methods prohibited under international humanitarian law and constituting war crimes, including in situations in which they have not been put out of combat.

As set forth in the international instruments,⁴⁹¹ the victims may be collective, whether they are individuals who have seen their individual human rights violated collectively or violations of collective rights.⁴⁹² Several individual human rights may be exercised and enjoyed both individually and collectively. In particular, the rights to freedom of expression, freedom of assembly, freedom of association and political rights are generally collectively exercised.⁴⁹³

⁴⁸⁹ Article 8.

⁴⁹⁰ Article 24 (1).

⁴⁹¹ See, inter alia: article 8 de *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*; and article 1 of the *Declaración on fundamental principles of justice for the victims of crimes and abuse of power*.

⁴⁹² For example, the rights of indigenous peoples (arts. 11.2, 20.2, 28, 32.3 y 40 of the *UN Declaration on the rights of indigenous peoples* and arts. 15, 16 of the *ILO Convention No. 169 on Indigenous and Tribal Peoples* (1989).

⁴⁹³ Human Rights Committee: Views of 7 July 2000, *J. G. A. Diergaardt and others v. Namibia*, Communication No. 760/1997; Views of 8 April 1993, *E. W. and others v. Netherlands*, Communication No. 429/1990; Views of 9 April 1981, *Aumeeruddy-Cziffra v. Mauritius*, Communication No. 035/1978; Views of 23

Although under international law natural or physical persons are the holders of human rights,⁴⁹⁴ and therefore the right to reparation, corporate entities or legal persons – as the collective expression of individual rights – may be the object of international protection. International case law has held that the collective exercise of certain individual rights and freedoms, which are exercised through associations of other legal entities, require that the legal entity be the beneficiary of a certain level of protection for its effective protection.⁴⁹⁵ Such “indirect protection” to the legal person, which directly protects the effectiveness of the enjoyment and exercise of freedom of expression and freedom of association, as well as political rights, may lead to recognition for the purposes of reparation to the head of legal entities, insofar as they are the expression of the collective exercise of rights and freedoms. Thus, the Human Rights Committee and the European Court of Human Rights have awarded reparations in favor of moral persons (including the restitution of the legal personhood of associations).

March 1994, *Hertzberg and others v. Finland*, Communication No. 431/1990; Views of 3 April 1989, *Ibrahima Gueye and others v. France*, Communication No. 196/1985; Views of 3 November 2004, *Leirvåg, Jansen et al v. Norway*, Communication No. 1155/2003; Views of 21 July 2003, *Adrien Mundy Busyo and others v. Democratic Republic of Congo*, Communication No. 933/2000; and Views of 21 October 2005, *Sister Immaculate Joseph and others v. Sri Lanka*, Communication No. 1249/2004.

⁴⁹⁴ Indeed, the *International Covenant on Civil and Political Rights* refers to “human person”, “human beings” and “individual” (Preamble), and its article 2.1 refers to “individuals”; the *American Convention on Human Rights* refers to “man” y a la “human personality” (Preamble), and article 1(2) precises that “[f]or the purposes of this Convention, ‘person’ means every human being.”. The *European Convention on Human Rights* recognizes only the juridical person as holder of rights in relation to the right to property (Article 1 of the First Protocol to the European Convention), but lies rights-holder of other human rights and fundamental freedoms in human beings.

⁴⁹⁵ Human Rights Committee: Views of 25 October 2010, *Vladimir Katsora and others v. Belarus*, Communication No. 1383/2005; Views of 27 July 2007, *Aleksander Belyatsky and others v. Belarus*, Communication No. 1296/2004; and Views of 31 October 2006, *Viktor Korneenko and others v. Belarus*, Communication No. 1274/2004. *European Court of Human Rights*: Judgment of 30 January 1998, *United Communist Party of Turkey and Others v. Turkey*, Application No.133/1996/752/951; Judgment of 12 July 2005, *Güneri and Others v. Turkey*, Applications Nos. 42853/98, 43609/98 y 44291/98; Judgment of 3 May 2007, *Backowski and Others v. Poland*, Application No. 1543/06; Judgment of 2 October 2001, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Application No. 29221/95 y 29225/95; and Judgment of 10 July 1998, *Sidiropoulos and Others s. Greece*, Application No. 57/1997/841/1047.

It is important to emphasize that the status as a victim, for the purposes of reparation, applies "regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim."⁴⁹⁶ In this sense, the IACHR on Human Rights has held that "[a]ccess to reparations for victims of crimes against humanity must never be subject exclusively to determination of the criminal liability of the perpetrators, or the prior disposal of their personal goods, licit or illicit."⁴⁹⁷

⁴⁹⁶ Article 9 of 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*.

⁴⁹⁷ *Principal Guidelines for a comprehensive reparations policy*, Doc. Cit., para. 2.

CHAPTER V: THE OBLIGATION TO INVESTIGATE

“The Security Council reaffirms its strong opposition to impunity for serious violations of international humanitarian law and human rights law. The Security Council further emphasizes the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation.”

UN Security Council⁴⁹⁸

1. Nature of the obligation to investigate

Investigating human rights violations is an international obligation, both under treaties and under customary international law, and it is one of the components of the State's duty to guarantee. The Inter-American Court of Human Rights has recalled as much, indicating that “[t]he State has a legal duty to [...] carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”⁴⁹⁹ The *Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Principles against Impunity)* establishes that “[i]mpunity arises from a failure by States to meet their obligations to investigate violations.”⁵⁰⁰

⁴⁹⁸ *Statement by the President of the Security Council, "Promotion and strengthening of the rule of law in the maintenance of international peace and security," S/PRST/2010/11 of 29 June 2010.*

⁴⁹⁹ Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, paras. 166 y 174.

⁵⁰⁰ Principle 1.

a. Legal basis for the obligation to investigate

The obligation to investigate human rights violations is expressly established in numerous treaties.⁵⁰¹ Although certain treaties do not contain express provisions regarding this obligation,⁵⁰² international jurisprudence has concluded that, in view of the duty to guarantee established in the human rights treaties and of the general principles of law, these treaties impose the obligation to investigate. The Inter-American Court of Human Rights has indicated that the States parties to the *American Convention on Human Rights* (ACHR) have the obligation to investigate grave human rights violations⁵⁰³. The Court has also established that "[t]he obligation to investigate human rights violations is one of the positive measures that the State must adopt to ensure the rights recognized in the Convention."⁵⁰⁴ Furthermore, the Court has held that "[t]he obligation to investigate cases of the violation of these rights arises from the general obligation to guarantee the rights to life, personal integrity and personal liberty [...]".⁵⁰⁵ With

⁵⁰¹ See, *inter alia*: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Arts. 12 and 13); International Convention for the Protection of All Persons from Enforced Disappearance (Art. 12); Convention on the Rights of Persons with Disabilities (Art. 16,5); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Arts. 4, 6 and 8); Inter-American Convention to Prevent and Punish Torture (Art. 8); Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Art. 7,b); and Inter-American Convention on Forced Disappearance of Persons (Arts. I and IV).

⁵⁰² See: the *American Convention on Human Rights* and the *International Covenant on Civil and Political Rights*.

⁵⁰³ See, *inter alia*: Judgment of 3 November 1997, *Case Castillo Páez v. Peru*, Series C No. 34; Judgment of 21 July 1989, *Case Velásquez Rodríguez v. Honduras*, Series C No. 7; Judgment of 21 July 1989, *Case Godínez Cruz v. Honduras*, Series C No. 8; Judgment of 8 December 1995, *Case Caballero Delgado and Santana v. Colombia*, Series C No. 22; Judgment of 14 September 1996, *Case El Amparo v. Venezuela*, Series C No. 28; Judgment of 12 November 1997, *Case Suárez Rosero v. Ecuador*, Series C No. 35; and Judgment of 24 January 1998, *Case Nicholas Blake v. Guatemala*, Series C No. 36.

⁵⁰⁴ Judgment of 26 November 2013, *Case of Osorio Rivera and family v. Peru*, Series C No. 274, para. 177.

⁵⁰⁵ Judgment of 16 November 2009, *Case González y Otras ("Cotton Field") V. Mexico*, Series C No. 2005, para. 287. See also, *inter alia*: Judgment of September 22, 2009, *Case Anzualdo Castro v. Peru*, Series C No. 202, para. 62; Judgment of 12 August 2008, *Case Heliodoro Portugal v. Panama*, Series C No. 186, para. 115; Judgment of 24 November 2010, *Case Gomes Lund y Otros ("guerrilha do Araguaia") v. Brazil*, Series C No. 219, para. 140; Judgment of 26 September 2006, *Case Almonacid Arellano and others v. Chile*, Series C No. 154, para. 110; Judgment of 26 May 2010, *Case Manuel Cepeda Vargas v. Colombia*, Series C No.

regard to grave human rights violations – such as extrajudicial execution, enforced disappearance, torture, sexual violence, crimes against humanity and war crimes, the Inter-American Court has repeatedly held that the obligation to invest has risen to the level of *jus cogens*.⁵⁰⁶

In this same vein, the Inter-American Commission on Human Rights (IACHR) has recalled that the obligation to investigate grave human rights violations and crimes under international law is irrevocable: “this is an international obligation that the State may not renounce.”⁵⁰⁷ The IACHR has repeatedly stated that the obligation to investigate is indelegable, since it forms part of “the imperative need to combat impunity.”⁵⁰⁸

For its part, the Human Rights Committee (HRC) has pointed out that the *International Covenant on Civil and Political Rights* (ICCPR) imposes the obligation to investigate the violations of the rights protected in it. The HRC has thus stated that “the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life [...].”⁵⁰⁹ The HRC has stated that the obligation to investigate arises from the general obligation to respect and guarantee human rights, established by article 2(1) of

213, para. 116; Judgment of February 27, 2012, *Case Narciso González Medina and family v. Dominican Republic*, Series C No. 240, para. 127.

⁵⁰⁶ See, inter alia: Judgment of September 22, 2009, *Case Anzualdo Castro v. Peru*, Series C No. 202, para. 59; Judgment of 8 July 2004, *Case Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 112; Judgment of 23 November 2009, *Case Radilla Pacheco v. Mexico*, Series C No. 209, para. 139; Judgment of 24 November 2010, *Caso Gomes Lund and others (“guerrilha do Araguaia”) v. Brazil*, Series C No. 219, para. 137; Judgment of 25 May 2010, *Case Chitay Nech and others v. Guatemala*, para. 193; Judgment of 26 September 2006, *Case Almonacid Arellano and others v. Chile*, Series C No. 154, para. 99; Judgment of 1 de September 2010, *Case Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, para. 197; Judgment of 22 September 2006, *Case Goiburú and others v. Paraguay*, Series C No. 153, para. 84; Judgment of 24 November 2009, *Case of the “Las Dos Erres” Massacre v. Guatemala*, Series C No. 148, para. 140; y Judgment of 24 February 2011, *Case Gelman v. Uruguay*, Series C No. 221, para. 75.

⁵⁰⁷ *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 230.

⁵⁰⁸ Report No. 136/99, Case 10.488, *Ignacio Ellacuría S.J. et al* (El Salvador), of December 22, 1999, para. 230.

⁵⁰⁹ Views of 13 November 1995, *Nydia Erika Bautista v. Colombia*, Communication No. 563/1993, para. 8.6. See also: Views of 29 July 1997, *José Vicente and Amado Villafañe Chaparro and others v. Colombia*, Communication No. 612/1995, para. 8.8.

the ICCPR and that under this treaty, there is a "general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. [...] A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant."⁵¹⁰

The Committee against Torture has indicated that the obligation to investigate acts of torture "is an absolute duty under the Convention and falls to the State."⁵¹¹ The Committee has also specified that the lack of investigative activity regarding complaints in cases of torture is "incompatible with the obligation on the State [...] to ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed."⁵¹²

Likewise, the Committee on the Elimination of Discrimination against Women has considered that, under the *Convention on the Elimination of All Forms of Discrimination against Women*, "States parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender based violence."⁵¹³

The obligation to investigate violations of human rights is expressly established in numerous international human rights instruments.⁵¹⁴

⁵¹⁰ *General Comment No. 31*, Doc. Cit., para. 16.

⁵¹¹ Views of 25 November 2011, *Fatou Sonko v. Spain*, Communication No. 368/2008, para. 10,6.

⁵¹² Views of 23 May 2012, *Orkatz Gallastegi Sodupe v. Spain*, Communication No. 453/2011, para. 7.3.

⁵¹³ General Recommendation No. 28: *Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, para. 19.

⁵¹⁴ See, inter alia: *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* (Principle 1); *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* (Art. 3.b); *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (Principle 19); *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (Art. 9,5); *Declaration on the Elimination of Violence against Women* (Art. 4); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; *Body of Principles for the*

"One of the major challenges in fighting impunity for torture is for the authorities to carry out effective investigations; investigations that are independent, thorough and comprehensive."

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak.⁵¹⁵

The political bodies of the United Nations have repeatedly reminded States of their obligation to undertake prompt, impartial and independent investigations regarding every gross violation of human rights and crimes under international law. It is worth highlighting several resolutions adopted by the General Assembly,⁵¹⁶ the former Commission on Human Rights⁵¹⁷ and the Human Rights Council,⁵¹⁸ as well as Statements of the President of the Security Council⁵¹⁹. Likewise, the special procedures of the former Commission on Human Rights and the Human Rights Council have reiterated the obligation to investigate: the Special Rapporteur on torture and other cruel, inhuman or degrading

Protection of All Persons under Any Form of Detention or Imprisonment (Principle 34); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rule 57); *Guidelines on the Role of Prosecutors*; *Code of Conduct for Law Enforcement Officials* (Art. 8); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*; and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle XXIII, 3).

⁵¹⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/62/221 of 13 August 2007, para. 46.

⁵¹⁶ See, inter alia, Resolutions Nos. 65/205, "Torture and other cruel, inhuman or degrading treatment or punishment", of 18 December 2010; 63/182, "Extrajudicial, summary or arbitrary executions", of 18 December 2008; 62/148, "Torture and other cruel, inhuman or degrading treatment or punishment", of 18 December 2007; 61/175, "Human Rights Situation in Belarus", 19 December 2006; 55/103, "Question of the enforced or involuntary disappearances", of 4 December 2000; 55/111, "Extrajudicial, summary or arbitrary executions", of 4 December 2000; and 55/111, "Enforced or involuntary disappearances", of 4 December 2000.

⁵¹⁷ See, inter alia, Resolutions Nos. 2003/53, "Extrajudicial, summary or arbitrary executions", of 24 April 2003; 2003/72, "Impunity", of 25 April 2003; 2001/62, "Question of the torture", of 25 April 2001; 2002/45, "Extrajudicial, summary or arbitrary executions", of 23 April 2002; and Nos. 1993/35, 1994/39 and 1995/38, "Question of the enforced disappearances".

⁵¹⁸ See, for example, Resolution No. 21/4 "Enforced or involuntary disappearance", of 27 September 2012.

⁵¹⁹ See, for example, *Statement by the President of the Security Council, "The promotion and strengthening of the rule of law in the maintenance of international peace and security"*, S/PRST/2010/11 of 29 June 2010; and *Statement by the President of the Security Council, "Promotion and strengthening of the rule of law in the maintenance of international peace and security"*, S/PRST/2014/5 of 21 February 2014.

treatment or punishment⁵²⁰ (Special Rapporteur on Torture); the Special Rapporteur on violence against women;⁵²¹ the Special Rapporteur on the Independence of judges and lawyers;⁵²² the Special Rapporteur on Extrajudicial, summary and arbitrary executions⁵²³ (Special Rapporteur on Executions) and the Working Group on Enforced or Involuntary Disappearances⁵²⁴ (WGEID). For his part, the Special Rapporteur on Executions has indicated that this obligation constitutes "one of the main pillars of the effective protection of human rights."⁵²⁵ The UN Expert on the right to restitution, compensation and rehabilitation has likewise considered that "the States parties are under an obligation [...] to investigate the facts."⁵²⁶

In the field of international humanitarian law, the International Committee of the Red Cross (ICRC) has stated that the States have the obligation to "investigate war crimes allegedly committed by their nationals or armed forces," as well as war crimes under their jurisdiction, in light of the principles of universal jurisdiction.⁵²⁷ The ICRC has held that this obligation is a

⁵²⁰ *Report of the Special Rapporteur on torture*, E/CN.4/2003/68, 17 December 2002, Recommendation (k).

⁵²¹ *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/49*, E/CN.4/2002/83, of 31 January 2002, para.124.

⁵²² See the Reports on the missions *Peru*, E/CN.4/1998/39/Add.1, of 19 February 1998, para. 131; *Guatemala*, E/CN.4/2002/72/Add.2, of 21 December 2001, Recommendation a); and *Mexico*, E/CN.4/2002/72/Add.1, of 24 January 2002, Recommendations b), j), k), and p).

⁵²³ *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, E/CN.4/1997/60 of 24 December 1996, para. 46; *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions –Mission to Brazil*, E/CN.4/2004/7/Add.3 of 28 January 2004, paras. 55 and 64.

⁵²⁴ See, *inter alia*, *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2003/70 of 21 January 2003, para. 27; "General Comment on article 18 of the Declaration", in *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2006/56, of 27 February 2005; y "General Comment on the right to the truth in relation to enforced disappearances", in *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48, of 26 January 2011.

⁵²⁵ UN Doc., E/CN.4/1993/46, of 23 December 1993, para. 686.

⁵²⁶ UN Doc., E/CN.4/Sub.2/1992/8, of 29 July 1992, para. 5.2.

⁵²⁷ Rule No. 158, in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Ed. ICRC, Cambridge University Press, 2009, pp. 607 *et seq.*

customary international law norm, applicable both in international armed conflicts and in internal armed conflicts.

b. An obligation of means

The duty to investigate has been called an obligation of means and not of results.⁵²⁸ The authorities must diligently investigate all allegations of human rights violations, since – as the Inter-American Court of Human Rights has said – this obligation “must be undertaken in a serious matter, and not as a mere formality preordained to be ineffective.”⁵²⁹

“The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.”

Inter-American Court of Human Rights⁵³⁰

For its part, the IACHR has held that “the fact that no one has been convicted in the case or that, despite the efforts made, it was impossible to establish the facts does not constitute a failure to fulfil the obligation to investigate. However, in order to establish in a convincing and credible manner that this result was not the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth, the State

⁵²⁸ Inter-American Court of Human Rights: Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 177, paras. 166 y 174; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 123; Judgment of 16 November 2009, *Case González and others (“Cotton Field”) v. Mexico*, Series C No. 205, para. 289; and Judgment of 23 September 2009, *Case of Garibaldi V. Brazil*, Series C No. 203, para. 113.

⁵²⁹ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 123.

⁵³⁰ Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 177.

must show that it carried out an immediate, exhaustive and impartial investigation.”⁵³¹

The WGEID has indicated that “[t]here is an absolute obligation to take all the necessary steps to find the person, but there is no absolute obligation of result. Indeed, in certain cases, clarification is difficult or impossible to attain, for instance when the body, for various reasons, cannot be found. A person may have been summarily executed, but the remains cannot be found because the person who buried the body is no longer alive, and nobody else has information on the person’s fate. The State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person.”⁵³²

c. Due diligence

The obligation to investigate must be complied with in good faith and with due diligence, and any and all purposes for using the investigations to guarantee impunity must be excluded. Due diligence means, as the Inter-American Court of Human Rights has established, that “the investigation must be conducted using all available legal means and it must be aimed at discovering the truth and at the pursuit, capture, prosecution and eventual punishment of all the masterminds and perpetrators of the facts, especially when State agents are or could be involved.”⁵³³ Along these lines, due diligence implies that investigations must take into account the totality of the facts, the complexity of the crimes, the contexts in which the crimes were committed, and the different participants in the crimes, “avoiding omissions in the gathering of evidence and in following up on logical lines of investigation.”⁵³⁴ Thus, as the HRC has noted, “perfunctory and unproductive investigations whose genuineness is doubtful”⁵³⁵ do not comply

⁵³¹ Report No. 55/97 of 18 November 1997, Case No. 11.137, *Juan Carlos Abella and others - Argentina*, para. 412.

⁵³² “General Comment on the Right to the Truth in Relation to Enforced Disappearances”, Doc. Cit., para. 5.

⁵³³ Judgment of 26 November 2013, *Case of Osorio Rivera and family v. Peru*, Series C No. 274, para. 178.

⁵³⁴ Judgment of 20 November 2013, *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Series C No. 270, para. 372.

⁵³⁵ Views of 2 April 2009, *Abubakar Amirov v. Russian Federation*, Communication No. 1447/2006, para. 11.4.

with the standards of the obligation to undertake investigations with due diligence.⁵³⁶

The Inter-American Court of Human Rights has established that “[d]ue diligence in the investigation means that all the relevant State authorities are obliged to collaborate in gathering evidence, so that they must provide the judge, prosecutor other judicial authorities with all the information required and abstain from actions that obstruct the progress of the investigations.”⁵³⁷ The Inter-American Court has added that “[p]ublic officials and private citizens who hamper, divert or unduly delay investigations tending to clarify the truth of the facts must be punished, rigorously applying, in this regard, provisions of domestic legislation.”⁵³⁸ In this context, it is worth emphasizing that several international normas and standards establish that the State has the obligation to punish individuals who obstruct the development of the investigations.⁵³⁹

In cases of enforced disappearance, secret extrajudicial executions or clandestine graves, due diligence additionally means promptly undertaking all essential and opportune actions and inquiries to clarify the fate or whereabouts of the victims and locate them.⁵⁴⁰

2. Object and content of the obligation to investigate

The investigation must aim to establish the crime; the conditions and circumstances in which it was committed, including both the preparations for the crime and subsequent acts to conceal it; the motives for the crime; and the identity and level of participation of those implicated in the events. As the Inter-American Court has stated, the investigation has as its aim “discovering the truth and at the pursuit, capture, prosecution and eventual punishment of all the masterminds and perpetrators of the facts, especially when

⁵³⁶ *Ibid.*, para 11.4.

⁵³⁷ Judgment of 26 November 2013, *Case of Osorio Rivera and family v. Peru*, Series C No. 274, para.244.

⁵³⁸ Judgment of 29 August 2002, *Case of the Caracazo v. Venezuela*, Series C No. 95, para. 119.

⁵³⁹ See, *inter alia*: *International Convention for the Protection of All Persons from Enforced Disappearance* (Arts. 12.4, 22 and 25.1,b); and *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13.5).

⁵⁴⁰ See, *inter alia*, Inter-American Court of Human Rights, Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 135 and Judgment of 26 November 2013, *Case of Osorio Rivera and family v. Peru*, Series C No. 274, para. 182.

State agents are or could be involved.”⁵⁴¹ The the Human Rights Committee⁵⁴² and the Committee against Torture⁵⁴³ have issued decisions along these same lines. Criminal investigations related to violations of human rights must also “include, inter alia: the recovery and preservation of evidence in order to assist in a potential criminal investigation of the perpetrators; identification of possible witnesses, obtaining their statements and determination of the cause, manner, place and time of the act investigated. In addition, there should be a thorough examination of the crime scene and a rigorous analysis of the evidence by competent professionals using the most appropriate procedures.”⁵⁴⁴

In this order of ideas, the Inter-American Court has highlighted that “The investigations must be conducted in line with the rules of due process of law, which implies that the bodies of administration of justice must be organized in a manner so that its independence and impartiality is guaranteed and the prosecution of grave human rights violations is made before regular courts, in order to avoid impunity and search for the truth.”⁵⁴⁵

The obligation to investigate is closely linked to the obligation to prosecute and punish the perpetrators of gross human rights violations, as well as the rights to an effective remedy, to reparation and to truth held by the victims and their family members. In this regard, the Committee against Torture has indicated that when a State does not proceed to undertake an

⁵⁴¹ Judgment of 26 November 2013, *Case of Osorio Rivera and family v. Peru*, Series C No. 274, para. 178. See also, *inter alia*, entre otras: Judgment of 16 November 2009, *Case González and others ("Cotton Fiel") v. Mexico*, Series C No. 205, para. 246; Judgment of 1 September 2010, *Case Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, para. 155; Judgment of 26 August 2011, *Case Torres Millacura and others v. Argentina*, Series C No. 229, para. 115; Judgment of 31 January 2006, *Case of the Massacre of Pueblo Bello v. Colombia*, Series C No. 140, para. 143; Judgment of 24 November 2011, *Case of Barrios Family v. Venezuela*, Series C No. 237, para. 178; and Judgment of February 27, 2012, *Case of Narciso González Medina and family v. Dominican Republic*, Series C No. 240, para. 204.

⁵⁴² See, *inter alia*: *Concluding observations on the third periodic report of the Plurinational State of Bolivia*, CCPR/C/BOL/CO/3, of 6 December 2013, para. 12

⁵⁴³ See, *inter alia*: *Concluding observations of the Committee against Torture: Honduras*, CAT/C/HND/CO/1, of 23 June 2009, para. 20.

⁵⁴⁴ Inter-American Court of Human Rights, Judgment of 31 August 2010, *Case of Rosendo Cantú and other v. Mexico*, Series C No. 216, para. 178.

⁵⁴⁵ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 125.

investigation, it “may constitute a *de facto* denial of redress and thus constitute a violation of the State’s obligations under article 14 [of the Convention against Torture],” in order to guarantee the rights to reparations and to truth.

“[It] should be recalled [...] that no law or provision of domestic legislation may prevent a State from complying with the obligation to investigate and punish those responsible for human rights violations. A State cannot grant direct or indirect protection to those prosecuted for crimes that involve serious human rights by unduly applying legal mechanisms that undermine the pertinent international obligations. Accordingly, the State authorities must ensure that considerations relating to the attribution of serious human rights violations prevail in decisions concerning the application of these procedural mechanisms to anyone.”

Inter-American Court of Human Rights⁵⁴⁶

The duty to investigate is not limited to violations of human rights and/or crimes committed by State agents, whether *de jure* or *de facto*. In this sense, the Inter-American Court has warned that the obligation to investigate remains “whatsoever the agent to which the violation may eventually be attributed, even individuals, because, if their acts are not investigated genuinely, they would be, to some extent, assisted by the public authorities, which would entail the State’s international responsibility.”⁵⁴⁷ For its part, the HRC has held that “[t]he article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a

⁵⁴⁶ Judgment of 26 May 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, para. 166.

⁵⁴⁷ Judgment of 16 November 2009, *Case González and others (“Cotton Field”) v. Mexico*, Series C No. 205, para. 291. See also: Judgment of 31 January 2006, *Case of the Massacre of Pueblo Bello v. Colombia*, Series C No. 140, para. 145; Judgment of February 27, 2012, *Case of Narciso González Medina and family v. Dominican Republic*, Series C No. 240, para. 206; and Judgment of 3 April 2009, *Case Kawas Fernández v. Honduras*, Series C No. 196, para. 78.

failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities.⁵⁴⁸

In this same vein, the Committee against Torture has indicated that "[w]here State authorities or others action in official capacity or under color of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. [...] [T]he State's indifference or inaction provides a form of encouragement and/or de facto permission."⁵⁴⁹

In addition to the provisions established in human rights treaties,⁵⁵⁰ several international instruments and standards define the content of the obligation to investigate:

- The *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*;
- The *Declaration on the Protection of All Persons against Enforced Disappearances*;
- The *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;

⁵⁴⁸ General Comment No. 31: *Nature of the General Legal Obligation on States Parties to the Covenant*, Doc. Cit., para. 8.

⁵⁴⁹ General Comment No. 2, Doc. Cit., para. 8.

⁵⁵⁰ See, for example, articles 11, 12, 18 and 24 of the International Convention for the Protection of All Persons from Enforced Disappearance.

- The *Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, also known as the *Minnesota Protocol*, which includes model protocols for investigations, autopsies, exhumations and analysis of skeletal remains;
- The *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, also known as the *Istanbul Protocol*; and
- The *Global consensus on principles and minimum standards for psychosocial work in forensic search and investigation processes for cases of forced disappearance and arbitrary or extrajudicial executions*.⁵⁵¹

As regards extrajudicial executions, international human rights jurisprudence has established guiding principles that must be observed in an investigation. Based on the *Minnesota Protocol*, the Inter-American Court has held that “the State authorities who conduct an investigation of this type should try, at least, inter alia: (a) to identify the victim; (b) to collect and preserve the probative material related to the death in order to assist any potential criminal investigation of those responsible; (c) to identify possible witness and obtain their testimony in relation to the death that is being investigated; (d) to determine the cause, manner, place and time of death, as well as to identify any pattern or practice that may have caused the death, and (e) to distinguish between natural death, accidental death, suicide and murder. It is also necessary to investigate the scene of the crime exhaustively and ensure that autopsies and analyses of the human remains are conducted rigorously by competent professionals using the most appropriate procedures.”⁵⁵²

Along these same lines, the IACHR has held that, in accordance with the “principles governing the effective prevention and

⁵⁵¹ Adopted at the *Second World Congress on Psychosocial Work in Exhumation Processes, Forced Disappearance, Justice and Truth* in 2010, and recognized by the OAS General Assembly as a contribution from organizations and associations of family members and civil society, in defining common standards for matters related to psychosocial care (Resolution 2717 (XLII-O/12) of 4 June 2012).

⁵⁵² Judgment of 23 September 2009, *Case of Garibaldi v. Brazil*, Series C No. 203, para. 115. See also: Judgment of June 7, 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 186, para. 128; Judgment of 31 January 2006, *Case of the Massacre of Pueblo Bello v. Colombia*, Series C No. 140, para. 177; and Judgment of 16 November 2009, *Case González and others (“Cotton Field”) v. Mexico*, Series C No. 205, para. 300.

investigation of extralegal, arbitrary or summary executions", [...] in order to determine whether or not a State has fulfilled its obligation to investigate immediately, exhaustively and impartially the summary executions of persons under its exclusive control. In accordance with these principles, the investigation of cases of this nature must be aimed at determining the cause, manner and time of death, the person responsible and the procedure or practice which might have led to the events. The investigation will distinguish between death from natural causes, death by accident, suicide and homicide."⁵⁵³

In cases of enforced disappearance, the obligation to investigate has a scope that arises from the particular nature of the crime. Indeed, forced disappearance is, by definition, a complex crime involving the cumulative effect of various behaviors, namely: a) deprivation of liberty; and b) refusal to acknowledge that deprivation and/or hiding the fate or whereabouts of the disappeared.⁵⁵⁴ Likewise, as international instruments⁵⁵⁵ and jurisprudence⁵⁵⁶ have defined it, enforced disappearance is by

⁵⁵³ Report No. 55/97 of 18 November 1997, Case No. 11.137, *Juan Carlos Abella and others -Argentina*, para. 413.

⁵⁵⁴ *Inter-American Convention on Forced Disappearance of Persons* (Art. II) and); *International Convention for the Protection of All Persons from Enforced Disappearance* (Art.o 2). See, *inter alia*: Inter-American Court of Human Rights, Case of *Gómez Palomino v. Peru*, Doc. Cit., paras. 94 et seq.; and Human Rights Committee, Views of 2 November 2005, *Norma Yurich v. Chile*, Communication No. 1078/2002, para. 6.3.

⁵⁵⁵ *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 17,1); *Inter-American Convention on Forced Disappearance of Persons* (Art. III); and *International Convention for the Protection of All Persons from Enforced Disappearance* (Arts. 8 and 24).

⁵⁵⁶ See, *inter alia*: Inter-American Court of Human Rights (Case of *Goiburú and others v. Paraguay*, Doc. Cit., paras. 83 y 85; Judgment of 2 July 1996, Case of *Blake v. Guatemala*, Series C No. 27, para. 39; and Case 19 *Merchants v. Colombia*, Doc. Cit. para. 142); Inter-American Commission on Human Rights (Report No. 7/00 of 24 February 2000, Case No. 10.337, *Amparo Tordecilla Trujillo v. Colombia*; Report No 60/01 of 4 April 2001, Case N0. 9111, *Ileana Del Rosario Solares Castillo and others v. Guatemala*; Report No. 58/01, of 4 April 2001, Petition No. 9207, *Óscar Manuel Gramajo López v. Guatemala*; Report No. 30/96, of 16 October 1996, Petition No. 10.897, Case *Cruz Soza v. Guatemala*; Report No. 22/93, of 12 October 1993, Petition No. 9477, Case *Familia Rivera v. Colombia*; Report No. 2/06 of 28 February 2006, Petition No. 12.130, Case *Miguel Orlando Muñoz Guzmán v. Mexico*; and Report No. 34/06, of 14 March 2006, Petition No. 875-03, Case *Rita Irene Wald Jaramillo and others v. Panama*); Human Rights Committee (Views of 2 November 2005, *Norma Yurich v. Chile*, Doc. Cit., para. 6.4); and Working Group on Enforced or Involuntary Disappearances ("General

definition a permanent or continued crime, that is, a crime whose consummation is prolonged over time, unlike instant crimes, which are developed and completed in a single momento. The nature of enforced disappearance as a permanent crime has also been recognized in criminal laws that define the crime of enforced disappearance⁵⁵⁷ and by the case law of national courts in Peru,⁵⁵⁸ Argentina,⁵⁵⁹ Chile⁵⁶⁰ and Colombia.⁵⁶¹ It is also worth recalling that enforced disappearance is often associated with public officials' courses of action that are not just illegal but fundamentally clandestine and generally associated with methods of terror.

Nonetheless, beyond the complex nature of the definition of this crime, enforced disappearance is a difficult crime from a factual standpoint, that is, the forms and methods in which it is committed. Indeed, reality has taught us that every one of these behaviors that make up the crime of enforced disappearance – deprivation of liberty and refusal to acknowledge such deprivation and/or concealing the fate or whereabouts of the disappeared – can be committed in turn through different behaviors. Insofar as the deprivation of liberty, there may be a “legal” detention followed by an arbitrary detention and then a kidnapping in quick succession. The ways to perform the behavior of concealing the fate or whereabouts of the person can follow different modalities, such as the alteration or falsification of detention records, destruction or incineration of these records or of documents that help to establish the deprivation of liberty or the fate or whereabouts of the disappeared.

Comment of the Working Group on article 17”, in *Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2001/68 of 18 December 2000, para. 28; and “General Comment on enforced disappearance as a continuous crime”, in *Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48, de 26 January 2011).

⁵⁵⁷ See, for example, article 181-A of Penal Code of Venezuela and article 201-Ter of Penal Code of Guatemala.

⁵⁵⁸ See, Constitucional Tribunal of Peru, Judgment of 18 March 2004, Files No. 2488-2002-HC, *Case Genaro Villegas Namuche*, and Judgment of 9 December 2004, Files No. 2798-04-HC/TC, *Case Gabriel Orlando Vera Navarrete*.

⁵⁵⁹ Supreme Court of Justice, Judgment of 24 August 2004, Case A.533.XXXVIII “Arancibia Clavel, Enrique Lautaro y otros s/ homicidio calificado y asociación ilícita -Causa No. 259-”, and Judgment of 14 June 2005, Case S. 1767. XXXVIII “Simón, July y otros s/ privación ilegítima de la libertad -causa nº 17768-”.

⁵⁶⁰ Appeal Court of Santiago, Chamber No. 5, Judgment of 5 January 2004, Files Nº 11.821-2003, para. 33.

⁵⁶¹ Constitutional Court of Colombia, Judgment C-580/02, of 3 July de 2002.

Each one of the aforementioned acts viewed in isolation may constitute, according to the case, a criminal offense. Nonetheless, in reality these crimes are the means for the commission of a more serious crime, enforced disappearance, and therefore must be addressed not as isolated and independent crimes, but as elements that make up a more serious crime. As such, in accordance with the principle of extinction of criminal liability, they make up or are subsumed as part of the behaviors of the complex crime of enforced disappearance. Deadling with this series of crimes that are means for greater crimes in an isolated and independent way entails denying their *raison d'être*, namely, committing the crime of enforced disappearance. The consequence of this is that the perpetrators and accomplices of the crime of disappearance are not judged for this crime, but rather for minor offenses, which in reality are nothing more than behaviors committed with the purpose of perpetrating an enforced disappearance. This constitutes what the doctrine, particularly the UN International Law Commission, has called "fraudulent administration of justice," which constitutes a serious form of impunity.

Given the particularities of the crime of enforced disappearance, the obligation to investigate also entails the obligation to establish with certainty the fate or whereabouts of the disappeared, locate the disappeared, and inform his or her next of kin of it.⁵⁶² In this sense, the Inter-American Court of Human Rights has held that "in cases of enforced disappearance, the investigation must have certain specific connotations that arise from the nature and complexity of the phenomenon investigated; in other words, the investigation must also include all the actions required to determine the fate of the victim and his whereabouts."⁵⁶³

The crime's permanent or continued nature means that the obligation to investigate "subsists while uncertainty about the final fate of the disappeared person remains, because the right of the

⁵⁶² See, inter alia, Inter-American Court of Human Rights, Judgment of 26 November 2013, *Case of Osorio Rivera and family v. Peru*, Series C No. 274, para. 176.

⁵⁶³ Judgment of 26 November 2013, *Case of Osorio Rivera and family v. Peru*, Series C No. 274, para.179. See, inter alia: Judgment of 24 November 2010, *Case of Gomes Lund and Others ("guerrilha do Araguaia") v. Brazil*, Series C No. 219, para. 110; and Judgment of 27 November 2008, *Case of Ticona Estrada and Others v. Bolivia*, Series C No. 191, para. 80.

victim's next of kin to know what happened to him and, if appropriate, where his remains are, represents a fair expectation that the State must satisfy with all the means available to it."⁵⁶⁴ In this regard, the *International Convention for the Protection of All Persons against Enforced Disappearances* expressly reaffirms "the obligation to continue the investigation until the fate of the disappeared person has been clarified."⁵⁶⁵ The WGEID has held that "[t]he obligation to continue the investigation for as long as the fate and the whereabouts of the disappeared remains unclarified is a consequence of the continuing nature of enforced disappearances."⁵⁶⁶

In cases of sexual violence, the Inter-American Court of Human Rights has stated that "the investigation must try to avoid re-victimization or the re-experiencing of the profoundly traumatic experience each time the victim recalls or testifies about what happened."⁵⁶⁷ Likewise, the Court has held that it is necessary that in a criminal investigation: "i) the victim's statement should be taken in a safe and comfortable environment, providing privacy and trust; ii) the victim's statement should be recorded to avoid or limit the need for repetition; iii) the victim should be provided with medical, health care and psychological treatment, both on an emergency basis, and continuously if required, through an assistance protocol designed to lessen the consequences of rape; iv) a complete and detailed medical and psychological examination should be conducted immediately by suitable trained personnel, of the sex preferred by the victim insofar as this is possible, and the victim should be informed that she may be accompanied by a trusted person if she so wishes; v) the investigative tasks should be coordinated and documented and the evidence handled with care, taking sufficient samples and performing all possible tests to determine the perpetrator of the act, and obtaining other evidence such as the victim's clothing, immediate examination of the crime

⁵⁶⁴ Inter-American Court of Human Rights, Judgment of 26 November 2013, *Case of Osorio Rivera and family v. Peru*, Series C No. 274, para. 179.

⁵⁶⁵ Article 24 (6). It is also worth noting that the *Declaration on the Protection of All Persons from Enforced Disappearance* establishes that "[a]n investigation [...] should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified." (Art. 13.6).

⁵⁶⁶ "General Comment on the Right to the Truth in Relation to Enforced Disappearances," Doc. Cit., para. 4.

⁵⁶⁷ Judgment of 31 August 2010, *Case of Rosendo Cantú and Other v. Mexico*, Series C No. 216, para. 180.

scene and guaranteeing the proper chain of custody of the evidence, and vi) access to free legal assistance at all stages of the proceedings should be provided for the victim.”⁵⁶⁸

In cases of torture, as repeatedly held by the Inter-American Court of Human Rights, the Committee against Torture,⁵⁶⁹ the Subcommittee for the Prevention of Torture⁵⁷⁰ and the Special Rapporteur on Torture⁵⁷¹, the investigation must be undertaken in accordance with the *Istanbul Protocol* and must include as a standard practice the completion of physical and psychological forensic examinations. The Committee against Torture has recommended that “all medical personnel involved in the detection of cases of torture are aware of the content of the Istanbul Protocol and are trained in its application [and] that the State party take the necessary steps to ensure that reports prepared in accordance with the Protocol are widely disseminated among medical professionals dealing with cases of torture.”⁵⁷² For his part, the Special Rapporteur on Torture, Mr. Manfred Nowak, has indicated that “lack of investigation together with impunity is the principal cause of the perpetuation of torture and ill-treatment. The inability to tackle it effectively will continue to encourage its practice. If States are serious about combating impunity for torture, they will improve the quality of their criminal investigations through effective documentation of evidence of torture.”⁵⁷³ The Rapporteur has also recommended that the States establish thorough, prompt and impartial investigation and documentation procedures as reflected in the Istanbul Protocol⁵⁷⁴ and particularly that:

“a) Complaints about torture should be recorded in writing, and a forensic medical examination (including, if appropriate, by a forensic psychiatrist) should be immediately ordered. Such an

⁵⁶⁸ *Ibid.*, para. 178.

⁵⁶⁹ *General Comment No. 3*, Doc. Cit., para. 25.

⁵⁷⁰ *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras*, CAT/OP/HND/1, of 10 February 2010, para. 95.

⁵⁷¹ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/62/221, of 13 August 2007, para. 47.

⁵⁷² *Concluding observations of the Committee against Torture: Chile*, CAT/C/CHL/CO/5, of 23 June 2009, para. 20.

⁵⁷³ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/62/221, 13 August 2007, para. 52.

⁵⁷⁴ *Ibid.*, para. 53.

approach should be followed whether or not the person concerned bears visible external injuries. Even in the absence of an express allegation of ill-treatment, a forensic medical examination should be requested whenever there are other grounds to believe that a person could have been the victim of ill-treatment;

"b) Access to forensic expertise should not be subject to prior authorization by an investigating authority;

"c) Forensic medical services should be under judicial or another independent authority, not under the same governmental authority as the police and the penitentiary system;

"d) Public forensic medical services should not have a monopoly on expert forensic evidence for judicial purposes;

"e) An independent forensic expert should be part of any credible factfinding or prevention mechanism."⁵⁷⁵

3. Requirements and characteristics of the investigation

The conditions for implementation and compliance with the obligation to investigation are set forth in international law, and particularly in international human rights law, both in the text of conventions and declarations, as well as the case law of international human rights bodies (See Annex IV) This obligation to investigate must be complied with in accordance with the standards established by international norms and jurisprudence. This means prompt, exhaustive, effective, impartial and independent investigations.

The obligation to investigate grave human rights violations must be executed in good faith and any attempt to use investigations to guarantee impunity must be stopped. The Inter-American Court of Human Rights has held that "the State's obligation to investigate must be fulfilled diligently to avoid impunity and the repetition of this type of act"⁵⁷⁶ and that the State, in compliance with its obligation to investigate grave human rights violations, "must remove all the obstacles, de facto and de jure, that maintain

⁵⁷⁵ *Ibidem*.

⁵⁷⁶ Judgment of February 27, 2012, *Case of Narciso González Medina and family v. Dominican Republic*, Series C No. 240, para. 203.

impunity.”⁵⁷⁷ Likewise, the Inter-American Court has held 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 [...] serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance[...].”⁵⁷⁸ The Court has also indicated that States “cannot allege domestic obstacles, such as the lack of infrastructure or personnel to conduct the investigative procedures, to exempt itself from [the] international obligation [to investigate].”⁵⁷⁹

a. Nature of the investigation

These investigations are generally criminal in nature, since their objective is prosecuting grave human rights violations constituting crimes and/or crimes under international law, and must be oriented toward establishing the facts, determining the circumstances in which they were committed, the motives for their commission, and the identity and level of participation of all the responsible parties. All of this has the purpose of the criminal prosecution, capture, prosecution and eventual punishment of all the intellectual and material authors of the crimes.

In the case of the Truth Commission for El Salvador, the IACHR has indicated about this types of commission: “[n]or an the institution of a Truth Commission be accepted as a substitute for the State's obligation, which cannot be delegated, to investigate violations committed within its jurisdiction, and to identify those responsible, punish them, and ensure adequate compensation for

⁵⁷⁷ Judgment of 26 November 2013, *Case of Osorio Rivera and family v. Peru*, Series C No. 274, para. 178.

⁵⁷⁸ Judgment of 14 March 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, para. 41. See, inter alia: Judgment of 27 February 2002, *Case of Trujillo Oroza v. Bolivia*, Series C No. 92, para. 106; Judgment of 29 August 2002, *Case of the Caracazo v. Venezuela*, Series C No. 95, para. 119; Judgment of 26 September 2006, *Case of Almonacid Arellano and Others v. Chile*, Series C No. 154, para. 102; Judgment of 24 November 2010, *Case of Gomes Lund and Others (“guerrilha do Araguaia”) v. Brazil*, Series C No. 219, para. 171; Judgment of 29 November 2009, *Case of Massacre of las Dos Erres v. Guatemala*, Series C No. 211, para. 129; Judgment of 24 February 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 225; y Judgment of October 25, 2012, *Case of the Massacres of El Mozote v. El Salvador*, Series C No. 252, para. 283.

⁵⁷⁹ Judgment of 23 September 2009, *Case of Garibaldi v. Brazil*, Series C No. 203, para. 137.

the victim [...].⁵⁸⁰ The IACHR has held that measures of reparation awarded to victims and their next of kin, as well as the establishment of "Truth Commissions," do not in any way exonerate the State of its obligations to investigate the facts and to bring the perpetrators of human rights violations to justice and punish them.⁵⁸¹

In the same vein, the Inter-American Court of Human Rights has established that the creation of truth commissions "does not fulfill or substitute for the State's obligation to establish the truth through judicial proceedings; thus the State had an obligation to launch a criminal investigation to determine the corresponding criminal responsibilities."⁵⁸²

"[T]he 'historical truth' documented in special reports, or tasks, activities and recommendations issued by special commissions, [...] neither completes nor replaces the State's obligation to establish the truth and investigate crimes through judicial proceedings. This Court has established that the obligation to investigate the facts, prosecute, and, if applicable, punish those responsible for a crime that constitutes a human rights violation, is an obligation that derives from the American Convention, and that criminal liability must be determined by competent judicial authorities, strictly adhering to the rules of due process set forth in Article 8 of the American Convention."

Inter-American Court of Human Rights⁵⁸³

For his part, when balancing national commissions for non-judicial investigation of extrajudicial executions created during the 26

⁵⁸⁰ Report No. 136/99, Case 10.488, *Ignacio Ellacuría S.J. y otros* (El Salvador), 22 December 1999, para. 230.

⁵⁸¹ See, for example, Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 y 10.311 (Argentina), 2 October 1992, para. 52.

⁵⁸² Judgment of 31 August 2011, *Case of Contreras and others v. El Salvador*, Series C No. 232, para. 135. See also: Judgment of September 22, 2009, *Case of Anzaldo Castro v. Peru*, Series C No. 202, para. 180; Judgment of 24 November 2010, *Case of Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*, Series C No. 219, para. 297; Judgment of 26 September 2006, *Case of Almonacid Arellano and others v. Chile*, Series C No. 154, para. 150; Judgment of 25 May 2010, *Case of Chitay Nech and others v. Guatemala*, Series C No. 212, para. 234; Judgment of 1 September 2010, *Caso Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, para. 158; Judgment of 23 November 2009, *Case of Radilla Pacheco v. Mexico*, Series C No. 209, para. 179; and Judgment of 29 November 2009, *Case of Massacre of las Dos Erres v. Guatemala*, Series C No. 211, para. 232.

⁵⁸³ Judgment of 1 September 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, paras. 158 y 159.

years of his mandate, the Special Rapporteur on Executions concluded that "[a] commission may not substitute a criminal trial."⁵⁸⁴ The Special Rapporteur emphasized that these commissions do not have the power that a court has to declare a person guilty or innocent.⁵⁸⁵

The HRC has stated that, as regards grave human rights violations – such as extrajudicial executions, enforced disappearance and torture – investigations must be of a criminal nature and must be oriented toward the prosecution of the respective responsible parties.⁵⁸⁶ Likewise, the Committee against Torture has held that investigations of cases of torture must be criminal in nature.⁵⁸⁷

b. Ex officio investigation

Treaties⁵⁸⁸ and international instruments⁵⁸⁹ establish that investigations for grave violations of human rights must be initiated *ex officio*, independently of whether any complaint or formal report exists. Numerous international norms and standards establish that when they have had knowledge or motives to believe that a human rights violation has happened or is about to happen, State officials must inform their superiors and/or the

⁵⁸⁴ *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/8/3 of 2 May 2008, para. 55.*

⁵⁸⁵ *Ibid.*

⁵⁸⁶ Views of 24 October 2002, *José Antonio Coronel and others v. Colombia*, Communication No. 778/1997, Views of 8 July 2008, *Sathasivam v. Sri Lanka*, Communication No. 1436/2005, and Views of 2 April 2009, *Abubakar Amirov and Others v. Russian Federation*, Communication No. 1447/2006.

⁵⁸⁷ *Concluding observation of the cOmmittee against Torture: El Salvador, CAT/C/SLV/CO/2, of 9 de December 2009, para.11.*

⁵⁸⁸ See, inter alia: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 12); *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 12,2); and *Inter-American Convention to Prevent and Punish Torture* (Art. 8).

⁵⁸⁹ See, inter alia: *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 9); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13,1); *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 9); *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 2); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rule 57); and *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 34).

competent authorities in charge of investigating.⁵⁹⁰ In certain circumstances, an omission by a public official may constitute a form of participation in the crimes or acquiescence,⁵⁹¹ which compromises his or her individual criminal responsibility.

"[W]henever there is a reason to believe that a person has been subjected to forced disappearance, an investigation must be conducted. This obligation is independent from the filing of a complaint, since in cases of forced disappearance, International Law and the general duty to guarantee, to which Peru is bound, imposes upon States the obligation to investigate the case *ex officio*, without delay and in a serious, impartial and effective way. This is a fundamental and conditioning element for the protection of certain rights that are otherwise affected or annulled by those situations, such as the right to life, personal liberty and personal integrity."

Inter-American Court of Human Rights⁵⁹²

The obligation to initiate investigations *ex officio* arises from the nature of grave human rights violations and crimes under international law. These are behaviors that breach rights protected by international public order. This obligation means that the duty to investigate is satisfied by deploying the necessary efforts *sua sponte* to reveal the facts and the circumstances that surrounded them, and identify the perpetrators. This is a legal obligation and not merely the management of private interests. The Inter-American Court has held that "[i]t is the responsibility of the State authorities to conduct a diligent, impartial and effective investigation, using all available legal means, aimed at discovering the truth and the eventual prosecution of the authors of the acts and their punishment."⁵⁹³ The Court has established that "[f]rom this obligation, once the State authorities are notified of the facts,

⁵⁹⁰ See, inter alia: *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 23,3); *Code of Conduct for Law Enforcement Officials* (Art. 8); and *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principles 24 y 25).

⁵⁹¹ See, inter alia, Committee against Torture, Views of 21 November 2002, *Hajrizi Dzemajl and others. Yugoslavia*, Communication No. 161/2000, para. 9.2

⁵⁹² Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 65.

⁵⁹³ Judgment of 20 November 2013, *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Series C No. 270, para. 371.

they must initiate ex officio and without delay, a serious, impartial, and effective investigation."⁵⁹⁴

International norms set the standard under which a State must undertake an investigation ex officio: there must be "reasonable motives."⁵⁹⁵ Although certain international instruments use other phrases – such as "reasonable grounds,"⁵⁹⁶ "well-grounded reason to believe,"⁵⁹⁷ "indications"⁵⁹⁸ or "all suspected cases"⁵⁹⁹ – international jurisprudence is unanimous in finding that the standard required under international law is that of "reasonable grounds."

"The Committee observes that article 13 of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence, and that it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention."

Committee against Torture⁶⁰⁰

The Committee against Torture has found that "it is sufficient for the facts to have been brought to the attention of Government"⁶⁰¹

⁵⁹⁴ Judgment of 24 November 2010, *Case of Gomes Lund and Others ("guerrilha do Araguaia") v. Brazil*, Series C No. 219, para. 138

⁵⁹⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 12); *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 12,2); *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 9); and *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (Art. 9,5).

⁵⁹⁶ *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13,1) and *Declaration and Programme of Acción of Viena* (para. 62).

⁵⁹⁷ *Inter-American Convention to Prevent and Punish Torture* (Art. 8).

⁵⁹⁸ *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 2).

⁵⁹⁹ *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 9).

⁶⁰⁰ Views of 14 May 1998, *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, para. 8,6.

⁶⁰¹ Views of 25 November 2011, *Fatou Sonko v. Spain*, Communication No. 368/2008, para. 10.6. See also: Views of 2 May 1995, *Henri Unai Parot v. Spain*, Communication No. 6/1990; and Views of 14 May 1998, *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996.

for the authorities to have the obligation to begin an investigation. For its part, the Human Rights Committee has held that in cases of death by firearm, at minimum an effective investigation into the possible participation of members of State security forces is required.⁶⁰² The Committee has recommended that “[i]n all cases of brutality or of excessive use of force by a law enforcement official in which the victim does not file a complaint, the State party should systematically ensure an investigation ex officio.”⁶⁰³ In this same vein, the Inter-American Court of Human Rights has held that “in investigations into a violent death [...], as soon as the State authorities are aware of the act, they should initiate ex officio and without delay a genuine, impartial and effective investigation.”⁶⁰⁴

It is worth noting that in cases of persons deprived of liberty, the very fact that there is a death or disappearance, as well as acts of violence, automatically generates the obligation to investigate ex officio.⁶⁰⁵ This is due in particular to the “special position of the States as guarantors regarding persons deprived of liberty.”⁶⁰⁶ Indeed, “there is a special relationship and interaction of subordination between the person deprived of his liberty and the State; typically the State can be rigorous in regulating what the prisoner’s rights and obligations are, and determines what the circumstances of the internment will be; the inmate is prevented from satisfying, on his own, certain basic needs that are essential if one is to live with dignity.”⁶⁰⁷ The Inter-American Court of

⁶⁰² Views of 2 April 2009, *Abubakar Amirov and Others v. Russian Federation*, Communication No. 1447/2006, para. 114.

⁶⁰³ *Concluding observations of the Human Rights Committee: Dominican Republic*, CCPR/C/DOM/CO/5, of 19 April 2014, para. 14.

⁶⁰⁴ Judgment of 23 September 2009, *Case of Garibaldi v. Brazil*, Series C No. 203, para. 114.

⁶⁰⁵ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 34); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rule 57); and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle XXIII, 3).

⁶⁰⁶ *Principle I Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. In the same sense, see *Inter-American Court of Human Rights; Judgment of 2 September 2004, Case of the "Juvenile Reeducation Institute" v. Paraguay*, Series C No. 112, paras. 151 et seq.; and Judgment of 1 February 2006, *Case of López Álvarez v. Honduras*, Series C No. 141, para. 104.

⁶⁰⁷ *Inter-American Court of Human Rights; Judgment of 2 September 2004, Case of the "Juvenile Reeducation Institute" v. Paraguay*, Series C No. 112, para. 152. See also: Judgment of 5 July 2006, *Case of Montero Aranguren and others (Retén de Catia) v. Venezuela*, Series C No. 150, para. 87.

Human Rights has held that “the State, in light of its role as guarantor of the rights enshrined in the Convention, is responsible for the observance of the right to humane treatment of all individuals in its custody.”⁶⁰⁸

c. Impartial and independent investigation

Treaties⁶⁰⁹ and international instruments⁶¹⁰ establish that the investigations of grave human rights violations should be impartial and independent.

i) Independent investigation

For an investigation to be independent, the investigating body and the investigators cannot be involved in the crime and must be independent of the alleged perpetrators and of the institutions or agencies to which they belong. An independent investigation also demands that the investigating body and the investigators do not have relationships of hierarchical or functional subordination or dependence with the alleged authors of the crime, or the organism to which they belong. The Independence of the investigation may be compromised if the investigations of crimes allegedly committed by members of the armed forces are carried out by the very members of the armed forces themselves.

The HRC,⁶¹¹ the Committee against Torture,⁶¹² the WGEID,⁶¹³ the Special Rapporteurs on Executions and Torture,⁶¹⁴ and the Special

⁶⁰⁸ Judgment of April 6, 2000, *Case of Baldeón García v. Peru*, Series C No. 147, para. 120.

⁶⁰⁹ See, *inter alia*: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 12); *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 12,1); and *Inter-American Convention to Prevent and Punish Torture* (Art. 8).

⁶¹⁰ See, *inter alia*: *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 9); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13,1); *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 9); and *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 2).

⁶¹¹ See, *inter alia*: Report of the *Human Rights Committee*, UN Doc. Supp. No. 40 (A/35/40), 1980, para. 249 et seq.; and *Concluding observations on: Colombia*, CCPR/C/79/Add.76, of 5 May 1997, paras. 19 and 23 and CCPR/CO/80/COL, of 26 May 2004, para. 9; and *Bolivia*, CCPR/C/79/Add.74, of 1 May 1997, para. 34.

⁶¹² Ver *inter alia*, *Concluding observations on: Ecuador*, of 15 November 1993, A/49/44, para. 105; and *Colombia*, CAT/C/CR/31/1, of 4 February 2004, para. 11 (b, ii).

Rapporteur on the Independence of judges and lawyers,⁶¹⁵ as well as the IACHR⁶¹⁶ and the Inter-American Court⁶¹⁷ have been unanimous in concluding that investigations of grave human rights violations attributable to members of the armed forces cannot be investigated by military courts or tribunals, but rather should be assigned to regular civilian courts of jurisdiction or under the direction and supervision of regular criminal court judges.

The HRC has reminded the States parties to the ICCPR that they must establish independent bodies and procedures apart from the armed forces and police bodies in order to promptly and impartially investigate human rights violations and cases of excessive use of force attributable to the members of the State security forces.⁶¹⁸

The HRC has concluded that civilian authorities must undertake the investigations of human rights violations, which constitute a crime under national or international law and are committed by members

⁶¹³ See, *inter alia*, UN Docs E/CN.4/1994/26, para. 86; E/CN.4/1990/13, para. 22; and E/CN.4/1992/18, para. 367.

⁶¹⁴ UN Doc. E/CN.4/1995/111, paras. 86 and 119.

⁶¹⁵ UN Doc. E/CN.4/1998/39/Add.2, paras. 80 and 185.

⁶¹⁶ See, *inter alia*: *First Report on the situation of human rights in Peru*, OEA/Ser.L/V/II.83, Doc. 31, March 12, 1993, para. 24; *Report on the situation of human rights in Brazil*, OEA/Ser.L/V/II.97 Doc. 29 rev.1 of September 29, 1997, para. 86; *Second Report on the situation of human rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, paras. 100, 238 and 244; *Report on the situation of human rights in Mexico*, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, 1998, paras. 35 and 339; *Fifth report on the situation of human rights in Guatemala*, OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, paras. 33 and 63; and *Second report on the situation of human rights in Colombia*, OEA/Ser.L/V/II.84, Doc. 39 rev., October 14, 1993, Chapter III, F.

⁶¹⁷ See, *inter alia*, Judgment of November 26, 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, paras. 189 and 190; and Judgment of August 31, 2010, *Case of Rosendo Cantú et al v. Mexico*, Series C No. 216, para. 161.

⁶¹⁸ *Concluding observations of the Human Rights Committee to: Peru*, CCPR/C/79/Add.67 of 25 July 1995, para. 22; *Venezuela*, CCPR/CO/71/VEN of 26 April 2001, para. 8; *Kyrgyzstan*, CCPR/CO/69/KGZ of 24 July 2000, para. 7; *Chile*, CCPR/C/79/Add.104 of 30 March 1999, para. 10; *Belarus*, CCPR/C/79/add.86 of 19 November 1997, para. 9; *Former Yugoslav Republic of Macedonia*, CCPR/C/79/Add.96 of 18 August 1998, para. 10; *Cameroon*, CCPR/C/79/Add.116 of 4 November 1999, para. 20; *Sudan*, CCPR/C/79/Add.85 of 19 November 1997, para. 12; *Mauritius*, CCPR/C/79/Add.60 of 4 June 1996, E; *Brazil*, CCPR/C/79/Add.66 of 24 July 1996, para. 22; *Alemania*, CCPR/C/79/Add.73 of 18 November 1996, para. 11; *Bolivia*, CCPR/C/79/Add.74 of 1 May 1997, para. 28; *Kuwait*, CCPR/CO/KWT of 27 July 2000, para. 13; *Sri Lanka*, CCPR/C/79/Add.56 of 23 July 1995, para. 30; *Yemen*, A/50/40 of 3 October 1995; *Guyana*, CCPR/C/79/Add.121 of 25 April 2000, para. 10; and *Algeria*, CCPR/C/79/Add.95 of 18 August 1998, paras. 6, 7 and 9.

of the armed forces.⁶¹⁹ The HRC has emphasized, on several occasions, that the fact that abuses and human rights violations attributed to members of police forces have not been investigated by an independent body contributes to creating a climate of impunity.⁶²⁰ Furthermore, the HRC has repeatedly held that – whether de jure or de facto – impunity for human rights violations is incompatible with States' obligations under the ICCPR.⁶²¹

"Judicial police functions should be carried out exclusively by a civilian entity, namely the technical unit of the criminal investigation police. This would allow the Independence of investigations and constitute an important improvement in the access to justice for victims of and witnesses to human rights violations, who, at present, very often see their complaints being investigated by the very institutions they accuse of being responsible for these violations."

Special Rapporteurs on Torture and on Extrajudicial, Summary or Arbitrary Executions⁶²²

For its part, the WGEID has recommended that the States adopt legal provisions and mechanisms that guarantee that "law enforcement officials suspected of having committed enforced disappearances do not participate in the investigation of those

⁶¹⁹ See, inter alia, the *Concluding observations of the Human Rights Committee* to: *Venezuela* (CCPR/CO/71/VEN of 26 April 2001, para. 8); *Kyrgyzstan* (CCPR/CO/69/KGZ of 24 July 2000, para. 7); *Chile* (CCPR/C/79/Add.104 of 30 March 1999, para. 10); *Belarus* (CCPR/C/79/Add.86 of 19 November 1997, para. 9); *Former Yugoslav Republic of Macedonia* (CCPR/C/79/Add.106 of 18 August 1998, para. 10); *Cameroon* (CCPR/C/79/Add.116 of 4 November 1999, para. 20); *Mauritius* (CCPR/C/79/Add.60 of 4 June 1996); and *Brazil* (CCPR/C/79/Add.66 of 24 July 1996, para. 22).

⁶²⁰ *Concluding observations of the Human Rights Committee* to: *Sri Lanka*, CCPR/C/79/Add.56 of 23 July 1995, para. 15; and *Belarus*, CCPR/C/79/Add.86 of 19 November 1997, para. 9.

⁶²¹ *Concluding observations of the Human Rights Committee* to: *Lesotho*, CCPR/C/79/Add.106 of 8 April 1999, para. 17; and *Brazil*, CCPR/C/79/Add.66 of 24 July 1996, para. 8.

⁶²² *Joint Report of the Special Rapporteur on the question of torture, Mr. Nigel S. Rodley, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolutions 1994/37 and 1994/82 – Visit by the Special Rapporteurs to the Republic of Colombia from 17 to 26 October 1994*, E/CN.4/1995/111 of 16 January 1995, para. 117(a).

disappearances and that it should take all the necessary measures to ensure that the guarantee is respected in all investigations.”⁶²³

The Committee against Torture has recommended that the investigation of crimes be “under the direct supervision of independent members of the judiciary.”⁶²⁴ The Committee has also held that in cases of torture and ill-treatment attributable to agents of law enforcement bodies, the corresponding investigations should not be undertaken by or under the authority of the police, but by an independent body.⁶²⁵

The Inter-American Court of Human Rights has emphasized that “[i]n order for [the] investigation [of a death] to be effective, it is essential that the persons in charge of such investigation be independent, de jure and de facto, of the ones involved in the case. This requires not only hierarchical or institutional independence, but also actual independence.”⁶²⁶

It is worth highlighting that the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* stipulate that if investigations are inadequate, “Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission [...] shall be independent of any institution, agency or person that may be the subject of the inquiry.”⁶²⁷

In this regard, it is worth noting the conclusions of the Inter-American Court of Human Rights in a case of enforced disappearance attributed to members of State security forces and investigated by a Police Board (*Junta Policial*) and a Joint Board (*Junta Mixta*) of the Armed Forces and National Police. The Court found that these boards “were composed of members of the

⁶²³ Concluding observations to the report submitted by Argentina under article 29, paragraph 1, of the Convention, CED/C/ARG/CO/1 of 12 December 2013, para. 23.

⁶²⁴ Conclusions and Recommendations of the Committee against Torture: Ecuador, A/49/44 of 15 November 1993, para. 105.

⁶²⁵ See, inter alia: Concluding observations of the Committee against Torture: Honduras, CAT/C/HND/CO/1 of 23 June 2009, para. 20.

⁶²⁶ Judgment of April 6, 2000, *Case of Baldeón García v. Peru*, Series C No. 147, para. 95.

⁶²⁷ Principle 11. Also, the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* stipulate: “[t]he investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial.” (Principle 2).

State's security entities to which the individuals belonged who, among others, should have been investigated. [...] [S]everal statements made before the said extrajudicial boards provided elements that should have been investigated [...]. This meant that the investigators should have made an effort to take all necessary measures to clarify whether Mr. González Medina had been detained in the State's security agencies for which they worked and whether their own colleagues and superiors had taken part in his disappearance."⁶²⁸ The Court noted "that the alleged relations of hierarchic subordination and dependence between those investigating the forced disappearance and those they should have been investigating could have led to constraints in the investigation"⁶²⁹ and concluded that "it is essential to mention that the omissions in which these boards could have incurred conditioned or limited the subsequent judicial investigation of the Public Prosecution Service."⁶³⁰

ii) Impartial investigation

Impartiality presupposes the absence of preconceived notions and prejudices on the part of those who direct and/or carry out the investigation. It also means that the persons in charge of the investigation do not have interests in the particular case they investigate and that they must not act in such a way as to promote the interests of one of the parties implicated in the matters under investigation.

Prosecutors play a fundamental role in the investigation. Indeed, according to national legislation, as well as the investigation model and the rules of criminal procedure adopted in a country, the prosecutors have the job of investigating crimes or have supervisory roles in the investigations. In this order of ideas, it is worth highlighting that the *Guidelines on the Role of Prosecutors*⁶³¹ establish that prosecutors must "[c]arry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination."⁶³² Likewise, the

⁶²⁸ Judgment of February 27, 2012, *Case of Narciso González Medina and family v. Dominican Republic*, Series C No. 240, para. 215.

⁶²⁹ *Ibid.*, para. 216.

⁶³⁰ *Ibid.*, para. 219.

⁶³¹ Adopted by the *Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders*, held in Havana (Cuba), 27 August – 7 September 1990, United Nations document A/CONF.144/28/Rev. 1.

⁶³² Guideline 13 (a).

Guidelines require that “[p]rosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.”⁶³³

“[P]rosecutors have multiple functions, which include the investigation of crimes, oversight to ensure the lawfulness of investigations, and enforcement of court rulings as representatives of the public interests. These functions are essential to eliminating impunity in cases of human rights violations that are crimes and providing an effective recourse to persons whose rights have been violated.”

Inter-American Commission on Human Rights⁶³⁴

The correct exercise of the prosecutor’s function requires autonomy and Independence from the other branches of government.⁶³⁵ Unlike what is true of judges, international law does not have specific provisions that guarantee the institutional Independence of prosecutors. This is because in some judicial systems, prosecutors are named by the executive or are under a certain level of dependence on this branch of government, which entails the obligation to comply with certain orders given by the government. Although an independent prosecutorial authority is preferable to one that depends on the executive, the States always have the obligation to provide guarantees so that prosecutors may carry out investigations impartially and objectively.

In this regard, the IACHR has found that “[i]f prosecution services are subordinate to other organs, their independence may be compromised, both in terms of the effectiveness and thrust of their investigations and their decision to either bring a criminal case or close the investigation; there may also be due process implications. Hence, international law has established a number of general criteria to measure the institutional independence that public prosecution services enjoy, with a view to ensuring that

⁶³³ Guideline 12.

⁶³⁴ *Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas*, OEA/Ser.L/V/II. Doc. 44 of 5 December 2013, para. 17.

⁶³⁵ Inter-American Commission on Human Rights, *Report on the situation of human rights in Mexico*, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, paras. 372 and 381; European Court of Human Rights, Judgment of 1 December 2008, *Medvedyev et al v. France*, Communication No. 3394/03, para. 61.

their respective role in guaranteeing access to justice and due process is performed effectively and in accordance with human rights standards.”⁶³⁶ Within these criteria, the IACHR has held: the autonomy of the prosecutors in relation to the executive and legislative branches, guaranteed through domestic legislation; the legal prohibition of instructions from the executive or legislative branch for the prosecutors not to investigate or to archive investigations in specific cases; and the strict separation, both functional and institutional, between the prosecutorial authorities and the judiciary branch.⁶³⁷

The Committee against Torture has found that investigations that do not aim to determine the nature and circumstances of the material facts, as well as the identity of the individuals who may have been involved, and in which requests for evidence to prove the relevance and circumstances of the crime and the identity of the alleged authors are rejected, are all incompatible with the obligation to carry out an impartial investigation.⁶³⁸ The Committee has also stated that investigations must be carried out without discrimination based on sex, race, social origin, or of any other kind.⁶³⁹ In a case of torture ending in death, in which the prosecutor informed the victim's next of kind that the death of their loved one was accidental, without having carried out the respective autopsy or having heard the statements of witnesses to the material facts, the Committee against Torture held that the State had failed to carry out an impartial investigation.⁶⁴⁰ The Committee has also emphasized that the independence of the work of prosecutors or other prosecutorial officials is eroded when they are located within military installations, and has called upon the States to end this practice.⁶⁴¹

⁶³⁶ *Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas*, OEA/Ser.L/V/II. Doc. 44 of 5 December 2013, para. 37.

⁶³⁷ *Ibid.*, paras. 38 et seq.

⁶³⁸ Views of 14 May 1998, *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, para. 8.8.

⁶³⁹ *Conclusions and recommendations of the Committee against Torture: Guatemala*, CAT/C/GTM/CO/4 of 25 July 2006, para. 16.

⁶⁴⁰ Views of 24 November 2005, *Slobodan Nikolić y Ljiljana Nikolić v. Serbia and Montenegro*, Communication No. 174/2000, para. 6.5.

⁶⁴¹ *Concluding observations of the Committee against Torture: Colombia*, CAT/C/COL/CO/4 de 4 May 2010, para. 13.

d. Prompt investigations without delay

International norms and standards⁶⁴² establish that investigations must be undertaken and carried out promptly. This means that the investigations must be undertaken immediately and without delay, as soon as competent authorities have received the complaint or, even in the absence of a complaint, they have learned of the facts or have reasonable grounds to believe that the events occurred.

This is critical, since it reflects the need to ensure, through prompt and opportune action, that the evidence does not disappear and is not destroyed. This has a direct relation with the effectiveness of the investigations. In cases of enforced disappearance, the Inter-American Court of Human Rights has emphasized the importance of undertaking investigations as soon as possible, since the practice of enforced disappearance "is characterized by the attempt to eliminate any element that would allow the detention, whereabouts, and fate of the victims to be determined."⁶⁴³ The Inter-American Court has also found that "the rights that are being investigated make it necessary to multiply efforts as regards the measures that must be taken in order to achieve their objective, because the passage of time bears a directly proportionate relationship to the limitation – and in some case, the impossibility – of obtaining evidence and/or testimony, making it difficult and even useless or ineffective, to carry out probative measures in order to clarify the facts that are being investigated, to identify the possible authors and participants, and to establish the eventual criminal responsibilities, as well as to clarify the fate of the victim and to identify those responsible for his disappearance."⁶⁴⁴

⁶⁴² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 12); *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 12,1); *Inter-American Convention to Prevent and Punish Torture* (Art. 8); *Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (art. 9); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art.13,1); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 9); and *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 2).

⁶⁴³ Judgment of February 27, 2012, *Case of Narciso González Medina and family v. Dominican Republic*, Series C No. 240, para. 134.

⁶⁴⁴ Judgment of November 26, 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 185. In this same vein, see: Judgment of August 12, 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, para. 150; Judgment of

"One of the most important aspects of a thorough and impartial investigation of torture is the collection and analysis of physical evidence. Investigators should document the chain of custody involved in recovering and preserving physical evidence in order to use such evidence in future legal proceedings, including potential criminal prosecution."

Istanbul Protocol (paragraph 102)

In certain cases of gross human rights violations – such as, for example, torture or enforced disappearance – this aspect is also important, insofar as it may produce the cessation of the violation. For example, the Committee against Torture has found that "promptness [in starting the investigation] is essential both to ensure that the victim cannot continue to be subjected to [torture or ill-treatment] and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear."⁶⁴⁵ Along these lines, and in relation with cases of enforced disappearance, the Inter-American Court of Human Rights has held that "it is essential that the prosecuting and judicial authorities take prompt and immediate action, ordering the timely and necessary measures to determine the victim's whereabouts or the place where he or she may be found deprived of liberty."⁶⁴⁶

e. Exhaustive and effective investigation

International norms and standards⁶⁴⁷ establish that investigations must be exhaustive and effective. This means that investigations must be genuinely aligned with establishing the material facts and

February 27, 2012, *Case of Narciso González Medina and family v. Dominican Republic*, Series C No. 240, para. 218; and Judgment of November 29, 2012, *Case of García and Family v. Guatemala*, Series C No. 257, para. 135.

⁶⁴⁵ Views of 14 May 1998, *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, para. 8.2.

⁶⁴⁶ Judgment of November 29, 2012, *Caso García y Familiares v. Guatemala*, Series C No. 257, para. 138. See also: Judgment of September 22, 2009, *Case of Anzaldo Castro v. Peru*, Series C No. 202, para. 134, and Judgment of February 27, 2012, *Case of Narciso González Medina and family v. Dominican Republic*, Series C No. 240, paras. 204, 209 y 218.

⁶⁴⁷ *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 12,1); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13,1); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 9); and *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* (Principle 2).

the circumstances in which the crime was committed and the motives for the crime, as well as the identification of every implicated individual and their level or participation in and responsibility for the crimes (perpetrators, accomplices, chain of command; accessories involved in the cover-up). In this sense, the Committee against Torture has held that the investigation must pay "particular attention to the legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence."⁶⁴⁸

"[T]he lack of the due investigation and punishment of reported irregularities encourages investigators to continue using such methods. This affects the ability of the judicial authorities to identify and prosecute those responsible and to impose the corresponding punishment, which makes Access to justice ineffective. [...] [A] State may be responsible when 'evidence that could have been very important for the due clarification of the [violations is] not ordered, practiced or evaluated.'"

Inter-American Court of Human Rights⁶⁴⁹

Exhaustiveness refers to the search for and collection of all direct and circumstantial pieces of evidence that may establish the materiality of the crime, identify the responsible parties and their level of responsibility for the criminal acts. In this sense, the Inter-American Court of Human Rights has established that there are certain "guiding principles that must be observed in criminal investigations into human rights violations, which include, inter alia: the recovery and preservation of evidence in order to assist in a potential criminal investigation of the perpetrators; identification of possible witnesses, obtaining their statements and determination of the cause, manner, place and time of the act investigated. In addition, there should be a thorough examination of the crime scene and a rigorous analysis of the evidence by competent professionals using the most appropriate procedures."⁶⁵⁰

⁶⁴⁸ General Comment No. 2: Implementation of Article 2 by States parties, CAT/C/GC/2 of 24 January 2008, para. 7.

⁶⁴⁹ Judgment of November 16, 2009, *Case of González et al ("Cotton Field") v. Mexico*, Series C No. 2005, paras. 346 and 349.

⁶⁵⁰ Judgment of August 31, 2010, *Case of Rosendo Cantú et al v. Mexico*, Series C No. 216, para. 178. En el mismo sentido, ver: Judgment of June 7, 2003, *Case of Juan Humberto Sánchez v. Honduras*, Op. Cit., para. 128; *Case of Garibaldi*, Doc. Cit., para. 115, and Judgment of November 16, 2009, *Case of "Cotton Field"*, Doc. Cit., para. 300.

The search for and collection of all the direct and circumstantial evidence, as well as contextual elements, allows investigators to elaborate logical hypotheses and lines of inquiry that are genuinely oriented toward revealing the material facts, identifying the responsible parties and their level of responsibility. Frequently, crimes are committed through a complex and compartmentalized organization, an intricate web of participants, using clandestine methods and creating terror and intimidating witnesses and victims' family members. In those cases, the evidence and direct witnesses are scarce, if not non-existent, or they have been eliminated. In contexts such as these, circumstantial evidence and indicia acquire great relevance in the investigations. In this regard, the Inter-American Court of Human Rights has held that: "[i]t is neither logical nor reasonable to investigate a forced disappearance and subordinate its clarification to the acceptance or confession of the possible authors or authorities involved, or to the similarity or agreement of their testimony with that of witnesses who state that they were aware of the victim's presence in State facilities. The Court notes that, in the investigation of an alleged forced disappearance, the State authorities must take into account the elements characteristic of this type of crime."⁶⁵¹

"The Court reiterates that in cases of forced disappearance it is of vital importance that the authorities in charge of the investigation pay special attention to the circumstantial evidence, indications and presumptions [...], thus avoiding omissions in gathering evidence and following up on logical lines of investigation."

Inter-American Court of Human Rights⁶⁵²

Important international instruments establish standards and procedures that should be observed when searching for and collecting evidence and clues. Among these, it is worth highlighting: the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*; the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol)*; the *Manual on the Effective Investigation*

⁶⁵¹ Judgment of February 27, 2012, *Case of Narciso González Medina and family v. Dominican Republic*, Series C No. 240, para. 161.

⁶⁵² *Ibid.*, para. 232.

and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol); and the Global consensus on principles and minimum standards for psychosocial work in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions. The Inter-American Court of Human Rights, the IACHR, the Committee against Torture and the Subcommittee for the Prevention of Torture, among other international bodies, have repeatedly held that the observance of these standards and procedures in investigations is of transcendent importance. Likewise, they have stated that failure to observe them leads to non-exhaustive investigations and, generally, to impunity.

The UN General Assembly, the former Commission on Human Rights and the Human Rights Council have emphasized the importance of forensic sciences in the framework of investigations of grave human rights violations and their role in the fight against impunity.⁶⁵³ The former Commission on Human Rights highlighted that “forensic investigations can play an important role in combating impunity by providing the evidentiary basis on which prosecutions can successfully be brought against persons responsible for grave violations of human rights and international humanitarian law,” as well as the role that non-governmental organizations play in this field.⁶⁵⁴

“[W]ith the exhumation carried out in adequate conditions at a technical-scientific level, we will be able to obtain a reliable verification of the narrated events that have left traces in everything (organic and inorganic) that is recovered in the forensic audit. In accordance with the specific conditions of the forensic evidence set forth in the tests to be completed, we will be able to establish whether or not there is forthcoming matches between the recovered evidence and the information reported by the family members of the victims.”

Peruvian Forensic Anthropology Team (EPAF)⁶⁵⁵

⁶⁵³ See, for example: Resolution No. 68/165 of the General Assembly, of 18 December 2013; Resolutions No. 2003/33 of 23 April 2003 and 2005/26 of 19 April 2005 of the Commission on Human Rights; and Resolutions No. 10/26, of 27 March 2009, and 15/5, of 29 September 2010 of the Human Rights Council.

⁶⁵⁴ Resolution No. 2005/26 of 19 April 2005.

⁶⁵⁵ Cited in: Defensoría del Pueblo de Peru, *Informe Defensorial No. 84: Hallazgo de fosas con restos humanos en el Distrito de Vinchos (Huamanga - Ayacucho)*, Lima, 2004 (Original in Spanish, free translation).

The UN Office of the High Commissioner for Human Rights has stated that “[f]orensic science is concerned with establishing facts, obtained through scientific means, which will be introduced as part of a criminal investigation as evidence in court, most commonly for the purpose of prosecuting crimes. It is also used, inter alia, to identify missing persons as a result of human rights violations or from multiple fatalities resulting from natural disasters. Forensic science is, therefore, one of the enabling tools to ensure the full implementation of the rule of law, and as such it needs to conform to the rule of law itself.”⁶⁵⁶ The *Minnesota Protocol*, the *Istanbul Protocol* and the *International Convention on the Protection of All Persons from Enforced Disappearance* set standard son the matter⁶⁵⁷, which must be observed by States.

“In order to determine whether the procedural obligation to protect the rights to life, personal integrity and personal liberty by means of a serious investigation into what happened was fully complied with in this case, the Tribunal must examine the different measures taken by the State after the bodies were found, as well as the domestic procedures to elucidate what occurred and to identify those responsible for the violations perpetrated against the victims[:] [...] (1) custody of the crime scene, collection and handling of evidence, autopsies, and identification and return of the victims’ remains; (2) actions taken against those presumed to be responsible and alleged ‘fabrication’ of suspects; (3) unjustified delay and absence of substantial progress in the investigations; (4) fragmentation of the investigations; (5) failure to sanction public officials involved in the irregularities, and (6) denial of access to the case file and delays or refusal of copies of this file.”

Inter-American Court of Human Rights⁶⁵⁸

The UN Special Rapporteur on Executions has considered that non-compliance with the norms set forth in the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* constitutes an “indication of governmental responsibility,” even if it cannot be proven that governmental officials have been directly implicated in the extrajudicial, arbitrary

⁶⁵⁶ *Report of the Office of the United Nations High Commissioner for Human Rights on the right to truth and on forensic genetics and human rights*, A/HRC/15/26, of 24 August 2010, para. 2.

⁶⁵⁷ Article 19.

⁶⁵⁸ Judgment of November 16, 2009, *Case of "Cotton Field"*, Doc. Cit., paras. 294 and 295.

or summary executions in question.⁶⁵⁹ Furthermore, in certain circumstances their ignorance and lack of due diligence in the activities of identifying the victims, autopsies, inhumations, and others may in and of themselves constitute forms of participation in extrajudicial executions by way of concealment.

Often, the crimes have been committed through a complex organization, an intricate network of participants, clandestine methods, structures or compartmentalized groups and distinct levels of responsibility. In this type of crimes there is a true "division of work," in which some decide and others plan, while others gather the information to commit the crime, others commit the crime, and still others cover it up. In this chain of criminality different actors play a role, such as – for example – State intelligence services, paramilitary groups and hired assassins.

In this regard, the Inter-American Court of Human Rights has held "[i]n complex cases, the obligation to investigate includes the duty to direct the efforts of the apparatus of the State to clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences, and not merely to discover, prosecute and, if applicable, punish the direct perpetrators. [...] As part of the obligation to investigate [...], the State authorities must determine, by due process of law, the patterns of collaborative action and all the individuals who took part in the said violations in different ways, together with their corresponding responsibilities. It is not sufficient to be aware of the scene and material circumstances of the crime; rather it is essential to analyze the awareness of the power structures that allowed, designed and executed it, both intellectually and directly, as well as the interested persons or groups and those who benefited from the crime (beneficiaries). This, in turn, can lead to the generation of theories and lines of inquiry, the examination of classified or confidential documents and of the scene of the crime, witnesses, and other probative elements, but without trusting entirely in the effectiveness of technical mechanisms such as these to dismantle the complexity of the crime, since they may not be sufficient. Hence, it is not a question of examining the crime in

⁶⁵⁹ UN Doc. E/CN.4/1991/36, para. 591 and E/CN.4/1990/22, para. 463.

isolation, but rather of inserting it in a context that will provide the necessary elements to understand its operational structure.”⁶⁶⁰

When the crimes are committed as part of a systematic pattern or part of a practice applied or tolerated by the State, the effectiveness of the investigation requires the development of lines of inquiry that incorporate these elements and that the facts are not investigated in isolation from other crimes that respond to the same pattern or practice. In this sense, the Inter-American Court of Human Rights has held “that certain lines of inquiry, which fail to analyze the systematic patterns surrounding a specific type of violations of human rights, can render the investigations ineffective.”⁶⁶¹

f. Framework and legal faculties for investigations

As established by international norms and standards,⁶⁶² in order for investigations to be effective, the officials in charge of them must be vested with the powers necessary to carry them out, obtain all necessary information, and even access places and documents under seal, privilege or classification, or restricted by national security, and to call witnesses and possible perpetrators and accomplices or co-conspirators.

Regarding this point, it is relevant to emphasize that the Inter-American Court has held that “public authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information

⁶⁶⁰ Judgment of May 26, 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, paras. 118 y 119. In the same vein, see: *Case of the Mapiripán Massacre v. Colombia*, Doc. Cit., para. 219; *Case of "Cotton Field," Doc. Cit.*, para. 454, and *Case of Valle Jaramillo et al v. Colombia*, Doc. Cit., para. 101.

⁶⁶¹ Judgment of November 16, 2009, *Case of "Cotton Field," Doc. Cit.*, para. 366. Ver, igualmente: Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, paras. 156, 158 and 164.

⁶⁶² *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 12.3); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13.2); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principles 10 and 11); and *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 3).

required by the judiciary may be considered an attempt to privilege the “clandestinity of the Executive branch” and to perpetuate impunity.”⁶⁶³

Also, there is a duty to preserve records and documents that may constitute evidence for the investigation of serious human rights violations and crimes under international law. Indeed, the *Principles against Impunity* establish that “[t]echnical measures and penalties should be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law.”⁶⁶⁴

“Request: a) That the Ministries of Defense and of the Interior provide to the Office of the Ombudsman the complete information contained in records, archives or any other form of registry in reference to possible responsibility of the Armed Forces and of the National Police of Peru for the events described in this Report, above all information that could establish the location of the alleged victims. [...]

“Recommend to the Ministry of Justice: [...] b) The creation, through the General Archive of the Nation, of measures for the protection and preservation of the administrative and judicial records related to violations of human rights that are held by the different government bodies, in order to impede their removal, destruction and/or diversion, and the creation of an inventory for the same. [...]

“[To the] Legislature: [...] 6. The approval of a law to penalize the conduct by public officials or public servants, including the members of the Armed Forces and of the National Police, of hiding relevant information for clarifying the events described in the present Report and especially to determine the whereabouts or ultimate fate of the victims, including the location of the mass graves.”

Ombudsman of Peru (*Defensoría del Pueblo del Perú*)⁶⁶⁵

At the hemispheric level, the General Assembly of the Organization of American States has repeated that the States must “take appropriate measures to establish mechanisms or institutions for reporting information on human rights violations and ensuring that

⁶⁶³ Judgment of November 25, 2003, Case of *Myrna Mack Chang v. Guatemala*, Series C No. 101, para. 181. In the same vein, see Case of *Goiburú et al v. Paraguay*, Doc. Cit., para.117.

⁶⁶⁴ Principle 14.

⁶⁶⁵ *Informe Defensorial No. 55: La Desaparición Forzada de Personas en el Perú (1980- 1990)*, Lima, 2002, pags. 252, 253 y 254 (Original in Spanish, free translation).

citizens have appropriate access to said information, in order to further the exercise of the right to the truth, prevent future human rights violations, and establish accountability in this area.”⁶⁶⁶ For its part, the HRC has referred to the use of State secrets as justification for restricting access to information related to alleged acts of torture or cruel, inhuman or degrading treatment. The HRC held that its concern with allegations torture was “deepened by the so far successful invocation of State secrecy in cases where the victims of these practices have sought a remedy before the State party’s courts.”⁶⁶⁷ Likewise, the HRC has recommended that the States make public all documents relating to human rights abuses, including documents under legal reservation or classification.⁶⁶⁸

The WGEID, in reference to investigations to reveal the fate or the whereabouts of the disappeared, concluded that “[t]he right to truth implies that the State has an obligation to give full access to information available, allowing the tracing of disappeared persons[; that the investigating authorities] should also have the power to have full access to the archives of the State[; and that] [a]fter the investigations have been completed, the archives of the said authority should be preserved and made fully accessible to the public.”⁶⁶⁹

“[T]he chain of custody represents the set of measures with which the existence, authenticity, completeness of all physical evidence and discovered or collected evidentiary materials may be preserved and protected, with the accreditation of their identity and original state, the circumstances in which they were collected, the individuals who took part in the collection, shipping, handling, analysis and storage of such items, as well as the changes made to them by each trustee.”

Constitutional Court of Colombia⁶⁷⁰

⁶⁶⁶ Resolution AG/RES. 2267 (XXXVII-O/07), “Right to the Truth”. See also, Resolutions on the “Right to the Truth”: AG/RES. 2406 (XXXVIII-O/08), AG/RES. 2509 (XXXIX-O/09), and AG/RES. 2595 (XL-O/10).

⁶⁶⁷ *Concluding observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3/Rev.1, para. 16.

⁶⁶⁸ *Concluding observations of the Human Rights Committee: Brazil*, CCPR/C/BRA/CO/2, para. 18.

⁶⁶⁹ “General Comment on the Right to Truth in Relation to Enforced Disappearances,” Op. Cit..

⁶⁷⁰ Judgment C-334/10 of 12 May 2010, Files D-7915 (Original in Spanish, free translation).

A crucial aspect of the investigations is the issue of the chain of custody and preservation of evidence. This ensures that evidence is unable to be altered and is not destroyed during the investigation and that, therefore, it may have legal effect in judicial proceedings. Furthermore, the observance of the chain of custody determines the validity or legality of the evidence.

In terms of forensic and medical-legal evidence, the *Minnesota Protocol* and the *Istanbul Protocol* establish clear standards in terms of the chain of custody and preservation of evidence. In this regard, the Inter-American Court of Human Rights has held that "due diligence in the legal and medical investigation of a death requires maintaining the chain of custody of each item of forensic evidence. This consists in keeping a precise written record, complemented, as applicable, by photographs and other graphic elements, to document the history of the item of evidence as it passes through the hands of the different investigators responsible for the case. The chain of custody can extend beyond the trial, sentencing and conviction of the accused; given that old evidence, duly preserved, could help exonerate someone who has been convicted erroneously. The exception to the foregoing is the positively identified remains of victims, which can be returned to their families for burial, on condition that they cannot be cremated and may be exhumed for new autopsies."⁶⁷¹

g. The security and protection of the victims, their family members and individuals who participate in the investigation

International standards⁶⁷² establish that the authorities should adopt measures in order to protect those who participate in

⁶⁷¹ Judgment of November 16, 2009, *Case of "Cotton Field,"* Op. Cit., para. 305.

⁶⁷² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 13); *International Convention for the Protection of All Persons from Enforced Disappearance* (Arts. 12.1 and 18.2); *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 13.3); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 15); *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 3.b); *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* (Principle 10); *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (Art. 12); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human*

investigations from any and all act or threat of violence, intimidation, ill-treatment or reprisals. This applies to the claimants, the victim, the victims' family members, the witnesses, and any other person – such as expert witnesses and non-governmental organizations – who may participate in the investigation.

"[D]uring the investigations into the events of this case, there were threats against judges, witnesses and next of kin. These threats have influenced the effectiveness of the proceedings. [...] [D]ue diligence in the investigations implies taking into account the patterns of operation of the complex structure of individuals who executed the massacre because this structure remained in place after the massacre had been committed, and because, precisely to ensure its impunity, it operates by using threats to instil fear in investigators and in possible witnesses, or in those who have an interest in seeking the truth, as in the case of the victims' next of kin."

Inter-American Court of Human Rights⁶⁷³

The Office of the UN High Commissioner for Human Rights has considered that "the failure to provide protection to witnesses can severely affect fundamental rights, such as the right to justice and the right to the truth. [...] The lack of such protection amounts to a violation of victims' rights to an 'effective remedy.'"⁶⁷⁴ For his part, the Special Rapporteur on Executions has indicated that "[t]he provision of adequate assistance to witnesses, family members, and others against whom retaliation is feared, is thus a necessary condition for breaking the cycle of impunity."⁶⁷⁵ The Inter-American Court of Human Rights has established that "States must provide all necessary means to protect agents of justice, investigators, witnesses, and next of kin of victims from harassment and threats aimed at obstructing the proceedings and avoiding the elucidation of the facts, and concealing the

Rights Law and Serious Violations of International Humanitarian Law (Art. 12.b) and *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* (Arts. 32 et seq.).

⁶⁷³ Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 165.

⁶⁷⁴ *The right to the truth – Report of the Office of the United Nations High Commissioner on Human Rights*, A/HRC/12/19 of 21 August 2009, paras. 32 and 34.

⁶⁷⁵ *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Philip Alston, presented in accordance with General Assembly Resolution 61/173, A/63/313 of 20 August 2008*, para. 14.

perpetrators, because, to the contrary, this would have an intimidating effect on those who could be witnesses, seriously impairing the effectiveness of the investigation.”⁶⁷⁶

The competent authorities must act with due diligence and take appropriate measures to guarantee the safety and integrity of these individuals, not only when attacks and threats occur, but also in order to prevent these eventualities. The nature of protective measures depends on each case and must take into account the nature and gravity of the crime, the vulnerability of the victims and their family members. In the case of minors,⁶⁷⁷ elders, and individuals with disabilities, victims or witnesses of rape and other forms of sexual violence, protective measures must be adjusted to the specificities and needs of these individuals.

“Fear of further violence prevents victims and witnesses from taking legal action, while the absence of effective investigations and penalties leads government officials and other persons to believe that their actions will go unpunished. [...] the victims themselves or witnesses prefer to remain silent for fear of reprisals or reach to the violations by moving to another region, thus making the investigator’s task considerably more difficult.”

Special Rapporteurs on torture and extrajudicial, summary or arbitrary executions⁶⁷⁸

The nature of the protective measures also depends on the characteristics and background of the alleged perpetrators and particularly their membership in State security forces and/or paramilitary groups. The Office of the UN High Commissioner for Human Rights has recommended that “witness protection mechanisms in such circumstances should not be associated with

⁶⁷⁶ Judgment of November 20, 2013, *Case of the Afro-descendant communities displaced from the Cacarica River Basis (Operation Genesis) v. Colombia*, Series C No. 270, para. 376. See also: Judgment of April 3, 2009, *Case of Kawas Fernández v. Honduras*, Series C No. 196, para. 106; Judgment of November 25, 2003, *Case of Myrna Mack Chang v. Guatemala*, Series C No. 101, para. 199; and Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No 163, para. 171.

⁶⁷⁷ Articles 32 et seq, of *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crimes*.

⁶⁷⁸ *Joint Report of the Special Rapporteur on the question of torture, Mr. Nigel S. Rodley, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolutions 1994/37 and 1994/82 – Visit by the Special Rapporteurs to the Republic of Colombia from 17 – 26 October 1994*, E/CN.4/1995/111 of 16 January 1995, paras. 77 and 82.

State agencies such as the police, security agencies and the military. In many cases, these agencies had political and ideological allegiances to the accused implicated in the proceedings, and the capacity to influence the prosecution.”⁶⁷⁹ In this same vein the WGEID has stated that “[i]t is particularly concerning, in any witness protection mechanism, if the agents who supposedly provide protection pertain to the law enforcement bodies against whom the witness is going to testify.”⁶⁸⁰

The measures should not be limited to aspects of “physical protection” (such as bodyguard services, armoured vehicles, etc.) or relocation of persons, but should include the investigation of the attacks and/or threats “with the purpose of obtaining effective results that may lead to the identification of those responsible and to their punishment.”⁶⁸¹ This last aspect is extremely important, since it constitutes the main guarantee of cessation of the attacks and threats and eliminates the risk factors. In this regard, in a case in which the witnesses were threatened and other individuals were coerced to offer false testimony, the Inter-American Court of Human Rights found that “[t]he fact that those responsible have not yet been punished gives rise to an intimidating efecto that is permanent in nature.”⁶⁸² Likewise, the Court found that “to fulfill the obligation to investigate, pursuant to Article 1(1) of the Convention, the State should adopt ex officio and immediately sufficient investigation and overall protection measures regarding any act of coercion, intimidation and threat towards witnesses and investigators.”⁶⁸³ The Court has also held that “the delay in executing issued arrest warrants contributes to the repetition of acts of violence and intimidation against witnesses and prosecutors connected to the determination of the truth of the events, particularly when [...] the survivors and several of the next of kin

⁶⁷⁹ *The right to the truth – Report of the Office of the United Nations High Commissioner on Human Rights*, A/HRC/12/19 de 21 August 2009, para. 69.

⁶⁸⁰ *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Mission to Argentina*, A/HRC/10/9/Add.1 of 5 January 2009, para. 75.

⁶⁸¹ Resolutions of the Inter-American Court of Human Rights, *Expansion of provisional measures requested by the Inter-American Commission on Human Rights regarding the Republic of Colombia – Case of Álvarez and others*, of August 10, 2000, para. 4.

⁶⁸² Judgment of April 3, 2009, *Case of Kawas Fernández v. Honduras*, Series C No. 196, para. 106.

⁶⁸³ *Ibid.*, para. 107.

and witnesses were harassed and threatened.”⁶⁸⁴ Likewise, the measures should not be limiting to the stage of investigation and, if the risks persist, they should last longer than this stage, even subsequent to criminal proceedings.⁶⁸⁵

Protective measures, including those in favour of investigators and justice operators, must be compatible with the State’s other international obligations.⁶⁸⁶ Invoking reasons of protection, some States have resorted to the use of “anonymous” or “faceless” prosecutors, investigators and witnesses, as well as “secret” evidence. Nonetheless, beyond these measures’ doubtful effectiveness in terms of protection, these kinds of measures are incompatible with the State’s other international obligations. Indeed, as international human rights bodies have repeatedly pointed out, this kind of mechanism violates basic judicial guarantees for the accused and/or prosecuted and violates the right to due process of law or a fair trial.⁶⁸⁷ Experience also shows that these practices lead sham trials by State security services involved in crimes so that, through the fabrication of false testimonies and evidence, they derail the investigations.⁶⁸⁸ Nonetheless, in exceptional circumstances, and under judicial supervision, the authorities in charge of the investigation or the

⁶⁸⁴ Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No 163, para. 175.

⁶⁸⁵ Article 12(b) of 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*.

⁶⁸⁶ *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy - Addendum: Report on the Mission to Peru*, E/CN.4/1998/39/Add.1, of 19 February 1998, para. 74

⁶⁸⁷ See, inter alia: Human Rights Committee, *Concluding observations to Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 13, and to the United States of America, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 18; Inter-American Commission on Human Rights, *Second Report on the situation of human rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paragraphs 103, 104 and 110, and *Third Report on the human rights situation in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, paras. 121-124, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. of 22 October 2002, para. 233; Reports of the Special Rapporteur on the Independence of Judges and Lawyers during their Missions to Peru (E/CN.4/1998/39/Add.1, 19 February 1998) and to Colombia (E/CN.4/1998/39/Add.2, of 30 March 1998); and *Report of the Working Group on Enforced or Involuntary Disappearances - Addendum: Mission to Argentina*, A/HRC/10/9/Add.1 of 5 January 2009, para. 77.

⁶⁸⁸ On the use of false witnesses, see, for example: Inter-American Commission on Human Rights, *Third report on the situation of human rights in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, para.126.

prosecutor may refuse to disclose the identity of the victim, of his or her next of kin or of witnesses during a criminal investigation. However, in any case, the identity of the victims and witnesses must be revealed to the parties to the criminal proceedings in time for the start of trial in order to guarantee a fair trial (See Chapter VI "The obligation to prosecute and punish).

h. Suspension and/or reassignment of officials

International standards establish that, during the investigations the State agents and officials suspected of being implicated, in any way, in the crimes under investigation must be suspended from their official duties,⁶⁸⁹ placed in a situation in which they are not able to influence the progress of the investigations⁶⁹⁰ or separated from their posts and functions that entail direct or indirect control or power over the complainants, the witnesses and their families, as well as those who participate in the investigations.⁶⁹¹

These types of measures are not of a punitive nature, nor a criminal or disciplinary purpose, and are adopted without pre-judging individual responsibility. Consequently, these measures do not substitute the actions and criminal and/or disciplinary proceedings against the individuals criminally implicated in grave human rights violations and/or crimes under international law. These measures have a preventive vocation, with two purposes: i) to preserve the integrity and effectiveness of the investigation; and ii) guaranteeing the integrity and personal safety of those participating in the investigations. As the Working Group on Disappearances and the Special Rapporteur on Executions have stated, these kinds of measures are directly related to the obligation to provide protection to witnesses and other individuals who participate in the investigation.⁶⁹²

⁶⁸⁹ Article 16(1) of the *Declaration on the Protection of All Persons from Enforced Disappearance* and Principle 36(a) of the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*.

⁶⁹⁰ Article 12 (4) of the *International Convention for the Protection of All Persons from Enforced Disappearance*.

⁶⁹¹ Article 12 (4) of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Principle 3(b) of the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Principle 15 of the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*.

⁶⁹² *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Mission to Argentina*, A/HRC/10/9/Add.1 of 5 January 2009, para. 75;

The UN General Assembly,⁶⁹³ the HRC,⁶⁹⁴ the Committee against Torture,⁶⁹⁵ the WGEID,⁶⁹⁶ the Special Rapporteur on Executions⁶⁹⁷ and the Special Rapporteur on Torture⁶⁹⁸ have recommended that the States suspend State agents implicated or suspected of being implicated in grave human rights violations from their official duties during the course of the investigations. The HRC has even insisted "[p]ersons alleged to have committed serious violations should be suspended from official duties during the investigation."⁶⁹⁹ The Committee on Enforced Disappearances has indicated that these officials should not be able to influence the progress of the investigations, "directly or indirectly, by themselves or through others."⁷⁰⁰

In some cases, as an alternative to suspension, the HRC⁷⁰¹ and the Committee against Torture⁷⁰² have recommended that the officials

Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Philip Alston, presented in accordance with General Assembly Resolution 61/173, A/63/313 of 20 August 2008, para. 17.

⁶⁹³ See, inter alia, Resolution No. 61/175, "Situation of human rights in Belarus," of 19 December 2006, operative paragraph 2(d).

⁶⁹⁴ See, inter alia, *Concluding observations of the Human Rights Committee to: Brazil* (CCPR/C/79/Add.66, 24 July 1996, para. 20), *Colombia* (CCPR/C/79/Add.76, 5 May 1997, parr. 32) and *Serbia and Montenegro* (CCPR/CO/81/SEMO, 12 August 2004, parr. 9).

⁶⁹⁵ See, inter alia, *Conclusiones and Recommendations of the Committee against Torture to: Peru* (CAT/C/PER/CO/4 of 25 July 2006, para. 16), *Bolivia* (CAT/C/XXVI/Concl.3/rev.1, para. 22), *El Salvador* (CAT/C/SLV/CO/2 of 9 December 2009, para. 12), *Guatemala* (CAT/C/GTM/CO/5-6 of 24 June 2013, para. 9), *Honduras* (CAT/C/HND/CO/1 of 23 June 2009, para. 20); *Venezuela* (CAT/C/CR/29/2 of 23 December 2002, para. 11); *Armenia* (CAT/C/ARM/CO/3 of 6 July 2012, para. 12); *Belarus* (CAT/C/BLR/CO/4 of 7 December 2011, para. 11) and *Turkey* (CAT/C/TUR/CO/3 of 20 January 2011, para. 7).

⁶⁹⁶ See, inter alia, *Report of the Working Group on Enforced or Involuntary Disappearance*, E/CN.4/2005/65 of 23 December 2004, para. 68.

⁶⁹⁷ See, inter alia, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston - Addendum: Mission to Colombia*, A/HRC/14/24/Add.2 of 31 March 2010, para. 93.

⁶⁹⁸ *Recommendations of the Special Rapporteur on Torture submitted in accordance with Commission resolution 2002/38*, E/CN.4/2003/68, 17 December 2002, Recommendation 26(k).

⁶⁹⁹ *Concluding observations of the Human Rights Committee: Serbia and Montenegro*, CCPR/CO/81/SEMO, 12 August 2004, para. 9.

⁷⁰⁰ *Concluding observations on the report presented by Uruguay under article 29, paragraph 1, of the Convention, approved by the Committee in its fourth period of sessions (8 – 19 April 2013)*, CED/C/URY/CO/1 of 8 May 2013, para. 20.

⁷⁰¹ See, for example, *Concluding observations of the Human Rights Committee: Brazil*, CCPR/C/BRA/CO/2 of 1 December 2005, para. 12.

be reassigned to other locations or assigned to other duties during the investigation, especially if there is a risk that the investigation might be held up. However, these measures of reassignment of location or of assignment to new duties must be carried out in such a way that the official in question is not able to obstruct the progress of the investigations, directly or indirectly. These measures should not consist in promoting the officials concerned either.

i. Victims' and family members' rights and the investigation

International rules and standards⁷⁰³ provide that the victims and their family members have the right to have the events effectively investigated. This includes the rights to access information relevant to the investigation, to present evidence and to request forensic expert testimony and counter-testimony, as well as to know the progress and the results of the investigation. The Inter-American Court of Human Rights has specified that the victims and/or their family members must have full access and ability to act in all the stages and instances of the investigations, to formulate their claims and present evidence, both to clarify the facts and to seek punishment of those responsible, and in seeking fair reparation.⁷⁰⁴

The results of the investigations should be public.⁷⁰⁵ However, the publication of some aspects of the investigation – such as the

⁷⁰² See, for example, *Conclusions and recommendations of the Committee against Torture to: El Salvador* (CAT/C/SLV/CO/2 of 9 December 2009, para. 12) and *Honduras* (CAT/C/HND/CO/1 of 23 June 2009, para. 20).

⁷⁰³ *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 24,2); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 16); *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 4); *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* (Arts. 11.c and 12); and *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes* (Art. 20).

⁷⁰⁴ See, inter alia: Judgment of July 4, 2006, *Case of Ximenes Lopes v. Brazil*, Series C No 149, para. 193; Judgment of July 1, 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148, para. 296; Judgment of June 7, 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 186; and Judgment of August 29, 2002, *Case of the Caracazo v. Venezuela* (Reparations and Costs), Series C No 95, para. 118.

⁷⁰⁵ See, inter alia: Principle 17 of the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*; Principle 2 of the

identity of some witnesses or sources of information – could compromise the prosecution and punishment of the perpetrators of the violations and thus it is possible to refrain from disclosing them if through this the instruction of the criminal case in progress would be obstructed.⁷⁰⁶ Nonetheless, this possibility may not be interpreted in such a way as to deny basic rights to the victim and his or her next of kind during the investigation. In this regard, the WGEID has established that this possibility must “be interpreted narrowly. [...] Such a limitation must be strictly proportionate to the only legitimate aim: to avoid jeopardizing an ongoing criminal investigation. A refusal to provide any information, or to communicate with the relatives at all, in other words, a blanket refusal, is a violation of the right to truth.”⁷⁰⁷

So, in any and all cases and circumstances:

- The family members of the victims of enforced disappearance or of secret extrajudicial executions, as well as individuals secretly buried, have the right to be informed about the progress and results of the investigation about their loved ones;⁷⁰⁸
- The victims and their next of kin, as well as their legal representatives, have the right to request, present and object to evidence;
- The victims and their family members, as well as their legal representatives, should be informed of the results of the investigation, of the decision to proceed to prosecute the alleged perpetrators or not, and to legally challenge to such a decision.

During the investigation, the victims and their family members must be treated with humanity and respect for their dignity and

Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Inter-American Court of Human Rights, Judgment of June 7, 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 186.

⁷⁰⁶ See, inter alia: Article 13 (4) of the *Declaration on the Protection of All Persons from Enforced Disappearance*; Principle 17 of the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*; and Principio 34 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

⁷⁰⁷ “General Comment on the Right to Truth in Relation to Enforced or Involuntary Disappearances”, Doc. Cit., para. 3.

⁷⁰⁸ Article 24 (2) of the *International Convention for the Protection of All Persons from Enforced Disappearance* and Principle 4 of the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*.

their human rights, and the authorities must adopt appropriate measures to guarantee their physical and psychological well-being and their privacy.⁷⁰⁹ Likewise, the investigations should take into account the cultural, ethnic and linguistic specifics, the gender and sexual orientation of the victims and their next of kind, and adopt working methods with a differential focus in accordance with these specifics.⁷¹⁰

"Victims as rights holders. All actions undertaken in cases of enforced disappearances, arbitrary or extrajudicial executions, and forensic investigations must promote the ethical and legal recognition of the victims and their families as rights holders, fostering their informed participation in all stages of the process. In addition, all bodies involved should provide the support necessary to ensure that this type of cases leads to the clarification of the truth, the search for justice and provide reparation to the persons, their families, their communities and to society."

Global consensus on principles and minimum standards for psychosocial work in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions.

The victims and their family members also have the right to receive legal advice, and social, medical, psychological and psychosocial assistance, including assistance from social workers and mental health professionals and reimbursement of costs, as well as legal aid and translation services when necessary.

In cases of extrajudicial execution, the family members of the victim have the right to have a doctor or other qualified representative be present at the autopsy.⁷¹¹ Also, the family

⁷⁰⁹ See, inter alia: Principle 10 of 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; the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime; Articles 4, 6, 14, 15, 16 and 17 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Article 24(6) of the International Convention for the Protection of All Persons from Enforced Disappearance; and Principle 10 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity.

⁷¹⁰ See: *Global consensus on principles and minimum standards for psychosocial work in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions*; and *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*.

⁷¹¹ Principle 16 of the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*.

members have the right to have the cadaver or skeletal remains of their murdered loved one delivered to them. In cases of "secret" extrajudicial executions or in those in which the families have not been informed of the exact location of the resting place of their loved ones, the HRC has concluded that these situations constituted inhuman treatment toward the family members of the executed individuals.⁷¹²

In cases of torture or ill-treatment, the victim has the right to access to the medical report in the investigation and to request his or her opinion be included in the report.⁷¹³

In cases of enforced disappearance, the authorities must adopt the necessary measures to safeguard the rights of the disappeared and their family members, in particular in relation to the legal situation of the disappeared and their close family, in areas such as social protection, economic issues, the right to family and property rights.⁷¹⁴ For these purposes, it is worth emphasizing that various countries have established the figure of the statement in absentia for enforced disappearance.⁷¹⁵ However, recalling that the purpose of these measures is to protect certain rights of the disappeared and of his or her family members and permit that they may exercise certain rights in the name of the victim, the WGEID has established that such a type of statement or of analogous measures cannot have a an effect the interruption or suspension of the investigations and not excuse the State of its obligations to continue to investigated the cases to establish the

⁷¹² See, inter alia: Views of 26 March 2006, *Sankara et al v. Burkina Faso*, Communication No. 1159/2003; Views of 3 April 2003, *Lyashkevich v. Belarus*, Communication No. 887/1999; Views of 30 March 2005, *Khalilova v. Tajikistan*, Communication No. 973/2001; Views of 16 November 2005, *Valichon Aliboev v. Tajikistan*, Communication No. 985/2001; and Views of 3 April 2003, *Mariya Staselovich v. Belarus*, Communication No. 887/1999.

⁷¹³ Principle 6 of the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

⁷¹⁴ Article 24 (6) of the *International Convention for the Protection of All Persons from Enforced Disappearance*; and Working Group on Enforced and Involuntary Disappearances, "General comment on the right to recognition as a person before the law in the context of enforced disappearances."

⁷¹⁵ See, for example: Argentina (Law 24.321 of 1994), Chile (Law No. 20.377 of 2009), Colombia (Law No. 1531 of 2012), Peru (Law No. 28.413 of 2004) y Uruguay (Law No. 17.984 of 2005).

fate or whereabouts of the disappeared, nor the prosecute and punish the authors of the crime.⁷¹⁶

The investigating authorities must take the appropriate measures so that the investigative activities involving the victims and their family members (such as testimony, statements, legal practices and forensic practices) do not generate new trauma or re-victimization for them.

⁷¹⁶ "General comment on the right to recognition as a person before the law in the context of enforced disappearances," Op. Cit.

CHAPTER VI: THE OBLIGATION TO PROSECUTE AND PUNISH

"[G]iven the nature and gravity of the facts, particularly since they occurred in a context of systematic human rights violations, and since the access to justice is a peremptory rule under International Law, the need to eliminate impunity gives rise to an obligation for the international community to ensure inter-State cooperation by which they must adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and the international law to prosecute it and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so."

Inter-American Court of Human Rights⁷¹⁷

1. General Considerations

The prosecution and punishment of the perpetrators of gross human rights violations is at the very heart of the question of impunity. The *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (Principles against Impunity)* define impunity as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account [...] since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, [...] [and] 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 [...]." ⁷¹⁸

United Nations human rights treaty-monitoring bodies, as well as the Inter-American Court and the IACHR, have held that the States have the obligation to combat and eradicate impunity, and to prosecute and punish the perpetrators of grave human rights violations. The Inter-American Court of Human Rights has defined impunity as "the complete absence of the investigation, pursuit,

⁷¹⁷ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 125.

⁷¹⁸ Definition A "Impunity" and Principle 1.

capture, prosecution and sentencing of those responsible for the violations of the rights protected by the American Convention.”⁷¹⁹ Likewise, the Court has repeatedly indicated that impunity “will not be eliminated unless it is accompanied by the determination of the general responsibility – of the State – and individuals – criminal and of its agents or of individuals.”⁷²⁰ It is worth recalling that this obligation also exists for the State in relation to criminal acts committed by private individuals or groups of people, particularly when they constitute crimes under international law.⁷²¹

“[I]t is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert toward gross misconduct of perpetrators.”

Theo van Boven, United Nations Expert of the right to restitution, compensation and rehabilitation⁷²²

2. Sources and nature of the obligation

The obligation to prosecute and punish the perpetrators of gross human rights violations arises from three sources of law: a) treaty-based norms that expressly reiterate this obligation; b) States’ duty to guarantee human rights; and c) general principles of international law and, in particular, of the *jus cogens* nature of these crimes.

⁷¹⁹ Judgment of November 26, 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 178. See also: Judgment of March 8, 1998, *Case of the “White Van” (Paniagua-Morales et al.) v. Guatemala*, Series C No. 37, para. 173; and Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154, para. 111.

⁷²⁰ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 125.

⁷²¹ See, inter alia: Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, para. 8; Committee against Torture, *General Comment No. 2, Application of article 2 by States Parties*; Inter-American Court of Human Rights, Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4; Judgment of September 15, 2005, *Case of the Mapiripán Massacre v. Colombia*, Series C No. 134; and Judgment of January 31, 2006, *Case of the Pueblo Bello Massacre v. Colombia*, Series C No. 140.

⁷²² *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms -Final report submitted by Mr. Theo van Boven, Special Rapporteur*, E/CN.4/Sub.2/1993/8, of 2 July 1993, para. 130.

a. Treaties and international instruments

The obligation to prosecute and punish is expressly established in numerous treaties.⁷²³ The obligation to curb acts of genocide is expressly established in articles IV, V and VI of the *Convention for the Prevention and Punishment of the Crime of Genocide*. With respect to the crime of enforced disappearance, this obligation is expressly established by: the *Inter-American Convention on the Forced Disappearance of Persons* (IACFDP)⁷²⁴ and the *International Convention for the Protection of All Persons from Enforced Disappearances* (ICPED).⁷²⁵ Likewise, as regards torture, the obligation is expressly established in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*⁷²⁶ (*Convention against Torture*) and the *Inter-American Convention to Prevent and Punish Torture*⁷²⁷ (*Inter-American Convention against Torture*).

It is worth mentioning that this obligation is also reiterated in numerous international instruments:⁷²⁸ the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary*

⁷²³ See, inter alia: Articles IV, V and VI of the *Convention on the Prevention and Punishment of the Crime of Genocide*; Articles 4 and 5 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Articles 4, 6 and 7 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Articles 3, 4 and 5 of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*; Article 4 of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*; Articles 1 and 6 of the *Inter-American Convention to Prevent and Punish Torture*; Article 7 of the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*; and Articles I and IV of the *Inter-American Convention on Forced Disappearance of Persons*.

⁷²⁴ Articles I and IV.

⁷²⁵ Articles 3, 4, 5, 6 and 7.

⁷²⁶ Articles 4, 5 and 7.

⁷²⁷ Articles 1 and 6.

⁷²⁸ *Declaration on the Elimination of Violence against Women* (Art. 4); *Declaration on the Protection of All Persons from Enforced Disappearances* (Art. 4); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 18); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principle 7); *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* (Principle 5); *Vienna Declaration and Program of Action* (Paragraphs 60 and 62); *Program of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (Paragraphs 84-89); and the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*.

and Summary Executions;⁷²⁹ the Declaration on the Protection of All Persons from Enforced Disappearances (DED);⁷³⁰ and the Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁷³¹

b. The duty to guarantee

Although some human rights treaties do not contain express clauses regarding the obligation to prosecute and punish the authors of crimes under international law,⁷³² international jurisprudence has nonetheless concluded that they establish this obligation. International case law has held that this obligation arises both from the duty to guarantee established in these treaties and under general principles of international law.

The obligation to prosecute and punish the authors of grave human rights violations, as an expression of the duty to guarantee, has its legal basis in article 2 of the ICCPR.⁷³³ The HRC has established that "[...] the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified."⁷³⁴ In its observations on countries, the HRC has reiterated that the States Parties to the ICCPR have the obligation to prosecute and punish those responsible for grave human rights violations.⁷³⁵

⁷²⁹ Article 18.

⁷³⁰ Article 4.

⁷³¹ Artículos 3, 7 and 10.

⁷³² For example: the *International Covenant on Civil and Political Rights*, the *Convención American Convention on Human Rights* and the *European Convention on Human Rights*.

⁷³³ See, inter alia, Human Rights Committee: *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*; Views of 27 October 1995, Communication No. 563/1993, *Nydia Erika Bautista v. Colombia*; Views of 29 July 1997, Communication No. 612/1995, *José Vicente and Amado Villafañe Chaparro et al v. Colombia*.

⁷³⁴ Views of 27 October 1995, Communication No. 563/1993, *Nydia Erika Bautista v. Colombia*, para. 8.6.

⁷³⁵ See, inter alia, *Concluding observations of the Human Rights Committee on: Peru*, CCPR/CO/70/PER, 15 November 2000, para. 9; *Uruguay*, CCPR/C/79/Add. 19, 5 May 1993 para. 7; *Chile*, CCPR/C/79/Add. 104, 30 March 1999, para. 7; *Lebanon*, CCPR/C/79/Add. 78, 1 April 1997, para. 12; *El Salvador*,

In its *General Comment No. 31* regarding article 2 of the ICCPR, the HRC indicated that “[w]here the investigations [...] 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 (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. [...] Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties [...] and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable.”⁷³⁶

With respect to the ACHR, Inter-American case law has established that the obligation to prosecute and punish the authors of grave

CCPR/C/79/Add. 34, 18 April 1994, para. 7; *Haiti*, A/50/40, 3 October 1995, para. 230; *France*, CCPR/C/79/Add. 80, 4 August 1997, para. 13; *Argentina*, CCPR/C/79/Add. 46, 5 April 1995, para. 146 and CCPR/CO/70/ARG, 3 November 2000, para. 9; *Croatia*, CCPR/CO/71/HRV, 4 April 2001, para. 11; *Guatemala*, CCPR/CO/72/GTM, 27 August 2001, para. 12; *Brazil*, CCPR/C/BRA/CO/2, 1 December 2005, para. 12; *Honduras*, CCPR/C/HND/CO/1, 13 December 2006, para. 5; *Paraguay*, CCPR/C/PRY/CO/2, 24 April 2006, para. 12 and CCPR/C/PRY/CO/3, 29 April 2013, para. 9; and *Suriname*, CCPR/CO/80/SUR, 4 May 2004, para. 7.

⁷³⁶ *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/74/CRP.4/Rev.6, of 29 March 2004, para. 18.

human rights violations has its legal basis in the duty to guarantee, established under article 1 of the treaty.⁷³⁷

"[B]ased on the general obligation to guarantee every person subject to its jurisdiction the human rights set forth in Article 1(1) of the Convention, together with the right to personal integrity set forth in Article 5 (Right to Personal Integrity) of the treaty, the State has the obligation to immediately initiate ex officio an effective investigation to identify, prosecute and punish perpetrators when a complaint has been filed or when there are sufficient reasons to believe that an act of torture has been committed."

Inter-American Court of Human Rights⁷³⁸

The Inter-American Court has recalled that, based on the obligations established in the ACHR: "[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."⁷³⁹ The Court has also established that the States parties to the ACHR have the international obligation to prosecute and punish the perpetrators of grave human rights violations such as enforced disappearances, extrajudicial executions, rape and torture,⁷⁴⁰ as well as crimes against humanity⁷⁴¹ and war crimes.⁷⁴²

⁷³⁷ See, inter alia: Judgment July 21, 1989, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 7; Judgment of July 21, 1989, *Case of Godínez Cruz v. Honduras*, Series C No. 8; Judgment of 8 December 1995, *Caso Caballero Delgado y Santana v. Colombia*, Series C No. 22; Judgment of September 14, 1996, *Case of El Amparo v. Venezuela*, Series C No. 28; Judgment of November 3, 1997, *Case of Castillo Páez v. Peru*, Series C No. 34; Judgment of November 12, 1997, *Case of Suárez Rosero v. Ecuador*, Series C No. 35; and Judgment of January 24, 1998, *Case of Nicholas Blake v. Guatemala*, Series C No. 36.

⁷³⁸ Judgment of April 6, 2000, *Case of Baldeón García v. Peru*, Series C No. 147, para. 156.

⁷³⁹ Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 174

⁷⁴⁰ See, inter alia: Judgment of July 21, 1989, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 7, and 34; Judgment of July 21, 1989, *Case of Godínez Cruz v. Honduras*, Series C No. 8, paras. 30 et seq.; Judgment of December 8, 1995, *Case of Caballero Delgado and Santana v. Colombia*, Series C No. 22, para. 69; Judgment of September 14, 1996, *Case of El Amparo v. Venezuela*, Series C No. 28, para. 61; Judgment of November 3, 1997, *Case of Castillo Páez v. Peru*, Series C No. 34, para. 90; Judgment of November 12, 1997, *Case of Suárez Rosero v. Ecuador*, Series C No. 35, para. 107; Judgment of January 24, 1998,

This obligation is directly related to the right of every person to be heard before a competent, independent and impartial court, for the determination of their rights, as well as the right to an effective remedy. As the Inter-American Court has held, “[t]he American Convention guarantees every person’s right of access to justice to assert his rights, and provides that the States Parties have the duty to prevent, investigate, identify, and punish the perpetrators of human rights violations and the accessories after the fact. [...] Article 8(1) of the American Convention bears a direct relation to Article 25 in conjunction with Article 1(1) of the Convention, which guarantees to all persons a simple and rapid recourse so that, among other things, those responsible for human rights violations will be tried and reparations may be obtained for the damages suffered.”⁷⁴³

“Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States’ erga omnes obligation to adopt all such measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and International Law to judge and eventually punish those responsible for such events, or collaborating with other States aiming in that direction.”

Inter-American Court of Human Rights⁷⁴⁴

Likewise, the Inter-American Court has held that “[...] punishing those responsible [...] is an obligation incumbent upon the State whenever there has been a violation of human rights, an obligation that must be discharged seriously and not as a mere formality.”⁷⁴⁵ The Court has thus considered that “[t]he State must ensure that domestic proceedings directed toward [...] punishment of those

Case of Nicholas Blake v. Guatemala, Series C No. 36, para. 97; and Judgment of August 31, 2010, *Case of Rosendo Cantú et al v. Mexico*, Series C No. 216, para. 108 et seq.

⁷⁴¹ See, inter alia: Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162 and Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154.

⁷⁴² See, inter alia: Judgment of October 25, 2012, *Case of the Massacres of El Mozote v. El Salvador*, Series C No. 252 and Judgment of November 20, 2012, *Case of Santo Domingo v. Colombia*, Series C No. 259.

⁷⁴³ Judgment of January 22, 1999, *Case of Nicholas Blake v. Guatemala*, Series C No. 48, paras. 61 and 63.

⁷⁴⁴ Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 160.

⁷⁴⁵ Judgment of September 14, 1996, *Case of El Amparo v. Venezuela*, Series C No. 28, para. 61.

responsible for the facts [...] have the desired effects and, specifically, not resort to measures such as amnesty, extinguishment and measures designed to eliminate responsibility.”⁷⁴⁶

For its part, the IACHR has recalled that the obligation to prosecute and punish the authors of human rights violations is not subject to delegation or renunciation. The IACHR has thus held that “the States have the obligation to investigate, prosecute, and punish persons responsible for human rights violations. [...] This international obligation of the state cannot be renounced.”⁷⁴⁷

In turn, the European Court of Human Rights has established that the protection of the right to life,⁷⁴⁸ the prohibition of torture⁷⁴⁹ and of cruel, inhuman or degrading treatment or punishment⁷⁵⁰ and the prohibition of enforced disappearances⁷⁵¹ require the prosecution and punishment of the act. The European Court has held that this duty to punish arises from the general obligation to protect human rights, which emanates from the *European Convention on Human Rights*. Thus, the Court has indicated that the States must “take appropriate steps to safeguard the lives of those within [their] jurisdiction. [...] [T]he State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.”⁷⁵² The Court has also held that there is a close link between the failure to effectively apply criminal law and the resulting impunity for the perpetrators

⁷⁴⁶ Judgment of August 29, 2002, *Case of the Caracazo v. Venezuela*, Series C No. 95, para. 119.

⁷⁴⁷ *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, para. 230.

⁷⁴⁸ Judgment of 28 October 1998, *Case of Osman v. United Kingdom*, Application No. 23452/94, para. 116.

⁷⁴⁹ Judgment of 18 December 1996, *Case of Aksoy v. Turkey*, Application No. 21987/93, para. 98.

⁷⁵⁰ Judgment of 23 September 1998, *Case of A. et al. v. United Kingdom*, Application No. 25599/94 paras. 22, 23.

⁷⁵¹ Judgment of 25 May 1998, *Case of Kurt v. Turkey*, Application No. 24276/94, para. 140.

⁷⁵² Judgment of 28 October 1998, *Case of Osman v. United Kingdom*, Application No. 23452/94, para. 115. See also: Judgment of 28 March 2000, *Case of Mahmut Kaya v. Turkey*, Application No. 22535/93, para. 85.

of the abuses and that defects in the investigation and prosecution undermine the effectiveness of the protection that criminal law may offer. The Court has considered that the lack of criminal accountability of members of the State security forces is not compatible with the legal system of a democratic society⁷⁵³ and that the obligation to prosecute and punish arises from the general obligation to protect and from the Convention's substantive guarantees, as well as the right to bring claims, guaranteed in article 13 of the *European Convention on Human Rights*.⁷⁵⁴

The African Commission on Human and Peoples' Rights has also repeatedly held that the duty to prosecute and punish those responsible for grave human rights violations arises from the obligation to protect and guarantee fundamental rights.⁷⁵⁵

c. Customary obligations and *jus cogens* norms

The obligation to prosecute and punish the perpetrators of gross human rights violations is not just treaty-based, and its recognition is longstanding. It was established early on in international law. One of the first case law precedents is the arbitral award issued on the first of May, 1925, by Professor Max Huber on the matter of British claims for damages caused to British subjects in the Spanish zone of Morocco. In this arbitral award, Professor Huber recalled that, under international law, "[i]t is held that generally, curbing crime is not only a legal obligation for the competent authorities, but also, [...] an international duty of the State."⁷⁵⁶

⁷⁵³ Judgment of 28 March 2000, *Caso Mahmut Kaya v. Turkey*, Application No. 22535/93, para. 75 y 98; and Judgment of 18 June 2002, *Case of Orhan v. Turkey*, Application No. 25656/94, para. 330.

⁷⁵⁴ See, inter alia: Judgment of 18 December 1996, *Case of Aksoy v. Turkey*, Doc. Cit., para. 98; Judgment of 25 September 1997, *Case of Aydin v. Turkey*, Application No. 23178/94, para. 103; and Judgment of 18 June 2002, *Case of Orhan v. Turkey*, Op. Cit. para. 384.

⁷⁵⁵ See, inter alia: *African Association of Malawi et al v. Mauritania*, Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 (27th Ordinary Session, May 2000) and *Center for Action for Social and Economic Rights and Center for Economic Rights v. Nigeria*, Communication 155/96 (30th Ordinary Session, October 2001).

⁷⁵⁶ « Affaire des biens britanniques au Maroc espagnol. Espagne contre Royaume-Uni. La Haye, 1^{er} mai 1925 », in *Recueil de sentences arbitrales*, Nations Unies, Vol. II, pp. 645 and 646 (Original in French, free translation).

In effect, the obligation to prosecute and punish those responsible for grave human rights violations, crimes against humanity, war crimes and genocide also has its basis in customary international law. This obligation has been reiterated by the United Nations General Assembly⁷⁵⁷ and the Security Council,⁷⁵⁸ as well as by international jurisprudence.

The United Nations General Assembly "*reiterates* the obligation of all States under international law to conduct thorough, prompt and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, while ensuring the right of every person to a fair hearing by a competent, independent and impartial tribunal established by law [...]."⁷⁵⁹

⁷⁵⁷ See, inter alia, Resolutions No. 49/193 of 23 December 1994 (enforced disappearance); 51/94 of 12 December 1996 (enforced disappearance); 53/150 of 9 December 1998 (enforced disappearance); 55/111 of 4 December 2001 (extrajudicial executions); 57/190, of 18 December 2002 (abduction of children); 57/228 of 18 December 2002 (proceedings against the Khmer Rouge); and 67/168 of 20 December 2012 (extrajudicial executions).

⁷⁵⁸ See, inter alia, Resolutions No. 2136 (2014), *Democratic Republic of Congo*, of 30 January 2014; 2122 (2013), *Women and peace and security*, of 18 October 2013; 2127 (2013), *Central African Republic*, of 5 December 2013; 2100 (2013), *Mali*, of 25 April 2013; 2101 (2013), *Ivory Coast*, of 25 April 2013; 2048 (2012), *Guinea-Bissau*, of 18 May 2012; 2040 (2012), *Libya*, of 12 March 2012; 2068 (2012), *Children and armed conflicts*, of 19 September 2012; 1998 (2011), *Children and armed conflicts*, 12 July 2011; 1959 (2010), *Burundi*, 16 December 2010; 1894 (2009), *Protection of civilians in armed conflicts*, of 11 November 2009; 1889 (2009), *Women and peace and security*, of 5 October 2009; 1820 (2008), *Women and peace and security*, of 19 June 2008; 1738 (2006), *Protection of civilians in armed conflicts*, of 23 December 2006; 1704 (2006), *East Timor*, of 25 August 2006; 1591 (2005), *Sudan*, of 29 March 2005; 1529 (2004), *The question of Haiti*, of 29 February 2004; 1479 (2003) *The situation in the Ivory Coast*, of 13 May 2003; 1318 (2000), *Declaration on strengthening the effectiveness of the Security Council's role in maintaining international peace and security, particularly in Africa*, of 7 September 2000; 1315 (2000), *Sierra Leone*, of 14 August 2000; 1272 (1999), *East Timor*, of 25 October 1999; 1019 (1995), *Regarding violations of international humanitarian law and of human rights committed in the former Yugoslavia*, of 9 November 1995; 941 (1994), *Regarding violations of international humanitarian law, and particularly the perpetrators in Banja Luka, Bijeljina and other zones in Bosnia & Herzegovina under Serbian forces of Bosnia*, 23 September 1994; 935 (1994), *Establishing an impartial International Commission of Experts in order to examine the serious violations of international humanitarian law committed in Rwanda*, of 1 July 1994; and 859 (1993), *Bosnia & Herzegovina*, of 24 August 1993.

⁷⁵⁹ See, inter alia, Resolution No. 67/168 of 20 December 2012.

From early on, the UN General Assembly declared genocide's status as a crime under customary international law, through its Resolution No. 96 (I), of 11 December 1946, when it held that genocide "is contrary to moral law and to the spirit and aims of the United Nations [...] [and] is a crime under international law."⁷⁶⁰ In this same Resolution, the General Assembly declared, "[t]he punishment of the crime of genocide is a matter of international concern."⁷⁶¹ Along these same lines, the 1948 *Convention for the Prevention and Punishment of the Crime of Genocide* "confirm[s] that genocide, whether committed in time of peace or in time of war, is a crime under international law."⁷⁶² Its nature as a breach of customary international law was also reaffirmed in 1951 by the International Court of Justice, which pointed out that the Convention was based on "principles which are recognized by civilized nations as binding on States, even without any conventional obligation"⁷⁶³ and that genocide is a "crime under international law."⁷⁶⁴ Likewise, and independent of the fact their Statutes incorporate the crime of genocide,⁷⁶⁵ the international criminal courts have reaffirmed that genocide is a crime of international law or "*crime de droit des gens*."⁷⁶⁶ In its first judgment, the International Criminal Tribunal for Rwanda asserted that "[t]he Genocide Convention is undeniably considered part of customary international law."⁷⁶⁷

⁷⁶⁰ Resolution 96 (I), "The Crime of Genocide," of 11 December 1946. The original versions of the resolution are in French and English. The version in French uses the expression "*droit des gens*", while the version in English uses the term "International Law."

⁷⁶¹ *Ibid.*, final paragraph of Preamble.

⁷⁶² Article I.

⁷⁶³ International Court of Justice, Advisory Opinion of 28 May 1951, *Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, pag. 23.

⁷⁶⁴ *Ibidem.* (In the French version, "*un crime de droit des gens*.")

⁷⁶⁵ *Statute of the International Criminal Tribunal for the former Yugoslavia* (article 4), *Statute of the International Criminal Tribunal for Rwanda* (article 2) and *Rome Statute of the International Criminal Court* (article 6).

⁷⁶⁶ See, inter alia: International Criminal Tribunal for Rwanda, II Trial Chamber, Judgment of 21 May 1999, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, para. 88; and International Criminal Tribunal for the former Yugoslavia, Judgment of 2 August 2001, *The Prosecutor v. Radislav Krstic ("Srebrenica")*, Case No. IT-98-33, para. 541.

⁷⁶⁷ Judgment of 2 October 1998, *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, para. 495.

International case law has repeatedly held that the prohibition of torture is a *jus cogens* norm, under which the obligation to prosecute and punish the perpetrators arises. When considering cases of torture committed prior to the entry into effect of the *Convention against Torture*, the Committee against Torture recalled that there was already an obligation to punish those responsible for acts of torture before the Convention entered into effect, since “there existed a general rule of international law which should oblige all States to take effective measures [...] to punish acts of torture.”⁷⁶⁸ The Committee based its finding on the “principles of the judgment of Nuremberg” and the right to not be tortured, established in the *Universal Declaration of Human Rights*. For its part, the Inter-American Court of Human Rights has considered that “[t]here is an international legal system that absolutely forbids all forms of torture, both physical and psychological, and this system is now part of *jus cogens*. Prohibition of torture is complete and non-derogable, even under the most difficult circumstances, such as war, the threat of war, the struggle against terrorism, and any other crimes, state of siege or of emergency, internal disturbances or conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies.”⁷⁶⁹

“It would be paradoxical to allow the individuals who are, in some respects, the most responsible for crimes [against humanity] to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, [and] violate some of the most fundamental rules of international law [...].” U

United Nations International Law Commission⁷⁷⁰

Enforced disappearance has been classified as a crime under international law and the State duty to prosecute and punish those responsible for this crime has been established by the

⁷⁶⁸ Views of 23 November 1989, Communications No. 1/1988, 2/1988 and 3/1988 (Argentina), para. 7.2.

⁷⁶⁹ Judgment of September 7, 2004, *Case of Tibi v. Ecuador*, Series C No. 114, para. 143.

⁷⁷⁰ *Report of the United Nations International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996, A/51/10, supplement 10, pp. 26-27.*

HRC,⁷⁷¹ the IACHR,⁷⁷² the Inter-American Court⁷⁷³ and the WGEID.⁷⁷⁴

The Inter-American Court of Human Rights has held that the prohibitions of enforced disappearance, torture, extrajudicial executions and massacres, as well as the corresponding State duty to investigate these crimes and to prosecute and punish the perpetrators, have reached the level of *jus cogens*.⁷⁷⁵

Dealing with the aforementioned crimes, the *Rome Statue* recalls the legal duty of "every State to exercise its criminal jurisdiction over those responsible for international crimes." The *Principles of*

⁷⁷¹ *General Comment No. 31*, Op. Cit.; Views of 13 November 1995, *Nydia Erika Bautista v. Colombia*, Doc. Cit.; Views of 29 July 1997, *José Vicente and Amado Villafañe Chaparro et al v. Colombia*, Doc. Cit.; Views of 2 November 2005, Communication No. 1078/2002, *Norma Yurich v. Chile*; Views of 16 July 2003, Communication No. 950/2000, *Jegatheeswara Sarma v. Sri Lanka*; Views of 30 March 2006, Communication No. 992/2001, *Louisa Bousroual v. Algeria*; and Views of 30 March 2006 Communication No. 1196/2003, *Boucherf v. Algeria*.

⁷⁷² See, inter alia: Annual Report 1983-1984, Chapter IV, paras. 8, 9 and 12 and Chapter V, I.3, OEA/Ser.L/V/II.63 doc. 10 of September 28, 1984; Annual Report of 1986-1987, Chapter V.II, OEA/Ser.L/V/II.71 Doc. 9 rev. 1 of September 22, 1987; Annual Report 1987-1988, Chapter IV, OEA/Ser.L/V/II.74 Doc. 10 rev. 1 of September 16, 1988; Annual Report 1990-1991, Chapter V, OEA/Ser.L/V/II.79, Doc. 12 Rev. 1 of February 22, 1991; and Annual Report 1991, Chapter IV, OEA/Ser.L/V/II.81 Doc. 6 Rev. 1 of February 14, 1992.

⁷⁷³ See, inter alia: Judgment of November 22, 2005, *Caso Gómez Palomino v. Peru*, Series C No. 136, para.92; Judgment of September 22, 2006, *Case of Goiburú et al v. Paraguay*, Series C No. 153, para. 82; Judgment of July 5, 2004, *Case of 19 Tradersmen v. Colombia*, Series C No. 109, para. 142; and Judgment of January 20, 1989, *Caso Godínez Cruz v. Honduras*, Series C No. 5, paras. 163 et seq.

⁷⁷⁴ UN Docs.: E/CN.4/1999/62 of December 28, 1998, para. 333; E/CN.4/2000/64, of December 21, 1999, para. 137; E/CN.4/2002/79 of January 18, 2002, executive summary.

⁷⁷⁵ See, inter alia: Judgment of August 18, 2000, *Case of Cantoral Benavides v. Peru*, Series C No. 69 paras. 95, 102 and 103; Judgment of July 8, 2004, *Case of Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 112; Judgment of November 25, 2005, *Case of García Asto and Ramírez Rojas v. Peru*, Series C No. 137, para. 222; Judgment of April 6, 2000, *Case of Baldeón García v. Peru*, Series C No. 147, para. 147; Judgment of November 25, 2006, *Case of the Miguel Castro Castro Prison v. Peru*, Series C No. 160, para. 271; Judgment of November 29, 2006, *Caso La Cantuta v. Peru*, Series C No. 162, para. 157; Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 132; Judgment of May 25, 2010, *Case of Chitay Nech et al v. Guatemala*, Series C No. 212, para. 86; Judgment of November 24, 2010, *Case of Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*, Series C No. 219, para.105; Judgment of October 25, 2012, *Case of the Massacres of El Mozote v. El Salvador*, Series C No. 252, para. 147; and Judgment of November 26, 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 112.

*International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*⁷⁷⁶ establish that “[w]ar crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.”⁷⁷⁷

The International Committee of the Red Cross (ICRC) has concluded that it is a norm of customary international humanitarian law, applicable both to international and internal armed conflicts, that “[p]ersons who commit war crimes are criminally responsible for them.”⁷⁷⁸

The absolute nature of the obligation to prosecute and punish the perpetrators of grave human rights violations, crimes against humanity, genocide and war crimes is reaffirmed by the fact that these crimes cannot be subject to amnesties or similar measures that allow impunity for their authors (see Chapter VIII “Amnesties and other similar measures”).

3. The obligation to codify international crimes in domestic law

The obligation to prosecute and punish implies the obligation to incorporate as crimes in their national criminal law the gross human rights violations and crimes under international law. The categorization of conduct prohibited by international law as crimes under domestic law is an essential element of effective compliance with the obligation to prosecute and punish. Numerous treaties⁷⁷⁹

⁷⁷⁶ UN General Assembly Resolution 3074 (XXVIII), of 3 December 1973.

⁷⁷⁷ Principle 1.

⁷⁷⁸ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Ed. ICRC, Cambridge University Press, 2009, p. 551.

⁷⁷⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 4); *International Convention for the Protection of All Persons from Enforced Disappearance* (Arts. 7 y 25); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (Art. 3); *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (Art. 4); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (Art. 5); *Inter-American Convention to Prevent and Punish Torture* (Art. 6); and *Inter-American Convention on Forced Disappearance of Persons* (Art. III).

and international instruments⁷⁸⁰ expressly establish this obligation. Other treaties and international instruments implicitly establish this obligation, by referring to the State obligation to take necessary legislative measures to ensure that those responsible for these crimes are prosecuted and punished.⁷⁸¹

"[T]he general obligation of the States to adapt their domestic laws to the American Convention [...] is also applicable in the case of the signature of the Inter-American Convention on Forced Disappearance of Persons, because it is derived from the customary norm according to which a State that has acceded to an international treaty must amend its domestic law as necessary in order to ensure the execution of the obligations assumed. [...] [This] means that States must define enforced disappearance as an autonomous offense and also define the wrongful conducts of which it is composed."

Inter-American Court of Human Rights⁷⁸²

The Committee against Torture has held that the obligation established in article 4 of the *Convention against Torture* – that is, to guarantee that acts of torture constitute crimes under criminal law – demands that the States define the crime of torture in their criminal codes.⁷⁸³ The Committee has also indicated that incorporating the crime of torture in domestic law is justified in order to comply with all the obligation contemplated in the Convention against Torture such as, for example, the principle of

⁷⁸⁰ *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 1); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 4); *Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 7); and *Basic Principles on the Use of Force and Firearms* (Principle 7).

⁷⁸¹ See, inter alia: *Convention on the Prevention and Punishment of the Crime of Genocide* (Art. V); *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (Art. 7); and *Declaration on the Elimination of Violence against Women* (Art. 4).

⁷⁸² Judgment of November 26, 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, paras. 204 and 205.

⁷⁸³ *Conclusions and recommendations of the Committee against Torture on: Zambia*, CAT/C/XXVII/Concl.4, 23 November 2001, para. 8 (a); *Saudi Arabia*, CAT/C/CR/28/5, 28 May 2002, para. 8 (a); *Indonesia*, CAT/C/XXVII/Concl.3, November 22, 2001, para. 10 (a); *United States of America*, A/55/44, paras. 175-180, 15 May 2000, para. 180 (a); *Sweden*, 6 June 2002, CAT/C/CR/28/6, paras. 5, 7; *Norway*, 28 May 2002, CAT/C/CR/28/7, para. 6; *Slovakia*, 11 May 2001, A/56/44, para. 105; *Belarus*, 20 November 2000, A/56/44, paras. 45, 46; *Austria*, 12 November 1999, A/55/44, para. 60; and *Finland*, 12 November 1999, A/55/44, para. 55.

legality or the obligation of extradition,⁷⁸⁴ or to allow universal jurisdiction.⁷⁸⁵

The obligation to define gross human rights violations as crimes under domestic law does not only arise from treaty-based obligations established. This obligation equally arises from the State duty to guarantee and its obligation to prosecute and punish grave human rights violations. The Inter-American Court of Human Rights has found that the obligation to define gross human rights violations in national criminal law also has its legal basis in the general obligation of the States to adjust their domestic laws to the norms of the *American Convention on Human Rights*.⁷⁸⁶

"States have a binding obligation under international customary law to criminalize genocide, war crimes and crimes against humanity and to investigate and prosecute perpetrators."

United Nations Secretary-General⁷⁸⁷

Compliance with this obligation is not left to the complete discretion of the State. When classifying grave human rights violations and other crimes under international law as crimes in their domestic legislation, the States must scrupulously observe two things: the principle of legality of crimes and the definition provided by international law with regards to the illegal conduct.

The principle of legality of crimes (also known as "no crime without law," or *nullum crimen sine lege*), universally recognized as one of the basic principles of criminal law⁷⁸⁸ and by human rights treaties,⁷⁸⁹ establishes that the legal definitions of criminal

⁷⁸⁴ *Conclusions and recommendations of the Committee against Torture on: Armenia*, 17 November 2000, A/56/44, para. 39; *Senegal*, 9 July 1996, A/51/44; and *Kazakhstan*, 17 May 2001, A/56/44, para. 128.

⁷⁸⁵ *Conclusiones and recommendations of the Committee against Torture: Namibia*, 6 May 1997, A/52/44, para.4.

⁷⁸⁶ See, *inter alia*: Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para.165; and Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 172.

⁷⁸⁷ *Responsibility to protect: State responsibility and prevention – Report of the Secretary General*, A/67/929–S/2013/399, of 9 July 2013, para. 40.

⁷⁸⁸ The UN International Law Commission has recalled that this is an essential principle of criminal law (UN Doc., Supplement 10 (A/49/10), p. 81).

⁷⁸⁹ *International Covenant on Civil and Political Rights* (Art. 15); *American Convention on Human Rights* (Art. 9); *European Convention on Human Rights* (Art. 7); and *African Charter on Human and Peoples' Rights* (Art. 7). See also: Third Geneva Convention (Art. 99), Fourth Geneva Convention (Art. 67) and Protocol II (Art. 6.2.c).

infractions must be strictly defined, and free of any and all ambiguity.⁷⁹⁰

Just as stated by the UN Special Rapporteur on the Independence of Judges and Lawyers, the vague or nebulous definitions of crimes run contrary to international human rights law and to the "general conditions provided by international law."⁷⁹¹

When including gross human rights violations and international crimes as criminal offenses in their domestic penal legislation, the States must observe the definitions of the crimes established by international law. The State may adopt broader definitions of crimes that provide a higher threshold of minimum protection for the victims. However, the definition of the crime must reflect at minimum the elements that characterize the definition of the crime established by international law. In this regard, the Inter-American Court of Human Rights has established that "[i]nternational law establishes a minimum standard with regard to the correct definition of this type of conduct and the minimum elements that this must observe, in the understanding that criminal prosecution is a fundamental way of preventing future human rights violations. In other words, the States may adopt stricter standards in relation to a specific type of offense to expand its criminal prosecution, if they consider that this will provide greater or better safeguard of the protected rights, on condition that, when doing so, such standards do not violate other norms that they are obliged to protect. Also, if elements considered non-derogable in the prosecution formula established at the international level are eliminated, or mechanisms are introduced that detract from meaning or effectiveness, this may lead to the impunity of conducts that the States are obliged to prevent, eliminate and punish under international law."⁷⁹² In this field, it is worth highlighting that the Constitutional Court of Colombia has

⁷⁹⁰ See, for example, *Concluding observations of the Human Rights Committee on: Algeria*, CCPR/C/79/Add.95, of 18 August 1998, para. 11; *Portugal (Macao)*, CCPR/C/79/Add.115, of 4 November 1999, para. 12; and *Democratic People's Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14. See also, European Court of Human Rights, Judgment of 25 May 1993, *Case of Kokkinakis v. Greece*, Application No. 14307/88, para. 52.

⁷⁹¹ *Report by the Special Rapporteur on the Independence of Judges and Lawyers*, E/CN.4/1998/39/Add.1, para. 129.

⁷⁹² Judgment of September 22, 2006, *Caso Goiburú et al v. Paraguay*, Series C No. 153, para. 92.

considered that “the definition of article 2 [of the Inter-American Convention on Forced Disappearance of Persons] establishes a minimum that must be protected by the States parties, without prejudice to their ability to adopt broader definitions within their domestic legal order.”⁷⁹³ The Constitutional Court reached the same conclusion regarding the Colombian definition of the crime of genocide, which included political groups among the passive subjects of the criminal offense, finding that “the regulation contained in International Treaties and Covenants establishes minimum parameters of protection, in such a way that nothing keeps the States from establishing a greater scope of protection in their domestic laws.”⁷⁹⁴

On repeated occasions, the Committee against Torture has found that the States must guarantee that the definition of the crime of torture established in their national criminal legislation is compatible with the definition established in article 1 of the Convention, and that the penal offense should criminalize all the acts and motives prohibited by the international rule that make up the international crime.⁷⁹⁵ In this sense, the Committee has established that “States parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention, and the requirements of article 4 [and] broader domestic definitions also advance the object and purpose of this Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum. In particular, the Committee emphasizes that elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances.”⁷⁹⁶

⁷⁹³ Constitutional Court of Colombia, Judgment C-580/02, of 3 July 2002 (Original in Spanish, free translation).

⁷⁹⁴ Judgment C-177/01 of 14 February 2001, case file D-3120 (Original in Spanish, free translation).

⁷⁹⁵ See, *inter alia*, Concluding observations of the Committee against Torture on: *Senegal*, CAT/C/SEN/CO/3, of 17 January 2013, para. 8; *Guatemala*, CAT/C/GTM/CO/5-6, of 24 June 2013, para. 8; *Chile*, CAT/C/CHL/CO/5, of 23 June 2009, para. 10; *Russia*, CAT/C/RUS/CO/5 of 11 December 2012, para. 7; and *Peru*, CAT/C/PER/CO/5-6, of 21 January 2013, para. 7.

⁷⁹⁶ *General Comment No. 2: Implementation of Article 2 by States Parties*, CAT/C/GC/2 of 24 January 2008, paras. 8 and 9.

The Committee against Torture has also held that torture must be defined under national legislation as a specific and autonomous crime and should not be subsumed under other connected crimes or treated as a less serious infraction, such as the crime of personal injuries.⁷⁹⁷ In this regard, the Committee has established that “[s]erious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity. [...] [M]ost States parties identify or define certain conduct as ill-treatment in their criminal codes. In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes. The Committee emphasizes that it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present.”⁷⁹⁸

“Even if the absence of an autonomous crime does not excuse States from investigating and punishing acts of enforced disappearances, the obligation to criminalize enforced disappearance under national legislation as a separate offence is a powerful mechanism for overcoming impunity.”

Working Group on Enforced or Involuntary Disappearances⁷⁹⁹

The WGEID has stated that in order to comply with article 4 of the DED, the act of enforced disappearance must be defined as a separate and autonomous crime.⁸⁰⁰ The WGEID has also established that “A number of States admit that they have not yet incorporated the crime of enforced disappearance into their domestic legislation, but argue that their legislation provides for safeguards from various offences that are linked with enforced disappearance or are closely related to it, such as abduction, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint and abuse of power. However, a

⁷⁹⁷ See, inter alia, *Concluding observations of the Committee against Torture: Colombia*, CAT/C/COL/CO/4, 4 May 2010, para. 10.

⁷⁹⁸ *General Comment No. 2*, Op. Cit., paras. 9 and 10.

⁷⁹⁹ *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3 of 28 December 2010, para. 10.

⁸⁰⁰ *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3 of 28 December 2010, para. 9. See also, the *Reports of the WGEID*: E/CN.4/1996/38, para. 54; and A/HRC/7/2, para. 26 (paragraph 3 of the General Comment on the definition of enforced disappearance).

plurality of fragmented offences does not mirror the complexity and the particularly serious nature of enforced disappearance. While the mentioned offences may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection.”⁸⁰¹

“In the *Gómez Palomino* case, this Court referred to the failure to adapt article 320 of the Peruvian Criminal Code to international standards because: (a) article 320 of the Peruvian Criminal Code restricted the authorship of enforced disappearance to ‘public officials or servants.’ This definition does not contain all the forms of criminal participation that are included in Article II of the Inter-American Convention on Forced Disappearance of Persons, and is thus incomplete; (b) the refusal to acknowledge the deprivation of liberty and to provide information on the fate of whereabouts of the person in order not to leave traces or evidence should be included in the definition of the offense, because this allows it to be distinguished from other offenses, with which it is usually related; however, article 320 of the Peruvian Criminal Code does not include this; (c) the wording of article 320 of the Criminal Code indicates that the disappearance must be ‘duly proven,’ and this gives rise to serious difficulties in its interpretation. First, it is not possible to know whether it should be duly proved before the offense is reported and, second, it is not clear who should execute the verification. The latter ‘does not allow the State to comply fully with its international obligations.’”

Inter-American Court of Human Rights⁸⁰²

Along these same lines, the Inter-American Court has held that “States must, in the first place, classify the forced disappearance of persons as an autonomous crime in their domestic legislation, on the understanding that the criminal prosecution can be an essential channel to prevent future human rights violations [and that] [s]aid classification must include the minimum elements established in specific international instruments, universal as well

⁸⁰¹ *Ibid.*, para. 11

⁸⁰² Judgment of November 26, 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 206.

as Inter-American, for the protection of persons against forced disappearances.”⁸⁰³

In cases in which the national criminal offenses of enforced disappearance do not meet the elements of this international crime, or do not include all the types of criminal involvement foreseen under international standards, the Court has concluded that the State has failed to effectively comply with its obligation to criminalize this international offense.⁸⁰⁴

In one case, upon finding that in the absence of the definition of the crime of enforced disappearance in domestic law the investigation and the judicial proceedings were filed based on other crimes (“kidnapping, deprivation of liberty, homicide and conspiracy”), the Inter-American Court concluded that “the judicial authorities did not take into account the elements that constitute forced disappearance of persons or their extreme gravity, [...] [and] committed the grave omission of failing to adopt the necessary measures to reveal the different elements that make up this grave human rights violation.”⁸⁰⁵

4. Materializing the obligation to punish: criminal proceedings before a court

The obligation to prosecute and punish must be complied with in accordance with the applicable norms established by international law and must guarantee the right to justice and to an effective remedy for the victims of human rights violations and their family members (see Chapter IV “Rights to an effective remedy and to reparation”).

The obligation to prosecute and punish the perpetrators of human rights violations is executed through the actions of ordinary courts. International law upholds the right to be judged by ordinary courts. The *Basic Principles on the Independence of the Judiciary* establish that “[e]very one shall have the right to be tried by ordinary courts or tribunals using established legal

⁸⁰³ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 66.

⁸⁰⁴ Judgment of November 22, 2005, *Caso Gómez Palomino v. Peru*, Series C No. 136, para. 102 et seq.; and Judgment of November 26, 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 206.

⁸⁰⁵ Judgment of February 27, 2012, *Case of Narciso González Medina and family v. Dominican Republic*, Series C No. 240, para. 245.

procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”⁸⁰⁶ This provision reiterates the principles of a “natural judge,” an essential component of contemporary criminal law and a fundamental guarantee of the right to a fair trial, which means that no one may be judged unless by an ordinary, pre-established and competent tribunal or judge. As a corollary to this principle, emergency, *ad hoc*, “extraordinary,” *ex post facto* or special tribunals are prohibited.

"We could, of course, set them at large without a hearing. But it has cost unmeasured thousands of American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a hearing. But indiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear."

Robert H. Jackson⁸⁰⁷

Although the HRC has indicated that “trial before courts other than ordinary courts is not necessarily, *per se*, a violation of the entitlement to a fair hearing,”⁸⁰⁸ with regards to grave human rights violations, international norms, standards and jurisprudence are unanimous in establishing that ordinary courts – excluding military courts – have jurisdiction to hear cases involving these international crimes (see Chapter IX “Military jurisdiction and impunity”).

Some countries have recurred to the establishment of courts of special jurisdiction to adjudicate serious crimes, including grave human rights violations. These have been characterized by the use

⁸⁰⁶ Principle 5.

⁸⁰⁷ Excerpt from the Report of Robert H. Jackson to President Truman, published 7 June 1945, in Telford Taylor, available in the Truman library, available at: https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?pagenumber=3&documentid=1-4&documentdate=1945-06-07&studycollectionid=nuremberg&groupid=

⁸⁰⁸ Views of 4 April 2001, Communication No. 819/1998, *Joseph Kavanagh v. Ireland*, para. 10.1.

of “anonymous,” “secret,” or “faceless” judges, tribunals and prosecutors. In this regard, the HRC,⁸⁰⁹ the Committee against Torture,⁸¹⁰ the Special Rapporteur on the Independence of Judges and Lawyers,⁸¹¹ the Inter-American Court⁸¹² and the IACHR⁸¹³ have concluded that this practice is incompatible with the basic judicial guarantees and the right to be adjudicated by an independent and impartial tribunal. The HRC has concluded that “trials by special tribunals composed of anonymous judges are incompatible with article 14 of the Covenant.”⁸¹⁴ The IACHR has expressed that “[i]f no one knows the identity of the presiding judges, then nothing can be said about their impartiality and independence. [...] Evidently, the right of the accused in any proceedings to know who is judging him and to be able to determine that judge’s subjective competence – that is, whether there are any grounds for challenging or removing the judge – is a basic guarantee. The anonymity of the judges deprives the accused of that basic guarantee, and also violates his right to be judged by an impartial court, [and] violates the fundamental right to due process of law.”⁸¹⁵ For its part, the Inter-American Court of Human Rights observed that the use of “faceless” judges means

⁸⁰⁹ Views of 6 November 1997, Communication No. 577/1994, *Víctor Alfredo Polay Campos v. Peru*; Views of 28 July 2000, Communication No. 688/1996, *María Sybila Arredondo v. Peru*; Views of 21 October 2005, Communication No. 1125/2002, *Jorge Luis Quispe Roque v. Peru*; Views of 22 July 2003, Communication No. 981/2001, *Teofila Gómez Casafranca v. Peru*; Views of 11 July 2006, Communication No. 1298/2004, *Manuel Francisco Becerra Barney v. Colombia*; and *Concluding observations of the Human Rights Committee: Peru*, CCPR/C/79/Add.67, of 25 July 1996, paras. 12 and 19, and *Colombia*, CCPR/C/79/Add.76, of 3 May 1997, para. 21.

⁸¹⁰ *Concluding observations of the Committee against Torture: Peru*, A/50/44, of 26 July 1995, para. 68.

⁸¹¹ Reports by the Special Rapporteur on the Independence of Judges and Lawyers: *Mission to Peru*, E/CN.4/1998/39/Add.1, 19 February 1998, and *Mission to Colombia*, E/CN.4/1998/39/Add.2, 30 March 1998.

⁸¹² Judgment of 30 May 1999, Case of *Castillo Petruzzi et al v. Peru*, Series C No. 52, para. 133, and Judgment of 25 November 2004, Case of *Lori Berenson Mejía v. Peru*, Series C No. 119, para. 147.

⁸¹³ *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paras. 103, 104 and 113, and *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, paras. 121-124.

⁸¹⁴ Views of 6 November 1997, *Victor Alfredo Polay Campos v. Peru*, Doc.. Cit., para. 8.8.

⁸¹⁵ *Second Report on the Situation of Human Rights in Peru*, Doc. Cit., paras. 103, 104 and 113.

"defendants have no way of knowing the identity of their judge and, therefore, or assessing their competence"⁸¹⁶ or "adequacy."⁸¹⁷

"It needs to be stressed that impartiality and independence of the judiciary is more a human rights of the consumers of justice than a privilege of the judiciary for its own sake."

Mr. L.M Singhvi, Special Rapporteur to the former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities⁸¹⁸

The right to be heard by an independent and impartial tribunal is universally recognized by numerous treaties and international human rights instruments,⁸¹⁹ and in international humanitarian law.⁸²⁰ The HRC has recalled that, even in times of war or in states of emergency, "[o]nly a court of law may try and convict a person for a criminal offence."⁸²¹ Likewise, the HRC has held that the right to be heard by an independent and impartial court "is an absolute right that is not subject to any exception"⁸²² and the majority of the components to the right to a fair trial are generally considered

⁸¹⁶ Judgment of May 30, 1999, Case of *Castillo Petruzzi et al v. Peru*, Doc. Cit., para. 133.

⁸¹⁷ Judgment of November 25, 2004, Case of *Lori Berenson Mejía v. Peru*, Doc. Cit., para. 147.

⁸¹⁸ UN Doc. E/CN.4/Sub.2/1985/18, para. 75.

⁸¹⁹ Universal Declaration of Human Rights (Art. 10); International Covenant on Civil and Political Rights (Art. 14.1); International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5,a); Convention on the Rights of the Child (Arts. 37,d y 40.2 Basic Principles on the Independence of the Judiciary; Basic Principles on the Role of Lawyers; Basic Principles on the Role of Lawyers; American Declaration on the Rights and Duties of Man (Art. XXVI); American Convention on Human Rights (Art. 8.1); European Convention on Human Rights (Art. 6.1); Recommendation No. R (94) 12 on the Independency, Efficiency and Role of the Judges, of the Committee of Minister of the Council of Europe, 1994; Guidelines on Human rights and the fight against terrorism, of the Committee of Ministers of the Council of Europe, 2002 (Guideline IX); Charter on Fundamental Rights of the Europea Union (Art. 47); *African Charter on Human and Peoples' Rights* (Arts. 7 y 26); *African Charter on the Rights and Welfare of the Child* (Art. 17); and *Arabic Charter on Human* (Art. 13).

⁸²⁰ See inter alia, article 84 of the III Geneva Convention; article s 54, 64 to 74 and 117 to 126 of the IV Geneva Convention; article 75 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I); and article 6 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II).

⁸²¹ *General Comment No. 29: States of Emergency* (Art. 4), para. 16.

⁸²² *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 19; and Views of 28 October 1992, Communication No. 263/1987, *M. González del Río v. Peru*, para. 5.2.

non-derogable.⁸²³ The HRC has also established that “[s]afeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations.”⁸²⁴

For its part, the IACHR has considered that “[i]n a constitutional and democratic state based on the rule of law, in which the separation of powers is respected, all punishments set forth in law must be imposed by the judiciary after the person’s guilt has been established with all due guarantees at a fair trial. The existence of a state of emergency does not authorize the state to ignore the presumption of innocence, nor does it empower the security forces to exert an arbitrary and uncontrolled *ius puniendi*.”⁸²⁵ These are protections that are applicable in the investigation, prosecution and punishment of crimes, independent of whether these initiatives may be adopted in times of peace or in national emergencies, including the armed conflict.⁸²⁶

In this context, it is worth bearing in mind that international humanitarian law has established minimum guarantees in judicial matters that must be scrupulously observed in times of armed conflict,⁸²⁷ which have been considered fundamental judicial guarantees by the International Committee of the Red Cross (ICRC).⁸²⁸ As the ICRC has expressed, this “emphasizes the need for administering justice as impartially as possible, even in the extreme circumstances of armed conflict, when the value of human life is sometimes small.”⁸²⁹ In light of the development of

⁸²³ *General Comment No. 29, Doc. Cit.* para.11 .

⁸²⁴ *Ibid.*, para. 16.

⁸²⁵ Report No. 49/00, Case 11.182, *Rodolfo Gerbert et al v. Peru*, of April 13, 2000, para. 86.

⁸²⁶ *Ibidem*.

⁸²⁷ See, inter alia: article 75 (4) of Protocol I and article 6 of Protocol II.

⁸²⁸ *Customary International Humanitarian Law – Volume I: Rules*, Op. Cit., pp. 352 et seq.

⁸²⁹ ICRC, Commentary on article 75, paragraph 4 of the *Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), para. 3084. In the same sense, see: ICRC, Commentary on article 6, paragraph 2 of the *Additional Protocol to the*

international law and of state practice, the ICRC has concluded that fundamental judicial guarantees, which should be observed both in times of international and non-international armed conflicts, are made up of the following elements: the right to be tried before an independent, impartial, competent and regularly-constituted court; the presumption of innocence; the principle of individual criminal responsibility; the principle of non-retroactivity of criminal law; the principle of double jeopardy or *non bis in idem*; the right to be informed regarding the nature and cause of the accusation; the rights and means necessary for the defense, including the right to be assisted by an attorney, the right to free legal assistance if the interests of justice require it, the right to have the necessary time and facilities to prepare the defense and the right of the accused to freely communicate with her or his lawyer; the right to be adjudicated without undue delays; the right to interrogate and cross-interrogate witnesses; the right to procedural equality; the right to be assisted by an interpreter if the accused does not understand the language used in the proceedings; the right to not be obligated to testify against oneself or to self-incriminate; the right to a public judgment; and the right to judicially challenge the conviction and/or the sentence.⁸³⁰

If respect for judicial guarantees is obligatory during armed conflicts, *a fortiori* such guarantees must be absolutely respected in the moments in which there is no armed conflict. The protection of rights in times of peace should be equal or greater to the level of protection recognized in times of war. In this regard, it is worth emphasizing the opinion expressed by the Expert on the Issue of the administration of justice through military tribunals, to the former UN Sub-Commission for the Promotion and Protection of Human Rights, Professor Emmanuel Decaux: "[i]f respecting for these judicial guarantees is compulsory during armed conflicts, it is not clear how such guarantees could not be absolutely respected in the absence of armed conflict. The protection of rights in peacetime should be greater if not equal to that recognized in wartime"⁸³¹

Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), para. 4601.

⁸³⁰ *Ibid.*, pag. 4101 et seq.

⁸³¹ *Issue of the administration of justice through military tribunals – Report submitted by Mr. Emmanuel Decaux*, E/CN.4/Sub.2/2004/7, of 14 June 2004, para. 13.

In this same vein, the HRC has identified the following judicial guarantees to may not be derogated: the principle of the presumption of innocence, the right to not be obligated to testify against oneself or make self-incriminating statements; the prohibition of using statements, confessions or other evidence obtained under torture or ill-treatment; and the principle that, in the case of a trial that may result in the imposition of the death penalty during a state of emergency, all the judicial guarantees established in the ICCPR must be applied.⁸³² The HRC has recalled "the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality or arms. Sufficient time and facilities must be granted to the accused and his counsel to prepare the judicial proceedings."⁸³³ This requirement applies to all stages of judicial proceedings.

For its part, the IACHR has emphasized that the "basic and non-derogable procedural protections" include "the right of an accused to prior notification in detail of the charges against him or her, the right to defend himself or herself personally and to have adequate time and means to prepare his or her defense which necessarily includes the right to be assisted by counsel of his or her choosing or, in the case of indigent defendants, the right to counsel free of charge where such assistance is necessary for a fair hearing, and the right to be advised on conviction of his or her judicial and other remedies and of the time limits within which they may be exercised, which may include a right to appeal the judgment to a higher court."⁸³⁴

In this vein, the following legal safeguards should apply in all circumstances, including in judicial proceedings for grave human rights violations:

- Every defendant shall be presumed innocent until guilt is proven in accordance with the law;

⁸³² *General Observation No. 29, Doc. Cit.*, para. 15 and *General Observation No. 32, Doc. Cit.*, para. 6.

⁸³³ Views of 4 July 1989, Communication No. 272/1988, *Alrick Thomas v. Jamaica*, para. 11.4. See also, Views of 24 July 1989, Communication No 283/1988, *Aston Little v. Jamaica*, para. 83.

⁸³⁴ *Report on Terrorism and Human Rights*, Op. Cit., Chapter IV, "Recommendations," operative paragraph 10(f).

- The proceedings shall ensure that the accused is informed, without delay and in detail, of the charges of which he or she is accused; the proceedings shall ensure all the defendant's rights and means of necessary legal defense in all the steps preceding and during the trial;
- No one shall be convicted for a crime, unless it is based on individual criminal responsibility;
- Every person accused of a crime shall have the right to be adjudicated without undue delay and to be present in the proceedings;
- Every defendant shall have the right to defend him or herself personally or to be assisted by a defense lawyer of his or her choosing; to be informed, if unrepresented, of the right to legal representation, and, insofar as the interests of justice require it, to have a public defender named to defend him or her, free of charge, if the accused lacks the means to pay for it;
- No one shall be obligated to declare against him or herself, nor to make self-incriminating statements;
- Every defendant shall have the right to interrogate or cross-examine the prosecution's witnesses, to secure the appearance of defense witnesses, and for them to be questioned under the same conditions as opposing witnesses;
- Every person convicted of a crime shall have the right to have their conviction and their sentence reviewed by a higher court;
- All convicted persons shall be informed, at the moment of their convictions, of their rights to judicial and other remedies, as well as the deadlines for filing such motions or requests.

5. Evidence and expert reports

Evidence and expert reports must be valid and legally produced, according to the parameters established by the domestic law of each country. The evidence may be illegal when it was obtained by authorities that were not authorized to undertake investigations by national legislation; when it is collected by investigating authorities who are not vested with jurisdiction; when it is obtained through procedures that do not comply with the conditions established for the legal collection of admissible evidence under national legislation; or when it has been obtained through illegal methods (principle of legality of evidence).

Furthermore, international law establishes certain practices concerning evidence. Thus, any and all confessions or statements

obtained under torture or other cruel, inhuman or degrading treatment, or other gross human rights violations – such as death threats – is inadmissible as evidence in judicial proceedings.⁸³⁵ The only exception to this principle is when it is used as evidence against the alleged perpetrators of these human rights violations.

As regards judicial proceedings that allow the use of “secret” evidence or “anonymous” witnesses or that prevent the accused from having total or partial access to documents and evidence, the HRC has expressed that the States must “guarantee the right of all persons to a fair trial, and in particular, to ensure that individuals cannot be condemned on the basis of evidence to which they, or those representing them, do not have full access.”⁸³⁶ In various cases, the HRC has concluded that the use of “secret,” “faceless” or “anonymous” witnesses in criminal proceedings constitutes a violations of the judicial guarantees established by article 14 of the ICCPR.⁸³⁷ The IACHR has found that the systems of judicial proceedings that allow secret evidence and secret witnesses do not provide the guarantees inherent to due process of law.⁸³⁸ The IACHR emphasized that, if the witnesses are secret, “the defendant is also prevented from carrying out any effective examination of the witnesses against him.”⁸³⁹ For its part, the

⁸³⁵ Ver: *International Covenant on Civil and Political Rights* (Arts. 7 and 14.2,g); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 15); *International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families* (arts. 10 and 18.3.g); *Guidelines on the Role of Prosecutors* (Guideline 16); *Inter-American Court of Human Rights* (Arts. 5.2 and 8.3); *Inter-American Convention to Prevent and Punish Torture* (Arts. 5 and 10); *African Charter of Human and Peoples’ Rights* (Art. 5); *Principles and Guidelines on the Right to a Fair Trial and to Legal Assistance in Africa* (Principio F); *Arab Charter on Human Rights* (Arts. 8 and 16.f); *European Convention on Human Rights* (Art. 3); and *Guidelines on human rights and the fight against terrorism*, Council of Europe (Guideline IV).

⁸³⁶ *Concluding observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, of 20 April 2006, para. 13. See also *Concluding observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3/Rev.1, of 18 December 2006, para. 18.

⁸³⁷ See Views of the Committee in: Communications No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; 1126/2002, *Carranza Alegre v. Peru*, para. 7.5; 1125/2002, *Quispe Roque v. Peru*, para. 7.3; and 1058/2002, *Vargas Mas v. Peru*, para. 6.4.

⁸³⁸ *Second Report on the Situation of Human Rights in Peru*, Doc. Cit., paras. 103, 104 and 110; and *Third Report on the Situation of Human Rights in Colombia*, Doc. Cit., paras. 121, 122, 123 and 124.

⁸³⁹ *Third Report on the Situation of Human Rights in Colombia*, Doc. Cit., para. 123.

Inter-American Court of Human Rights has held that the anonymous testimony of victims and witnesses during the trial constitutes a violation of the due process of law.⁸⁴⁰ In this same vein, the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, has stated that this practice seriously restricts the fundamental right to challenge the statements of witnesses and violates the right of the accused to examine, or have examined, the prosecution witnesses.⁸⁴¹

However, the foregoing does not keep the figures of anonymous witnesses or reserved evidence from being cited during the stage of the criminal investigation. They may be admitted in exceptional cases, only during the criminal investigation stage, and under strict judicial supervision, when it is indispensable to protect the life and integrity of the witness or to preserve the evidence. Nonetheless, in all cases the identity of the anonymous victims and witnesses, as well as the sealed evidence must be revealed to the defendant sufficiently in advance of the trial to ensure a fair proceeding, the effectiveness of the right of defense and that the accused may challenge the veracity of the statements and evidence.⁸⁴² In effect, the right to have adequate facilities to prepare the defense requires that the defendant and his or her attorney access to all appropriate information, documents and other evidence that the prosecution plans to offer in court against the accused, or that may constitute exculpatory evidence.⁸⁴³

⁸⁴⁰ Judgment of November 25, 2005, Case of *García Asto and Ramírez Rojas v. Peru*, Series C No. 137, paras. 152-154; Judgment of November 25, 2004, Case of *Lori Berenson Mejía v. Peru*, Series C No. 119, paras. 183, 184 and 192; and Judgment of May 30, 1999, Case of *Castillo Petrucci et al v. Peru*, Series C No. 52, paras. 153, 154 and 172.

⁸⁴¹ *Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy- Addendum: Report on the Mission to Colombia*, E/CN.4/1998/39/Add.2 of 30 March 1998, paras. 93, 94 and 160. See also *Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy*, E/CN.4/1996/37.

⁸⁴² *Concluding observations of the Human Rights Committee on: Canada*, CCPR/C/CAN/CO/5, of 20 April 2006, para. 13; *United States of America*, CCPR/C/USA/CO/3/Rev.1, of 18 December 2006, para. 18. See also: Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Op. Cit., para. 262; *Second Report on the Situation of Human Rights in Peru*, Op. Cit., paras. 103, 104 and 110; and *Third Report on the Situation of Human Rights in Colombia*, Op. Cit., paras. 121, 122, 123 and 124. In the same sense, see: European Court of Human Rights, Judgment of 20 November 1989, Case of *Kostovski v. Netherlands*, Application No. 11454/85, paras. 43-45.

⁸⁴³ Human Rights Committee, *General Comment No. 32*, Doc. Cit., para. 33.

Indeed, the restrictions to this right may not be of such a nature that they become “secret evidence” or “secret witnesses.”⁸⁴⁴ All witnesses or evidence – whether they have been “anonymous” or “secret” during the investigation or instruction stage – must be subject to the rule that both parties to a dispute must be heard and such witnesses or evidence may not be the only basis or the dispositive evidence for the conviction.⁸⁴⁵ The defendant has the right to personally examine and cross-examine prosecution witnesses. However, the right to personally examine or cross-examine a witness may be limited when the witness is a victim of sexual violence or a minor, taking into consideration the right of the accused to a fair trial. This kind of limitation may not be interpreted as an authorization for the use of secret or anonymous witnesses and, in any case, the defense attorney has the right to examine and cross-examine the prosecution’s witnesses.⁸⁴⁶

6. Sentencing and impunity

In accordance with international practice, treaties and other international instruments do not establish the punishment or sentences applicable to crimes under international law. For example, Professor Cherif Bassiouni states that none of the 315 instruments on international criminal law created between 1815 and 1988 include the penalties for the conduct that they classify as crimes under international law.⁸⁴⁷ This aspect is left to domestic legislation or to the international tribunals. Nonetheless, the States must follow two fundamental rules: the prohibitions in international law with regards to certain punishments; and the principle of proportionality in sentencing.

⁸⁴⁴ Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, Op. Cit., paras. 103, 104 and 110; and *Third Report on the Situation of Human Rights in Colombia*, Op. Cit., paras. 121, 122, 123 and 124.

⁸⁴⁵ European Court of Human Rights: Judgment of 20 November 1989, Case of *Kostovski v. Netherlands*, Application No. 11454/85; and Judgment of 26 March 1996, Case of *Doorson v. Netherlands*, Application No. 20524/92.

⁸⁴⁶ See: International Commission of Jurists, *Trial Observation Manual for Criminal Proceedings – Practitioners Guide No. 5*, Geneva, 2009, p. 98.

⁸⁴⁷ Bassiouni, Cherif, *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1992, p. 111.

a. Prohibited punishments

Under international law there is an absolute prohibition of cruel, inhuman or degrading punishment.⁸⁴⁸ The imposition by court order of corporal punishment (such as physical punishment involving blows to the body – like whipping, flogging, beatings, mutilation, amputation and branding with fire) is prohibited under international law, given that it violates the absolute prohibition against inflicting torture or cruel, inhuman or degrading treatment or punishment.⁸⁴⁹ Also, prison sentences in conditions that violate international standards on conditions of deprivation of liberty are prohibited. Thus, for example, the following are prohibited: prolonged incommunicado detention regimes or solitary confinement without communication with the outside; confinement in a totally inhospitable place due to weather or atmospheric conditions; and confinement in a geographically isolated place that makes it very difficult, in practice, for the prisoner to receive visits from family members.⁸⁵⁰ Thus, no judiciary authority may order sentences of this kind, however serious the offense for which the person has been convicted.⁸⁵¹

Likewise, international law absolutely prohibits punishments that go beyond the convicted individual,⁸⁵² as well as collective

⁸⁴⁸ See, inter alia: *International Covenant on Civil and Political Rights* (Art. 7); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; *Inter-American Court of Human Rights* (arts. 5); and *Inter-American Convention to Prevent and Punish Torture*.

⁸⁴⁹ Human Rights Committee, *General Comment No. 20*, para. 5. See also, *Concluding observations of the Human Rights Committee on: Iraq*, CCPR/C/79/Add.84 of 19 November 1997 para. 12; *Libya*, CCPR/C/LBY/CO/4/, para. 16; *Trinidad and Tobago*, CCPR/CO/70/TTO of 3 November 2000, para. 13; and *Yemen*, CCPR/CO/84/YEM of 9 August 2005, para. 16. See also, *Conclusions and recommendations of the Committee against Torture: Saudi Arabia*, CAT/C/CR/28/5 of 12 June 2002, paras. 4(b) and 8(b); and *Inter-American Court of Human Rights*, Judgment of March 11, 2005, Case of *Caesar v. Trinidad & Tobago*, Series C No. 123, paras. 60 et seq.

⁸⁵⁰ Human Rights Committee, Views of 6 November 1997, Communication No. 577/1994, *Polay Campos v. Peru*, paras. 8.4 et seq, and Views of 28 October 2005, Communication No. 1126/2002, *Marlem Carranza Alegre v. Peru*, paras. 7.4; Committee against Torture, "Summary account of the results of the proceedings concerning the inquiry in Peru" (Article 20 of the Convention), A/56/44, paras. 183 and 184; and *Inter-American Court of Human Rights*, Judgment of November 25, 2005, Case of *García Asto and Ramírez Rojas v. Peru*, Series C No.137, paras. 221 et seq.

⁸⁵¹ Human Rights Committee, *General Comment No. 20*, Op. Cit., paras. 2 and 3.

⁸⁵² Article 5 (3) of the *American Convention on Human Rights*.

punishments.⁸⁵³ Both prohibitions are intimately related to the principles of legality of crimes and of individual criminal responsibility.

b. Proportionality of sentencing

International law obligates States to punish individuals found guilty of grave human rights violations and international crimes with sentences that are appropriate for the gravity of the crimes. This principle is established in numerous treaties and international human rights instruments⁸⁵⁴ and under international criminal law.⁸⁵⁵

In effect, the *Convention against Torture* establishes: "[e]ach State party shall make these offences punishable by appropriate penalties which take into account their grave nature."⁸⁵⁶ The ICPED establishes that "[e]ach State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness."⁸⁵⁷ The DED establishes that "[a]ll acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness."⁸⁵⁸ The

⁸⁵³ Human Rights Committee: *General Comment No. 29*, Op. Cit., para. 11; Views of 26 March 1986, Communication No. 138/1983, *Ngalula Mpandanjila et al v. Zaire*, para. 8.2; *Concluding observations of the Human Rights Committee: Libya*, CCPR/C/LBY/CO/4, para. 20. See also, Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Op. Cit., para. 227.

⁸⁵⁴ See, inter alia: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 4.2); International Convention for the Protection of All Persons from Enforced Disappearance (Art. 7); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Art. 3.3); Inter-American Convention to Prevent and Punish Torture (Art. 6); Inter-American Convention on Forced Disappearance of Persons (Art. III); Declaration on the Protection of All Persons from Enforced Disappearances (Art. 4.1); and Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 1). It is worth emphasizing that some treaties create the obligation to impose severe punishments, such as the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 1956.

⁸⁵⁵ Article 3 of the *Draft Code of Crimes against the Peace and Security of Mankind*, of the International Law Commission (1996); Article 24 (2) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*; Article 23 (2) of the *Statute of the International Criminal Tribunal for Rwanda*; and Article 78 (1) of the *Rome Statute of the International Criminal Court*.

⁸⁵⁶ Article 4(2).

⁸⁵⁷ Article 7.

⁸⁵⁸ Article 4(1).

Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions establish that "Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences."⁸⁵⁹ In the Inter-American System, the *Inter-American Convention to Prevent and Punish Torture* establishes that "[t]he States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature."⁸⁶⁰ The IACFDP establishes that "[t]he States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity."⁸⁶¹

The principle of proportionality in sentencing demands that the sanctions provided for by law and applied by courts are not arbitrary or disproportional to the gravity of the offenses they punish. Certainly, the principle of proportionality should be evaluated in light of the gravity of the offense, as well as the penalties imposed for crimes of similar gravity under domestic legislation.

The imposition of derisory penalties, in contempt of the principle of proportionality of punishment, is a recognized form of de facto impunity under international law. The International Law Commission, in its work on the *Draft Code of Crimes against the Peace and Security of Mankind*, stated that the principle of *non bis in idem* (double jeopardy) cannot be recognized as valid when judicial actions had the purpose of creating a sham trial or imposing penalties that were absolutely not proportional with the gravity of the crime.⁸⁶² The Commission concluded that the

⁸⁵⁹ Principle 1.

⁸⁶⁰ Article 6.

⁸⁶¹ Article III.

⁸⁶² *Report of the International Law Commission on its work completed during its 48th period of sessions – 6 May to 26 July 1996*, Supplementary Document No. 10 (A/51/10), Commentary on article 12 of the Draft Code, pp. 36 et seq; and *Report of the International Law Commission on its work completed during its 46th period*

international community cannot be obligated to recognize a decision resulting from such a serious breach of criminal justice proceedings.⁸⁶³ This is why the International Law Commission's *Draft Code of Crimes against the Peace and Security of Mankind*⁸⁶⁴, the *Statute of the International Criminal Tribunal for the Former Yugoslavia*⁸⁶⁵, the *Statute of the International Criminal Tribunal for Rwanda*⁸⁶⁶ and the *Rome Statute of the International Criminal Court*⁸⁶⁷ provide for the ability to quash a judicial ruling that results from proceedings set up to obtain impunity, whether it was by absolving the perpetrators of guilt for their crimes or by imposing derisory penalties.

In this context, it is worth emphasizing that the *Principles against Impunity* define impunity as: "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account [...] since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties [...]."⁸⁶⁸ Likewise, the *Principles against Impunity* emphasize that "impunity arises from a failure by States 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[...]."⁸⁶⁹

International human rights bodies have considered that the imposition of derisory penalties, that are not at all proportional to the gravity of the crimes, constitutes a form of *de facto* impunity and a violation of the obligation to punish grave violations of human rights through appropriate sentencing. Thus, in a case of a multiple homicide in which only some of the perpetrators were

of sessions - 2 May to 22 July 1994, Supplementary Document No. 10 (A/49/10), p. 57.

⁸⁶³ Report of the International Law Commission on its work completed during its 48th period of sessions - 6 May to 26 July 1996, Op. Cit., pag. 75; and Report of the International Law Commission on its work completed during its 46th period of sessions - 2 May to 22 July 1994, Op. Cit., pag. 86

⁸⁶⁴ Article 12 of the Draft, in Report of the International Law Commission on its work completed during its 48th period of sessions - 6 May to 26 July 1996, Op. Cit., pag. 36.

⁸⁶⁵ Article 10 (2).

⁸⁶⁶ Article 9 (2).

⁸⁶⁷ Article 20 (3).

⁸⁶⁸ Definition A, "Impunity."

⁸⁶⁹ Principle 1.

prosecuted and sentenced to punishments that are not proportionate with the gravity of the offense, the IACHR found that the State concerned "by virtue of the improper actions of its organs responsible for investigation (including an *ad hoc* body composed of military officers), prosecution and the administration of justice, has failed in its obligation to conduct a diligent and effective investigation into the violations that occurred, and in its obligation to prosecute and punish those responsible by means of impartial and effective procedures such as the American Convention demands. All of these factors affected the integrity of the process and implied a manipulation of justice, with the evident abuse and misuse of power. The result is that these crimes have gone unpunished to this day, and justice has been denied. The State has also violated, to the prejudice of the victims, the right to judicial guarantees and to effective judicial protection established in Articles 1(1), 8(1) and 25 of the American Convention."⁸⁷⁰

For its part, the Committee against Torture concluded in a case under its consideration that "one of the purposes of the Convention is to avoid allowing persons who have committed acts of torture to escape unpunished. [...] [A]rticle 4 sets out a duty for States parties to impose appropriate penalties against those held responsible for committing acts of torture, taking into account the grave nature of those acts. [...] [T]he imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment. [...] Consequently, the Committee considers that there has been a violation of article 4, paragraph 2, of the Convention."⁸⁷¹ In the case of Law No. 975 of 2005 (or "Justice and Peace Act") in Colombia, whereby demobilized paramilitaries can accommodate alternative imprisonment not exceeding 8 years in prison, regardless of the number and gravity of the crimes they committed, the Committee against Torture found that such legislation does not coincide with the principle of proportionality, and is "a de facto amnesty in contravention of international human rights obligations."⁸⁷² Regarding this legislation, the Human Rights

⁸⁷⁰ Report No. 136/99, Case 10.488, *Ignacio Ellacuría S.J. et al* (El Salvador), December 22, 1999, para. 238.

⁸⁷¹ Views of 17 May 2005, *Kepa Urrea Guridi v. Spain*, Communication No. 212/2002, para. 6.7.

⁸⁷² *Concluding observations of the Committee against Torture: Colombia*, CAT/C/COL/CO/4, of 19 November 2009, para. 13.

Committee has reached the same conclusion, recommending to the Colombian State “that in order to combat impunity, stringent measures be adopted to ensure that all allegations of human rights violations are promptly and impartially investigated, that the perpetrators are prosecuted, that appropriate punishment is imposed on those convicted and that the victims are adequately compensated.”⁸⁷³

7. Mitigating factors or extenuating circumstances

The principle of proportionality for sentencing may be qualified by the causes of criminal attenuation or reduction of sentences. In terms of crimes against humanity, genocide, war crimes and grave human rights violations, international law only restrictively allows such mitigating factors. They may only proceed if they are admissible “under general principles of law. This criterion limits the possible extenuating circumstances [...]”⁸⁷⁴. Given the gravity of these crimes, typical extenuating circumstances or mitigating factors under criminal law must be rejected. Since the Nuremberg Tribunal, international law has retained certain causes that justify a mitigation of punishment in the judgment or, after the court ruling, a reduction of the sentence. According to international criminal jurisprudence, these cases are limited to the age and/or personality of the delinquent, his or her level of participation in the offense and, eventually, his or her state of health.⁸⁷⁵ One recognized cause for mitigation and/or sentence reduction is effective cooperation with the justice operators, and in particular collaboration in the investigation of the crime.⁸⁷⁶

⁸⁷³ *Concluding observations of the Human Rights Committee: Colombia*, CCPR/C/79/Add.76, of 5 May 1997, para. 32.

⁸⁷⁴ *Report of the International Law Commission on the work completed in its 48th session – 6 May – 26 July 1996*, Supplement Document No. 10 (A/51/10), p. 42.

⁸⁷⁵ See the work of the UN International Law Commission (*Report of the International Law Commission on its work completed during its 48th period of sessions – 6 May to 26 July 1996*, Op. Cit., p. 42; and *Report of the International Law Commission on its work completed during its 46th period of sessions – 2 May to 22 July 1994*, Supplementary Document No. 10 (A/49/10), p. 60).

⁸⁷⁶ See, inter alia: Declaration on the Protection of All Persons from Enforced Disappearance (Art. 4); Inter-American Convention on Forced Disappearance of Persons (Art. III); International Convention for the Protection of All Persons from Enforced Disappearance (Art. 7); and Rome Statute of the International Criminal Court (Art. 110, 4).

8. Extraterritorial jurisdiction and international cooperation

Faced with these crimes, international law obliges the State in whose territory the alleged purpose of these offenses is found, to try him or extradite him (*aut dedere aut judicare*), regardless of the nationality of the alleged perpetrator and of the victim and the place the crime was committed.⁸⁷⁷

"Though it is true that in all systems of law the principles of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty."

Permanent Court of International Justice⁸⁷⁸

This obligation does not only arise from treaty provisions, but also from the nature of these acts as crimes under international law. The International Criminal Tribunal for the former Yugoslavia has reiterated this with respect of torture: "one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation [...] in the inherently

⁸⁷⁷ See, inter alia: Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7); International Convention for the Protection of All Persons from Enforced Disappearance (Arts. 9 and 11); Inter-American Convention to Prevent and Punish Torture (Art. 12); Inter-American Convention on Forced Disappearance of Persons (Art. IV); Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 18); and Inter-American Commission on Human Rights, Resolution No. 1/03 on trial for international crimes, of 24 October 2003.

⁸⁷⁸ Judgment of 7 September 1927, *The Case of S.S. Lotus (France v. Turkey)*, Series A, No. 10 (1927), 2 (20).

universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.”⁸⁷⁹

“[W]hile it is true that the tribunal before which the extradition of an individual is requested may consider and observe the conditions established in domestic law, this work should be done reconciling the latter provisions with those that in a special and preferential way have been imposed by the applicable international instruments, so that by privileging the principle of mutual assistance between nations in order to conserve the legal order, by impeding impunity through the escape of the accused.”

Supreme Court of Justice of Chile⁸⁸⁰

International law also obligates the States to mutually cooperate in suppressing these crimes. The HRC has emphasized that “States parties should [...] assist each other to bring to justice persons suspected of having committed acts in violations of the Covenant that are punishable under domestic or international law.”⁸⁸¹ For its part, the inter-American Court has held that “[i]n view of the nature and seriousness of the events, all the more since the context of this case is one of systematic violation of human rights, the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states for such purpose. Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States’ erga omnes obligation to adopt all such measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and International Law to judge and eventually punish those responsible for such events, or collaborating with other States aiming in that direction. The Court points out that, under the collective guarantee mechanism set out in the American Convention, and the regional and universal international obligations in this regard, the States

⁸⁷⁹ Judgment of 10 December 1998, *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T 10, para. 156.

⁸⁸⁰ Judgment of 21 September 2007, Extraditional File N° 03 – 05, Request for extradition of Alberto Fujimori (Original in Spanish, free translation).

⁸⁸¹ *General Comment No. 31*, Doc. Cit., para. 18.

Parties to the Convention must collaborate with one another towards that end.”⁸⁸²

⁸⁸² Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 160. See also: Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202; and Judgment of September 22, 2006, *Case of et al v. Paraguay*, Series C No. 15.

CHAPTER VII: THE RIGHT TO THE TRUTH

“The Nation has the right to know the truth about the unjust and painful facts or events caused by the multiple forms of State and non-State violence. This right means the possibility to know the circumstances of the time, form and place in which they occurred, as well as the motives of their authors. The right to truth is, in this sense, an inalienable collective legal right. Side by side with its collective dimension, the right to truth has an individual dimension, whose bearers are the victims, their family members and their loved ones. Knowing the circumstances in which the violations of human rights happened and, in the case of death or disappearance, of the fate of the victim, by its very nature, is not subject to prescription or expiration. The individuals directly or indirectly affected by a crime of this magnitude, always have the right know, even if a long time has passed since the day the crime was committed, who the perpetrators were, what date and place the crime was perpetrated, why it happened, and where the remains are, *inter alia*.”

Constitutional Tribunal of Peru⁸⁸³

1. Introduction

The proclamation of March 24th as “International Day for the Right to the Truth Concerning Gross Human Rights Violations and for the Dignity of Victims”, by the United Nations General Assembly in December 2010⁸⁸⁴, reflects the crucial importance that the right to the truth has gained. This increasing importance of the right to the truth has been reflected at the national judicial level. As a result, important jurisprudence has been developing in different countries,

⁸⁸³ Judgment of 18 March 2004, Case File 2488-2002-HC/TC.

⁸⁸⁴ Resolution No. 65/196 “Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims” of 27 December 2010.

such as Peru,⁸⁸⁵ Argentina,⁸⁸⁶ Bosnia & Herzegovina,⁸⁸⁷ and Colombia.⁸⁸⁸

This has been the result of a long evolution. Historically, the right to the truth had its roots in international humanitarian law and emerged in connection with families' need to learn the fate of their disappeared loved ones during armed conflict. However, along with the development of the international jurisprudence and doctrine on human rights, a veritable international corpus juris emerged about the right to the truth, understood as the right of the victim and his or her family to know the whole truth concerning the gross human rights violations committed, the specific circumstances and the identity of those responsible and of the perpetrators, as well as their motives. The Office of the United Nations High Commissioner for Human Rights has organized this international corpus juris in several studies.⁸⁸⁹

⁸⁸⁵ See, for example, Constitucional Tribunal: Judgment of 18 March 2004, Case File 2488-2002-HC/TC, Piura, *Caso Genaro Villegas Namuche*, and Judgment of 3 January 2003, Case File No. 010-2002-AI/TCLIMA.

⁸⁸⁶ See, inter alia: Suprem Court of Justice, Judgment of 14 June 2005, Case File S. 1767. XXXVIII, "*Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*", Rol. N° 17.768; National Court for Federal Criminal and Correctional Affairs, Decision of 1 September 2003, *Case Suárez Mason, Rol 450*; National Court for Federal Criminal and Correctional Affairs, Decision of 1 September 2003, *Case Escuela Mecánica de la Armada*, Rol. 761; National Court for Federal Criminal and Correctional Affairs, Judgment of 8 December 2004, *Case María Elena Amadio*, Rol 07/04-P; and Judgment of the Oral Tribunal for Federal Criminal Affairs No. 3, case *Carlos Alberto Telleidín y otros - homicidio (Caso Amia)*, Rol 487-00.

⁸⁸⁷ See, inter alia, Human Rights Chamber: Decision of 6 May 2002, Case No. CH/99/2150, *Unkovic v. Federation of Bosnia and Herzegovina*; Decision of 9 December 2000, Case No. CH/99/3196, *Palic v. Serb Republic*; Decision of 11 January 2001, *Palic v. Serb Republic*, Case No. CH/99/3196; and Decision of 7 March 2003, "*Srebrenica Cases*", Cases No. CH/01/8365 et al.

⁸⁸⁸ See, inter alia: Constitutional Court (Judgments T-249/03 de 2003, C-228 de 2002; C-580/02; C-875 de 2002; C-370/06; C-454/06; C-516/07; C-209/07; C-516/07; C-208/08 C-260/11) and Suprem Court of Justice, Criminal Chamber (Decisión on Appeal, 11 July 2007, *Case Orlando César Caballero Montalvo / Tribunal Superior de Antioquia*).

⁸⁸⁹ *Study on the right to the truth – Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91 of 9 January 2006; *The right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/5/7 of 7 June 2007; *The right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/12/19 of 21 August 2009; and *Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth*, A/HRC/17/21 of 14 April 2011.

As a result of the evolutionary process of international law, various international human rights instruments have arisen codifying the right to the truth. Thus, it is important to note that *The updated Set of Principles for the protection and promotion of human rights through action to combat impunity (Principles against Impunity)*, 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 (Principles on Reparation)*, the *Guiding Principles on Internal Displacement*, and the *International Convention for the Protection of All Persons from Enforced Disappearance (ICPED)*. Further, intergovernmental political branches have reaffirmed the existence of the right to the truth. Notable among them are the UN General Assembly,⁸⁹⁰ the Human Rights Council⁸⁹¹, and the former UN Commission on Human Rights,⁸⁹² as well as the General Assembly of the Organization of American States (OAS).⁸⁹³

Although the right to the truth has been amply reaffirmed by intergovernmental organs, developed by international jurisprudence and doctrine, and codified in international instruments, many of its aspects and dimensions remain in an evolutionary state. Thus, for example, it is important to note its collective dimension, its relation with the issue of the right to memory and the duty to remember⁸⁹⁴, as well as in regards to the records.

2. Origin and development of the right to truth

⁸⁹⁰ See Resolutions No. 66/160 of 19 December 2011; 65/210 of 21 December 2010; 65/209 of 21 December 2010; 65/196 "Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims" of 21 December 2010; 64/167 of 18 December 2009; 63/183 of 18 December 2008; 61/155 of 19 December 2006; 59/189 of 20 December 2004; 57/207 of 18 December de 2002; and 57/161 of 16 December 2002.

⁸⁹¹ Resolutions No. 9/11, "The right to the truth," of 24 September 2008 and 12/12, "The right to the truth," of 1 October 2009.

⁸⁹² Resolution No. 2005/66 "The right to the truth" of 20 April 2005.

⁸⁹³ See Resolutions "The Right to the Truth": AG/RES. 2175 (XXXVI-O/06), AG/RES. 2267 (XXXVII-O/07), AG/RES. 2406 (XXXVIII-O/08), AG/RES. 2509 (XXXIX-O/09), AG/RES. 2595 (XL-O/10), AG/RES. 2662 (XLI-O/11) and AG/Res. 2725 (XLII-O/12).

⁸⁹⁴ See, inter alia, Principle 3 of the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*.

The right to the truth for victims of grave human rights violations and crimes under international law and for their families has been the result of a long evolution. This right has been demanded throughout history by victims, their families, and, in certain contexts, by society itself.

a. International humanitarian law

Historically, the right to the truth had its roots in international humanitarian law and emerged in connection with the families' needs to know the fate of their disappeared loved ones during armed conflict.⁸⁹⁵ The fate and whereabouts of combatants missing in action or in the hands of the enemy, as well as the anguish of their family for knowing the destiny of their loved ones, were the main concerns in the development of international humanitarian law. The international conferences of Paris and Berlin, held in 1867 and 1869, respectively,⁸⁹⁶ were the initial steps were taken on the matter. Subsequently, various treaties and international instruments addressed the issue.⁸⁹⁷ The 1949 Geneva Conventions incorporated various provisions⁸⁹⁸ that impose obligations on the

⁸⁹⁵ See, inter alia: International Conferences of Paris and Berlin, of 1867 in 1869; Article 32 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*; Resolution II of the XXIV International Conference of the Red Cross and Red Crescent (Manila, 1981); and Resolution XIII of the XXV International Conference of the Red Cross and the Red Crescent (1986).

⁸⁹⁶ Bugnion, François, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, Ed. Comité International de la Croix-Rouge, Ginebra, 1994, pag. 569 et seq.

⁸⁹⁷ See, inter alia: *Oxford Manual on the Laws of War on Land*, of 9 September 1880 (Art. 20); *Convention (II) with Respect to the Laws and Customs of War on Land and its Regulations concerning the Laws and Customs of War on Land*, The Hague, of 19 July 1899 (Art. 14); *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, of 6 July 1906, (Arts. 3 and 4); *Convention (IV) respecting the Laws and Customs of War on Land and its Regulations concerning the Laws and Customs of War on Land*, The Hague, of 18 October 1907 (Art. 14); *Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention*, The Hague, of 18 October 1907 (Arts. 16 and 17); and *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, of 27 July 1929 (Arts. 3, 4, 8, 36 and 77).

⁸⁹⁸ In particular, articles 16 and 17 of the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Convention I); article 122 et seq of the *Geneva Convention relative to the Treatment of Prisoners of War* (Convention III); and article 136 et seq of the *Geneva Convention relative to the Protection of Civilian Persons in Times of War* (Convention IV).

belligerent parties to respond to these problems, as well as prescribe the establishment of a central search agency.

"Thus, the conclusion is inescapable that peace in the future requires justice, and that justice starts with establishing the truth."

Commission of experts on graves breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia⁸⁹⁹

The emergence of new armed conflicts in the 1950's, such as the struggle for national liberation, against foreign occupation or against racist regimes, raised even greater problems as to the fate of the disappeared and the necessity to respond appropriately to the anguish of their family. The *International Conference of the Red Cross and Red Crescent* (Tehran, 1973) unanimously adopted their Resolution V, calling on conflicting parties to provide information and cooperate with the International Committee of the Red Cross (ICRC) in order to establish the fate and whereabouts of disappeared persons.

The adoption of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* in 1977 would mean the emergence of the first conventional rule that explicitly recognizes the existence of the "right of families to know the fate of their relatives" (article 32). This right would be expressly recognized as a "general principle" of international humanitarian law with respect to disappeared persons. This was reiterated by the XXV International Conference of the Red Cross and Red Crescent, held in 1986, in its Resolution XIII. Even when article 32 of Protocol I refers to "missing persons", this concept entails different situations,⁹⁰⁰ including "enforced disappearance", of which international humanitarian law recognizes the right of families to

⁸⁹⁹ *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, S/1994/674, May 27, 1994, Annex, par. 320.

⁹⁰⁰ Generally the notion of "disappearance" in international humanitarian law covers all situations in which the fate or whereabouts of a person are unknown. In this vein, the concept of "disappearance" encompasses various situations, e.g.: the wounded or sick under enemy power who have not yet been identified; the prisoners of war or interned civilians whose names have not been registered or transmitted; the combatants "missing in action"; the civilian persons arrested, imprisoned or abducted without informing their family members, as well as the victims of enforced disappearance, as understood under international human rights law.

know the fate of their relatives. The *International Conference of the Red Cross and Red Crescent* (Manila, 1981) reaffirmed the existence of such right in its Resolution II on "forced or involuntary disappearances", by stating that "families have a right to be informed of the whereabouts, health and welfare of their members, a right which is laid down in various resolutions of the United Nations General Assembly."

Even when Protocol I is applied to situations of international armed conflict and common Article 3 of the Geneva Convention and the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* do not contain a similar clause to article 32 of Protocol I, the International Movement of the Red Cross and Red Crescent have reiterated that the right to know the truth about the fate of victims of forced disappearance applies to situations of internal armed conflict.⁹⁰¹ Common Article 3 of the Geneva Convention and Article 4 of Protocol II establish the concordant principle that the people that do not take part directly in the hostilities must be treated humanely under any circumstances. Based on these two norms, "there is no doubt that, the act of withholding available information on the persons killed or disappeared constitute a form of moral torture that is not compatible with this obligation".⁹⁰² In its commentary on the Article 4 (3) (b) of Protocol II, the ICRC highlighted that "[t]he most important thing is that the right of families to be informed of the fate of their relatives and to be reunited should be fully recognized, and that steps to this end should be facilitated."⁹⁰³

The ICRC has concluded that the right to the truth refers to all infractions of international humanitarian law and it implicitly falls within the obligation of customary status that the States have to provide victims with reparation for the conduct that violates

⁹⁰¹ Thus, for example, the *XXIV International Conference of the Red Cross and the Red Crescent*, when reiterating the existence of such a right, did not distinguish in its resolution between international armed conflicts and internal armed conflicts.

⁹⁰² Bugnion, François, Op. Cit., pag. 576 (original in French, free translation).

⁹⁰³ See: *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977 – Commentary, ICRC, 1-11-1998, para. 4554. Text available on the ICRC website: <http://www.cicr.org/ihl.nsf/COM/475-760008?OpenDocument>.

international humanitarian law.⁹⁰⁴ As they systemized the jurisprudence of international human rights protection bodies, the ICRC concluded that "the principle that reparation includes the right to the truth, as well as the investigation and prosecution of the persons responsible for human rights violations".⁹⁰⁵ The ICRC also concluded that the right to the truth is a rule of customary international law, applicable to both international and internal armed conflict, so that each party in the conflict should take all possible measures to find out the whereabouts of the alleged disappeared persons due to an armed conflict and should notify their relatives any available information as to their fate.⁹⁰⁶ The ICRC highlighted that "practice indicates that this rule is motivated by the right of families to know the fate of their missing relatives"⁹⁰⁷ and that the right of the families to know the fate of their family members already existed before the approval of Protocol I.⁹⁰⁸

b. International human rights law

With the emergence of forced disappearances in the 1970's, the concept of the right to the truth started to receive increasing attention by the international human rights bodies and by the special procedures of the United Nations. The issue of the right to the truth for victims of human rights violations and their families began to be addressed by international human rights law, initially from the perspective on the practice of forced disappearance and based on international humanitarian law, and in particular in article 32 of Protocol I. Indeed, if international humanitarian law explicitly recognized the existence of the right to the truth for family members of disappeared persons in situations of armed conflict,⁹⁰⁹ there was no legal or objective reason that this right might not be recognized for the victims of forced disappearance and their families in time of peace or during an absence of armed conflict.

⁹⁰⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Ed. ICRC, pp. 540 et seq.

⁹⁰⁵ *Ibid.*, p. 549.

⁹⁰⁶ Rule No. 117, in *Customary International Humanitarian Law, Volume I: Rules*, Op. Cit., p. 421.

⁹⁰⁷ *Ibid.*, p. 423.

⁹⁰⁸ *Ibid.*, p. 424.

⁹⁰⁹ Article 32 of the en *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* and Resolution XIII of the XXV International Conference of the Red Cross and the Red Crescent (1986).

The Conference on Enforced Disappearance of Persons (Paris, 1981), the first international meeting that started a process that culminated in the adoption of various international enforced disappearance instruments,⁹¹⁰ recommended that the "[t]he protection, in times of peace, of the disappeared and their families should be better than – or a fortiori at least equal to – the protection recognized for the disappeared in times of war."⁹¹¹ It should be noted that this principle of equal or greater protection during peacetimes in relation to the protection recognized in wartime would be reiterated by the Working Group on Enforced or Involuntary Disappearances (WGEID), as they addressed the issue of missing children or children abducted from disappeared parents,⁹¹² and by the *Meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, organized by the UN Special Rapporteur on human rights and states of emergency,⁹¹³ while addressing the legal bases of the right to the truth.

"Their right to protection finds its source in the fundamental rights that families have to know the fate of their loved ones, just as if has been defined in the Geneva Conventions and Protocols. [...] It would be shocking on a humanitarian level – and at least paradoxical in law – the find out that, de facto, individuals subjected to enforced or involuntary disappearances do not benefit from the same guarantees that positive law recognizes, particularly in the Geneva Conventions, for persons disappeared in the course of or as a consequence of armed conflicts."⁹¹⁴

Louis Joinet, Rapporteur of the Conference on the Enforced Disappearance of Persons (Paris, 1981)

⁹¹⁰ *Declaration on the Protection of All Persons from Enforced Disappearance* (1992), *Inter-American Convention on Forced Disappearance of Persons* (1994), and *International Convention for the Protection of All Persons from Enforced Disappearance* (2006).

⁹¹¹ *Le refus de l'oubli - La politique de disparition forcée de personnes - Colloque de Paris, Janvier/février 1981*, Ed. Berger-Levrault, collection Mondes en devenir, Paris 1982, pag. 302 (Original in French, free translation).

⁹¹² United Nations document E/CN.4/1984/21, para. 159.

⁹¹³ See "Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances, held in Geneva on 17 – 19 March 1995", in *Report of the Special Rapporteur on the issue of human rights and states of emergency*, E/CN.4/Sub.2/1995/20, Annex I.

⁹¹⁴ Joinet, Louis, "Rapport général", in *Le refus de l'oubli*, Op Cit., p. 302 (Original in French, free translation).

Since the mid-1970s, in the context of the practice of enforced disappearance in the military or *de facto* regimes in Latin America, different mandates and procedures of human rights of the United Nations and the Inter-American Commission on Human Rights (IACHR) reaffirmed the right to the truth.

i) The UN Human Rights System

The UN *Ad Hoc* Working Group on the Situation of Human Rights in Chile was the first special procedure to raise the issue of the right of the families of victims of enforced disappearance to know the fate and whereabouts of their missing loved ones. In 1978, the Ad Hoc Working Group reaffirmed the right based on Article 32 of Protocol I, as to the duty of the State to thoroughly investigate gross human rights violations and right to an effective legal remedy.⁹¹⁵

Since its creation in 1980, the WGEID affirmed the right to the truth for families of the victims of enforced disappearance. Thus, in its first report to the former UN Commission on Human Rights in 1981, the WGEID would recognize existence of the right to the families to know the fate of their relatives that were victims of enforced disappearance, based on Article 32 of Protocol I,⁹¹⁶ and as an autonomous right.⁹¹⁷ Since then, the WGEID has developed a broad and important doctrine on the right to the truth. The WGEID has pointed out that: "it has been clearly decided by the international community that the relatives of missing persons have a right to know their whereabouts or fate"⁹¹⁸ and that this right cannot be "denied or ignored";⁹¹⁹ that the right to the truth finds its legal basis in Article 32 of Protocol I as well as in various resolutions of the UN General Assembly,⁹²⁰ and in articles 4 (2) and 9 of the *Declaration on the protection of all persons against enforced disappearance*⁹²¹ (DED) and that the absence of information for the families about the fate and whereabouts of the

⁹¹⁵ UN Doc. A/33/331, of 25 October 1978, para. 418 *et seq.*

⁹¹⁶ *First Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1435, of 22 January 1981, para. 187.

⁹¹⁷ *Ibidem*.

⁹¹⁸ UN Doc. E/CN.4/1984/21, para. 171.

⁹¹⁹ UN Doc. E/CN.4/1492 of 31 December 1981, para. 5. In the same vein, see UN Doc. E/CN.4/1983/14, para. 134.

⁹²⁰ Particularly Resolutions No. 34/179 and 35/188 on the situation of human rights in Chile.

⁹²¹ "General Comment on article 18 of the Declaration," in *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2006/56.

disappeared persons violated various rights of their relatives, such as the right to a family and to health.⁹²² The WGEID has systematized their doctrine in their General Comment on the right to the truth in relation to enforced disappearance.⁹²³ In this commentary, they defined the right to the truth, in relation to enforced disappearances, as the "the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s)."⁹²⁴

Another body of the United Nations, pioneers of the right to the truth, is the former Sub-Commission on Prevention of Discrimination and Protection of Minorities. In a resolution of 1981 about the issue of human rights of people subject to any form of detention or imprisonment, the Sub-commission reaffirmed the existence of the right of the families to know the fate of their relatives.⁹²⁵ Different studies and reports from the Sub-commission have also recognized the right to the truth, in particular for the relatives of the victims of enforced disappearance. In 1985, the Special Rapporteur on Amnesty Laws and their role in the safety and protection of human rights, Mr. Louis Joinet, in his final report, concluded that "[i]n the case of victims of forced or involuntary disappearance, the family's 'right to know' is becoming increasingly recognized."⁹²⁶ The meeting of experts on Rights not subject to derogation during states of emergency and exceptional circumstances, organized by the Special Rapporteur on the question of human rights and states of emergency, concluded that the right to the truth constituted "a customary international law norm."⁹²⁷ The Special Rapporteur would emphasize that the right of the families to be informed as to the whereabouts of their family members is also has a legal basis in article 9 (4) of the *Convention on the Rights of the Child*.⁹²⁸ On

⁹²² UN Doc. E/CN.4/1983/14, para. 134.

⁹²³ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48 of 26 January 2011, para. 30, pages 10 – 18.

⁹²⁴ *Ibid.*, para. 1 of Commentary.

⁹²⁵ Resolution No. 15 (XXXIV) of 10 September 1981.

⁹²⁶ *Study on amnesty laws and their role in the safeguard and promotion of human rights*, E/CN.4/Sub.2/1985/16, para. 81.

⁹²⁷ UN Doc. E/CN.4/Sub.2/1995/20, Annex I, para. 40, pag. 57.

⁹²⁸ UN Doc. E/CN.4/Sub.2/1991/20, Annex I, p. 45. This provision establishes, in the case of separation of the child from his or her parents by a measure adopted by the State, the State obligation to provide basic information about the whereabouts

his behalf, the Special Rapporteur on the right to reparation, Professor Theo van Boven, would emphasize the relation between the right to the truth and the rights to judicial remedy and to obtain reparation for gross human rights violations.⁹²⁹

"The fight against impunity has its origins in the need to do justice, but not centered solely in one objective: punishing the guilty. It should respond to three imperatives: punish those responsible, but also satisfy victims' rights to know and to receive reparation and, furthermore, allow the authorities to carry out their mandate as public officials guaranteeing public order."

Louis Joinet, Expert on impunity of perpetrators of human rights violations⁹³⁰

But it would be the Expert on the impunity of perpetrators of civil and political rights, Mr. Louis Joinet, who would address the issue of the right to the truth of the victims of grave human rights violations and of their families. In systemizing the development of international law and national law practices, the Expert considered that the right to the truth - or the "right to know" - exists as such and is an "inalienable right".⁹³¹ His studies would conclude in 1997 with the elaboration of a draft of a *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*,⁹³² adopted by the Sub-Commission that same year and afterwards was constantly updated, as requested by the former Commission on Human Rights.⁹³³ The instrument was finally published under the title *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*⁹³⁴ (Principles against Impunity).

Also, the Independent Expert in charge of updating the Principles against Impunity, Ms. Diane Orentlicher, found that "[t]he

of the missing family member(s), the child, to the parents or even, in certain circumstances, to other family members.

⁹²⁹ UN Docs. E/CN.4/Sub.2/1993/8, E/CN.4/1997/104 and E/CN.4/2000/62 and the draft of 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*.

⁹³⁰ UN Doc. E/CN.4/Sub.2/1993/6, para.16 (original in French, free translation)

⁹³¹ UN Doc. E/CN.4/Sub.2/1997/20, para. 16.

⁹³² UN E/CN.4/Sub.2/1997/Rev.1, Annex I.

⁹³³ Resolution No. 2004/72 of the former Commission on Human Rights.

⁹³⁴ The *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* has been reproduced in UN Doc. E/CN.4/2005/102/Add.1 of 8 February 2005.

individual dimension of the right to know the truth [...] has received strong affirmation by human rights treaty bodies, although the contours of this right have been delineated somewhat differently under various conventions.”⁹³⁵ Based on the evolution of both universal and regional human rights case law and national practices, Orentlicher concluded that the right to the truth was widely recognized and that “recent developments in international law have strongly affirmed the Principles [including the principles regarding the right to truth]. Some of the Principles embody principles of human rights treaty and customary law that were already well established in 1997; others have been affirmed by more recent developments in international law summarized in this study. The Principles have themselves provided an influential framework for domestic measures aimed at combating impunity.”⁹³⁶

Various mandates or special procedures of the former Commission on Human Rights have commented on the right to the truth. The Special Rapporteur on the independence of judges and lawyers is one of them. In his report on his mission in Peru, the Special Rapporteur concluded that the Peruvian amnesty laws “deprive their victims of the right to know the truth.”⁹³⁷ In another report, the Special Rapporteur concluded that “[m]anifestations of impunity violate the rights of victims to truth.”⁹³⁸ In his report from 2006, he did a comprehensive study on the relation between the administration of justice and the right to the truth,⁹³⁹ in which he highlighted that: “[i]n the implementation of the right to the truth, the right to justice plays a prominent part, since it ensures a knowledge of the facts through the action of the judicial authority, responsible for investigating, evaluating evidence and bringing those responsible to trial. The right to justice in turn implies the right to an effective remedy, which means the possibility of claiming rights before an impartial and independent tribunal established by law, while ensuring that perpetrators are tried and

⁹³⁵ *Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity*, E/CN.4/2004/88, of 27 February 2004, para. 14.

⁹³⁶ *Ibid.*, para. 65.

⁹³⁷ UN Doc. E/CN.4/1998/39/Add.1, para. 131.

⁹³⁸ *Report of the Special Rapporteur on the independence of judges and lawyers*, Mr. Leandro Despouy, E/CN.4/2004/60 of 31 December 2003, para. 37.

⁹³⁹ *Report of the Special Rapporteur on the independence of judges and lawyers*, Leandro Despouy, E/CN.4/2006/52 of 23 January 2006.

punished in the course of a fair trial, and it entails fair compensation for victims. So from the point of view of the right to justice, truth is both a requisite for determining responsibilities and the first step in the process of reparation. Due legal process is the means of attaining the lofty values of truth and justice. From this point of view, the independent and impartial administration of justice is an extremely valuable tool for achieving the right to the truth."⁹⁴⁰

Since 1983, the Human Rights Committee (HRC) has explicitly recognized the right to the truth for the families of victims of human rights violations without making reference to international humanitarian law. In a case of enforced disappearance, the HRC concluded that "[t]he author [of the communication to the HRC] has the right to know what has happened to her daughter."⁹⁴¹ The HRC considered the continued uncertainty as to her fate and whereabouts constituted per se, for the mother, a violation of the right to not be subject to torture and cruel or inhumane treatment⁹⁴². The HRC has confirmed this case law in subsequent decisions in individual cases and Concluding observations on countries.⁹⁴³ While they initially referred to the right to the truth in connection with the relatives of disappeared persons, they also gradually used the same legal approach in cases involving secret executions, in which the families had neither been informed of the date or place of their executions, nor the exact place of burial of their loved ones.⁹⁴⁴ The HRC concluded that these situations constituted inhuman treatment towards the relatives of the executed prisoners. Also, the HRC, implying the term "the right to the truth" and without limiting themselves to cases of enforced

⁹⁴⁰ *Ibid.*, para. 17.

⁹⁴¹ Views of 21 July 1983, *María del Carmen Almeida de Quintero and Elena Quintero de Almeida v. Uruguay*, Communication No. 107/1981, para. 14.

⁹⁴² Article 7 of the *International Covenant on Civil and Political Rights*.

⁹⁴³ See, inter alia: Views of 25 March 1996, *Katombe L. Tshishimbi v. Zaire*, Communication No. 542/1993, para. 5.5; Views of 25 March 1996, *Ana Rosario Celis Laureano v. Peru*, Communication No. 540/1996, para. 8.5; Views of 16 July 2003, *Sarma v. Sri Lanka*, Communication No. 950/2000, para. 9.5; and *Concluding Observations on: Algeria*, CCPR/C/79/Add.95, of 18 August 1998, para. 10; and *Uruguay*, CCPR/C/79/Add.90, of 8 April 1998, para. C.

⁹⁴⁴ See, inter alia: Views of 26 March 2006, *Sankara et al v. Burkina Faso*, Communication No. 1159/2003; Views of 3 April 2003, *Lyashkevich v. Belarus*, Communication No. 887/1999; Views of 30 March 2005, *Khalilova v. Tajikistan*, Communication No. 973/2001; and Views of 16 November 2005, *Valichon Aliboev v. Tajikistan*, Communication No. 985/2001.

disappearance or execution, have implicitly recognized the right to the truth of the victims or relatives of victims is human rights violations. For example, in their Observations on Guatemala, the HRC exhorted Guatemalan authorities to, inter alia, continue working "to allow the victims of human rights violations to find out the truth about those acts."⁹⁴⁵

For its part, the Committee against Torture has addressed the right to the truth within the framework of the obligations of investigation and criminal prosecution and of reparation, imposed by articles 12, 13, and 14 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Thus, the Committee has pointed out that, as part of the measures of satisfaction, the States must guarantee the "verification of the facts and full and public disclosure of the truth."⁹⁴⁶

The Office of the High Commissioner for Human Rights has carried out a fundamental role for the right to truth. On the one hand, the High Commissioner expresses recognition for the right to the truth and its importance both for the victims of grave human rights violations and for society. For instance, in the Declaration on truth commissions in Sierra Leone and East Timor, the High Commissioner emphasized that the commissions must respect "the right of nations to learn the truth about past events. Full and effective exercise of the right to the truth is essential if recurrence of violations is to be avoided."⁹⁴⁷ In her report on the situation of human rights in Colombia and on the issue of negotiation between the government and paramilitary groups, the High Commissioner observed that "[t]hese talks took place in the absence of a parallel appropriate legal framework that would have guaranteed the right to truth, justice and reparation for victims, and ensured that there would be no impunity for perpetrators of crimes against humanity and war crimes."⁹⁴⁸

⁹⁴⁵ *Concluding observations of the Human Rights Committee: Guatemala*, CCPR/C/79/Add.63, para. 25. See also, *Concluding observations of the Human Rights Committee: Brazil*, CCPR/C/BRA/CO/2 of 1 December 2005.

⁹⁴⁶ *General Comment No. 3: Implementation of article 14 by States parties*, para. 16.

⁹⁴⁷ "Statement by Mary Robinson, United Nations High Commissioner for Human Rights at the 55th Annual DPI/NGO Conference: Rebuilding Societies Emerging from Conflict: A Shared Responsibility", New York, 9 September 2002.

⁹⁴⁸ *Report of the High Commissioner for Human Rights on the situation of human rights in Colombia*, E/CN.4/2005/10 of 28 February 2005, para. 5.

On the other hand, initially by request of the former Commission on Human Rights, then by the Human Rights Council,⁹⁴⁹ the High Commissioner has systematized the evolution of international human rights case law, doctrine and national practices, as well as international norms and standards on the right to the truth, through numerous studies.⁹⁵⁰ These studies have systematized the existing international *corpus juris* and have been a valuable instrument for a clear understanding of the right to the truth, its legal basis, as well as its scope, nature, and content. The High Commissioner concluded that, in accordance with the development of international law, "[i]n cases of gross human rights violations - such as torture, extrajudicial executions [...] and other crimes under international law, victims and their relatives are entitled to the truth"⁹⁵¹ and that "[t]he right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them."⁹⁵²

Thus, in her first study, the High Commissioner formulated the following conclusions:

"55. The right to the truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right, recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels.

⁹⁴⁹ Resolution No. 2005/66 "The right to the truth," of 20 April 2005, of the former Commission on Human Rights; Decision No. 2/105 "Right to the truth," of 27 November 2006, of the Human Rights Council; Resolutions No. 9/11, "The right to the truth," of 24 September 2008, of the Human Rights Council; and Resolution No. 12/12, "The right to the truth," of 1 October 2009, of the Human Rights Council.

⁹⁵⁰ *Study on the right to the truth – Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91 of 9 January 2006; *The right to the truth – Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/5/7 of 7 June 2007; *The right to the truth – Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/12/19 of 21 August 2009; and *Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to truth*, A/HRC/17/21 of 14 April 2011.

⁹⁵¹ *Study on the right to truth – Report of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91 of 9 January 2006, para. 58.

⁹⁵² *Ibid.*, para. 59.

"56. The right to the truth is closely linked to the State's duty to protect and guarantee human rights and to the State's obligation to conduct effective investigations into gross human rights violations and serious violations of humanitarian law and to guarantee effective remedies and reparation. The right to the truth is also closely linked to the rule of law and the principles of transparency, accountability and good governance in a democratic society.

"57. The right to the truth is closely linked with other rights, such as the right to an effective remedy, the right to legal and judicial protection, the right to family life, the right to an effective investigation, the right to a hearing by a competent, independent, and impartial tribunal, the right to obtain reparation, the right to be free from torture and ill-treatment; and the right to seek and impart information. Truth is fundamental to the inherent dignity of the human person.

"58. In cases of gross human rights violations - such as torture, extrajudicial executions and enforced disappearance - serious violations of humanitarian law and other crimes under international law, victims and their relatives are entitled to the truth. The right to the truth also has a societal dimension: society has the right to know the truth about past events concerning the perpetration of heinous crimes, as well as the circumstances and the reasons for which aberrant crimes came to be committed, so that such events do not reoccur in the future.

"59. The right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them. In cases of enforced disappearance, missing persons, children abducted or during the captivity of a mother subjected to enforced disappearance, secret executions and secret burial place, the right to the truth also has a special dimension: to know the fate and whereabouts of the victim.

"60. The right to the truth as a stand-alone right is a fundamental right of the individual and therefore should not be subject to limitations. Giving its inalienable nature and its

close relationship with other non-derogable rights, such as the right not to be subjected to torture and ill-treatment, the right to the truth should be treated as a non-derogable right. 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. The right to the truth is intimately linked with the States' obligation to fight and eradicate impunity."⁹⁵³

The United Nations Secretary-General has also reaffirmed the existence of the right to the truth. One of the first precedents was constituted in the Secretary General's Bulletin entitled *Observance by United Nations forces of international humanitarian law*,⁹⁵⁴ directed to the forces that carry out operations under the command and control of the UN wherein the principles and norms that should be observed are established. The Bulletin establishes that "[t]he United Nations forced shall respect the right of the families to know about the fate of their sick, wounded and deceased relatives"⁹⁵⁵. However, the Secretary General has not limited the right to the truth to the previous hypothesis. For example, in his official declaration during the initiation of formal dialogue between the Colombian Government and paramilitary groups, he highlighted that in the process of negotiation "the rights of truth, justice and reparations for victims must be fully respected."⁹⁵⁶ The Secretary-General also emphasized the importance of the truth within the framework of transitional justice.⁹⁵⁷ And, in its report to the General Secretary of the UN, the International Commission on the Investigation of East Timor qualified the right to the truth, to justice, and to compensation as "basic human rights."⁹⁵⁸

⁹⁵³ *Study on the right to truth – Report of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91 of 9 January 2006.

⁹⁵⁴ UN Doc. ST/SGB/1999/13, of 6 August 1999.

⁹⁵⁵ Section 9.8.

⁹⁵⁶ "Secretary-General urges respect for ceasefire as Colombia peace talks open," Press Release SG/SM/9400 of 1 July 2004.

⁹⁵⁷ *The rule of law and transitional justice in conflict and post-conflict societies – Report of the Secretary-General*, S/2004/616 of 23 August 2004; *Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi*, S/2005/158, of 11 March 2005.

⁹⁵⁸ *Report of the International Commission of Inquiry on East Timor to the Secretary General*, A/54/726, S/2000/59 of 31 January 2000, para. 146.

ii) The Inter-American Human Rights System

The IACHR addressed the issue of the right of families to know the fate of relatives who were victims of enforced disappearance since the end of the 1970s, during the time of South American dictatorships.⁹⁵⁹ Since 1986, and in relation with the fate of missing children or children abducted from disappeared parents during the military regime in Argentina, the IACHR asserted that the norms of international humanitarian law, particularly Protocol I, "establish the right of family members to know the fate of their loved ones."⁹⁶⁰ In its annual report corresponding to 1985 and 1986, the IACHR concluded, "nothing should impede the family members [of the disappeared] from knowing what happened to their loved ones."⁹⁶¹

However, the IACHR progressively extended the reach of the right to the truth to other human rights violations, such as extrajudicial execution and torture.⁹⁶² Also, they defined in greater detail the scope and content of the right to the truth. If initially this was defined as "the right to know the truth about what happened, as well as the reasons for and circumstances in which the crimes were committed."⁹⁶³ The IACHR made its content even more explicit, insofar as this right entails "knowing the comprehensive, complete and public truth about the facts, their specific circumstances and who participated in them."⁹⁶⁴ Also, the IACHR started legally establishing the right to the truth in the State's duty to guarantee rights and the right to the protection of the law, to judicial guarantees, to legal protection and to information. Thus, the

⁹⁵⁹ *Annual Report of the Inter-American Commission on Human Rights, 1977-1978*, OEA/Ser.L/V/II.43, doc.21, corr.1, p. 24, and *Report on the situation of human rights in Argentina*, 1980, OEA/Ser.L/V/II/49, doc. 19, p. 59.

⁹⁶⁰ *Annual Report of the Inter-American Commission on Human Rights, 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev 1, September 18, 1986, p. 205 and *Annual Report of the Inter-American Commission on Human Rights, 1987-1988*, OEA/Ser.L/V/II.74, Doc. 10, rev. 1, September 16, 1988, p. 359.

⁹⁶¹ *Annual Report of the Inter-American Commission on Human Rights, 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev 1, September 28, 1986, p. 205.

⁹⁶² See, for example, Report No. 136/99, of 22 December 1999, *Case of Ignacio Ellacuría et al v. El Salvador*, para. 221.

⁹⁶³ *Annual Report of the Inter-American Commission on Human Rights, 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev 1, of 28 September 1986, p. 205.

⁹⁶⁴ Report No. 37/00, of 13 April 2000, Case No. 11.48, *Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador*, para. 148. See also Report No. 136/99, of 22 December 1999, Case 10.488, *Ignacio Ellacuría S.J. et al v. El Salvador*, para. 221; and Report No. 1/99, of 27 January 1999, Case No. 10.480, *Lucio Parada Cea et al v. El Salvador*, para. 147.

doctrine established by the IACHR throughout the decades would lead them to also establish the right to the truth in Inter-American human rights standards. Along those lines, the IACHR has considered that the right to the truth develops as an essential and indispensable result for each State Party to the *American Convention on Human Rights*, since a lack of knowledge of the facts in connection with human rights violations means, in practice, that there is no protection system capable of guaranteeing the identification and eventual punishment of those responsible.⁹⁶⁵

"The right to know the truth with respect to the facts that gave rise to the serious human rights violations that occurred in El Salvador, and the right to know the identity of those who took part in them, constitutes an obligation that the State must satisfy with respect to the victims' relatives and society in general."

Inter-American Commission on Human Rights⁹⁶⁶

The IACHR has stated that, other than the relatives of the victims directly affected by a human rights violation, society in general should have the right to be duly informed.⁹⁶⁷ Thus, as a general principal, the IACHR has considered that "[e]very society has the right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future."⁹⁶⁸ In the same vein, the IACHR has concluded "[t]he right to truth is a collective right which allows a society to gain access to information essential to the development of democratic systems, and also an individual right for the relatives of the victims, allowing for a form of reparation"⁹⁶⁹.

Since its groundbreaking ruling in the case *Vélasquez Rodríguez Vs. Honduras*, the Inter-American Court of Human Rights has recognized the right of the families of the victims of enforced

⁹⁶⁵ *Ibid.*, para. 223.

⁹⁶⁶ Report No. 136/99 of December 22, 1999, Case 10.488, *Case of Ignacio Ellacuría et al v. El Salvador*, para. 221.

⁹⁶⁷ Report No. 1/99, of 27 January 1999, Case No. 10.480, *Lucio Parada Cea y Otros v. El Salvador*.

⁹⁶⁸ *Annual Report of the Inter-American Commission on Human Rights, 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev 1, of 28 September 1986, p. 205.

⁹⁶⁹ Report No. 136/99, of 22 December 1999, Case 10.488, *Ignacio Ellacuría et al v. El Salvador*, para. 224.

disappearance to know their fate and whereabouts.⁹⁷⁰ The Court has repeatedly confirmed the existence of this right in subsequent rulings.⁹⁷¹ Even when the Court does not use the phrase "right to truth," it has recognized the existence of the "right to know what happened to [them]."⁹⁷²

"The State is obliged to combat the situation of impunity [...] by all possible means, because impunity fosters the chronic repetition of human rights violations and the total defenselessness of the victims and their next of kin, who have the right to know the truth about the facts. When this right to the truth is recognized and exercised in a specific situation, it constitutes an important measure of reparation, and is a reasonable expectation of the victims that the State must satisfy."

Inter-American Court of Human Rights⁹⁷³

The Court has found the basis of the right to the truth for the family members of victims of enforced disappearance in the rights to justice and to legal action under articles 8 and 25, respectively, of the *American Convention on Human Rights*, as well as in the generally obligation of the State to thoroughly investigate the

⁹⁷⁰ Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 181.

⁹⁷¹ See, inter alia: Judgment of January 20, 1989, *Case of Godínez Cruz v. Honduras*, Series C No. 5, para. 191; Judgment of November 3, 1997, *Case of Castillo Páez v. Peru*, Series C No. 34, para. 90; Judgment of January 24, 1998, *Case of Blake v. Guatemala*, Series C No. 36, para. 97; Judgment of November 25, 2000, *Case of Bámaca Velásquez v. Guatemala*, Series C No. 70, para. 201; Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, para. 48; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 118; Judgment of November 16, 2009, *Case of González et al ("Cotton Field") v. Mexico*, Series C No. 2005, para. 388; and Judgment of November 12, 2012, *Case of the Santo Domingo Massacre v. Colombia*, Series C No. 259, para. 155.

⁹⁷² See, inter alia: Judgment of January 20, 1989, *Case of Godínez Cruz v. Honduras*, Series C No. 5, para. 191; Judgment of November 3, 1997, *Case of Castillo Páez v. Peru*, Series C No. 34, para. 90; Judgment of 24 January 1998, *Case of Blake v. Guatemala*, Series C No. 36, para. 97; Judgment of November 25, 2000, *Case of Bámaca Velásquez v. Guatemala*, Series C No. 70, para. 201; Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, para. 48; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 118; Judgment of November 16, 2009, *Case of González et al ("Cotton Field") v. Mexico*, Series C No. 2005, para. 388; and Judgment of 12 November 2012, *Case of the Santo Domingo Massacre v. Colombia*, Series C No. 259, para. 155.

⁹⁷³ Judgment of September 22, 2006, *Case of Goiburú et al v. Paraguay*, Series C No. 153, paragraphs 164 and 165.

crime of enforced disappearance and the corresponding right of the their families to an effective investigation.⁹⁷⁴

While the Inter-American Court initially addressed the issue of the right to the truth in connection with the practice of enforced disappearance, the Tribunal gradually considered that this right is applicable to all types of serious human rights violations. In this regard, the Court has stated that “any person, including the next of kin of victims of grave human rights violations, has the right to know the truth, under Articles 1(1), 8(1), and 25 and also, in certain circumstances, Article 13 of the Convention; therefore, they and society in general must be informed of what happened.”⁹⁷⁵

“[T]he right to the truth is subsumed in the right of the victim or his next of kind to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.”

Inter-American Court of Human Rights⁹⁷⁶

It should also be noted that in various rulings the Court has stated that the right to the truth is closely linked to the rights to effective remedy, to an effective investigation, to be informed of the results of the official investigation about human rights violations, to obtain reparation and justice or the right to legal protection.⁹⁷⁷ The Court

⁹⁷⁴ See, inter alia: Judgment of January 24, 1998, *Case of Blake v. Guatemala*, Series C No. 36, para. 97; Judgment of November 25, 2000, *Case of Bámaca Velásquez v. Guatemala*, Series C No. 70, para. 201; and Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 118

⁹⁷⁵ Judgment of October 25, 2012, *Case of the Massacres of El Mozote v. El Salvador*, Series C No. 252, para. 298. In this same vein see, inter alia: Judgment of November 25, 2003, *Case of Myrna Mack Chang v. Guatemala*, Series C No. 101; Judgment of January 31, 2006, *Case of the Pueblo Bello Massacre v. Colombia*, Series C No. 140; Judgment of July 4, 2006, *Case of Ximenes Lopes v. Brazil*, Series C No. 149; Judgment of September 22, 2006, *Case of Goiburú et al v. Paraguay*, Series C No. 153; Judgment of November 24, 2010, *Case of Gomes Lund et al (“Guerrilha do Araguaia”) v. Brazil*, Series C No. 219; Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221; and Judgment of August 31, 2011, *Case of Contreras et al v. El Salvador*, Series C No. 232.

⁹⁷⁶ Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, para. 48.

⁹⁷⁷ See, inter alia: Judgment of July 8, 2004, *Case of the Gómez-Paquiyaui Brothers v. Peru*, Series C No. 110; Judgment of July 5, 2004, *Case of 19 Merchants v. Colombia*, Series C No. 109; Judgment of September 7, 2004, *Case of Tibi v. Ecuador*, Series C No. 114; Judgment of July 3, 2004, *Case of Molina*

has stressed that the right to the truth is also based on the duty of the State to carry out effective investigations of grave human rights violations.⁹⁷⁸ In this regard, the court has highlighted that the obligation to investigate and the corresponding right of the alleged victim or of their family are detached from both standard practice of international law and those of a peremptory or *jus cogens* nature.⁹⁷⁹ Likewise, the Court has emphasized that “the right to access to justice goes beyond the processing of domestic proceedings, as it must also ensure, within a reasonable time, the right of the alleged victims or their next of kind for everything necessary to be done to learn the truth about what happened and to punish those who may be responsible.”⁹⁸⁰

“[T]he right to know the truth represents a necessary effect for it is important that a society knows the truth about the facts of serious human rights violations. This is also a fair expectation that the State is required to satisfy, on the one hand, by means of the obligation to investigate human rights violations and, on the other hand, by the public dissemination of the results of the criminal and investigative procedures. The right to know the truth requires from the State the procedural determination of the patterns of joint action and of all those who participated in various ways in said violations and their corresponding responsibilities.”

Inter-American Court of Human Rights⁹⁸¹

In this regard, the Court has warned that “the investigations and prosecutions conducted on account of the events in this case warrant the use of all available legal means and must aim to determine the whole truth and to prosecute and eventually

Theissen v. Guatemala, Series C No. 108; Judgment of June 15, 2005, *Case of the Moiwana Community v. Suriname*, Series C No. 124; Judgment of November 22, 2004, *Case of Carpio Nicolle et al v. Guatemala*, Series C No. 117; Judgment of March 1, 2005, *Case of Serrano Cruz Sisters v. El Salvador*, Series C No. 120; Judgment of September 15, 2005, *Case of the Mapiripán Massacre v. Colombia*, Series C No. 134; and Judgment of November 25, 2003, *Case of Myrna Mack Chang v. Guatemala*, Series C No. 101.

⁹⁷⁸ *Ibidem*.

⁹⁷⁹ Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221, paras. 183 *et seq*.

⁹⁸⁰ Judgment of September 15, 2005, *Case of the Mapiripán Massacre v. Colombia*, Series C No. 134, para. 216. See also: Judgment of March 1, 2005, *Case of Serrano Cruz Sisters v. El Salvador*, Series C No. 120, para. 66; and Judgment of July 5, 2004, *Case of 19 Merchants v. Colombia*, Series C No. 109, para. 188.

⁹⁸¹ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 119.

capture, try and punish all perpetrators and instigators of the acts.”⁹⁸² The Inter-American Court has specified that “every person, including the next of kind of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kind of the victims and society as a whole must be informed of everything that has happened in connection with said violations.”⁹⁸³

c. Other regional human rights systems

Since 1998, the European Court of Human Rights began to address the issue of the right of the families to know the fate of their loved ones in cases of enforced disappearance. In some judgments concerning cases of enforced disappearance, the Court concluded that the fact that a State did not provide the families information as to the fate and whereabouts of the victims, did not launch an effective investigation on the circumstances of the disappearance and didn’t concede an effective remedy to the families to determine the fate of their missing family members, constitute a violation of Articles 3 (torture and abuse) and 13 (effective remedy) of the European Convention.⁹⁸⁴

But it would actually be in 2011 when the European Court would specifically address the right to the truth. Thus, in a case of the use of lethal force by troops during the suppression of demonstrations, that included homicides and acts of torture, the Court considered that the victims and their families and persons had “the right [...] to know the truth about the circumstances surrounding events involving a violation of rights as fundamental as that of the right to life, which implies the right to effective judicial investigation [...]”.⁹⁸⁵ In 2012, in a case concerning a victim of the ill-named “secret CIA flights” (extraordinary renditions), or in other words, an enforced disappearance, the Court emphasized the great importance of the right to the truth for the victims and

⁹⁸² Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 157.

⁹⁸³ Judgment of November 25, 2003, *Case of Myrna Mack Chang v. Guatemala*, Series C No. 101, para. 274.

⁹⁸⁴ See, inter alia, Judgment of 25 May 1998, *Case of Kurt v. Turkey*, Application No. 15/1997/799/1002; Judgment of 14 November 2000, *Case of Tas v. Turkey*, Application No. 24396/94; and Judgment of 10 May 2001, *Case of Cyprus v. Turkey*, Application No. 25781/94.

⁹⁸⁵ Judgment of 24 May 2011, *Case of Association of "21 December 1989" and others v. Romania*, Application s No. 33810/07 and 18817/08.

their families, as well as for the other victims of similar crimes and for the general public, all of which have the "right to know what had happened."⁹⁸⁶ The Court pointed out that inadequate investigation of the facts and the invocation of "State secrets" violated this right.

d. Intergovernmental political bodies

The political bodies of the different intergovernmental systems have spoken out on the issue of the right to know or the right to the truth and, gradually, have reaffirmed the right to the truth.

i) The United Nations

Since 1974, in the context of enforced disappearance, the UN General Assembly addressed the issue of the necessity that the families of missing persons to know the fate or whereabouts of their loved one, qualifying it as a "basic human need"⁹⁸⁷ and "essential need of the families,"⁹⁸⁸ and recognizing that the denial of this information caused pain and suffering among the families.⁹⁸⁹ In a number of resolutions, the General Assembly pointed out that the families of disappeared persons "should know the fate of their relatives."⁹⁹⁰ Although the General Assembly did not use the term "right to the truth" or "the right to know" in these resolutions, they were considered as an integral part of the legal basis of the right to know or to the truth.⁹⁹¹ Starting in the decade of the 1990s and *a fortiori* with the adoption of the ICPED in 2006,⁹⁹² the General Assembly has reaffirmed the right to the truth

⁹⁸⁶ Judgment of 12 December 2012, Case of *El-Masri v. former Yugoslav Republic of Macedonia*, Application No. 39630/09, para. 191.

⁹⁸⁷ Resolution No. 3220 (XXIX), "Assistance and Cooperation in Accounting for Persons who are Missing or Dead in Armed Conflicts", of 6 November 1974.

⁹⁸⁸ See, inter alia, Resolutions No. 36/164 of 16 December 1981 and 37/181 of 17 December 1982.

⁹⁸⁹ See Resolutions No. 33/173 of 20 December 1978; 35/193 of 15 December 1980; 36/163 of 16 December 1981; 37/180 of 17 December 1982; 38/94 of 16 December 1983; 39/111 of 14 December 1984; 40/147 of 13 December 1985; 41/145 of 4 December 1986; 42/142 of 7 December 1987; 43/159 of 8 December 1988; 44/160 of 15 December 1989; 45/165 of 18 December 1990; 46/125 of 17 December 1991; and 47/132 of 18 December 1992.

⁹⁹⁰ See, inter alia, Resolutions No. 37/180 of 17 December 1982; 38/94 of 16 December 1983; 39/111 of 14 December 1984; and 40/147 of 13 December 1985.

⁹⁹¹ For example, the XXIV *International Conference of the Red Cross and the Red Crescent* (Manila, 1981), while reaffirming the right to know in its Resolution II on "enforced or involuntary disappearances," invoked resolutions of the UN General Assembly.

⁹⁹² Resolution No. 61/177 of 20 December 2006.

in various resolutions, about enforced disappearances⁹⁹³ and missing persons during armed conflict⁹⁹⁴ as well as crimes against humanity, genocide, war crimes and gross human rights violations, and in connection with process of peace and the establishment of truth commissions.⁹⁹⁵

Finally, in December of 2010, the General Assembly adopted a resolution proclaiming "24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims."⁹⁹⁶ This resolution reaffirmed the right to the truth of victims of grave human rights violations and their families. Also, the resolution recognized "the importance of promoting the memory of victims of gross and systematic human rights violations and the importance of the right to truth and justice."⁹⁹⁷ In a subsequent resolution entitled "The Right to the Truth", the General Assembly recognized "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights."⁹⁹⁸

Since the 1980s, the former Commission on Human Rights addressed the issue of the right to the truth or the right to know. In their resolution on Chile in 1989, the Commission urged the Chilean authorities to guarantee that amnesty law would not create an obstacle in the effort to find out the truth about grave human rights violations.⁹⁹⁹ In other resolutions about disappeared persons, the Commission urged the States to observe, respect, and guarantee strict observance of international humanitarian law norms and reaffirmed the right of the families to know the fate of disappeared family members for reasons relating to armed

⁹⁹³ Resolutions No. 64/167 of 18 December 2009; 65/209 of 21 December 2010; 66/160 of 19 December 2011; 67/180 of 20 December 2012; and 68/166 of 18 December 2013.

⁹⁹⁴ Resolutions No. 65/210 of 21 December 2010; 63/183 of 18 December 2008; 61/155 of 19 December 2006; 59/189 of 20 December 2004; and 57/207 of 18 December 2002.

⁹⁹⁵ See, inter alia, Resolutions No. 57/105 of 25 November 2002; 57/161 of 16 December 2002; 55/118 of 4 December 2000; 54/187 of 17 December 1999; and 48/148 of 20 December 1993.

⁹⁹⁶ Resolution No. 65/196 "Proclamation of 24 March as the International Day for the Right to Truth" of 21 December 2010.

⁹⁹⁷ *Ibid.*, para. 7 of preamble.

⁹⁹⁸ Resolution No. 68/165, "The right to the truth," of 18 December 2013, operative paragraph 1.

⁹⁹⁹ Resolution No. 1989/62, of 8 March 1989, para. 7 (b).

conflict.¹⁰⁰⁰ In 2005, the Commission adopted a resolution on the right to the truth,¹⁰⁰¹ wherein recognized "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights." In that resolution, the Commission highlighted "the imperative for society as a whole to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families, within the framework of each State's domestic legal system, to know the truth regarding such violations, including the identity of the perpetrators and the causes, facts and circumstances in which such violations took place".

The Human Rights Council, following the tradition inaugurated by the former Commission on Human Rights in 2005, has adopted three resolutions on the right to the truth.¹⁰⁰² In their resolution of 2012, the Council stated "the importance for the international community to endeavour to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular the identity of the perpetrators, the causes and facts of such violations and the circumstances under which they occurred."¹⁰⁰³ Also, the Council has reaffirmed the right to the truth in resolutions regarding enforced disappearance,¹⁰⁰⁴ forensic genetics and human rights,¹⁰⁰⁵ and human rights and transitional justice.¹⁰⁰⁶

In reaffirming the right to the truth, the General Assembly, the former Commission on Human Rights and the Human Rights Council have invoked the article 32 of Protocol I, the ICPED, the *Principles against Impunity*, the *Principles on Reparation* and the studies about the right to the truth of the Office of the UN High

¹⁰⁰⁰ Resolution No. 2002/60.

¹⁰⁰¹ Resolution No. 2005/66, "Right to the truth", of 20 April 2005.

¹⁰⁰² Resolutions No. 9/11 of 24 September 2008, 12/12 of 1 October 2009, and 21/7 of 27 September 2012.

¹⁰⁰³ Resolution 21/7 "Right to the truth," of 27 September 2012.

¹⁰⁰⁴ See, for example, Resolution No. 16/16 of 24 March 2011.

¹⁰⁰⁵ See, for example, Resolution No. 15/5 of 29 September 2010.

¹⁰⁰⁶ See, for example, Resolutions No. 12/11 "Human rights and transitional justice," of 1 October 2009 and 18/7 of 29 September 2011 (establishing the mandate of the Special Rapporteur for the promotion of truth, justice, reparation and guarantees of non-repetition).

Commissioner for Human Rights, and also the doctrine and the jurisdiction of the treaty bodies and human rights procedures.

ii) The Organization of American States

Since 1982, when speaking out on the practice of enforced disappearance in the American hemisphere, the General Assembly of the Organization of American States (OAS) urged the States to inform families about the fate of victims of enforced disappearance.¹⁰⁰⁷ En 2005, the Permanent Council of the OAS adopted the resolution "Disappeared persons and assistance to their families." Though this focuses in situations of armed conflict, en is content it urges the member States of the OAS to adopt all necessary measure to avoid enforced disappearances and guarantee the right to the truth of families of the disappeared person.¹⁰⁰⁸

Since 2006, in each one of it regular period of sessions, the OAS General Assembly has annually adopted a resolution entitled "The Right to the Truth".¹⁰⁰⁹ In each one of them, they reinforce the fundamental right to the truth and have resolved to "[r]ecognize the importance of respecting and ensuring the right of victims of gross violations of human rights and grave breaches of international humanitarian law, and of their families and society as a whole, to know the truth regarding such violations to the fullest extent practicable, in particular, the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred, in order to contribute to ending impunity and to promoting and protecting human rights."¹⁰¹⁰

It is important to highlight that, in recognizing the right to the truth, other than the other international instruments¹⁰¹¹ and the

¹⁰⁰⁷ Resolutions No. AG/RES. 618 (XII-0/82) of 1982; AG/Res.666 (XIII-0/83) of 1983; AG/Res.742 (XIV-0/84) of 1984; AG/Res.950 (XVIII-0/88) of 1988; AG/Res.1022 (XIX-0/89) of 1989; and AG/Res.1044 (XX-0/90) of 1990.

¹⁰⁰⁸ *Resolution on Persons Who Have Disappeared and Assistance to Members of Their Families*, OES/Ser.G CP/CAJP-2278/05 rev.4, 23 May 2005.

¹⁰⁰⁹ See Resolutions: AG/RES. 2175 (XXXVI-O/06); AG/RES. 2267 (XXXVII-O/07); AG/RES. 2406 (XXXVIII-O/08); AG/RES. 2509 (XXXIX-O/09); AG/RES. 2595 (XL-O/10); AG/RES. 2662 (XLI-O/11); AG/Res. 2725 (XLII-O/12); and AG/RES. 2800 (XLIII-O/13).

¹⁰¹⁰ Resolution AG/RES. 2800 (XLIII-O/13).

¹⁰¹¹ The Resolutions on "The Right to the Truth" have invoked: the *American Declaration on the Rights and Duties of Man*; the *Inter-American Convention to Prevent and Punish Torture*; the *Inter-American Convention on Forced Disappearance of Persons*; the *Universal Declaration of Human Rights*; the

studies carried out by the Office of the UN High Commissioner for Human Rights on the right to the truth, the OAS General Assembly has invoked, "Articles 25, 8, 13, and 1.1 of the American Convention on Human Rights, related, respectively, to the right to judicial protection, the right to a fair trial and judicial guarantees, the right to freedom of expression, and the obligation of states to respect and ensure human rights."¹⁰¹²

Also, the OAS General Assembly has reaffirmed the right to the truth in its resolutions "persons who have disappeared and assistance to members of their families."¹⁰¹³

iii) Other systems

The Parliamentary Assembly of the Council of Europe began to address the issue of the right to the truth in resolutions and recommendations on enforced disappearance. Thus, in a recommendation adopted in 1979 about the disappeared political prisoners in Chile, the Parliamentary Assembly emphasized the right to the family members to know the fate or whereabouts of the disappeared.¹⁰¹⁴ In their recommendation on the refugees and the disappeared Cypriot persons of 1987, the Parliamentary Assembly emphasized that the families of the disappeared have the right to know the truth about the fate and whereabouts of their loved ones.¹⁰¹⁵ In a Resolution from 2004, the Parliamentary Assembly reminded that "the right to know the fate of missing relatives is a fundamental right of the families concerned and should be respected and implemented."¹⁰¹⁶ In their Resolution on truth commissions from 2008,¹⁰¹⁷ the Parliamentary Assembly reaffirmed the right to the truth of the victims of human rights

International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Geneva Conventions of 1949 and their Additional Protocols I and II of 1977; the International Convention for the Protection of All Persons from Enforced Disappearances; and the Vienna Declaration and Program of Action.

¹⁰¹² Resolution "Right to the Truth," AG/Res. 2725 (XLII-O/12) of 4 June 2012, para. 2 of the Preamble.

¹⁰¹³ See, for example, Resolutions No. AG/RES. 2231 (XXXVI-O/06); AG/RES. 2594 (XL-O/10); AG/RES. 2651 (XLI-O/11); AG/RES. 2717 (XLII-O/12); and AG/RES. 2794 (XLIII-O/13).

¹⁰¹⁴ Resolution No. 868 of 5 June 1979.

¹⁰¹⁵ Resolution No. 1056 of 5 May 1987.

¹⁰¹⁶ Resolution No. 1414 (2004), "Persons unaccounted for as a result of armed conflicts or internal violence in the Balkans," of 23 November 2004, para. 3.

¹⁰¹⁷ Resolution No. 1613 (2008), "The experience of the use of truth commissions," of 29 May 2008.

violations and stated that "truth commissions should not concede amnesties for crimes under international law."¹⁰¹⁸

The European Union has also reaffirmed the right to the truth in numerous opportunities¹⁰¹⁹. In their Resolution on missing persons in Cyprus, adopted in 1983, the European Parliament confirmed the inalienable right of all families to know the fate of involuntarily disappeared family members due to actions of the government or of their law enforcement personnel.¹⁰²⁰

On the occasion of the commemoration of the 57th anniversary of the *Universal Declaration of Human Rights*, the Presidents of the *South American of Common Market* (MERCOSUR) and the Associated States adopted a Declaration in which they reaffirmed the right to the truth of the victims of human rights violations and of their families.¹⁰²¹ In this declaration, the Heads of States emphasized, "the importance of developing new focuses on human rights, such as the right to truth promoting the fight against impunity in all its expressions"¹⁰²² and highlighted "that it is a collective right of our societies to know the truth about what happened."¹⁰²³ It is important to note that since their first meeting in 2005, High Authorities on Human Rights and Foreign Ministries of MERCOSUR and Associated States (RAADDHH) have reaffirmed in various opportunities the right to the truth of victims of human rights violations and their families¹⁰²⁴.

3. International norms & standards on the right to the truth

Various international instruments, though they don't make explicit reference to the right to the truth, they approach it in an implicit

¹⁰¹⁸ *Ibid.*, para. 6.

¹⁰¹⁹ See, *inter alia*, *Declaration of the European Union on the situation of human rights in Colombia*, before the 61st session of the United Nations Commission on Human Rights, E/CN.4/2005/SR.48, of 21 April 2005 and *Conclusions of the Council of the European Union on Colombia*, Luxembourg, 3 October 2005, para. 4.

¹⁰²⁰ Resolution on the issue of missing persons in Cyprus, of 11 January 1983.

¹⁰²¹ *Declaration on human rights by the Heads of State of MERCOSUR and Associated States*, http://www.mercosur.int/t_ligaenmarco.jsp?contentid=90&site=1&channel=secretaria&seccion=3

http://archivo.presidencia.gub.uy/xxix_mercosur/documentos/ddhh.pdf.

¹⁰²² *Ibid.*, para. 5 (Original in Spanish, free translation).

¹⁰²³ *Ibid.*, para. 6 (Original in Spanish, free translation).

¹⁰²⁴ See: High Authorities Competent in Human Rights and Foreign Ministries of MERCOSUR and Partner States, at <http://www.derhuman.jus.gov.ar/mercosur/documentos.html>.

manner in terms of the right to an effective investigation or to access to the findings of an investigation. Others approach the issue of the right to the truth in a more emphatic manner. These instruments have been considered by jurisprudence and doctrine as legal sources of the right to the truth.

The *Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts of 1977* (Protocol I), prescribe to their article 32 and as a "general principle" that: "[...] the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations [...] shall be prompted mainly by the right of families to know the fate of their relatives."

It is important to note that during the Diplomatic Conference in which this article was discussed and adopted, some States initially questioned whether a right to the truth existed and they expressed that the proposed provision should be limited to providing a response to the pain suffered by the family for the disappearance of their loved one.¹⁰²⁵ In the *travaux préparatoires* of Article 32 of Protocol I, the fundamental character of the family's right to be informed worried a number of delegations.¹⁰²⁶ Nevertheless, the vast majority of the governmental delegations considered it a fundamental right of families. This view was what prevailed in the end. After the passing of this resolution by consensus of Article 32, the Director of the UN Secretariat's Division of Human Rights made the following declaration: "[t]he text that has just been adopted by consensus is an important step forward regarding international efforts to protect human rights. The Conference highlights the 'right' of the families to be informed of the fate of their relatives involved in armed conflicts."¹⁰²⁷

¹⁰²⁵ In this regard, see ICRC, Commentary on article 32 of Protocol I, in *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977. Commentary, Article 32, on ICRC webpage: <http://www.icrc.org/ihl.nsf/COM/470-750039?OpenDocument>.

¹⁰²⁶ For example: Austria, Cyprus, France, Greece, Democratic Republic of Germany, Nicaragua, Spain and the United States of America (ver: *Actes de la Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés, 1974-1977*, volumes III and XI).

¹⁰²⁷ Document CDDH/II/SR.78, para. 46.

The DED establishes that “[t]he findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.”¹⁰²⁸

The *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* establish that “[f]amilies of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence.”¹⁰²⁹

The *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* establish that “[a]lleged victims of torture or ill-treatment and their legal representatives shall be informed of, and have access to, any hearing, as well as to all information relevant to the investigation, and shall be entitled to present other evidence.”¹⁰³⁰

The *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* establishes that, in the case of death or disappearance of a person detained or imprisoned, the conclusions of the respective investigation or report will be made available to the families, unless doing so could jeopardize an ongoing criminal investigation.¹⁰³¹

The *Guiding Principles on Internal Displacement*¹⁰³² establish that “[a]ll internally displaced persons have the right to know the fate and whereabouts of missing relatives [and that] [t]he authorities concerned shall endeavour to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organizations engaged in this task. They shall inform the next of kin on the progress of the investigation and notify them of any result.”¹⁰³³

The *Principles on Reparation* state that, as a mode of reparation, “[v]erification of the facts and full and public disclosure of the truth

¹⁰²⁸ Article 13 (4).

¹⁰²⁹ Principle 16.

¹⁰³⁰ Principle 4.

¹⁰³¹ Article 34.

¹⁰³² Published in UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998.

¹⁰³³ Principle 16 (1 and 2).

to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations."¹⁰³⁴

Additionally, the *Principles on Reparation* establish that "victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations."¹⁰³⁵

The *Principles against Impunity* were the first international instrument to extensively crystallize the right to the truth. This instrument would be the result of various years of work systematizing the development of international human rights jurisprudence and doctrine. The *Principles against Impunity* establish various principles about the right to truth:

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 systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations."

Principle 3. "The Duty to Preserve Memory": "A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments."

Principle 4. "The Victim's Right to Know": "Irrespective of any legal proceedings, victims and their families have the

¹⁰³⁴ Article 22 (b).

¹⁰³⁵ Article 24.

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."

Principle 5. "Guarantees to Give Effect to the Right to Know": "States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know. Appropriate measures to ensure this right may include non-judicial processes that complement the role of the judiciary. Societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence. Regardless of whether a State establishes such a body, it must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law."

The ICPED was the first human rights treaty that expressly incorporated the right to the truth in their regulatory provisions. Indeed, in its preamble, the ICPED reaffirmed "the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person."¹⁰³⁶ Article 24 (2) of the ICPED provides that "[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard."

4. Content and scope of the right to truth

a. Definition, nature and scope of the right to truth and the correlative State obligation

As noted in previous sections, the right to truth has been defined as the right to know the full, complete and public truth about the serious human rights violations and crimes under international law, their specific circumstances and identity, degree participation and motives of those responsible for these crimes. The right to truth

¹⁰³⁶ Paragraph 8 of the Preamble.

exists on all gross human rights violations such as extrajudicial executions, enforced disappearances and torture.¹⁰³⁷ Both the *Impunity Principles* and the *Principles on Reparation*¹⁰³⁸ refer to the right to truth against gross violations of human rights, grave breaches of international humanitarian law, and crimes under international law.

In cases of enforced disappearance, secret executions and clandestine burials, the right to truth also has a special dimension: to know the fate and whereabouts of the victim. Also, in cases of disappearance and/or child abduction during the captivity of their parents subjected to enforced disappearance, the right to truth also implies the right of children to know their true identity¹⁰³⁹.

The right to truth has its legal basis in both rules of international humanitarian law and international human rights law. International jurisprudence and doctrine have stressed that the right to truth is directly related to the rights to protection of the law, to an effective remedy, to an effective investigation, not to be subjected to torture or inhuman acts, protection of family, special protection of children, information and redress. Thus, the right to the truth is

¹⁰³⁷ See, for example: Human Rights Committee (Views of 26 March 2006, *Sankara et al v. Burkina Faso*, Communication No. 1159/2003; Views of 3 April 2003, *Lyashkevich v. Belarus*, Communication No. 887/1999; Views of 30 March 2005, *Khalilova v. Tajikistan*, Communication No. 973/2001; Views of 16 November 2005, *Valichon Aliboev v. Tajikistan*, Communication No. 985/2001; and *Concluding observations on: Guatemala*, CCPR/C/79/Add.63, para. 25; and *Brazil*, CCPR/C/BRA/CO/2 of 1 December 2005); Inter-American Court of Human Rights (Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75; Judgment of January 24, 1998, *Case of Blake v. Guatemala*, Series C No. 36; Judgment of November 25, 2000, *Case of Bámaca Velásquez v. Guatemala*, Series C No. 70; Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202; Judgment of November 16, 2009, *Case of González et al ("Cotton Field") v. Mexico*, Series C No. 205; and Judgment of November 12, 2012, *Case of Santo Domingo Massacre v. Colombia*, Series C No. 259); and Inter-American Commission on Human Rights (Report No. 136/99, of 22 December 1999, *Case of Ignacio Ellacuría et al v. El Salvador*; Report No. 37/00, of April 13, 2000, Case No. 11.48, *Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador*; and Report No. 1/99, of January 27, 1999, Case No. 10.480, *Lucio Parada Cea et al v. El Salvador*).

¹⁰³⁸ Articles 11, 22 (b) and 24.

¹⁰³⁹ Inter-American Court of Human Rights, Judgment of February 24, 2011, *Case of Gelman Vs. Uruguay*, Series C No. 221; Judgment of August 31, 2011, *Case of Contreras et al v. El Salvador*, Series C No. 232; and Judgment of March 1, 2005, *Case of the Serrano Cruz Sisters v. El Salvador*, Series C No. 120. See also article 25 of the *International Convention on the Protection of All Persons from Enforced Disappearance*.

closely associated with the duty of guarantee incumbent on the State, in general, address the gross violations of human rights.¹⁰⁴⁰ In that sense, to systematize the evolution of international law on this issue, the UN High Commissioner for Human Rights concluded that "[t]he right to the truth is closely linked to the State's duty to protect and guarantee human rights and to the State's obligation to conduct effective investigations into gross human rights violations and serious violations of humanitarian law and to guarantee effective remedies and reparation."¹⁰⁴¹

Right holders are entitled to the truth for victims of gross human rights violations and their families. However, the universe of persons entitled to the right to the truth was gradually expanded, and international jurisprudence and doctrine believe that society as such is also entitled to know the truth about the gross violations of human rights and crimes under the law international. This has been crystallized particularly in the *Principles against Impunity*.

"This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a 'duty to remember,' which the State must assume in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right."

Louis Joinet¹⁰⁴²

The right to the truth also has a collective dimension: the society has the right to know the truth about serious human rights

¹⁰⁴⁰ See, *inter alia*: *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (Principle 1); Inter-American Commission on Human Rights, Report No. 136/99 of December 22, 1999, *Case of Ignacio Ellacuría et al v. El Salvador*, para. 221; and Inter-American Court of Human Rights, Judgment of September 22, 2009, *Case of Anzualdo Castro vs. Perú*, Series C No. 202.

¹⁰⁴¹ *Study on the right to truth – Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91 of 9 January 2006, para. 56.

¹⁰⁴² *Revised final report prepared on the question of impunity of perpetrators of human rights violations (civil and political) prepared by Mr. L. Joinet in accordance with Resolution 1996/119 of the Sub-Commission*, E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997, para. 17.

violations, the circumstances in which they were committed, the perpetrators of these and their motives. As it has specified the Inter-American Court of Human Rights, the investigation of these crimes and satisfaction of the "right of the next of kin of victims to know what happened and the identity of the State agents responsible for the respective facts [...] This measure benefits not only the next of kin of the victims, but also society as a whole, because, by knowing the truth about such crimes, it can prevent them in the future."¹⁰⁴³

The right to the truth has been characterized as inalienable and not submitted to statutory limitation by both international instruments and by international jurisprudence and doctrine. In this matter, principle 4 of the *Principles against Impunity* provides that "[i]rrespective 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." In addition, national courts have reaffirmed the inalienable nature of the right to truth¹⁰⁴⁴.

Although, in reality, it is closely linked with other rights (such as the right to an effective remedy, the protection of the law, an effective investigation, not to be subjected to torture and inhuman treatment, and to reparation, etc.), international jurisprudence and doctrine characterize the right to truth as an autonomous right.¹⁰⁴⁵ However, it is noteworthy that Inter-American Court of Human Rights has considered that the right to the truth "is framed within

¹⁰⁴³ Judgment of July 5, 2004, *Case of 19 Merchants v. Colombia*, Series C No. 109, paras. 258 and 259.

¹⁰⁴⁴ See, inter alia: Peru, Constitutional Tribunal, Case of *Piura – Genaro Villegas Namuche*, Rol No. 2488-2002-HC/TC; and Argentina, National Chamber on Criminal Correctional Federal matters, Case of *María Elena Amadio*, Rol 07/04-P.

¹⁰⁴⁵ See, inter alia: *First Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1435, of 22 January 1981; *Study on the right to the truth*, Report of the Office of the United Nations High Commission for Human Rights, E/CN.4/2006/91 of 9 January 2006, paras. 55 and 60; *The Right to the Truth - Report of the Office of the United Nations High Commission for Human Rights*, A/HRC/5/7 of 7 June 2007, para. 85; "United Nations General Comment on the right to the truth in relation to enforced or involuntary disappearances," in *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48 of 26 January 2011, para. 30, p. 10 *et seq*; and Inter-American Commission on Human Rights, Report No. 1/99, of 27 January 1999, Case No. 10.480, *Lucio Parada Cea et al v. El Salvador*, paras. 147 – 154.

the right to justice”¹⁰⁴⁶ and, in particular, with respect to, “the investigation and prosecution provided for in Articles 8 and 25 of the [American] Convention [on Human Rights].”¹⁰⁴⁷

Certainly, as the ICCPR, the ACHR does not explicitly enshrine the right to the truth. In that sense, without denying the autonomous nature of the right to truth, the IACHR found that the right to the truth arises from the obligations set out in Articles 1 (1), 8, 25 and 13 of the ACHR.¹⁰⁴⁸ Although the Inter-American Court of Human Rights has held that the right to the truth is subsumed in other rights and obligations arising from the ACHR, this is not to deny its autonomous nature.

It is worth recalling that the *Principles against Impunity, Principles on Reparation* and the ICPED and resolutions of intergovernmental bodies¹⁰⁴⁹, both universal and regional, confirm this autonomous right to the truth.

This characterization as inalienable, imprescriptible and autonomous right is of vital importance to distinguish the right to the truth of the right to information. Indeed, both are closely related, as stated by the UN High Commissioner for Human Rights: “[t]he right to the truth and freedom of expression, which includes the right to seek and impart information, are linked”¹⁰⁵⁰. Nonetheless, these are two distinct rights, as the High

¹⁰⁴⁶ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 118. In this same vein, see: Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, para. 48; Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154, para. 148; and Judgment of November 25, 2000, *Case of Bámaca Velásquez v. Guatemala*, Series C No. 70, para. 201.

¹⁰⁴⁷ Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154, para. 148.

¹⁰⁴⁸ See, inter alia, Report No. 1/99, de 27 January 1999, Case No. 10.480, *Lucio Parada Cea et al v. El Salvador*, para. 147.

¹⁰⁴⁹ See, inter alia: UN General Assembly Resolution No. 65/196, “Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims” of 27 December 2010; Resolution No. 2005/66, “The right to the truth,” of 20 April 2005 of the former UN Commission on Human Rights; UN Security Council Resolutions on “The right to the truth” No. 9/11 and 12/12; and OAS General Assembly Resolutions No. AG/RES. 2175 (XXXVI-O/06), AG/RES. 2267 (XXXVII-O/07), AG/RES. 2406 (XXXVIII-O/08), AG/RES. 2509 (XXXIX-O/09), AG/RES. 2595 (XL-O/10), AG/RES. 2662 (XLI-O/11) y AG/Res. 2725 (XLII-O/12).

¹⁰⁵⁰ *Study on the right to the truth – Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91, 9 January 2006, para. 43.

Commissioner also acknowledged by specifying that, "the right to seek information may be an instrumental right to realize the right to the truth, but both constitute different and separate rights[,] [a]s the right to freedom of information can be restricted for certain reasons under international law,"¹⁰⁵¹ whereas the right to the truth, given its inalienable character of right and its material scope of application, should not be subject to derogation under any circumstances.¹⁰⁵²

Also, this characterization of the right to the truth has other consequences. Indeed, as noted by the UN High Commissioner for Human Rights, "[given] its inalienable nature and its close relationship with other non-derogable rights, such as the right not to be subjected to torture and ill-treatment, the right to the truth should be treated as a non-derogable right. 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. The right to the truth is intimately linked with the States' obligation to fight and eradicate impunity."¹⁰⁵³ In the same vein they have made statements the WGEID,¹⁰⁵⁴ the Special Rapporteur on the Independence of judges and lawyers,¹⁰⁵⁵ the IACHR¹⁰⁵⁶ and the Inter-American Court of Human Rights.¹⁰⁵⁷

It is worth noting that the Inter-American Court of Human Rights concluded that "[t]his type of [amnesty] law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access

¹⁰⁵¹ *Ibidem*.

¹⁰⁵² *Ibid.*, para. 44.

¹⁰⁵³ *Ibid.*, para. 60.

¹⁰⁵⁴ "General comment on the right to the truth in relation to enforced disappearance", in *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48.

¹⁰⁵⁵ UN Doc. E/CN.4/1998/39/Add.1, para. 131.

¹⁰⁵⁶ See, inter alia, Report No. 37/00, April 13, 2000, Case No. 11.48, *Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador*; Report No. 136/99, December 22, 1999, Case 10.488, *Ignacio Ellacuría S.J. et al v. El Salvador*; and Report No. 1/99, January 27, 1999, Case No. 10.480, *Lucio Parada Cea et al v. El Salvador*.

¹⁰⁵⁷ See, inter alia, Judgment of February 24, 2011, Case of *Gelman v. Uruguay*, Series C No. 221.

to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.”¹⁰⁵⁸

Forensic science plays a fundamental role in the implementation of the right to the truth, as the UN General Assembly emphasized¹⁰⁵⁹ as well as the UN Human Rights Council.¹⁰⁶⁰ Forensic genetics and anthropology are fundamental for the identification of victims of grave human rights violations and elucidate the circumstances in which the crimes were committed.¹⁰⁶¹

b. The right to the truth and truth commissions

As pointed out by international jurisprudence and doctrine, the right to the truth is closely linked to the right to justice. Indeed, by definition, the right to the truth requires the course of justice, entails the knowledge of the circumstances in which the gross human rights violations were committed, as well as the identity and level of participation and responsibility of the perpetrators and anyone else involved. It implies the assessment of individual criminal responsibility by a tribunal. In that regard, the UN High Commissioner for Human Rights has pointed out that “if the right to the truth is addressed in the frame of criminal judicial procedures or after the determination of criminal responsibilities by a tribunal, there is no conflict between the right to the truth and the principle of the presumption of innocence. There is a potential problem, nevertheless, where perpetrators are named pursuant to an extrajudicial mechanism, such as a truth commission, given that not all truth-seeking processes apply due process guarantees.”¹⁰⁶² In doing so, the *Principles against Impunity* set standards to safeguard the rights and, in particular, the presumption of innocence of the alleged perpetrators in the procedures of the truth commissions.¹⁰⁶³

¹⁰⁵⁸ Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, para. 43. See, inter alia, Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154, paras. 112 and 114.

¹⁰⁵⁹ Resolution No. 68/165 “Right to Truth” of 18 December 2013.

¹⁰⁶⁰ Resolutions No. 10/26, of 27 March 2009, and 15/5, of 29 September 2010.

¹⁰⁶¹ See *Report of the Office of the United Nations High Commissioner for Human Rights on the right to truth and on forensic genetics and human rights*, A/HRC/15/26, 24 August 2010.

¹⁰⁶² *Study on the right to truth – Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91, of 9 January 2006, para. 39.

¹⁰⁶³ Principle 9 states: “Before a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees: (a) The

The creation of truth commissions and extrajudicial investigation commissions in various countries, as well as other similar mechanisms, basically designed to verify human rights violations, to identify those responsible and, in some cases, to provide the basis for judgement, reflect the tendency of universal recognition of the right to the truth. The acts by which such commissions have been established have explicitly reaffirmed the right to the truth of victims, their families, and society in general. For example, it is worth noting that the acts of setting up truth commissions reaffirmed the right to the truth in Peru¹⁰⁶⁴, Germany¹⁰⁶⁵, Brazil,¹⁰⁶⁶ Chile,¹⁰⁶⁷ El Salvador,¹⁰⁶⁸ Ghana,¹⁰⁶⁹ Guatemala,¹⁰⁷⁰ Sierra Leone¹⁰⁷¹ and East Timor,¹⁰⁷² among others.¹⁰⁷³

commission must try to corroborate information implicating individuals before they are named publicly; (b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission's file."

¹⁰⁶⁴ Supreme Decree No. 065-2001-PCM of 4 June 2001, para. 4 of the Preamble.

¹⁰⁶⁵ Law No. 12/2597, of 4 May 1992, which establishes the *Commission of Inquiry on "Working through the History and the Consequences of the SED Dictatorship"*.

¹⁰⁶⁶ Law No. 12.528 of 18 November 2011, which establishes the National Truth Commission (*Comisión Nacional de la Verdad*).

¹⁰⁶⁷ Supreme Decree No. 355 of 25 April 1990, establishing the Truth and Reconciliation Commission (*Comisión de Verdad y Reconciliación*).

¹⁰⁶⁸ Accords of Mexico City, Accord No. IV "Truth Commission," in *El Salvador Accords: On the Road to Peace*, UN Doc. DPI/1208-92615-July 1992-7M, 1992.

¹⁰⁶⁹ *National Reconciliation Commission Act* of 2002.

¹⁰⁷⁰ "Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer," para. 2 of the Preamble, in *Peace Agreements*, Ediciones Presidencia de la República de Guatemala, Guatemala, 1997, pag. 33.

¹⁰⁷¹ *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* (Art. XXVI) and *The Truth and Reconciliation Commission Act 2000* of Sierra Leone (Art. 6).

¹⁰⁷² *Terms of Reference for the Commission of Truth and Friendship* of 10 March 2005.

¹⁰⁷³ See, in this regard: Hayner, Priscilla, "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study", in *Human Rights Quarterly*, No. 16, 1994; Comisión de Derechos Humanos del Distrito Federal (México), *Memoria -Seminario internacional Tortura, reparación y prevención - Comisiones de la Verdad*, México, 2003; Gabriella Citroni, *L'orrore rivelato – L'esperienza della Commissione della Verità e Riconciliazioni in Peru: 1980-2000*, Giuffrè Editore, Milano 2004; Víctor Espinoza Cuevas, María Luisa Ortiz Rojas, Paz Rojas Baeza, *Comisiones de la Verdad: un camino incierto?*, Ed. Codepu-APT, Chile, 2003; and Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Ed. Routledge, New York, 2001.

"[T]he painful process of violence lived by the country over the last two decades must be fully elucidated. It may not be forgotten and [...] the State must guarantee society's right to the truth."

Supreme Decree No. 065-2001-PCM of 4 June 2001, creating the Truth Commission in Peru.

However, we must not confuse truth commissions with the right to truth. Given the inherent implications of the right to the truth, the international jurisprudence has pointed out that the truth commissions, or other similar mechanisms, have a limited reach. Thus, the Inter-American Court of Human Rights has specified that "in compliance with their obligation to guarantee the right to know the truth, States may establish truth commissions that contribute to the construction and preservation of the historical memory, the clarification of the facts, and the determination of institutional, social, and political responsibilities during specific historical periods of a society. Nevertheless, this does not fulfill or substitute for the State's obligation to establish the truth through judicial proceedings; thus the State had an obligation to launch a criminal investigation to determine the corresponding criminal responsibilities."¹⁰⁷⁴

For his part, while examining and take stock of the national investigation commissions on extrajudicial executions, created during the 26 years of his appointment, the UN Special Rapporteur on extrajudicial, summary, and arbitrary executions concluded that "[a] commission is not a substitute for a criminal prosecution."¹⁰⁷⁵ He highlighted that these commissions do not have the powers that a tribunal has to declare the guilt or innocence of a person and said that "[a] commission's role in terms of the State's obligation to prosecute and punish is to gather evidence for a subsequent

¹⁰⁷⁴ Judgment of August 31, 2011, *Case of Contreras et al v. El Salvador*, Series C No. 232, para. 135. In this same vein, see: Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202; Judgment of November 24, 2010, *Case of Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*, Series C No. 219; Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154; Judgment of May 25, 2010, *Case of Chitay Nech et al v. Guatemala*, Series C No. 212; Judgment of September 1, 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217; and Judgment of November 24, 2009, *Case of the Massacre of Dos Erres v. Guatemala*, Series C No. 211.

¹⁰⁷⁵ Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Philip Alston, A/HRC/8/3 of 2 May 2008, para. 55.

prosecution, identify perpetrators or recommend individuals for prosecution."¹⁰⁷⁶

¹⁰⁷⁶ *Ibidem.*

CHAPTER VIII: AMNESTIES AND OTHER SIMILAR MEASURES

"While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law."

United Nations Secretary-General¹⁰⁷⁷

1. General considerations

Amnesties and other similar measures that prevent the perpetrators of gross human rights violations from being investigated, prosecuted and punished by the courts of justice are incompatible with States' obligations under international law.

First, these measures are incompatible with the obligation to investigate, prosecute and punish those responsible for gross human rights violations, crimes against humanity, war crimes and genocide. Second, these measures are also incompatible with the State obligation to guarantee the rights of victims and their next of kin to an effective remedy, to be heard by an independent and impartial court for the determination of their rights and to know the truth. Third, measures of this kind are generally incompatible with the State obligation to provide comprehensive reparations to victims and their family members. Finally, amnesties and similar measures undermine the absolute prohibition of committing gross human rights violations and crimes under international law.

There is international consensus – both in the political bodies of the intergovernmental systems, human rights bodies and international criminal law tribunals– regarding the prohibition of providing amnesties or similar measures to obstruct investigations of gross human rights violations, crimes against humanity, genocide and war crimes, and/or measures that exonerate their perpetrators and other participants of their criminal responsibility. This rule of international law has been the result of a long evolution (See Chapter I) and have been set forth in various international instruments.

¹⁰⁷⁷ *Report of the Secretary-General: The Establishment of a Special Court for Sierra Leone, S/2000/915, of 4 October 2000, para. 22.*

"One of the fundamental principals in every democratic and constitutional State under the rule of law is the *prohibition of excesses* or of *arbitrariness*. According to this, all branches of government and public acts are subject to limits, not only formal but also substantive, such as the respect of life, justice and equality. In this context, amnesty laws may not be evaluated only in terms of their compliance with the formal demands for their exercise, that is, whether or not Congress has approved them through a law. Amnesty, like any other act of the power of the state, cannot be an expression of arbitrariness, but rather must be duly justified and legitimized by respect for the substantive or material limits of the Constitution. [...] A second limit on the constitutional and democratic State's exercise of amnesty under the rule of law is respect for fundamental rights and the objective order of values that these rights represent. [...] [F]undamental rights determine the limit to what acts of public authority the State can decide to use. [...] In this way, fundamental rights constitute a protected area, from governmental power and thus from the legislator, in the sense that it is impossible to refuse to honour them or affect their essential content. [...] An amnesty law may not include crimes that express manifest contempt for the life, integrity and dignity of persons, since that would amount to denial of the effectiveness of those rights. If this were to happen, amnesty would have been used to remove certain persons from the course of justice, affecting the right to access to justice for those harmed by the amnestied acts."

Ombudsman of Peru (*Defensoría del Pueblo de Perú*)¹⁰⁷⁸

When systematizing the development of international law on this matter, the UN Secretary-General came to the conclusion that "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights."¹⁰⁷⁹

International norms, doctrine and jurisprudence regarding impunity generally refer to amnesties or other similar or analogous measures, without offering explanations or details about the latter. Nonetheless, it is important to specify that these legal standards are applicable to every measure, independent of its name under national law, that has the effect of obstructing or preventing

¹⁰⁷⁸ Defensoría del Pueblo (Ombudsman of Peru), *Informe Defensoría No. 57: Amnistía v. Derechos Humanos – Buscando justicia*, Lima, 2001, pp. 22 and 23. (Original in Spanish, free translation)

¹⁰⁷⁹ *Report of the Secretary-General - The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616 of 20 July 2004, para.10.

investigations and judicial proceedings, exonerating the perpetrators from criminal responsibility or denying the victims and/or their family members their right to an effective remedy.

2. International norms and standards

Several international instruments and standards have expressly prohibited the granting of amnesties and other similar measures for the authors of grave human rights violations and crimes under international law.

The *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* establish:

"In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions."¹⁰⁸⁰

The *Declaration on the Protection of All Persons from Enforced Disappearance* (DED), in article 18(1), establishes:

"Persons who have or are alleged to have committed offences [that constitute the crime 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."

The incompatibility of laws that allow or ensure impunity, against the obligation to investigate, prosecute and punish those responsible for grave human rights violations was implicitly recognized by the *World Conference on Human Rights*, held under the auspices of the United Nations in June 1993, in Vienna. In effect, the *Vienna Declaration and Programme of Action*, adopted by the *World Conference on Human Rights*, contains a clause according to which:

"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."¹⁰⁸¹

¹⁰⁸⁰ Principle 19.

¹⁰⁸¹ *World Conference on Human Rights – Vienna Declaration and Programme of Action*, June 1993, DPI/1394-48164-October 1993-/M, Section II, paragraph 60, pag. 65.

The *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*¹⁰⁸² (*Principles against Impunity*) contains a specific principle on amnesties and other measures. Principle 24, "Restrictions and other measures relating to amnesty," stipulates:

"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 prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question;

"b) Amnesties and other measures of clemency shall be without effect with respect to the victims' right to reparation, to which principles 31 through 34 refer, and shall not prejudice the right to know;

"c) 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, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, 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;

"d) 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

¹⁰⁸² The Updated Set of Principles is published in: *Impunity – Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity – Addendum: Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1 of 8 February 2005.

of the right to a fair hearing guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights, 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.”

It is worth highlighting that the *Principles against Impunity* has been widely invoked as the legal reference point on the matter by the UN General Assembly,¹⁰⁸³ the UN Secretary-General,¹⁰⁸⁴ the UN Office of the High Commissioner on Human Rights,¹⁰⁸⁵ the former UN Commission on Human Rights,¹⁰⁸⁶ the UN Human Rights Council,¹⁰⁸⁷ and the UN special procedures and mandates on human rights,¹⁰⁸⁸ as well as by the General Assembly of the

¹⁰⁸³ See, inter alia: Resolution No. 62/148, *Torture and other cruel, inhuman or degrading treatment or punishment*, of 18 December 2007, para. 6; Resolution No. 65/205, *Torture and other cruel, inhuman or degrading treatment or punishment*, of 21 December 2010, para. 7; and Resolution No. 68/165, *The right to the truth*, of 18 December 2013, paragraph 11 of the Preamble.

¹⁰⁸⁴ See, inter alia, *Uniting our strengths: Enhancing United Nations support for the rule of law – Report of the Secretary-General*, A/61/636-S/2006/980, of 14 December 2006, para. 25.

¹⁰⁸⁵ *Study on the right to the truth – Report of the Office of the United Nations High Commissioner for Human Rights*, UN document E/CN.4/2006/91 of 9 January 2006; *The right to the truth – Report of the Office of the United Nations High Commissioner for Human Rights*, UN document A/HRC/5/7 of 7 June 2007; *The right to the truth – Report of the Office of the United Nations High Commissioner for Human Rights*, UN document A/HRC/12/19 of 21 August 2009; *Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth*, UN document A/HRC/17/21 of 14 April 2011; *Rule of law tools for post-conflict states – Vetting processes: operational framework*, United Nations, New York and Geneva, 2006, index HR/PUB/06/5; *Rule of law tools for post-conflict states – Amnesties*, New York and Geneva, 2009, index HR/PUB/09/1; and *Working with the United Nations Human Rights Programme: A Handbook for Civil Society*, New York and Geneva, 2008, index HR/PUB/06/10/Rev.1.

¹⁰⁸⁶ See, inter alia, Commission on Human Rights Resolutions No. 2000/68, 2001/70, 2003/72, 2004/72, 2995/66 and 2005/81.

¹⁰⁸⁷ See, inter alia, Human Rights Council Resolutions No. 9/10, 9/11, 12/11, 12/12, 18/7 and 21/15.

¹⁰⁸⁸ See, for example: Working Group on Enforced or Involuntary Disappearances (*General Comment on the Right to Truth in Relation to Enforced Disappearances*, in *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48 of 26 January 2011); Special Rapporteur on the independence of judges and lawyers (*Report of the Special Rapporteur on the independence of judges and lawyers*, Leandro Despouy, E/CN.4/2006/52 of 23 January 2006).

Organization of American States (OAS).¹⁰⁸⁹ In 2005, the UN Independent Expert to update the Set of Principles to combat impunity, Diana Orentlicher, found that "[r]elevant developments in international law have on the whole strongly affirmed the Principles while providing further clarification of the scope of States' established legal obligations."¹⁰⁹⁰

The statutes of international courts or tribunals, established or created under the auspices of the UN Security Council, have also incorporated clauses that expressly exclude the application or the legal recognition of amnesties for various crimes under international law. It is worth highlighting the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon.

The *Statute of the Special Court for Sierra Leone*¹⁰⁹¹ establishes, in article 10, that "[a]n amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 and 3 of the present Statute [crimes against humanity, breaches of common article 3 of the Geneva Conventions and of Protocol II to the Geneva Convention and other serious violations of international humanitarian law] shall not be a bar to prosecution."

The *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, adopted under the auspices of the United Nations, excludes amnesty and pardons for the crimes of homicide, torture and religious persecution, genocide, crimes against humanity, serious violations of the Geneva Conventions of 12 August 1949, destruction of cultural property during armed conflicts, and crimes against internationally

¹⁰⁸⁹ See, for example, Resolution AG/RES. 2225 (XXXVI-O/06), *Cooperation among the Member States of the Organization of American States to ensure the protection of human rights and fight impunity*, of 6 June 2006.

¹⁰⁹⁰ *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, E/CN.4/2005/102 of 8 February 2005, pag. 1 (summary).

¹⁰⁹¹ Approved by the Security Council in Resolution No. 1400 of 2002.

protected persons in accordance with the *Vienna Convention on Diplomatic Relations* of 1961.¹⁰⁹²

In the case of the *Statute for the Special Tribunal for Lebanon*, two clauses expressly exclude amnesties. Article 16 ("Amnesty") of the *Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon*¹⁰⁹³ establishes that "[t]he Government undertakes not to grant amnesty to any person for any crime falling within the jurisdiction of the Special Tribunal. An amnesty already granted in respect of any such persons and crimes shall not be a bar to prosecution." Article 6 ("Amnesty") of the *Statute of the Special Tribunal for Lebanon*¹⁰⁹⁴ establishes that "[a]n amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution."

3. Doctrine and practice of the United Nations

In the framework of overcoming armed conflicts or in the transition to democracy, the United Nations has rejected the adoption of amnesties, pardons, or analogous measures that leave gross human rights violations and international crimes unpunished.

In several resolutions, the Security Council has indicated that amnesties cannot be applied to the crime of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.¹⁰⁹⁵ In a Resolution on Croatia in 1997, the Security Council urged the government of that country "to eliminate ambiguities in implementation of the Amnesty Law, and to implement it fairly and objectively in accordance with international standards, in particular by concluding all investigations of crimes covered by the amnesty and undertaking an immediate and comprehensive review with United Nations and local Serb participation of all charges outstanding against individuals for serious violations of international humanitarian law which are not covered by the amnesty in order to end proceedings

¹⁰⁹² Article 40 of the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea*, 15 January 2001.

¹⁰⁹³ Approved by Security Council Resolution No. 1757 of 2007.

¹⁰⁹⁴ *Ibidem*.

¹⁰⁹⁵ See, for example, la Resolution No. 1120 (1997), *Croatia*, of 14 July 1997 and Resolution No. 1315 (2000), *Sierra Leone*, of 14 August 2000.

against all individuals against whom there is insufficient evidence."¹⁰⁹⁶

In its Resolutions on Côte d'Ivoire in 2003, the Security Council emphasized "the need to bring to justice those responsible for the serious violations of human rights and international humanitarian law"¹⁰⁹⁷ and endorsed the peace agreement signed between the parties to the conflict in that country,¹⁰⁹⁸ which reflected the point of view that amnesties can and should, in keeping with the spirit of article 6(5) of Additional Protocol II, be given to the members of the parties to the conflict for having taken part in the hostilities, but not to those who committed grave violations of human rights and international humanitarian law.

The former Commission on Human Rights has reiterated that "amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes, [and] urge[d] States to take action in accordance with their obligations under international law and welcome[d] the lifting, waiving, or nullification of amnesties and other immunities."¹⁰⁹⁹ In 2005, the former Commission recognized "the Secretary-General's conclusions that United Nations-endorsed peace agreements can never promise amnesties for genocide, crimes against humanity, war crimes, or gross violations of human rights."¹¹⁰⁰

For its part, the Human Rights Council has reaffirmed "the responsibility gross violations of human rights and serious violations of international humanitarian law constituting crimes under international law, with a view to end impunity"¹¹⁰¹ and has

¹⁰⁹⁶ Resolution No. 1120 (1997) of 14 July 1997, para. 7.

¹⁰⁹⁷ Resolution No. 1479 (2003) of 13 May 2003, para. 8.

¹⁰⁹⁸ Resolution No. 1464 (2003) of 4 February 2003, para. 1; agreement signed by the Ivorian political forces in Linas-Marcoussis on 24 January 2003, United Nations document S/2003/99.

¹⁰⁹⁹ Resolution No. 2004/72, "Impunity," of 21 April 2004, para. 3. See also, Resolutions No. 2005/81, "Impunity," of 21 April 2005, para. 3; 2004/72 of 21 April 2004, para. 3; 2003/72 of 25 April 2003, para. 2; and 2002/79 of 25 April 2002, para. 2.

¹¹⁰⁰ Resolution No. 2005/81, "Impunity," of 21 April 2005, para. 3.

¹¹⁰¹ Resolution No. 21/15, "Human rights and transitional justice," of 27 September 2012, para. 5. In the same vein, see Resolution No. 12/11, "Human rights and transitional justice," of 1 October 2009, para. 7.

received with satisfaction an ever greater number of peace agreements that do not provide for general amnesties.¹¹⁰²

"The removal of statutory limitations, amnesties or immunities that obstruct the prosecution of State officials and other individuals responsible for atrocity crimes and therefore fall short of international standards, strengthens national legal frameworks for accountability."

United Nations Secretary-General¹¹⁰³

The UN Secretary-General has repeatedly stated that amnesties or pardons are not applicable to the crimes of genocide, crimes against humanity and war crimes, nor to gross human rights violations.¹¹⁰⁴ In the report on *The rule of law and transitional justice in conflict and post-conflict societies*, the Secretary-General summed up the position and practice of the United Nations in the following terms: "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights."¹¹⁰⁵ Likewise, in several peace agreements signed under the auspices of the United Nations, and in which amnesties or similar measures have been agreed upon for grave human rights violations, or have not been expressly excluded for war crimes, crimes against humanity and genocide in the scope of its application, the Secretary-General and its representatives have incorporated reservations to the texts, rejecting general amnesties or amnesties that allow impunity for the perpetrators of these crimes. This has happened in the peace accords for Angola,¹¹⁰⁶ Burundi,¹¹⁰⁷ Sierra Leone,¹¹⁰⁸ Sudan¹¹⁰⁹ and

¹¹⁰² *Ibid.*, para. 12. In the same vein, see Resolution No. 12/11, "Human rights and transitional justice," of 1 October 2009, para. 11.

¹¹⁰³ *The Responsibility to Protect: State responsibility and prevention – Report of the Secretary-General*, United Nations document A/67/929-S/2013/399, of 9 July 2013, para. 41.

¹¹⁰⁴ *Seventh Report of the United Nations Secretary-General on the Observers' Mission in Sierra Leone*, United Nations document S/1999/836, 30 July 1999, para. 7; *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, para. 22; and *Report pursuant to resolutions 1160(1998), 1199(1998) and 1203(1998) of the Security Council*, para. 32.

¹¹⁰⁵ *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, S/2004/616, 20 July 2004, para. 10.

¹¹⁰⁶ In the case of the 2002 Memorandum of Understanding between the Angolese armed forces and the National Union for the Total Independence of Angola (UNITA), the Special Representative of the Secretary-General included a reservation indicating that the United Nations did not recognize any general amnesty.

Uganda.¹¹¹⁰ In the cases of Sudan and Uganda, the respective governments withdrew the clauses granting general amnesty from the agreements. In the case of Sierra Leone, the Secretary-General warned the perpetrators of these crimes that their actions were not included within the amnesty granted by virtue of the Peace Accord and that, consequently, they would be considered responsible.¹¹¹¹ With the adoption of the *Statute of the Special Court for Sierra Leone* the situation was overcome.

The UN Office of the High Commissioner for Human Rights has reiterated that amnesties that prevent the prosecution of the alleged perpetrators of crimes against humanity, war crimes, genocide and grave human rights violations are incompatible with the international obligations of the States and with United Nations policy.¹¹¹² The Office of the High Commissioner has indicated

¹¹⁰⁷ In the case of the *Dar-es-Salaam Agreement on principles towards lasting Security and Stability in Burundi*, of 18 June 2006, the Interim Special Representative for the Secretary-General reiterated the position that the United Nations would not recognize amnesty for the crime of genocide, war crimes and crimes against humanity, in a letter directed to the signatories of the agreement.

¹¹⁰⁸ The Lomé Peace Accord in 1999, between the government of Sierra Leone and the United Revolutionary Front, contained a general amnesty. Upon signing the Accord, the Special Representative of the Secretary General in Sierra Leone added a statement, indicating that the United Nations did not recognize amnesty for genocide, crimes against humanity, war crimes or other serious violations of international humanitarian law. (*Seventh Report of the United Nations Secretary-General on the Observers' Mission in Sierra Leone*, United Nations document S/1999/836, 30 July 1999, para. 7, and *Annual Report of the Office of the United Nations High Commissioner of Human Rights and of the Secretary-General*, A/HRC/12/18 of 6 August 2009, para. 53).

¹¹⁰⁹ The Agreement signed between the Government of Sudan and the Sudan People's Liberation Movement in 2004 included a general amnesty clause.

¹¹¹⁰ The Agreement signed between the Government of Uganda and the Lord's Resistance Army (LRA), in 2008, included a general amnesty clause.

¹¹¹¹ *Report of the Office of the High Commissioner for Human Rights, presented pursuant to resolution 2000/24 of the Commission on Human Rights – Situation of human rights in Sierra Leone*, E/CN.4/2001/35, of 1 February 2001, para. 6.

¹¹¹² See, inter alia: *Report of the Office of the High Commissioner for Human Rights, presented pursuant to resolution 2000/24 of the Commission on Human Rights – Situation of human rights in Sierra Leone*, E/CN.4/2001/35, of 1 February 2001; *Study by the Office of the United Nations High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the United Nations system*, E/CN.4/2006/93, of 7 February 2006, *Annual Report of the Office of the United Nations High Commissioner for Human Rights and reports of the Secretary-General*, A/HRC/12/18 of 6 August 2009; and *Rule of law tools for post-conflict States – Amnesties*, New York and Geneva, 2009, index HR/PUB/09/1.

"[u]nder various sources of international law and United Nations policy, amnesties are impermissible if they prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity, gross violations of human rights, or serious violations of international humanitarian law. Both international law and United Nations policy also recognize the right of victims to an effective remedy, including reparations, and the right of victims and societies to know the truth about violations. The continuing work of the United Nations in the area of justice and peace, particularly with regard to amnesties, aims to safeguard room for justice both during and after peace processes."¹¹¹³

4. Case law and doctrine of international human rights bodies and courts

a. The Human Rights Committee

The UN Human Rights Committee (HRC) addressed the question early on, when in 1978 an amnesty was issued by General Augusto Pinochet Ugarte's regime in Chile.¹¹¹⁴ The HRC questioned the validity of the measure with respect to the perpetrators of grave human rights violations, in particular enforced disappearance.¹¹¹⁵ The HRC, in its General Comment 20 on article 7 of the *International Covenant on Civil and Political Rights* (ICCPR), concluded that "[a]mnesties are generally incompatible with the duty of States to investigate such acts [as torture]; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."¹¹¹⁶

The HRC has repeatedly reaffirmed its jurisprudence when examining amnesties and other analogous measures that allow impunity, adopted by States Parties to the ICCPR. In its "Concluding observations", the HRC has considered that measures that allow impunity for the perpetrators of grave human rights violations, that keep the crimes from being investigated, keep their

¹¹¹³ *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, A/HRC/12/18 of 6 August 2009, para. 52.

¹¹¹⁴ Decree Law No. 2191 of 18 April 1978.

¹¹¹⁵ UN Doc. Supplement 40 (A/34/40), 1979, para. 81.

¹¹¹⁶ *General Comment 20 (44th Session, 1992), Article 7.*

authors from being prosecuted and punished and keep the victims and their family members from having an effective remedy and from receiving reparations are incompatible with the obligations established in the ICCPR. The HRC has held this when examining amnesty laws or “pardons” for gross violations of human rights in its Concluding observations on: Peru,¹¹¹⁷ Argentina,¹¹¹⁸ Chile,¹¹¹⁹ Croatia,¹¹²⁰ El Salvador,¹¹²¹ Spain,¹¹²² the former Yugoslav Republic of Macedonia,¹¹²³ France,¹¹²⁴ Haiti,¹¹²⁵ Lebanon,¹¹²⁶ Niger,¹¹²⁷ the Democratic Republic of the Congo,¹¹²⁸ Senegal,¹¹²⁹ Sudan,¹¹³⁰ Suriname,¹¹³¹ Uruguay,¹¹³² and Yemen.¹¹³³ In all of these situations, the HRC held that such amnesty laws were incompatible with the States’ obligation to guarantee an effective remedy for the victims of human rights violations, protected under article 2 of the ICCPR. Likewise, in decisions on individual cases, the HRC has reaffirmed “its position that amnesties for gross violations of human rights and legislation such as the Law No. 15,848 (*Ley de*

¹¹¹⁷ *Concluding Observations on Peru*: CCPR/C/79/Add.67 of 1996, paras. 9 and 10; and CCPR/CO/70/PER of 15 November, para. 9.

¹¹¹⁸ *Concluding Observations on Argentina*: CCPR/C/79/Add.46 and A/50/40, 5 April 1995, para. 144; and CCPR/CO/70/ARG of 3 November 2000, para. 9.

¹¹¹⁹ *Concluding Observations on Chile*, CCPR/C/79/Add.104, of 30 March 1999, para. 7.

¹¹²⁰ *Concluding Observations on Croatia*: CCPR/C/HRV/CO/2 of 4 November 2009, para. 10; and CCPR/CO/71/HRV of 4 April 2001, para. 11.

¹¹²¹ *Concluding Observations on El Salvador*: CCPR/C/SLV/CO/6 of 18 November 2010, para. 5; CCPR/CO/78/SLV, of 22 August 2003; and CCPR/C/79/Add.34 of 18 April 1994, para. 7.

¹¹²² *Concluding Observations on Spain*, CCPR/C/ESP/CO/5 of 5 January 2009, para. 9.

¹¹²³ *Concluding Observations on former Yugoslav Republic of Macedonia*, CCPR/C/MKD/CO/2 of 3 April 2008, para. 12.

¹¹²⁴ UN Doc. CCPR/C/79/Add.80, para. 13.

¹¹²⁵ UN Doc. A/50/40, paras. 224 - 241.

¹¹²⁶ UN Doc. CCPR/C/79/Add.78, para. 12.

¹¹²⁷ *Concluding Observations on Niger*, CCPR/C/79/Add.17 de 29 April 1993, para. 7.

¹¹²⁸ *Concluding observations on Congo*, CCPR/C/79/Add.118 of 27 March 2000, para. 12.

¹¹²⁹ *Concluding Observations on Senegal*, CCPR/C/79/Add.10, of 28 December 1992, para. 5.

¹¹³⁰ *Concluding Observations on Sudan*, 26 July 2007, para. 9, en A/62/40 (Vol. I).

¹¹³¹ *Concluding Observations on Suriname*, CCPR/CO/80/SUR of 4 May 2004, para. 7.

¹¹³² *Concluding Observations on Uruguay*: CCPR/C/URY/CO/5 of 2 December 2013, para. 19; and, CCPR/C/79/Add.19 paras. 7 and 11; CCPR/C/79/Add.90, Part “C. Main areas of concern and recommendations.”

¹¹³³ UN Doc. A/50/40, paras. 242 - 265.

Caducidad de la Pretensión Punitiva del Estado) are incompatible with the obligations of [every] State party under the Covenant."¹¹³⁴

The HRC has emphasized that amnesties, pardons or other analogous measures contribute to creating an atmosphere of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for human rights and the rule of law, situations that run contrary to the obligations of the States under the ICCPR.

The HRC has also held that the non-adoption of amnesty laws or other similar measures with respect to the perpetrators of human rights violations, or their prohibition in constitutional clauses, are positive factors for the implementation of the obligations enshrined in the ICCPR. The HRC thus received with satisfaction the statement made by the delegation of Paraguay, "according to which the Government will not enact any amnesty law, and that, on the contrary, concrete steps have already or are being taken to make accountable perpetrators of human rights abuses under the past dictatorial regime. It notes in this regard that such laws, where adopted, are preventing appropriate investigation and punishment of perpetrators of past human rights violations, undermine efforts to establish respect for human rights, further contribute to an atmosphere of impunity among perpetrators of human rights violations, and constitute impediments to efforts undertaken to consolidate democracy and promote respect for human rights."¹¹³⁵

Regarding the new Constitution of Ecuador, the HRC "welcome[d] the information that article 23 of the Constitution prohibits the enacting of amnesty legislation or granting pardons for human rights violations."¹¹³⁶

¹¹³⁴ Views of 9 August 1994, *Hugo Rodríguez v. Uruguay*, Communication No. 322/1988, CCPR/C/51/D/322/1988, para. 12.4.

¹¹³⁵ *Concluding observations of the Human Rights Committee: Paraguay*, CCPR/C/79/Add.48; A/50/40 of 3 October 1995, paras. 192-223

¹¹³⁶ *Concluding observations of the Human Rights Committee: Ecuador*, CCPR/C/79/Add.92, of 18 August 1998, para. 7. It is worth mentioning that the Constitution was modified in 2011. Nonetheless the clause of article 23 was maintained in the new article 80, in the following terms: "Proceedings and punishment for the crimes of genocide, crimes [against] humanity, war crimes, forced disappearance of persons or crimes of aggression to a State shall not be subject to statutes of limitations. None of the above-mentioned cases shall be liable

The Committee is deeply concerned that the amnesty granted by Decree Law 26,479 on 14 June 1995 absolves from criminal responsibility and, as a consequence, from all forms of accountability, all military, police and civilian agents of the State who are accused, investigated, charged, processed or convicted for common and military crimes for acts occasioned by the "war against terrorism" from May 1980 until June 1995. It also makes it practically impossible for victims of human rights violations to institute successful legal action for compensation. Such an amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations, undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity among perpetrators of human rights violations, and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and is thus in violation of article 2 of the Covenant. [...] In addition, the Committee expresses serious concern in relation to the adoption of Decree Law 26,492 and Decree Law 26,6181, which purport to divest individuals of the right to have the legality of the amnesty law reviewed in courts. With regard to article 1 of this law, declaring that the Amnesty Law does not undermine the international human rights obligations of the State, the Committee stresses that domestic legislation cannot modify a State party's international obligations under the Covenant. [...] the Committee considers that the Amnesty laws violate the Covenant, it recommends that the Government of Peru review and repeal these laws to the extent of such violations. In particular, it urges the government to remedy the unacceptable consequences of these laws by, *inter alia*, establishing an effective system of compensation for the victims of human rights violations and by taking the necessary steps to ensure that the perpetrators of these violations do not continue to hold government positions.

Human Rights Committee¹¹³⁷

The HRC has warned various States to abstain from adopting amnesties or similar measures in cases of grave human rights violations. Thus, for example, the HRC urged the State of Algeria to "[e]nsure that pardon, commutation or remission of sentence or termination of public proceedings is granted in respect of any person, whether a State official or member of an armed group, who has committed or commits serious human rights violations

to benefit from amnesty. The fact that one of these crimes might have been perpetrated by a subordinate shall not exempt the superior who ordered said crime or the subordinate who carried out the order from criminal liability."

¹¹³⁷ *Concluding observations of the Human Rights Committee: Peru*, CCPR/C/79/Add.67 of 25 July 1996, paras. 9, 10 and 20.

such as massacres, torture, rapes and disappearances, that a thorough and exhaustive inquiry is conducted by the competent judicial authorities, into other violations and that the courts are able to examine the crimes of which these persons are allegedly guilty before any decision on a pardon, commutation or remission of sentence or termination of public proceedings is taken.”¹¹³⁸

Likewise, the HRC has held that laws that exonerate State agents of criminal responsibility for crimes – such as extrajudicial executions – committed during security operations are incompatible with the obligations established under the ICCPR.¹¹³⁹

b. The Committee against Torture

Since its first decision adopted on an individual case in 1989, the Committee against Torture has considered that amnesty laws and similar measures that leave the perpetrators of acts of torture unpunished, creating impunity, run contrary to the spirit and the letter of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.¹¹⁴⁰ The Committee has repeated this in its “Concluding observations” on Peru,¹¹⁴¹ Azerbaijan,¹¹⁴² Benin,¹¹⁴³ Chile,¹¹⁴⁴ Croatia,¹¹⁴⁵ Spain,¹¹⁴⁶ the

¹¹³⁸ *Concluding observations of the Human Rights Committee: Algeria*, CCPR/C/DZA/CO/3 of 12 December 2007, para. 7.

¹¹³⁹ Views of 31 March 1982, Communication No. 45/1979, *Case of María Fanny Suárez de Guerrero v. Colombia*.

¹¹⁴⁰ Views of 23 November 1989, Communications No. 1/1988, 2/1988 and 3/1988 (Argentina).

¹¹⁴¹ *Conclusions and Recommendations of the Committee against Torture: Peru*, A/55/44 de 15 November 1999, paras.59 (g) and 61 (d).

¹¹⁴² “Concluding observations of the Committee against Torture: Azerbaijan”, of 17 November 1999, paras. 68 and 69 in *Report of the Committee against Torture – 23rd period of sessions (8 – 19 November 1999) 24th period of sessions (1 – 19 May 2000)*.

¹¹⁴³ “Concluding observations of the Committee against Torture: Benin,” of November 22, 2007, para. 9 (*Report of the Committee against Torture – 39th period of sessions (5 – 23 November 2007) – 40th period of sessions (28 April – 16 May 2008)*, A/63/44, pag. 8).

¹¹⁴⁴ *Concluding observations of the Committee against Torture: Chile*, CAT/C/CR/32/5 of 14 June 2004, paras. 6(b) and 7(b).

¹¹⁴⁵ *Report of the Committee against Torture in its 21st period of sessions (9 – 20 November 1998) 22nd period of sessions (26 April to 14 May 1999) Official documents of the General Assembly Fifty-fourth period of sessions Supplement No. 44 (A/54/44)*, para. 42.

¹¹⁴⁶ *Concluding observations of the Committee against Torture: Spain*, CAT/C/EST/CO/5 of 19 November 2009, para. 21.

former Yugoslav Republic of Macedonia,¹¹⁴⁷ the Russian Federation,¹¹⁴⁸ Indonesia,¹¹⁴⁹ Mauritania,¹¹⁵⁰ Kyrgyzstan,¹¹⁵¹ Tajikistan,¹¹⁵² and Senegal.¹¹⁵³ In its Concluding observations on Senegal in 2013, the Committee against Torture found that "the State party's laws should not encourage impunity for acts of torture or violate article 2 of the Convention, which states that 'internal political instability' may not be invoked as a justification of torture."¹¹⁵⁴ The Committee also reiterated that "amnesties or other impediments which preclude prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability of the prohibition of torture. They would constitute an intolerable obstacle for victims seeking redress, and would contribute to a climate of impunity."¹¹⁵⁵ In its respective Concluding observations on Azerbaijan and Kyrgyzstan, the Committee recommended to the authorities of both countries that, "[i]n order to ensure that the perpetrators of torture and ill-treatment do not enjoy impunity, the State party ensure the investigation and, where appropriate, the prosecution of all those accused of having committed such acts, and ensure that amnesty laws exclude torture from their reach."¹¹⁵⁶

¹¹⁴⁷ "Concluding observations of the Committee against Torture: former Yugoslav Republic of Macedonia", of 15 May 2008, para. 5 (*Report of the Committee against Torture -39th period of sessions (5 – 23 November 2007) – 40th period of sessions (28 April – 16 May 2008)*, A/63/44, pages. 103-104).

¹¹⁴⁸ *Concluding observations on the fifth periodic report of Russia, approved by the Committee in its 49th period of sessions (29 October – 23 November 2012)*, CAT/C/RUS/CO/5, of 11 December 2012, para. 13.

¹¹⁴⁹ "Concluding observations of the Committee against Torture: Indonesia", of 15 May 2008, para. 30 (*Report of the Committee against Torture -39th period of sessions (5 – 23 November 2007) – 40th period of sessions (28 April – 16 May 2008)*, A/63/44, pag. 91).

¹¹⁵⁰ *Concluding observations of the Committee against Torture: Mauritania*, CAT/C/MRT/CO/1, of 18 June 2013, para. 19.

¹¹⁵¹ *Concluding observations of the Committee against Torture: Kyrgyzstan*, paras. 74 and 75, in A/55/44 of 17 November 1999.

¹¹⁵² *Concluding observations of the Committee against Torture: Tajikistan*, CAT/C/TJK/CO/2 2012 of 21 January 2013, paragraph 7.

¹¹⁵³ *Concluding observations of the Committee against Torture: Senegal*, A/51/44 of 9 July 1996, paras. 102-119 and CAT/C/SEN/CO/3 of 17 January 2013, para. 9.

¹¹⁵⁴ *Concluding observations of the Committee against Torture: Senegal*, CAT/C/SEN/CO/3 of 17 January 2013, para. 9.

¹¹⁵⁵ *Ibidem*.

¹¹⁵⁶ *Concluding observations of the Committee against Torture: Azerbaijan*, Op. Cit., para. 69, and *Concluding observations of the Committee against Torture: Kyrgyzstan*, A/55/44 of 17 November 1999, para. 75.

In its observations on Spain, the Committee highlighted regarding the Amnesty Act of 1977 that "bearing in mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by the principle of legality or the statute of limitations."¹¹⁵⁷

The Committee has warned various States to abstain from adopting amnesties or similar measures in cases of grave human rights violations.¹¹⁵⁸ For example, faced with instructions given by the *Commission for truth and friendship*, established by Indonesia and East Timor, to recommend amnesties for those who are involved in grave human rights violations, the Committee urged the authorities of Indonesia to "not [...] establish any reconciliation mechanism or participate in any mechanism that promotes amnesty for the perpetrators of acts of torture, war crimes or crimes against humanity."¹¹⁵⁹

The Committee against Torture has likewise considered that legal measures that do not contemplate an adequate legal framework to establish the guilt of the perpetrators of grave human rights violations and provide for derisory punishments constitute "*de facto* amnesty in contravention of international human rights obligations."¹¹⁶⁰ Thus, in the case of the "Justice and Peace" legislation for de-mobilized paramilitaries in Colombia, the Committee found that the granting of benefits under criminal law, such as the substantial reduction of sentences ("alternative penalty"), and the waiver of criminal prosecution ("principle of opportunity"), did not comply with human rights norms and the absence of convictions amounted to "*de facto* amnesty in contravention of international human rights obligations."¹¹⁶¹ The Committee has emphasized that such measures are contrary to the international obligations contained in the Convention and in other international instruments, including the *Rome Statute of the*

¹¹⁵⁷ *Concluding observations of the Committee against Torture: Spain*, CAT/C/EST/CO/5 of 19 November 2009, para. 21.

¹¹⁵⁸ *Concluding observations of the Committee against Torture: Bolivarian Republic of Venezuela*, CAT/C/CR/29/2, 23 December 2002, para. 6(c).

¹¹⁵⁹ *Concluding observations of the Committee against Torture: Indonesia*, 15 May 2008, para. 279 (*Report of the Committee against Torture – 39th period of sessions (5 – 23 November 2007) – 40th period of sessions (28 April – 16 May 2008)*, A/63/44, pag. 90).

¹¹⁶⁰ *Concluding observations of the Committee against Torture: Colombia*, CAT/C/COL/CO/4 of 4 May 2010, para. 14.

¹¹⁶¹ *Ibidem*.

International Criminal Court, to investigate and punish the crime of torture with adequate sentences that take into account the seriousness of the crime. In Algeria, the Order No. 06-01, on the application of the *Charter for Peace and National Reconciliation*, established that the members of armed groups would not be prosecuted or would benefit from the attenuation of sentencing, so long as they had not committed massacres, bombings or rapes. This legislation also established that "no proceedings may be instituted individually or collectively against any of the components of the defence and security forces of the Republic for actions taken to protect persons and property, safeguard the nation and preserve the institutions of the Republic of Algeria."¹¹⁶² The Committee concluded that these provisions amounted to amnesty and "are not consistent with the obligation of every State party to conduct an impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction, to prosecute the perpetrators of such acts and to compensate the victims."¹¹⁶³ The Committee emphasized that "waivers of prosecution do not apply under any circumstance to crimes such as torture, including rape, and enforced disappearance, which are crimes to which the statute of limitations does not apply [and] that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability."¹¹⁶⁴

In its *General Comment 2* of 2008, recalling that prohibition of torture and other ill-treatment's nature as "a peremptory *jus cogens* norm," the Committee specified that "amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability."¹¹⁶⁵

¹¹⁶² Article 45 of Order No. 06-01.

¹¹⁶³ *Concluding observations of the Committee against Torture: Algeria* of 13 May 2008, para. 11 (*Report of the Committee against Torture – 39th period of sessions (5 – 23 November 2007) – 40th period of sessions (28 April – 16 May 2008)*, A/63/44, pag. 55).

¹¹⁶⁴ *Ibidem*.

¹¹⁶⁵ *General Comment 2, Implementation of Article 2 by States Parties*, para.5.

The Committee against Torture has held that, although they show relative progress, the judicial interpretations that render amnesty laws inapplicable, or that limit their scope, are not *per se* sufficient. Thus, in the case of Chile, the Committee noted that “the Chilean courts, and in particular the Supreme Court, are handing down judgements in which they rule that the Amnesty Decree-Law [...] is inapplicable, citing international human rights instruments as the legal basis for that finding.”¹¹⁶⁶ However, the Committee held that such evolution did not definitively settle the problem, insofar as the validity of the amnesty laws were still left to the national courts. The Committee urged the Chilean State to repeal the Amnesty Decree-Law. In the case of El Salvador, the Supreme Court of Justice held that, although the Amnesty Law is constitutional, the judges have the possibility to decline to apply it by deciding on specific cases and “the judge must determine in each specific case when this exception applies, through an interpretation in conformity with the Constitution”¹¹⁶⁷ and, consequently, to give way to claims for compensation. However, the Committee noted that the Amnesty Law “violates the right to an effective remedy, since it hinders the investigation and punishment of all those responsible for human rights violations and stands in the way of the right to redress, compensation and rehabilitation of the victims”¹¹⁶⁸ and urged the Salvadoran authorities to repeal this law.

On the other hand, the Committee has held that the non-adoption of amnesties and other similar measures constitutes a positive factor for States’ compliance with the obligations established under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. For example, the Committee emphasized this in its Concluding observations on Paraguay (just as the HRC did)¹¹⁶⁹ and on Venezuela.¹¹⁷⁰

¹¹⁶⁶ *Concluding observations of the Committee against Torture; Chile*, CAT/C/CHL/CO/5 of 23 June 2009, para. 12.

¹¹⁶⁷ Supreme Court of Justice of El Salvador, Judgment of 26 September 2000 (Original in Spanish, free translation).

¹¹⁶⁸ *Concluding observations of the Committee against Torture: El Salvador*, CAT/C/SLV/CO/2 of 19 November 2009, para. 15.

¹¹⁶⁹ *Concluding observations of the Committee against Torture: Paraguay*, A/52/44 of 5 May 1997, paras. 189-213.

¹¹⁷⁰ *Conclusions and recommendations of the Committee against Torture: Venezuela*, CAT/C/CR/29/2, 23 December 2002, para. 6.

c. The Committee on the Rights of the Child

In various observations on countries, the Committee on the Rights of the Child has decided on amnesties. In the case of the Democratic Republic of the Congo (DRC), the Committee found that "the Law promulgated on 7 May 2009 granting amnesty to militias in the East which excludes genocide, war crimes and crimes against humanity has already led to the release of a perpetrator of recruitment and use of child soldiers."¹¹⁷¹ The Committee urged the State to "[e]nsure that no person responsible for the recruitment and use of child soldiers which constitute a war crime under the Rome Statute of the International Criminal Court is released on the basis of the 2009 Amnesty Law."¹¹⁷²

d. The Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women has recommended in a general sense that, in situations of conflict and post-conflict, the States "[e]nsure that support for reconciliation processes do not result in blanket amnesties for any human rights violations, especially sexual violence against women and girls and ensure that such processes reinforce its efforts to combat impunity for such crimes."¹¹⁷³

e. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights has repeatedly held 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

¹¹⁷¹ *Consideration of reports submitted by States parties under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict – Concluding observations: Democratic Republic of Congo*, CRC/C/OPAC/COD/CO/1 of 7 Marcy 2012, para. 38.

¹¹⁷² *Ibid.*, para. 39

¹¹⁷³ *General Recommendation No. 30, Women in conflict prevention, conflict and post-conflict situations*, CEDAW/C/GC/30, 1 November 2013, para 81.

prohibited because they violate non-derogable rights recognized by international human rights law."¹¹⁷⁴

"[O]nce the American Convention has been ratified, it corresponds to the State to adopt all the measures to revoke the legal provisions that may contradict said treaty as established in Article 2, such as those that prevent the investigation of serious human rights violations given that it leads to the defenselessness of victims and the perpetuation of impunity and prevent the next of kin from knowing the truth."

Inter-American Court of Human Rights¹¹⁷⁵

In its first judgment on the matter, the Inter-American Court held that "in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention that adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and

¹¹⁷⁴ Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, para. 41. See *inter alia*: Judgment of November 26, 2006, *Case of La Cantuta v. Peru*, Series C No. 162; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202; Judgment of February 27, 2002, *Case of Trujillo Oroza v. Bolivia*, Series C No. 92; Judgment of August 29, 2002, *Case of the Caracazo v. Venezuela*, Series C No. 95; Judgment of July 1, 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148; Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154; Judgment of November 26, 2009, *Case of the Massacre of Dos Erres v. Guatemala*, Series C No. 211; Judgment of September 1, 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217; Judgment of November 24, 2010, *Case of Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*, Series C No. 219; Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221; and Judgment of October 25, 2012, *Case of the Massacres of El Mozote v. El Salvador*, Series C No. 252.

¹¹⁷⁵ Judgment of November 24, 2010, *Case of Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*, Series C No. 219, para. 173.

their next of kin from knowing the truth and receiving the corresponding reparation.”¹¹⁷⁶

In a later judgment, when examining the validity of an amnesty ratified through a popular referendum, the Court held that “[t]he fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law.”¹¹⁷⁷ The Court specified that “[t]he bare existence of a democratic regime does not guarantee, per se, the permanent respect of International Law, including International Law of Human Rights, and which has also been considered by the Inter-American Democratic Charter. The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention, in such a form that the existence of one true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of non-revocable norms of International Law, the protection of human rights constitutes a impassable limit to the rule of the majority, that is, to the forum of the “possible to be decided” by the majorities in the democratic instance.”¹¹⁷⁸ The Court concluded that the amnesty law was incompatible with the State’s obligations under the *American Convention on Human Rights* (articles 1, 2, 8 and 25).

In another judgment, when systematizing the development of international law and comparative law, the Court found that “all of the international organs for the protection of human rights and several high courts of the region that have had the opportunity to rule on the scope of amnesty laws regarding serious human rights violations and their compatibility with international obligations of States that issue them, have noted that these amnesty laws impact the international obligation of the State to investigate and punish said violations.”¹¹⁷⁹ The Court also specified that “the non-compatibility with the Convention includes amnesties of serious

¹¹⁷⁶ Judgment of March 14, 2001, *Case of Barrios Altos*, Op. Cit., para. 43.

¹¹⁷⁷ Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 238.

¹¹⁷⁸ *Ibid.*, para. 239.

¹¹⁷⁹ Judgment of November 24, 2010, *Case of Gomes Lund et al (“Guerrilha do Araguaia”) v. Brazil*, Series C No. 219, para. 170.

human rights violations and is not limited to those which are denominated, 'self-amnesties'. [...] The non-compatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect as they breach the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention."¹¹⁸⁰

f. The Inter-American Commission on Human Rights

The IACHR has repeatedly concluded that "the application of amnesties renders ineffective and worthless the obligations that States Parties have assumed under Article 1.1 of the Convention, and thus constitute a violation of that article and eliminate the most effective means for protecting such rights, which is to ensure the trial and punishment of the offenders."¹¹⁸¹ Likewise, the Inter-American Commission has found that "amnesty laws [...] eliminate the most effective measure for enforcing human rights, *i.e.*, the prosecution and punishment of the violators."¹¹⁸² The IACHR has repeatedly considered amnesty laws, pardons and similar measures incompatible with the States' obligations under the *American Declaration on the Rights and Duties of Man* (article XVIII, Right to Justice) and the *American Convention on Human Rights* (articles 1(1), 2, 8 and 25), when they were adopted in Peru,¹¹⁸³ Argentina,¹¹⁸⁴ Chile,¹¹⁸⁵ El Salvador,¹¹⁸⁶ Haiti,¹¹⁸⁷ Nicaragua,¹¹⁸⁸ Suriname¹¹⁸⁹ and Uruguay.¹¹⁹⁰

¹¹⁸⁰ *Ibid.*, para. 175.

¹¹⁸¹ Report No. 36/96, Case 10.843 (Chile), October 15, 1996, para. 50. See also, *inter alia*: Report No. 34/96, Cases 11.228, 11.229, 11.231 and 11.282 (Chile), October 15, 1996; Report No. 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), April 7, 1998; Report No. 136/99, Case 10.488 *Ignacio Ellacuría S.J. et al* (El Salvador), December 22, 1999; Report No. 1/99, Case 10.480, *Lucio Parada Cea et al* (El Salvador), January 27, 1999; Report No. 26/92, Case 10.287, *Massacre of Las Hojas* (El Salvador), September 24, 1992; Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), October 2, 1992; Report No. 37/00, Case 11.481, *Monsignor Oscar Arnulfo Romero y Galdámez* (El Salvador), April 13, 2000; and Report No. 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 (Uruguay), October 2, 1992.

¹¹⁸² Report No. 136/99, Case 10.488, *Ignacio Ellacuría S.J. et al* (El Salvador), December 22, 1999, para. 200.

¹¹⁸³ Report No. 1/96, Case 10.559, *Chumbivilcas* (Peru), 1 March 1996; Report No. 42/97, Case 10.521, *Angel Escobar Jurador* (Peru), 19 February 1998; Report No. 38/97, Case 10.548, *Hugo Bustos Saavedra* (Peru), of 16 October 1997; Report No.

When analyzing the amnesty in El Salvador, the IACHR held that "regardless of any necessity that the peace negotiations might pose and irrespective of purely political considerations, the very sweeping General Amnesty Law passed by El Salvador's Legislative Assembly constitutes a violation of the international obligations it undertook when it ratified the American Convention on Human Rights, because it makes possible a "reciprocal amnesty" without first acknowledging responsibility (despite the recommendations of the Truth Commission); because it applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims."¹¹⁹¹ In another case, the IACHR

43/97, Case 10.562, *Héctor Pérez Salazar* (Peru), 19 February 1998; Report No. 39/97, Case 11.233, *Martín Javier Roca Casas* (Peru), of 19 February 1998; Report No. 41/97, Case 10.491, *Estiles Ruiz Dávila* (Peru), of 19 February 1998; Report No. 19/99, Case No. 10.542, *Pastor Juscamaíta Laura* (Peru); Report No. 43/00, Case No. 10.670, *Alcides Sandoval Flores, Julio César Sandoval Flores y Abraham Sandoval Flores* (Peru), of 13 April 2000; Report No. 44/00 of 13 April 2000, Case No. 10.820, *Américo Zavala Martínez* (Peru); Report No. 45/00 of 13 April 2000, Case No. 10.826, *Manuel Mónago Carhuaricra and Eleazar Mónago Laura* (Peru); Report No. 46/00 of 13 April 2000, Case No. 10.904, *Manuel Meneses Sotacuro y Félix Inga Cuya* (Peru); and Report No. 47/00 of 13 April 2000, Case No. 10.820, *Manuel Pacotaype Chaupin, Martín Cayhualla Galindo, Marcelo Cabana Tucno and Isaías Huamán Vilca* (Peru).

¹¹⁸⁴ Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 y 10.311 (Argentina), of 2 October 1992.

¹¹⁸⁵ Report No. 36/96, Case 10.843 (Chile), of 15 October 1996, para. 105; Report No. 34/96, Cases 11.228, 11.229, 11.231 y 11.282 (Chile), of 15 October 1996, para. 104; Report No. 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 y 11.705 (Chile), of 7 April 1998, para. 101.

¹¹⁸⁶ Report No. 136/99, Case 10.488, *Ignacio Ellacuría S.J. y otros* (El Salvador), of 22 December 1999; Report No. 37/00, Case 11.481, *Monsignor Oscar Arnulfo Romero y Galdámez* (El Salvador), of 13 April 2000; Report No. 1/99, Case 10.480 *Lucio Parada Cea et al.* (El Salvador), 27 January 1999; and Report No. 26/92, Case 10.287, *Massacre of Las Hojas* (el Salvador), of 24 September 1992.

¹¹⁸⁷ Report No. 8/00 of 24 February 2000, Case 11.378 (Haiti), paras. 35 and 36; and "Statement on the Duty of the Haitian State to Investigate the Gross Violations of Human Rights Committed during the Regime of Jean-Claude Duvalier," May 17, 2011.

¹¹⁸⁸ Report No. 52/97 of 18 February 1998, Case 11.218, *Arges Sequeira Mangas* (Nicaragua).

¹¹⁸⁹ Press Release No. 038, "IACHR Expresses Concern about Amnesty Legislation in Suriname," of 13 April 2012.

¹¹⁹⁰ Report No. 29/92 of 2 October 1992, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 (Uruguay).

¹¹⁹¹ Case No. 11138, *Nazario de Jesús Gracias* (El Salvador), in *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.85, Doc. 28 rev. of February 11, 1994.

held that "El Salvador's amnesty decree, by preventing any judicial proceedings against those responsible for the murder at Las Hojas, is directly contrary to this obligation to ensure human rights by punishing those responsible for violations. The amnesty decree, as applied to military and other government personnel, also is in direct conflict with El Salvador's obligation under Article 25 of the Convention, right to judicial protection."¹¹⁹²

"In practice, the application of amnesty laws has obstructed the clarification of grave human rights violations and the prosecution and punishment of those responsible, leading to impunity. As a consequence, based on the obligations established in the inter-American system, several States in the region have had to review and invalidate the effects of their amnesty laws."

Inter-American Commission on Human Rights¹¹⁹³

Finding that the amnesty laws in Peru were applied to "acts of torture, forced disappearances, and extrajudicial executions, [which] have been considered an affront to the conscience of the hemisphere and are crimes against humanity," the IACHR recommended to the State of Peru to "repeal the amnesty law (Nº 26,479), and the law on judicial interpretation (Nº 26,492), because they are incompatible with the American Convention, and investigate, try, and punish the state agents accused of human rights violations, especially violations that amount to international crimes."¹¹⁹⁴ Likewise, the IACHR has held that "when it adopted laws 26479 and 26492, the Peruvian State unilaterally renounced its obligation to investigate and punish crimes that affect fundamental rights, [such as] the right to life, in violation of the American Convention on Human Rights"¹¹⁹⁵. Likewise, the IACHR has held that "[a]mnesty laws frustrate and run contrary to a State's obligation to investigate and punish those responsible for human rights violations whether those responsible be members of the military or civilians. The expectation of an eventual amnesty casts a blanket of impunity over the Armed Forces or any non-military perpetrator, enabling them to commit any atrocity in the name of

¹¹⁹² Report No. 26/92 of September 24, 1992, Case 10.287, *Massacre of Las Hojas (El Salvador)*.

¹¹⁹³ Press Release No. 14/10 "IACHR expresses concern about amnesty decree in Honduras," February 3, 2010.

¹¹⁹⁴ *Annual Report of the Inter-American Commission on Human Rights 1996*, OEA/Ser.L/V/II.95, Doc. 7 rev., March 14, 1997, Chapter V, Part 4, Section Peru.

¹¹⁹⁵ Report No. 1/96 of March 1, 1996, Case No.10.559, *Chumbivilcas* (Peru).

their cause, and such a climate breeds inevitable excess and contempt for the rule of law.”¹¹⁹⁶

“With respect to Peru's allegation that the amnesty laws are consistent with the Peruvian Constitution, the Commission recalls that the Peruvian State, on ratifying the American Convention on Human Rights, on July 28, 1978, contracted the obligation to respect and ensure the rights set forth in it. In this regard, and in keeping with Article 27 of the Vienna Convention on the Law of Treaties, the Peruvian State cannot invoke its internal laws as justification for failure to comply with the obligations it assumed on ratifying the American Convention on Human Rights. Over the years, this Commission has adopted reports in several key cases in which it has had the opportunity to express its point of view and crystallize its doctrine with respect to the application of amnesty laws, establishing that such laws violate several provisions of both the American Declaration and the American Convention.”
Inter-American Commission on Human Rights¹¹⁹⁷

In the case of Argentina, when examining Laws No. 23,492 and 23,521 and Decree No. 1002/89 (pardon), the IACHR concluded that this legislation was incompatible with the State's obligations under the *American Declaration of the Rights and Duties of Man* and the *American Convention on Human Rights*. The IACHR, recalling that “[i]n [criminal law] systems such as Argentina's, the victim of a crime has a fundamental right to go to the courts,”¹¹⁹⁸ held that, given that Laws No. 23,492 and 23,521 and Decree No. 1002/89 obstructed the exercise of the right to be heard by an independent and impartial court, the Argentine State – by passing and applying these laws – had “failed in its obligation to guarantee the rights” protected under article 8(1) of the *American Convention on Human Rights*. The IACHR also found that Laws No. 23,492 and 23,521 and Decree No. 1002/89 violated the obligation to guarantee the right to judicial protection, contained in article 25 of the *American Convention on Human Rights*.¹¹⁹⁹ Along these lines, and taking into account the Argentine State's obligation to respect and guarantee the rights established in the *American*

¹¹⁹⁶ Report No. 41/97 of February 19, 1998, Case No. 10.491, *Estiles Ruíz Dávila (Peru)*, para. 34.

¹¹⁹⁷ Report No. 43/00 of April 13, 2000, Case No. 10.670, *Alcides Sandoval Flores, Julio César Sandoval Flores and Abraham Sandoval Flores (Peru)*, para. 73.

¹¹⁹⁸ Report No. 28/92 of October 2, 1992, Cases No. 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), para. 34.

¹¹⁹⁹ *Ibid.*, para. 39.

Convention on Human Rights, the IACHR also held that by the “enactment of these laws and the Decree, Argentina has failed to comply with its duty under Article 1.1 and has violated rights that the Convention.”¹²⁰⁰ Based on these considerations, and taking into account that the legal effect of the enactment of the Laws and Decrees was to deprive the victims of their “right to obtain a judicial investigation in a court of criminal law to determine those responsible for the crimes committed and punish them accordingly,” the IACHR concluded that “Laws No. 23,492 and No. 23,521 and Decree no. 1002/89 are incompatible with Article XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man and Articles 1, 8 and 25 of the American Convention on Human Rights.”¹²⁰¹

“States that adopt laws whose effect is to deny judicial protection and exercise of the right to a simple and prompt recourse are violating articles 8 and 25 of the American Convention, in combination with articles 1(1) and 2 thereof. Such laws lead to the defenselessness of victims, precludes the identification of the individuals who are responsible for human rights violations and perpetuate impunity. Hence, because amnesty laws are manifestly incompatible with the American Convention, they lack legal effect and must not obstruct the investigation of serious human rights violations and the identification and punishment of those responsible.”

Inter-American Commission on Human Rights¹²⁰²

In the case of the application of the Chilean amnesty (Decree-Law 2191 of 1978) by national courts in judicial cases, the IACHR has concluded that “[t]he judgment of the Supreme Court of Chile, rendered on 28 August 1990, and its confirmation on 28 September of that year, declaring that Decree-Law 2191 was constitutional and that its enforcement by the Judiciary was mandatory although the American Convention on Human Rights had already entered into force in Chile, violates the provisions of Articles 1.1 and 2 of that Convention.”¹²⁰³

¹²⁰⁰ *Ibid.*, para. 41.

¹²⁰¹ *Ibid.*, first operative paragraph.

¹²⁰² “Statement on the Duty of the Haitian State to Investigate the Gross Violations of Human Rights Committed during the Regime of Jean-Claude Duvalier,” May 17, 2011, para. 17.

¹²⁰³ Report No. 36/96, Case No. 10.843 (Chile), October 15, 1996, para. 106; Report No. 34/96, Cases 11.228, 11.229, 11.231 and 11.282 (Chile), October 15,

Likewise, the IACHR held in a Chilean case that “[t]he judicial rulings of definitive dismissal issued in the criminal charges brought in connection with the detention and disappearance of the 70 persons in whose name the present case was initiated, not only aggravated the situation of impunity, but were also in clear violation of the right to justice pertaining to the families of the victims in seeking to identify the authors of those acts, to establish the corresponding responsibilities and penalties, and to obtain legal satisfaction from them.”¹²⁰⁴ In this same vein, in another Chilean case, the IACHR specified that “the judicial decisions ruling the dismissal of criminal proceedings initiated concerning the detention, forced disappearance, torture and extrajudicial execution of Carmelo Soria Espinoza, in whose name this case was instigated, not only aggravate the situation of impunity, but also violate the victim’s family’s right to justice for the purpose of identifying the perpetrators of these crimes, establishing responsibility, imposing the corresponding punishment and providing judicial reparation.”¹²⁰⁵ The IACHR concluded that the judicial application of the Chilean amnesty law violated articles 1, 2, 8 and 25 of the *American Convention on Human Rights*.

In the case of Uruguay (Law No. 15,848 of 22 December 1986, on Expiry of the State’s Punitive Power), the IACHR held that “Article 2 stipulates that the States Parties are obliged to adopt “such legislative or other measures as may be necessary to give effect to those rights or freedoms” (Article 2). *A fortiori*, a country cannot by internal legislation evade its international obligations [,] [...] even domestic laws which allegedly abrogate or violate rights and freedoms embodied therein.”¹²⁰⁶ The IACHR found that the amnesty law “has the intended effect of dismissing all criminal proceedings involving past human rights violations. With that, the law eliminates

1996, para. 105; and Report No. 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), April 7, 1998, para. 102.

¹²⁰⁴ Report No. 36/96, Case No. 10.843 (Chile), October 15, 1996, para. 107. In the same vein, see: Report No. 34/96, Cases 11.228, 11.229, 11.231 y 11.282 (Chile), October 15, 1996, para. 106; and Report No. 25/98, Cases Nos. 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), April 7, 1998, para. 103.

¹²⁰⁵ Report No. 133/99 of November 19, 1999, Case 11.725, *Carmelo Soria Espinoza (Chile)*, para. 155.

¹²⁰⁶ Report No. 29/92 of October 2, 1992, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 y 10.375 (Uruguay), para. 32.

any judicial possibility of a serious and impartial investigation designed to establish the crimes denounced and to identify their authors, accomplices, and accessories after the fact.”¹²⁰⁷ The IACHR also recalled “the nature and gravity of the events with which the law concerns itself; alleged disappearances of persons and the abduction of minors, among others, have been widely condemned as a particularly grave violation of human rights.”¹²⁰⁸ The IACHR concluded, “Law 15,848 of December 22, 1986, is incompatible with Article XVIII (Right to a Fair Trial) of the American Declaration of the Rights and Duties of Man, and Articles 1, 8 and 25 of the American Convention on Human Rights.”¹²⁰⁹

The IACHR has also held that amnesty laws drafted in an ambiguous way and in confusing terms that allow these laws to be applied to grave human rights violations are incompatible with the States’ obligations under the *American Convention on Human Rights*.¹²¹⁰

g. Other systems for the protection of human rights

In several cases related to Turkey, the European Court of Human Rights has considered that, as regards the right to an effective remedy, it is of the utmost importance that amnesties or pardons are not granted in the criminal proceedings and judgments about crimes such as torture.¹²¹¹ Likewise, the European Court has considered that amnesties and similar measures are generally incompatible with the obligation of the State to investigate grave human rights violations and fight impunity for international crimes.¹²¹²

¹²⁰⁷ *Ibid.*, para. 35.

¹²⁰⁸ *Ibid.*, para. 38.

¹²⁰⁹ *Ibid.*, first operative paragraph.

¹²¹⁰ Press Release No. 14/10 “IACHR expresses concern about amnesty decree in Honduras,” February 3, 2010 and “Preliminary observations of the Inter-American Commission on Human Rights on its visit to Honduras, May 15 to 18, 2010,” OEA/Ser.L/V/II. Doc. 68 of June 3, 2010, paras. 106 *et seq.*

¹²¹¹ Judgment of 2 November 2004, Application No. 32446/96, Case of *Abdülşamet Yaman v. Turkey*, para. 55; 2 Judgment of 17 October 2006, Application No. 52067/99, Case of *Okkalı v. Turkey*, para. 76; and Judgment of 5 June 2007, Application No. 34738/04, Case of *Yeşil and Sevim v. Turkey*, para. 38.

¹²¹² Judgment of 2 November 2004, Application No. 32446/96, Case of *Abdülşamet Yaman v. Turkey*; Judgment of 17 March 2009, Application No. 13113/03, Case of *Ould Dah v. France*; and Judgment of 24 May 2011, Application No. 33810/07 and 18817/08, Case of Association “21 December 1989” and others v. Romania.

In a case regarding a former commander of the Croatian Armed Forces convicted in 2007 for war crimes committed against civilians in 1991 and who had benefitted from an amnesty for some of these crimes in 1997, the First Chamber of the European Court found that, in accordance with the evolution of international law, amnesties are generally incompatible with the obligations of the State to investigate acts of torture and prosecute its authors, and that they cannot benefit from legal measures of impunity.¹²¹³ The Court also held that "[g]ranting amnesty in respect of 'international crimes' – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law. This understanding is drawn from customary rules of international humanitarian law, human rights treaties, as well as the decisions of international and regional courts and developing State practice, as there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by Governments."¹²¹⁴ In its judgment of 22 May 2014, the Grand Chamber of the European Court confirmed this decision.

The African Commission on Human and Peoples' Rights has considered that amnesty laws in cases of grave human rights violations are incompatible with international human rights obligations and may not protect the State that adopts them from compliance with these obligations. In a case regarding the application of an amnesty law in Mauritania that impeded investigations and criminal proceedings for gross human rights violations, as well as suits to obtain reparations, the Commission considered that such legislation was incompatible with the State's international obligations.¹²¹⁵ Likewise, in a case regarding Zimbabwe, the Commission held that by enacting measures that prohibit the prosecution of the perpetrators of grave human rights violations the States promote impunity, foreclose the possibility that these crimes are investigated and deny the victims of their

¹²¹³ Judgment of 13 November 2012, Application No. 4455/10, Case of *Marguš v. Croatia*.

¹²¹⁴ *Ibid.*, para. 74.

¹²¹⁵ Judgment of 11 May 2000, Communications No. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, Case of the *Malawi African Association and Others v. Mauritania*.

right to an effective remedy and to obtain reparation.¹²¹⁶ In another case, regarding Côte d'Ivoire, the Commission concluded that coherent international jurisprudence suggests that the prohibition of enacting amnesties that entail impunity for grave human rights violations has become a norm of customary international law.¹²¹⁷

5. Case law of international criminal tribunals

International case law has confirmed the inapplicability of amnesties or analogous measures in cases of gross human rights violations, war crimes and crimes against humanity. Thus, in its judgment in the case of *The Prosecutor v. Anto Furundzija*, the International Criminal Tribunal for the former Yugoslavia recalled that: "[t]he 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 delegitimise any legislative, administrative or judicial act authorising 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 authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition."¹²¹⁸

The Appeals Chamber of the Special Court for Sierra Leone has held that it is "a crystallized norm of international law that a government cannot grant amnesty for serious crimes under international law"¹²¹⁹. It is worth emphasizing that the *Statute of the Special Court for Sierra Leone* stipulates in its article 10 that no amnesty may block the prosecution of crimes under its

¹²¹⁶ Judgment of 21 May 2006, Communication No. 245/02, Case of *Zimbabwe Human Rights NGO Forum v. Zimbabwe*.

¹²¹⁷ Judgment of July 2008, Communication No. 246/02, Case of *Mouvement ivoirien des droits humains (MIDH) v. Côte d'Ivoire*, para. 91.

¹²¹⁸ Judgment of 10 December 1998, *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T 10, para. 155.

¹²¹⁹ Appeals Chamber of the Special Court for Sierra Leone, Decision on preliminary motion on jurisdiction, 25 May 2004, *The Prosecutor v. Moinina Fofana*, Case No. SCSL-2004-14-AR72 (e), operative paragraph 3.

jurisdiction, *i.e.* crimes against humanity, violations of Common Article 3 of the Geneva Conventions and Additional Protocol II, and other serious breaches of international humanitarian law. In several judgments, the Special Court has considered that amnesty laws are not applicable to serious international crimes.¹²²⁰

The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea have held that granting amnesties for genocide, torture and serious breaches of the Geneva Conventions, without any type of prosecution or punishment, constitutes a violation of the obligations established under the *Convention for the Prevention and Punishment of the Crime of Genocide*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the Geneva Conventions of 1949.¹²²¹ Likewise, the Extraordinary Chambers considered that the granting of amnesties, which implied absolving and forgetting the crimes against humanity that were committed, constitutes a violation of the obligations established under the ICCPR, to prosecute and punish the perpetrators and provide effective remedies to the victims.

6. Internal armed conflicts and amnesties and other similar measures

Some have attempted to justify amnesties and other similar measures granted to the perpetrators of gross human rights violations and graves breaches of international humanitarian law, committed during internal armed conflicts, by citing provisions of the *Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*. Certainly, article 6(5) of Protocol II establishes the possibility that upon the “cessation of hostilities” the broadest possible amnesty is granted to “persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

¹²²⁰ See: Judgment of 25 May 2004, *The Prosecutor v. Gbao*, Case No. SCSL-04-15-PT-141; Judgment of 2 March 2009, *The Prosecutor v. Sesay, Callon and Gbao*, Case No. SCSL-04-15-T; and Judgment of April 2009, *The Prosecutor v. Sesay, Callon and Gbao*, Case No. SCSL-04-15-T.

¹²²¹ Judgment of 11 April 2011, Case No. 002/19 09-2007-ECCC/OCIJ (PTC75).

Nonetheless, these amnesties cannot cover war crimes, crimes against humanity, genocide and gross human rights violations, such as arbitrary killings, torture and enforced disappearances. It is worth recalling that this restrictive interpretation of the scope of article 6(5) of Protocol II was defended by various States during the adoption of the treaty.¹²²² Likewise, the International Committee of the Red Cross (ICRC) has specified that the possibility of granting amnesties, foreseen in article 6(5) of Protocol II, does not cover war crimes, crimes against humanity and other gross human rights violations. Thus, the ICRC has indicated that “[t]he preparatory works for Article 6(5) indicate that this precept has the purpose of encouraging amnesty [...] as a sort of liberation at the end of hostilities for those who were detained or sanctioned for the mere fact of having participated in the hostilities. It does not claim to be an amnesty for those who have violated international humanitarian 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.”

International Committee of the Red Cross¹²²³

The ICRC has indicated that amnesties adopted at the end of internal armed conflicts that, invoking article 6(5) of Protocol II, seek to benefit the alleged perpetrators of war crimes, “would also be incompatible with the rule obliging States to investigate and prosecute persons suspected of having committed war crimes in non-international armed conflicts.”¹²²⁴ This interpretation about the restrictive scope of article 6(5) of Protocol II has also been reaffirmed by the UN Security Council.¹²²⁵ Likewise, the international human rights courts and bodies have decided in the same way.

The HRC has considered that amnesties granted for acts committed during the course of armed conflicts, and that

¹²²² *Customary International Humanitarian Law, Volume I: Rules*, Op. Cit., p. 611 *et seq.*

¹²²³ *Ibid.*, p. 611.

¹²²⁴ *Ibid.*, p. 612.

¹²²⁵ See, for example, Resolutions No. S/RES/1120 (Croatia), S/RES/1315 (Sierra Leone) No. S/RES/1464 (2003) (Côte d’Ivoire) of 4 February 2003.

constitute gross human rights violations, are not compatible with the obligations established under the ICCPR. The HRC has said the same regarding the amnesties in El Salvador, the Democratic Republic of Congo, Croatia, and Lebanon, among others. In the case of the Lebanese amnesty granted to civil and military personnel for human rights violations committed against civilians during the course of the civil war, the HRC recalled that "such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy."¹²²⁶ The HRC, when examining the 1996 amnesty law in the Republic of Croatia, when contained a vague exception for "war crimes" in the scope of its application, expressed its concern regarding the danger that this rule might be interpreted in such a way as to allow impunity for the perpetrators of gross human rights violations. The HRC recommended that Croatian authorities adopt the measures in order to ensure that the amnesty law would not be interpreted and utilized to guarantee impunity for the perpetrators of gross violations of human rights.¹²²⁷

For its part, the IACHR rejected the argument advanced by the Government of El Salvador, according to which the amnesty approved by its Legislative Assembly could be justified by the provisions of Additional Protocol II to the Geneva Conventions. The IACHR warned that "the Protocol cannot be interpreted to cover violations of fundamental rights set forth in the American Convention on Human Rights."¹²²⁸

The Inter-American Court of Human Rights has held that "[a]ccording to the international humanitarian law [established in article 6(5) of Additional Protocol II] applicable to these situations [of internal armed conflict], the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts are

¹²²⁶ UN Doc. CCPR/C/79/Add.78, para. 12.

¹²²⁷ *Concluding Observations of the Human Rights Committee: Croatia*, CCPR/CO/71/HRV, of 4 April 2001, para. 11.

¹²²⁸ Case No. 11138, *Nazario de Jesús Gracias (El Salvador)*, in *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.85, Doc. 28 rev., February 11, 1994. In this same vein, see Report No. 1/99, Case 10.480, *Lucio Parada Cea et al* (El Salvador), January 27, 1999, para. 115.

sometimes justified top are the way to a return to peace.”¹²²⁹ However, the Court emphasized that “this norm [in article 6(5) of Additional Protocol II] is not absolute, because, under international humanitarian law, States also have an obligation to investigate and prosecute war crimes [... and thus] article 6(5) of Additional Protocol II refers to extensive amnesties in relation to those who have taken part in the non-international armed conflict or who are deprived of liberty for reasons related to the armed conflict, provided that this does not involve facts, such as those of the instant case, that can be categorized as war crimes, and even crimes against humanity.”¹²³⁰ The Court concluded that an amnesty – such as the *Law of General Amnesty for the Consolidation of Peace* in El Salvador – that “has resulted in the installation and perpetuation of a situation of impunity owing the absence of investigation pursuit capture, prosecution and punishment of those responsible” for war crimes or crimes against humanity, is incompatible with articles 1 and 2 of the *American Convention on Human Rights*.¹²³¹ Likewise, the Court concluded that the provisions of such an amnesty “that prevent the investigation and punishment of the grave human rights violations [...] lack legal effects and, consequently, cannot continue to represent an obstacle to the investigation of the facts of this case and the identification, prosecution and punishment of those responsible, and they cannot have the same or a similar impact in other cases of grave violations of the human rights recognized in the American Convention that may have occurred during the armed conflict in El Salvador.”¹²³²

The European Court of Human Rights has also considered that the amnesties foreseen under article 6(5) of Protocol II are not applicable to gross human rights violations.¹²³³

7. Legal developments in Latin America

Numerous countries from different regions of the world have incorporated express prohibitions of granting amnesties in cases of

¹²²⁹ Judgment of October 25, 2012, *Case of the Massacres of El Mozote v. El Salvador*, Series C No. 252, para. 285.

¹²³⁰ *Ibid.*, para. 286.

¹²³¹ *Ibid.*, para. 296.

¹²³² *Ibidem*.

¹²³³ Judgment of 27 May 2014, Application No. 4455/10, *Case of Marguš v. Croatia*, para. 131.

crimes against humanity, war crimes, genocide and gross human rights violations in their constitutions or their legislation. Thus, for example, it is worth highlighting the Constitution of Ethiopia¹²³⁴ and the Prevention and Prohibition of Torture Act of Uganda.¹²³⁵ In the Americas region it is worth highlighting: Colombia,¹²³⁶ Ecuador,¹²³⁷ Panama,¹²³⁸ the Bolivarian Republic of Venezuela¹²³⁹ and Uruguay.¹²⁴⁰

In Argentina, through Law No. 24,942 of 25 March 1998, Congress repealed the amnesty laws (Laws No. 23,492, "Full Stop Law" of 12 December 1986, and No. 23,521, "Law of Due Obedience" of 4 June 1987). Subsequently, through Law No. 25,779 of 21 August 2003, Congress permanently annulled the "Full Stop" and "Due Obedience" laws.

In various cases, amnesty laws expressly exclude gross human rights violations and crimes under international law from the scope

¹²³⁴ Article 28 of the Constitution of 1994 prohibits amnesties for genocide, extrajudicial executions, enforced disappearance and torture.

¹²³⁵ Article 23 of the *Prevention and Prohibition of Torture Act* (of 18 September 2012) prohibits the granting of amnesties to persons accused of the crime of torture.

¹²³⁶ Article 14 of Law No. 589 of 2000 prohibits amnesties and pardon for the crimes of enforced disappearance, genocide, torture and enforced displacement of populations; Law No. 14 of 1993, "National Statute against Kidnapping," prohibits the granting of amnesty, pardons or cessation or proceedings for the crime of kidnapping; and Law No. 782 of 2002 expressly excludes from the scope benefits from pardons "those who undertake conduct constituting atrocious acts of ferocity or barbarity, terrorism, kidnapping, genocide, homicide committed outside of combat or placing a victim in a state of defenselessness."

¹²³⁷ Article 23 of the Constitution of 1998 prohibits amnesties and pardons for genocide, torture, enforced disappearance of persons, kidnapping and "homicide for political reasons." The Constitution was modified in 2011, and article 80 of the new constitutional text prohibits amnesties for "crimes of genocide, against humanity, war crimes, enforced disappearance of persons [...]"

¹²³⁸ Article 115 of the Criminal Code of 2007 prohibits the granting of amnesties or pardons for crimes against humanity and the crime of enforced disappearance.

¹²³⁹ The article of the Constitution of 1998 establishes that "crimes against human rights" and crimes against humanity "are excluded from the benefits that may entail impunity, including pardons and amnesty"; and the Law partially reforming the Criminal Code of 2000 prohibits the enactment of amnesty and pardon to the perpetrators of the crime of enforced disappearance.

¹²⁴⁰ Article 8 of Law No. 18.026 of 25 September 2006 establishes that amnesties, pardons or "any other institution of clemency" cannot be applied for crimes against humanity, war crimes, genocide, "political homicide," enforced disappearance, torture, "grave deprivation of liberty," and "sexual aggression against a person deprived of liberty."

of their application. For example, it is worth mentioning: Guatemala,¹²⁴¹ Côte d'Ivoire,¹²⁴² the Salomon Islands,¹²⁴³ Poland,¹²⁴⁴ the Bolivarian Republic of Venezuela¹²⁴⁵ and the Democratic Republic of Congo.¹²⁴⁶

Also, in Latin America, national courts and tribunals have annulled amnesty laws, or have left them without legal effects, for gross human rights violations.

In Peru, the first judicial precedent of non-application of the amnesty (Law No. 26479, published 15 June 1995) was registered the day after its publication. On 16 June 1995, invoking the powers of diffuse constitutional control (article 138 of the Constitution), the Specialized Criminal Judge No. 16 of Lima, in charge of carrying out the criminal proceedings initiated against the "Colina" paramilitary group for the extrajudicial execution of 15 persons in Barrios Altos, issued a judicial resolution declaring article 1 of Law No. 26479 inapplicable to the case.¹²⁴⁷ In her Resolution, the Judge would invoke the Peruvian State's obligations under the *Universal Declaration of Human Rights*, the *American Convention on Human Rights*, and the *American Declaration on the Rights and Duties of Man*, as well as the constitutional duty to protect human rights. The Judge indicated

¹²⁴¹ The Law for National Reconciliation of 1996 establishes that the amnesty shall not be able to be applied to extinguish criminal responsibility for the crimes of genocide, torture and enforced disappearance, nor for those crimes that are not subject to statutes of limitation in accordance with international treaties ratified by Guatemala.

¹²⁴² The Amnesty Law No. 2003-309 of 8 August 2003 excluded the application of amnesty from gross human rights violations, crimes against humanity, war crimes and genocide.

¹²⁴³ The 2001 Amnesty law establishes that the amnesty "is not applicable to any criminal act committed in violations of the norms of international humanitarian law, violations of human rights or abuses."

¹²⁴⁴ The Law of December 1998, relating to the amnesties approved before 7 December 1989, stipulates that these amnesties shall not be applied for war crimes or crimes against humanity, among other crimes.

¹²⁴⁵ The General Political Amnesty Law, of 17 April 2000, expressly excluded "crimes against humanity, gross human rights violations and war crimes" (article 4) from its scope of its application.

¹²⁴⁶ Law No. 14/006 relating to amnesty for acts of insurrection, acts of war and political infractions, of 11 February 2014, excludes crimes against humanity, genocide, war crimes, torture and other gross human rights violations from the amnesty's scope of application (artículo 4).

¹²⁴⁷ Judgment of 16 June 1995, Case File No. 93-95 (Original in Spanish, free translation).

that the amnesty law “is incompatible with the aforementioned constitutional norms and international treaty norms, insofar as under the first article, point one, of the American Convention it is established that the States parties – among them Peru – have the obligation to investigate human rights violations and punish those responsible; principles and norms from which the Peruvian State is not isolated and that are contravened by the cited legal provision, because they show contempt for rights that the text of the Constitution itself enshrines.”

However, on 2 July 1995, Law No. 26492 would be published, ordering that “the general amnesty [Law No. 26479] that is granted is of mandatory application by the courts of jurisdiction and reaches all facts derived from or arising from the occasion or consequences of the fight against terrorism, committed individually or in groups between the month of May 1980 and the 14th of June, 1995, without regard to whether military, police or civil personnel were involved, whether or not reported, investigated, subject to criminal proceedings or convicted; and definitively closing and archiving all judicial proceedings currently underway.”¹²⁴⁸ Based on this provision, the Superior Court of Lima would overturn and declare null and void the Resolution, issued by the Specialized Criminal Judge No. 16 of Lima, for non-application of the amnesty.¹²⁴⁹ The Superior Court would declare the application of Law No. 26479 and the closure of archiving of the case, and annul the “police, judicial or criminal records” of the accused.

Based on the judgment of the Inter-American Court of Human Rights in the case of *Barrios Altos*, the Constitutional Tribunal would issue two important judgments in the Case of Santiago Martín Rivas. In the first judgment in 2005, resolving an extraordinary remedy, the Constitutional Tribunal held that “the obligation of the State to investigate the facts and punish those responsible for the human rights violation declared in the Judgment of the Inter-American Court of Human Rights does not only include overturning the proceedings wherein the amnesty laws were applied [...], after having declared that these laws do not have legal effects, but also every practice aimed at preventing

¹²⁴⁸ Article 3 of Law No. 26492.

¹²⁴⁹ Judgment of 14 July 1995, Case File 424-95 (Original in Spanish, free translation).

investigation and punishment for the violation of the rights to life and personal integrity.”¹²⁵⁰

In its second judgment on the same case, resolving a remedy for constitutional complaints (*recurso de agravio constitucional*), the Constitutional Tribunal established that “[t]he obligations assumed by the Peruvian State with the ratification of the human rights treaties include the duty to guarantee those rights that, in accordance with International Law, are non-derogable and with respect to which the State has internationally obligated itself to punish breaches of the same. In attention to the mandate contained in the [...] Code of Constitutional Procedure, we refer to the treaties that have crystallized the absolute prohibition of those crimes that, in accordance with International Law, may not be subject to amnesties, insofar as they violate both the minimum standards of protection of the dignity of the human person.”¹²⁵¹ The Tribunal held that “the amnesty laws constitute a legal-constitutional competence of the Congress of the Republic, in such a way that the judicial resolutions that are issued in application of the constitutionally legitimate amnesty laws give way to the configuration of constitutional *res judicata* (*cosa juzgada constitucional*). The control of the amnesty laws, however, starts with the presumption that the criminal legislator has wanted to act within the framework of the Constitution and the respect of fundamental rights. [...] [Said presumption] does not operate when it is established that through the exercise of competence to enact amnesty laws, the criminal legislator sought to cover the commission of crimes against humanity. Nor is it when the exercise of said competence was used to ‘guarantee’ impunity for grave human rights violations.”¹²⁵² The Tribunal concluded that “the amnesty laws [in question] are null and void and lack, *ab initio*, legal effects. Therefore, the judicial resolutions issued with the purpose of guaranteeing impunity for the violations of human rights by [state agents] are also void.”¹²⁵³

¹²⁵⁰ Judgment of November 29, 2005, *Caso Santiago Martín Rivas, Recurso extraordinario*, Case File No. 4587-2004-AA/TC, para. 63. (Original in Spanish, free translation).

¹²⁵¹ Judgment of March 2, 2007, *Caso Santiago Martín Rivas, Recurso de agravio constitucional*, Case File No. 679-2005-PA/TC, para. 30. (Original in Spanish, free translation).

¹²⁵² *Ibid.*, paras. 52 and 53 (Original in Spanish, free translation).

¹²⁵³ *Ibid.*, para. 60 (Original in Spanish, free translation).

In Argentina, although the amnesty laws ("Full Stop" and "Due Obedience") had been repealed by Congress in 1998, their legal effects remained relatively untouched. In effect, a draft law repealed and declared null and void the "Full Stop" and "Due Obedience" laws. However, in the text that was finally adopted, the references to the invalidity of both laws were removed and the text only referred to their repeal. This was interpreted to mean that Law No. 24,942 had not voided the legal effects of the "Full Stop" and "Due Obedience" laws and that it was only possible to reopen judicial proceedings for humanitarian reasons (to clarify the fate and whereabouts of the disappeared), but not for criminal proceedings to prosecute the crimes that were committed. This interpretation guaranteed impunity.

Although in August 2003 the Congress through Law No. 25,779 cleared up the situation, declaring the irremediable nullity of the "Full Stop" and "Due Obedience" laws, in the meantime the Argentine justice system would rule the laws were invalid. In June 2001, in a case of enforced disappearance and abduction of children,¹²⁵⁴ the Federal Judge Gabriel Cavallo ruled that the main provisions of the "Full Stop" and "Due Obedience" laws were unconstitutional and absolutely null and void.¹²⁵⁵ The Federal Judge specified that "the criminal acts that are undertaken in the exercise of the total power prohibited by Art. 29 of the National Constitution are not eligible for the benefits of an amnesty law or any other analogous measure."¹²⁵⁶ The Federal Judge concluded that both amnesty laws were "incompatible with the American Convention of Human Rights (arts. 1, 2, 8 and 25), with the American Declaration on Human Rights (art. XVIII), with the International Covenant on Civil and Political Rights (arts. 2 and 9), and with the object and purpose of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

¹²⁵⁴ The proceedings arose out of the requirement for formal indictment and movement of the criminal complaint, filed on 20 April 1998 by the Federal Prosecutor Horacio Comparatore, for the enforced disappearance of the husband and wife José Liborio Poblete Roa and Gertrudis Marta Hlaczick and of their daughter Claudia Victoria Poblete, on 28 November 1978 (Original in Spanish, free translation).

¹²⁵⁵ Resolution of 6 March 2001 of the National Judge No. 4 for Federal Criminal Criminal and Correctional Matters, Case File No. 8686/2000, "*Simón, Julio, Del Cerro, Juan – re abduction of children under 10 years of age* (Original in Spanish, free translation).

¹²⁵⁶ *Ibidem* (Original in Spanish, free translation).

(art. 18 of the Vienna Convention on the Law of Treaties)” and, therefore, unconstitutional and tainted by “irremediable nullity.”¹²⁵⁷

The Federal Judge’s judgment was appealed and Chamber II of the National Criminal and Federal Correctional Chamber (*Sala II de la Cámara Nacional en lo Criminal y Correccional Federal*) upheld the holding in the trial court judgment, in November of the same year.¹²⁵⁸ This second judgment was challenged and the case made it to the Supreme Court of Justice of the Nation of Argentina (*Corte Suprema de Justicia de la Nación de Argentina*). In 2005, the Supreme Court declared the “Full Stop” and “Due Obedience” laws unconstitutional and left them without legal effects, finding that they were a legal obstacle to the investigation of grave human rights violations and to the prosecution and punishment of the perpetrators.¹²⁵⁹ The Court held that “insofar as [the amnesties] were oriented toward ‘forgetting’ grave human rights violations, they were opposed to the provisions of the American Convention on Human Rights and the International Covenant on Civil and Political Rights and, therefore, they are constitutionally intolerable.”¹²⁶⁰ Likewise, the Court considered that by hindering the clarification and effect punishment of violations of human rights recognized in international treaties, the amnesty laws “impede compliance with the duty to guarantee that the Argentine State has committed to uphold, and are inadmissible.”¹²⁶¹ The Supreme Court held that “any regulation in domestic law that, invoking reasons of ‘pacification,’ orders providing any type of amnesty to allow impunity for serious violations of human rights perpetrated by the regime that the provision benefits, runs contrary to clear and mandatory provisions of international law and must be effectively abolished.”¹²⁶² The Court concluded that “in

¹²⁵⁷ *Ibid.*, operative paragraphs I, II and III (Original in Spanish, free translation).

¹²⁵⁸ See in this regard: *Argentina - Memorial en Derecho Amicus Curiae sobre la incompatibilidad de las leyes de Punto final y de Obediencia debida presentado por la Comisión Internacional de Juristas, Amnistía Internacional y Human Rights Watch ante la Cámara Nacional en lo Criminal y Correccional Federal de la República Argentina (1 de junio de 2001)*, ed. International Commission of Jurists, Serie documentos ocasionales, Geneva, 2001 (Original in Spanish, free translation).

¹²⁵⁹ Resolution of 14 June 2005, *Caso Simón, Julio Héctor y otros re illegitimate deprivation of liberty, etc.*, Case file No. 17.768, considering paragraph 31 (Original in Spanish, free translation).

¹²⁶⁰ *Ibid.*, considering paragraph 26 (Original in Spanish, free translation).

¹²⁶¹ *Ibid.*, considering paragraph 25 (Original in Spanish, free translation).

¹²⁶² *Ibid.*, considering paragraph 26 (Original in Spanish, free translation).

order to comply with international human rights treaties, the abolition of [amnesty] laws is of the utmost urgency, and must occur in such a way that from it, there can be no legal obstacle to the prosecution of crimes such as those that are the object of the instant case. This means that those who were benefitted by such laws may not invoke the prohibition of retroactivity of more severe criminal laws, nor the principle of *res judicata*.”¹²⁶³ Likewise, the Court considered that Law No. 25,779 was valid, insofar as through it Congress had sought to correct the serious breach of international human rights law, complying with the obligations assumed through international human rights treaties.

In Chile, the applicability of the amnesty (Decree Law No. 2191 of 1978) was initially resolved by the Court of Appeals of Santiago in several cases, starting in the mid-1990s. For example, in the case of abduction, torture and homicide of Lumi Videla Moya in 1974 by Osvaldo Romo Mena – a former agent of the National Intelligence Directorate (*Dirección de Inteligencia Nacional – DINA*) who invoked the statute of limitations for criminal proceedings and the application of the amnesty – the Court of Appeals held in 1994 that the crimes of which he was accused were serious breaches of the Geneva Conventions of 1949 (Common Article 3) or war crimes, insofar as at the time the crimes were committed a state of siege¹²⁶⁴ had been declared by the State, and the regulations of the Code of Military Justice, relative to times of armed conflict, were being applied.¹²⁶⁵

The Court recalled that, under international law, war crimes are not subject to statutes of limitations and are not subject to amnesty. It also established that “[t]he attempt by a State to alter the criminal condition and the resulting responsibility for the acts that violate the laws of war and the rights of individuals during it, is beyond the State’s jurisdiction, as it is a party to the Geneva Conventions on humanitarian law. It would be worse still if with this the State sought to cover up criminal responsibility not only of individuals, but also of State agents of public officials, which would constitute a situation of self-acquittal that is repugnant to any

¹²⁶³ *Ibid.*, considering paragraph 31 (Original in Spanish, free translation).

¹²⁶⁴ Decree Law No. 640 of 10 September 1974 (Original in Spanish, free translation).

¹²⁶⁵ Resolution of 26 September 1994, Case File No. 13.597-94, *Case Lumi Videla* (Original in Spanish, free translation).

legal notion based on the respect of human rights and respect of customary and treaty-based international human rights law, together with a violations of the basic values and principles of our constitutional order.”¹²⁶⁶

Likewise, citing the ICCPR, the Court indicated, “amnesty may not be invoked to prevent the punishment of individuals or State agents who, in spite of their duty to protect and guarantee the life and physical and mental integrity of individuals, have acted to violate such rights. To this we must add the principle that legal rules must be interpreted in the way that best furthers the protection of rights. Therefore, the exceptions should always be considered narrowly.”¹²⁶⁷ The Court invoked the obligation to investigate under the *American Convention on Human Rights* and the non-derogable nature of the rights to justice and to an effective remedy, and ordered to continue criminal proceedings against Osvaldo Romo Mena.

In another case regarding Osvaldo Romo Mena – the enforced disappearance of Bárbara Uribe Tamblay and Edwin Francisco Van Yurick Altamirano – the Court of Appeals of Santiago held that the nature of abduction as a permanent crime, and the absence of evidence of the death of the victims prevented the application of amnesty to the case.¹²⁶⁸ Likewise, the Court reiterated that the facts of the case constituted war crimes, insofar as at the time in which the crimes were committed there was a state of siege and wartime legislation was being applied regarding the military justice system. Thus, the Court ordered to continue criminal proceedings against Osvaldo Romo Mena.

In both cases the judgments of the Court of Appeals would be challenged before the Supreme Court of Justice. The highest Chilean court would depart from the holdings of the Court of Appeals, leaving the appellate decisions without legal effects, and would apply the amnesty.¹²⁶⁹ In both cases, the Supreme Court

¹²⁶⁶ *Ibid.*, considering paragraph No. 12 (Original in Spanish, free translation).

¹²⁶⁷ *Ibid.*, considering paragraph No. 15 (Original in Spanish, free translation).

¹²⁶⁸ Resolution of 30 September 1994, Case File No. 38.683-94, *Case Bárbara Uribe Tamblay y Edwin Francisco Van Yurick Altamirano* (Original in Spanish, free translation).

¹²⁶⁹ Judgment of 25 October 1995, Case File No. 5.566, *Case Bárbara Uribe Tamblay y Edwin Francisco Van Yurick Altamirano*, and Judgment of 30 January 1996, Case File No. 5.476-94, *Case Lumi Videla* (Original in Spanish, free translation).

would find that the facts did not constitute war crimes, because they did not happen during an armed conflict, and therefore the amnesty law was applicable. Paradoxically, even though the Supreme Court rejected the applicability of Protocol II to the Geneva Conventions, it invoked article 6(5) of the Protocol, which allows "at the end of hostilities," that the authorities in power "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." Consequently, the Supreme Court ordered the definitive dismissal of the proceedings against the defendant.

The Supreme Court would systematically reject the legal arguments of the Court of Appeals of Santiago.¹²⁷⁰ In one case in which the Court of Appeals would consider that the material facts were crimes against humanity and thus were not subject to amnesty or statutes of limitations under international law, the Supreme Court held that the amnesty "the power to enact laws of this nature arises from the legitimate exercise of sovereignty."¹²⁷¹

Nonetheless, starting in the middle of the decade of the 2000s, the Supreme Court would substantially change its position. Thus, in 2004, in the case of Miguel Ángel Sandoval Rodríguez – disappeared by members of the Army and Military Police (*Cuerpo de Carabineros*) – the Supreme Court of Justice considered that, in cases of enforced disappearances, the application of Decree Law No. 2191 of 1978 could only cover a certain period of time and not the whole duration of the enforced disappearance and its effects.¹²⁷² The Court held that "although the Decree Law [...] has expressly stated that crimes committed between 11 September

¹²⁷⁰ See Judgments of the Supreme Court: Case File No. 31.200, enforced disappearance of Alfonso Chanfreau Oyarce; Case File No. 33.035, enforced disappearance of Nicomedes Toro Bravo; Case File No. 2.539, enforced disappearance of Mauricio Jorquera Encina; Case File No. 263, enforced disappearance of José Herrera Cofré; Case File No. 33.696, death of Eulogio Fritz Monsalve; Case File No. 2.538, illegal detention, inter alia, of Rodrigo González Pérez; Case File No. 972, illegal detention of Mónica Llanca Iturra; and Case File No. 469-98, enforced disappearance of Pedro Enrique Poblete Córdova (Original in Spanish, free translation).

¹²⁷¹ Judgment of 9 September 1998, Case File No. 469-98, *Case of Pedro Enrique Poblete Córdova* (Original in Spanish, free translation).

¹²⁷² Judgment of 17 November 2004, Case File No. 517-2004, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepúlveda et al.)* (Original in Spanish, free translation).

1973 and 10 March 1978 are granted amnesty, the crime in the instance case began to be perpetrated on 7 January 1975[...], and there is certainty that on 10 March 1978, the date of the expiry of the deadline contemplated by article 1 of the D.L. 2191, Sandoval Rodríguez had not appeared and there was no news of him, or the place where his remains could be found, in the event his death had occurred [...], which renders the alleged amnesty inapplicable, since the abduction continued to be perpetrated once the time period covered by the grounds for the expiration of criminal responsibility had ended."¹²⁷³ Likewise, the Court specified that "the State of Chile imposed upon itself, by signing and ratifying [international treaties], the obligation to guarantee the security of individuals [...], which did not allow measures to protect the wrongs committed against certain individuals or to achieve the impunity of their perpetrators, bearing especially in mind that these international accords should be complied with in good faith. [This] Supreme Court has repeatedly recognized that the domestic sovereignty of the State [...] recognizes limits in the forms of the rights emanating for human nature; values that are superior to any rule that may provide authority to the State, including Constituent Power itself, which prevents contempt for these rights."¹²⁷⁴

In 2010, in the case of Coronel Claudio Lecaros Carrasco, the Supreme Court of Justice overturned an earlier judgment resulting in acquittal¹²⁷⁵ and invalidated the application of the amnesty in Decree Law No. 2191 of 1978, through a replacement judgment (*sentencia de reemplazo*).¹²⁷⁶ In its replacement judgment, the Court held that "the crime of abduction [...] is a crime against humanity and, therefore, amnesty may not be invoked as grounds for extinguishing criminal responsibility."¹²⁷⁷ The Court indicated that "the amnesty law enacted by the *de facto* authority that assumed the title of 'Supreme Leader of the Nation,' [...] must be

¹²⁷³ *Ibid.*, considering paragraph 33 (Original in Spanish, free translation).

¹²⁷⁴ *Ibid.*, considering paragraph 35 (Original in Spanish, free translation).

¹²⁷⁵ Coronel Claudio Lecaros Carrasco had been prosecuted for the crime of qualified abduction (*secuestro calificado*) of Miguel Antonio Figueroa Mercado, committed in September 1973 (Original in Spanish, free translation).

¹²⁷⁶ Replacement judgment of 18 de May 2010, *Case of Claudio Abdón Lecaros Carrasco seguido por el delito de secuestro calificado*, Case File No. 47.205, Udicial Action No. 3302/2009, Resolution 16698, Appeal Judgment, and Resolution 16699 (Original in Spanish, free translation).

¹²⁷⁷ *Ibid.*, considering paragraph 1 (Original in Spanish, free translation).

interpreted in a way consistent with international treaties protecting the fundamental rights of the individual and punishing the serious abuses committed against them since the entry into effect of that legal instrument.”¹²⁷⁸ Likewise, the Court held that “the aforementioned prohibition of self-exoneration does not only apply to obvious situations, in which those in power have used the advantageous in which they were to establish the extinguishment of their own criminal responsibility, as is the case with amnesties they granted themselves, but it also entails the suspension of the effects of pre-existing institutions, such as [...] statutes of limitation for filing criminal complaints, conceived to operate in a state of social peace in which they were called to serve, but not in a situation of violations of all the institutions on which the State was built, and not to the benefit of precisely those who caused this breach.”¹²⁷⁹

In Uruguay, in the case of Nibia Sabalsagaray Curutchet, a literature professor who was detained, tortured and murdered by the military in 1974, the Supreme Court of Justice declared the amnesty (Law No. 15.848 on Expiration of the Punitive Power of the State, of 2 May 1988) was unconstitutional and inapplicable in 2009.¹²⁸⁰

The Uruguayan Supreme Court found that, although “through a law enacted through special majority and for extraordinary cases, a State may abdicate the prosecution of certain crimes,” in the case of Law No. 15,848, “the Legislative Branch exceeded the constitutional framework for agreeing upon amnesties,” because “declaring the expiration of criminal complaints, in any scenario, exceeds the powers of the legislators and invades the scope of the powers that are constitutionally assigned to the judges, so, whatever their motives, the legislators could not attribute to themselves the power to resolve that the expiration had operated for all the criminal actions regarding certain crimes.”¹²⁸¹

Likewise, the Supreme Court would hold that “the current regulation of human rights is not based on the sovereign position

¹²⁷⁸ *Ibid.*, considering paragraph 2 (Original in Spanish, free translation).

¹²⁷⁹ *Ibid.*, considering paragraph 3 (Original in Spanish, free translation).

¹²⁸⁰ Judgment No. 365/09, resolution of 19 October 2009, *Case of Nibia Sabalsagaray Curutchet* (Original in Spanish, free translation).

¹²⁸¹ *Ibid.*, Considering III.2, paras. 8, 9 and 13 (Original in Spanish, free translation).

of the States, but rather on the individual who is the holder – because of their status as a person – of fundamental rights that cannot be ignored based on the exercise constituent power, neither original nor derived.”¹²⁸² Finally, the Supreme Court established that “[w]ithin this framework, [the Law for the Expiration of the Punitive Power of the State] affected the rights of numerous individuals (specifically, the victims, family members or survivors of violations of the aforementioned human rights) whose right to a remedy, and to an impartial and exhaustive judicial investigation to identify the perpetrators and impose the appropriate criminal sentences have been frustrated, to such a degree that the legal consequences of the law regarding the right to judicial guarantees are incompatible with the American Convention [on] Human Rights.”¹²⁸³

¹²⁸² *Ibid.*, Considering III.8, para. 6 (Original in Spanish, free translation).

¹²⁸³ *Ibid.*, Considering III.8, para. 11 (Original in Spanish, free translation).

CHAPTER IX: MILITARY COURTS AND IMPUNITY

"[I]n cases of serious violations of human rights committed by State agents, it is essential that the civilian justice system should have an absolute monopoly over the exercise of the State's punitive power. The perpetration of a serious violation of human rights by a member of the armed forces or security of the State brakes the bindings of service and, as consequence, the act cannot be considered abuse of office." Robert Goldman¹²⁸⁴

1. General Considerations

One of the practices that have raised the most concern has been prosecuting members of the armed forces and the police who have committed gross human rights violations in military courts. It has been shown that this practice constitutes one of the greatest sources of impunity in the world.

Many of the unyielding defenders of military courts have traditionally rejected criticism of military courts, calling these arguments anti-military. However, the problem does not lie in whether the Armed Forces and/or the military criminal courts are well founded. The issue at hand revolves around determining whether a military court meets the conditions established by the general principles and international norms, namely, independence impartiality, and competence, and whether it guarantees due process. Also, because this regards the trial of those responsible of serious violations of human rights, it must be determined whether the military court, as specialized jurisdiction, constitutes a competent court that effectively guarantees the right to judicial remedies, justice, and truth for the victims and their families.

In many countries, military jurisdiction and the *esprit de corps* that has historically characterized it have turned military courts into instruments of military power over civil power. Many times, military courts remove the members of the armed forces and

¹²⁸⁴ "La aplicación de la justicia en contextos transicionales. La efectividad y necesidad de judicializar los casos de violaciones de los derechos humanos" [*Applying transitional justice. The effectiveness and necessity of prosecuting human rights violations*], in *Democracia y derechos humanos en el Perú: del reconocimiento a la acción*, Fondo Editorial de la Pontificia Universidad Católica del Perú, Lima, 2005, págs. 23 *et seq.* (Original in Spanish, free translation).

military institutions from the scrutiny of the justice system and society. In a number of countries, "military justice" is affected by the same obscurity that surrounds military institutions. In 1979, the Military Auditor General of Belgium, John Gilissen, noted with concern that in many countries "the issue of military Justice is covered up by the secrecy that covers all military organizations."¹²⁸⁵ This is still the reality in many countries.

"In a democratic constitutional State the military criminal jurisdiction should have a restricted and exceptional scope and should be aimed at the protection of special legal interests related to the duties the law assigns to the military. Therefore, only military members should be tried for the commission of criminal offenses or breaches which, due to their own nature, constitute an attack on military order."

Inter-American Court of Human Rights¹²⁸⁶

2. General principles on the administration of justice

The principle of separation of powers is the cornerstone and the *sine qua non* condition for the administration of independent and impartial justice, as well as an inherent element of the Rule of Law, as has been highlighted by the UN Secretary General.¹²⁸⁷ The Inter-American Commission on Human Rights (IACHR) has pointed out that protection of human rights implies the existence of institutional control by the law and the preservation and respect of the Rule of Law, which depends on three fundamental principles: the principle of limitation of power, the principle of legality, and the principle of the acknowledgement of fundamental rights.¹²⁸⁸

The Human Rights Committee (HRC) has stressed the obligation of the States to guarantee an effective separation of the Executive,

¹²⁸⁵ John Gilissen, "Evolution actuelle de la justice militaire - Rapport général", in *Huitième Congrès International, Ankara, 11-15 octobre 1979, L'Evolution actuelle de la justice militaire, Recueils de la Société internationale de droit pénal militaire et de droit de la guerre*, Book VIII, Volume 1, Bruselss, 1981, pg. 28 (Original in French, free translation).

¹²⁸⁶ Judgment of November 22, 2005, *Case of Palamara Iribarne v. Chile*, Series C No. 135, para. 124.

¹²⁸⁷ UN Doc. A/57/275, para. 1.

¹²⁸⁸ *Annual Report of the Inter-American Commission on Human Rights - 1998*, document OAS/Ser.L/V/II.102, Doc. 6 rev., of 16 of April 1999, Chapter IV, Section 3 "Paraguay", para. 49.

Legislative, and Judicial powers.¹²⁸⁹ The lack of clarity in defining the responsibilities of executive, legislative, and judicial authorities or those situations in which the executive branch can control or direct the judicial power are incompatible with the concept of an independent and impartial court and it can endanger the rule of law and the application of a coherent human rights policy.¹²⁹⁰ The Special Rapporteur on the independence of judges and lawyers, Mr. Param Kumaraswamy, has emphasized that “the principle of the separation of powers, [is] the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a *sine qua non* for a democratic State.”¹²⁹¹

“The principle of the separation of powers goes together with the requirement of statutory guarantees provided at the highest level of the hierarchy of norms, by the constitution or by the law, avoiding any interference by the executive or the military in the administration of justice.”

Emmanuel Decaux, Special Rapporteur on the Administration of Justice Through Military Tribunals¹²⁹²

The IACHR, upon observing the state of the Peruvian justice under the administration of President Alberto Fujimori, characterized by the continuing militarization of the judicial system – both in terms of the judicial function as well as in the investigation of crimes – emphasized that: “[t]he impairment of the rule of law in Peru affects the fundamental corollary of human rights, i.e., the right to recourse to independent and impartial judicial authorities to ensure respect for fundamental rights and the essential principles of representative democracy in light of the effective and not merely

¹²⁸⁹ *Concluding observations on: Peru*, 15 November 2000, CCPR/CO/70/PER, para. 10; *El Salvador*, CCPR/C/79/Add.34, 18 April 1994, para. 15; *Tunisia*, CCPR/C/79/Add.43, 10 November 1994, para. 14; *Nepal*, CCPR/C/79/Add.42, 10 November 1994, para. 18; and *Romania*, CCPR/C/79/Add.111, 28 July 1999, para. 10.

¹²⁹⁰ See, inter alia: *Human Rights Committee, General comment No. 32, article 14, Right to equality before courts and tribunals and to a fair trial*, para. 19; *Concluding observations of the Human Rights Committee: Slovakia*, CCPR/C/79/Add.79 4 August 1997, para. 3, Views of 20 October 1993, Communication No. 468/1991, *Angel N. Olo Bahamonde v. Equatorial Guinea*, para. 9.4; and *Inter-American Commission on Human Rights, Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 October 2002, para. 229.

¹²⁹¹ UN Doc. E/CN.4/1995/39, para. 55.

¹²⁹² *The Administration of Justice Through Military Tribunals – Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights*, Emmanuel Decaux E/CN.4/2006/58 13 January 2006, para. 13.

formal separation of the executive, legislative, and judicial branches of government.”¹²⁹³

“The principle of judicial independence constitutes one of the basic pillars of the guarantees of the due process, reason for which it shall be respected in all areas of the proceeding and before all the procedural instances in which decisions are made with regard to the person’s rights. [...] the principle of judicial independence results necessary for the protection of fundamental rights.”

Inter-American Court of Human Rights¹²⁹⁴

International case law and doctrine have continuously highlighted that the independence and impartiality of justice are necessary requirements for the effective observance of human rights and constitute general principles of international law, imperative for the proper administration of justice and the protection of fundamental human rights.¹²⁹⁵ This implies that the courts must be autonomous and independent of other branches of public authority, that they be free from influence, threats, or interference of any source or reason, and possess other characteristics necessary to guarantee proper and independent compliance of judicial functions.¹²⁹⁶

Numerous international instruments reiterate the principle of separation of powers, especially concerning the Judiciary.¹²⁹⁷

¹²⁹³ *Second report on the situation of human rights in Peru*, OAS/Ser.L/V/II.106 Doc. 59 rev., 2 June 2000, para. 238.

¹²⁹⁴ Judgment of 30 June 2009, *Case Reverón Trujillo v. Venezuela*, Series C No. 197, para. 68.

¹²⁹⁵ See, inter alia: Inter-American Court of Human Rights, Judgment of 31 January 2001, *Case Constitutional Tribunal v. Peru*, Series C No. 71; Inter-American Commission on Human Rights, *Report Terrorism and Human Rights*, OAS/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002 and *The Situation of Human Rights in Cuba: Seventh Report*, OAS/Ser.L/V/II.61, doc. 29, rev. 1, 1983; Human Rights Committee, *General comment No. 32*, Doc.Cit., and *General comment No. 13 – article 14*; and *Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers - Report of the Special Rapporteur, Mr. Param Kumaraswamy, submitted in accordance with Commission on Human Rights resolution 1994/41, E/CN.4/1995/39*, 6 February 1995.

¹²⁹⁶ See, inter alia: *Basic principles on independence and judgeship*, Principles 1, 2, 3 y 4; Inter-American Court of Human Rights, Judgment of 30 June 2009, *Case Reverón Trujillo v. Venezuela*, Series C No. 197; Inter-American Commission on Human Rights, *Report Terrorism and Human Rights*, Op. Cit., para. 229; and Human Rights Committee, *General comments No. 32*, Doc. Cit, para. 18.

¹²⁹⁷ See, inter alia: *Recommendation No. (94) 12 on the independence, efficiency and role of*, adopted by the European Council, 13 October 1994; and *Resolution on the Respect and the Strengthening on the Independence of the Judiciary*, of the

Therefore, it is important to point out the *Basic Principles on the Independence of the Judiciary*,¹²⁹⁸ the first principle of which establishes that “[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.” Furthermore, the *Inter-American Democratic Charter*¹²⁹⁹ establishes, in article 3, that “[e]ssential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms [...] the separation of powers and independence of the branches of government.”

As a corollary of the principle of separation of powers, only the judiciary of the State is authorized to administer justice. Thus, the HRC has highlighted that, even in times of war or in a state of emergency, “[o]nly a court of law may try and convict a person for a criminal offence.”¹³⁰⁰ Similarly, the IACHR has considered that “[i]n a constitutional and democratic state based on the rule of law, in which the separation of powers is respected, all punishments set forth in law must be imposed by the judiciary after the person’s guilt has been established with all due guarantees at a fair trial. The existence of a state of emergency does not authorize the state to ignore the presumption of innocence, nor does it empower the security forces to exert an arbitrary and uncontrolled *ius puniendi*.”¹³⁰¹

The right to be tried by an independent, impartial, and competent tribunal, is a principle universally recognized in numerous international treaties and instruments, both pertaining to human rights¹³⁰² and international humanitarian law.¹³⁰³ This right is

African Commission on Human and People’s Rights (April 1996, 19th ordinary session).

¹²⁹⁸ Adopted by the *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, celebrated in Milan on 26 August to 6 September 1985, and confirmed by the General Assembly in its resolutions 40/32 29 November 1985 and 40/146 13 December 1985.

¹²⁹⁹ Approved on 11 September 2001 by the General Assembly of the Organization of American States.

¹³⁰⁰ UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

¹³⁰¹ Report No. 49/00, Case 11.182, *Rodolfo Gerbert, Ascencios Lindo et al v. Peru*, 13 April 2000, para. 86.

¹³⁰² It is noteworthy in the universal sphere: *Universal Declaration of Human Rights* (Art. 10); *International Covenant on Civil and Political Rights* (Art. 14, 1); *International Convention for the Elimination of Racial Discrimination* (Art. 5, a);

closely linked to the right of equality before a court. Not only are both of these human rights, but also essential and characteristic principles of proper administration of justice. The HRC has highlighted that: "[t]he right to equality before the courts and to an impartial trial is a fundamental element of the protection of human rights and serves as a procedural means to safeguard the rule of law [and that] the States Parties must respect, regardless of their legal tradition or their domestic law."¹³⁰⁴

The HRC and the IACHR have stressed that the right to a fair trial before an independent, impartial, and competent court is an absolute right that cannot be the subject of exception or suspension.¹³⁰⁵ Nevertheless, it should be noted that the right to an independent, impartial, and competent court is not exclusive to the accused under criminal justice. The victims of serious violations of human rights and their families have, within the framework of effective remedy, the right to have their cause and rights determined by an independent, impartial, and competent court (See Chapter IV "Right to an Effective Remedy and Reparation").

One of the essential aspects of the independence of the courts is that its magistrates and judges should be judicial officials and that they not be subordinate, or have any type of hierarchical

Convention on the Rights of the Child (Arts. 37, d and 40,2); *Basic Principles on the Independence of the Judiciary*; *Guidelines on the Role of Prosecutors* and *Basic Principles on the Role of Lawyers*. In the regional sphere, it is worth noting: *American Declaration on the Rights and Duties of Man* (Art. XXVI); *Inter-American Convention on Human Rights* (Art.8,1); *European Convention on Human Rights* (Art. 6,1); *Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers of the European Council* (Guideline IX); *The Charter of Fundamental Rights of the European Union* (Art. 47); *African Charter on Human and People's Rights* (Arts. 7 y 26); *African Charter on the Rights and Welfare of the Child* (Art. 17); and *Arab Charter on Human Rights* (Art. 13).

¹³⁰³ Noteworthy: article 3 found in the Geneva Conventions of 1949; articles 84 and 130 of the III Geneva Convention; articles 54, 64 a 74 and 117 a 126 of the IV Geneva Convention; article 75 of Protocol I; and article 6 of Protocol II.

¹³⁰⁴ *General Comments No. 32*, Doc. Cit., para. 2 and 4.

¹³⁰⁵ Human Rights Committee, *General Comments No. 32*, Doc. Cit., para. 19 and Views of 28 October 1992, Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Op. Cit., para. 261.

dependency, in relation to any of the other powers, the Executive in particular.¹³⁰⁶

3. Competent courts and judges previously established by law

The principle of “judicial competence” – also referred to as a court previously established by law¹³⁰⁷ – constitutes a fundamental part of the right to a fair trial and is one of the elements of contemporary criminal law,¹³⁰⁸ and has as a legal basis the principles of equality before the law and before the courts. According to this principle, nobody can be judged other than by a regular, predetermined, and competent tribunal or judge.¹³⁰⁹ The principle of a tribunal previously established by law has as a corollary the prohibition of exceptional, *ad hoc*, extraordinary, *ad personam*, *ex post facto*, and special courts.¹³¹⁰

The principle of judicial competence evidently refers to the concept of the legally established jurisdiction of the court. The judge’s legal jurisdiction is delimited by territorial (*ratione loci*), material (*ratione materiae*), personal (*ratione personae*), and temporal (*ratione tempore*) factors established by law. But to reduce the principle of a tribunal previously established by law to a formal or merely legalistic concept is the same as emptying it of its content. The Inter-American Court of Human Rights indicated this: the existence of judicial jurisdiction does not depend exclusively on the existence of a law. The Inter-American Court of Human Rights highlighted that “judicial competence can be neither derogated nor

¹³⁰⁶ See, in this regard, International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – Practitioners’ Guide No. 1*, Ed. ICJ, Geneva, 2007.

¹³⁰⁷ In some judicial systems, this principle is known as “legal judge” (*juez natural*, *juge naturel*) or “tribunal previously established by law.”

¹³⁰⁸ Jiménez de Asúa, Luis, *Tratado de Derecho Penal. Volumen II: Filosofía y Derecho Penal*, Ed. Losada, Buenos Aires, Argentina, 1950.

¹³⁰⁹ Inter-American Court on Human Rights, Judgment of 30 May 1999, Case *Castillo Petruzzi et al. vs Peru*, Series C No. 52, para. 129.

¹³¹⁰ See, inter alia: Principle 5 of the *Basic Principles on the Independence of the Judiciary*; *Annual Report of the Inter-American Commission of Human Rights - 1997*, OAS/Ser.L/V/II.98, Doc. 6, 17 February 1998, Chapter VII “Recommendations issued by the Inter-American Commission on Human Rights”; Report No. 50/00 13 April 2000, Case 11.298, *Reinaldo Figueredo Planchart v. Bolivarian Republic of Venezuela*; Report on the situation of human rights in Chile, OAS/Ser.L/V/II.77.rev.1, Doc. 18, 8 May 1990; and Report on Terrorism and Human Rights, Op. Cit., para. 230.

removed; in other words, absolute adherence to the law is required and judicial competence may not be arbitrarily altered [...] for a tribunal established by law to exist it is not sufficient that it be provided for by law; such a tribunal must also fulfill all the other requirements stipulated in Article 8 of the American Convention and elsewhere in international law."¹³¹¹

The principle of judicial competence and its corollary regarding the prohibition of exceptional and special courts is not to be confused with the issue of specialized courts. While the principle of judicial competence is founded upon the principles of equality before the law and equality before the courts, which requires the laws to be non discriminatory nor be applied in a discriminatory way by the judges, that is not incompatible with the existence of courts of specialized jurisdiction.

As pointed out by the HRC, "[t]he right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory."¹³¹² However, differential treatment, as reiterated by the HRC, is only admissible if it is founded on reasonable and objective criteria.¹³¹³ The HRC has indicated that special or specialized courts can only be legitimately admitted under international law if there are reasonable and objective grounds to make their existence necessary.¹³¹⁴ Otherwise, a violation is committed against the right to be equal before the courts and against being tried by a competent court guaranteeing due process. Furthermore, the Inter-American Court on Human Rights has stressed that "[t]here may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position [...] Accordingly, no discrimination exists if the difference

¹³¹¹ Judgment of 30 May 1999, *Case Castillo Petruzzi et al v. Peru*, Series C No. 52, para. 125 (c).

¹³¹² Views of 9 April 1987, *Broeks v. The Netherlands*, Communication No. 172/1984. Also, see, inter alia: Views of 9 April 1987, *Zwaan-de-Vries v. The Netherlands*, Communication No. 182/1984; Views of 3 April 1989, *Ibrahima Gueye et al v. France*, Communication No. 196/1985; and Views of 19 July 1995, *Alina Simunek v. The Czech Republic*, Communication No. 516/1992.

¹³¹³ *Ibidem*.

¹³¹⁴ Views of 4 April 2001, *Joseph Kavanagh v. Irlanda*, Communication No. 819/1998.

in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind."¹³¹⁵

4. Specialized Courts

The existence of specialized courts or jurisdictions is admitted and founded on the specificity of the matter or of the litigants. Under international Law, courts of specialized jurisdiction, or those that differ from courts of ordinary jurisdiction, are only legitimate and legally recognized if there are reasonable and objective grounds to justify their existence. International case law has identified two accepted reasonable and objective grounds: (i) the special legal status and/or vulnerability of the litigant that requires special protection, like indigenous peoples or minors; and (ii) the specificity of the issue, like strictly military crimes.

Therefore, in criminal matters, and as an exception, the existence of specialized courts or jurisdictions for certain people, like indigenous peoples or minors, is recognized by international Law and is enshrined in various international instruments.¹³¹⁶

¹³¹⁵ Advisory Opinion OC-4/84 of 19 January 1984, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Series A No.4, para. 56-57.

¹³¹⁶ See, for example: *ILO Convention No. 169 on indigenous and tribal peoples in independent countries* (Arts. 9 and 10); *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights (Part I, para. 20); *Convention on the Rights of the child* (Art. 40, 3); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules"); and the *United Nations Guidelines for the Prevention of Juvenile Delinquency* ("The Riyadh Guidelines"). Also see: Human Rights Committee, *General Comment No. 17 (on article 24 of the Covenant)*, para. 1 and 2; the Committee of the Rights of the Child, *General comments No. 10, The Rights of the Child in the Justice of minors*, para. 10; and Inter-American Court of Human Rights, *Advisory Opinion OC-17/2002*, 28 August 2002, *Juridical Status and Human Rights of the Child*, para. 109.

5. Military criminal courts: functional jurisdiction with limited scope

There is no international human rights treaty or instrument that prohibits the existence *per se* of military criminal courts. The HRC¹³¹⁷, the European Human Rights Court¹³¹⁸, the IACHR¹³¹⁹, the Inter-American Court on Human Rights¹³²⁰, and the African Commission on Human and Peoples' Rights¹³²¹ have unanimously concluded that the existence of military courts is not in itself incompatible with the rules regarding independence and impartiality of the Judiciary. The case law and doctrine of the courts and human rights treaty bodies have repeatedly confirmed that the military courts must present the same characteristics of independence, impartiality, and competency inherent to all courts of justice.¹³²² The UN General Assembly has encouraged the authorities of various countries to "reform military justice in compliance with the International Covenant on Civil and Political Rights."¹³²³

¹³¹⁷ *General Comment No. 32*, Doc. Cit., para. 22.

¹³¹⁸ Judgment of 4 May 2006, Case of *Ergin v. Turkey*, Application No. 47533/99; Judgment of 21 September 2006, Case of *Maszni v. Romania*, Application No. 59892/00; and Judgment of 10 May 2001, Case of *Cyprus v. Turkey*, Application No. 25781/94.

¹³¹⁹ See, for example, Resolution "Terrorism and Human Rights", 12 December 2001.

¹³²⁰ See, for example, Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68.

¹³²¹ See, for example, Decision of 7 May 2001, Communication No. 218/98 (Nigeria).

¹³²² See, inter alia: Human Rights Committee, *General Comment No. 32*, Op. Cit. para.22; Inter-American Court of Human Rights, Judgment of May 30, 1999, Case of *Castillo Petruzzi et al. v. Peru*, Series C No. 52, and Judgment of August 18, 2000, Case of *Cantoral Benavides v. Peru*, Series C No. 69; Inter-American Commission on Human Rights, *Second report on the situation of human rights in Peru*, OEA/Ser.L/V/II.106, doc. 59 rev., of 2 June 2000, Chapter II "Justice administration and the rule of law," and *Report on Terrorism and Human Rights*, Op. Cit.; European Court of Human Rights, Judgment of 4 May 2006, Case of *Ergin v. Turkey*, Doc. Cit., Judgment of 21 September 2006, Case of *Maszni v. Rumania*, Doc. Cit., and Judgment of 10 May 2001, Case of *Cyprus v. Turkey*, Doc. Cit.; and African Commission on Human and Peoples' Rights, Decision of 6 November 2000, Communication 224/98, *Media Rights Agenda v. Nigeria*, and Decision of 7 May 2001, Communication 218/98 (Nigeria).

¹³²³ Resolution 56/173, "Situation of human rights in the Democratic Republic of the Congo," of 19 December 2001, paragraph 3(b). In the same vein, see Resolutions No.: 54/179, "Situation of human rights in the Democratic Republic of the Congo," of 17 December 1999; 55/117, "Situation of human rights in the Democratic

Likewise, military criminal proceedings, in observance of the judicial guarantees required by international human rights law, can be compatible with the standards of due process.

Military courts, because they have specialized jurisdiction that is distinct from ordinary jurisdiction, imply a *per se* affectation of the principles of equality before the courts and of a competent tribunal, that is, a competent tribunal previously established by law. Therefore, it is not enough for the military court to comply with the conditions of independence and impartiality as laid out by international Law and that its procedure follow the judicial guarantees intrinsic to due process and fair trial. The military court must also be a competent court.

Given the special or specialized nature of military courts and, thus, the impact on the principles of judicial competence and equality before courts and the law, the test for competence, or jurisdiction, lies in determining whether there are objective reasons that legitimately justify encroaching on the general jurisdiction of the regular courts and introducing a differential treatment in judicial matters, by removing certain matters or a specific category of litigants from the ordinary criminal judges to subject them to a specialized military court.

Under international human rights law, military criminal courts – as specialized courts that encroach on the jurisdiction of the regular courts and, thus, affect the principle of equality before the courts and the principle of a competent tribunal – are only admitted due to their special field of material and personal expertise, namely: the knowledge strictly of military crimes committed by military or police personnel. In that regard, international law strictly regulates the sphere of military criminal courts' competence, granting them a functional nature as opposed to a personal nature, bound to the active or passive subject's status as a member of the military.

The jurisdiction of military criminal courts are only admitted under international human rights law as a function of their special area of subject matter jurisdiction and personal jurisdiction, namely: hearing offenses of a strictly military nature, committed by

Republic of the Congo"; 40/145, "Situation of human rights and fundamental freedoms in Chile", of 13 December 1985; and 41/161, "Situation of human rights and fundamental freedoms in Chile", of 4 December 1986.

military personnel. This is functional subject matter jurisdiction (*rationae materiae*) and personal jurisdiction (*rationae personae*), restricted to hearing crimes of a strictly military nature, meaning those offenses that only infringe on military legal interests, attributed to military personnel.

International jurisprudence has thoroughly developed the nature, scope, and sphere of competence of military criminal courts. The Inter-American Court of Human Rights¹³²⁴ and the IACHR,¹³²⁵ the HRC¹³²⁶, the Committee against Torture¹³²⁷, the European Court

¹³²⁴ Judgment of 30 May 1999, Case of *Castrillo Petruzzi et al. v. Peru*, Series C No. 52, para. 128.

¹³²⁵ *Second report on the situation of human rights in Peru*, Op. Cit., Chapter II, para. 155; *Annual Report of the Inter-American Commission on Human Rights: 1986 - 1987*, OEA/Ser.L/V/II.71, Doc. 9 rev. 1, Chapter IV (b); *Annual Report of the Inter-American Commission on Human Rights: 1992 - 1993*, OEA/Ser.L/V/II.83, Doc. 14, Chapter V; *Annual Report of the Inter-American Commission on Human Rights: 1993*, OEA/Ser.L/V/II.85, Doc. 8 rev., Chapter V; *Annual Report of the Inter-American Commission on Human Rights: 1997*, OEA/Ser.L/V/II.98, Doc. 6, Chapter VII; *Annual Report of the Inter-American Commission on Human Rights: 1998*, OEA/Ser.L/V/II.102, Doc. 6, Rev., Chapter VII; *Report on the situation of human rights in Brazil*, of 29 de septiembre 1997, OEA/Ser.L/V/II.97; *Second report on the situation of human rights in Colombia*, OEA/Ser.L/V/II.84, Doc. 39 rev, of 14 October 1993; *Third report on the situation of human rights in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 Rev. 1, of 26 February 1999; *Report on the situation of human rights in Chile*, OEA/Ser.L/V/II.66, doc. 17 rev.1, of 9 September 1985; *Report on the situation of human rights in Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 Rev. 1; *Report on the situation of human rights in Guatemala*, OEA/Ser.L/V/II.61 Doc. 47; and *Third report on the situation of human rights in Paraguay*, OEA/Ser.L/VII.110, 2001.

¹³²⁶ *Concluding Observations on: Peru*, CCPR/C/79/Add.8, of 25 September 1992, para. 8; *Egypt*, CCPR/C/79/Add.23, of 9 August 1993, para. 9; *Chile*, CCPR/C/79/Add.104, of 30 March 1999, para. 9; *Poland*, CCPR/C/79/Add.110, of 29 July 1999, para. 21; *Cameroon*, CCPR/C/79/Add.116, of 4 November 1999, para. 21; *Morocco*, A/47/40, of 23 October 1991, párr. 57; *Syria*, CCPR/CO/71/SYR, para. 17; *Kuwait*, CCPR/CO/69/KWT, para. 10; *Russia*, CCPR/C/79/Add.54, of 29 July 1995, para. 25; *Slovakia*, CCPR/C/79/Add.79, para. 20; *Uzbekistan*, CCPR/CO/71/UZB, of 26 April 2001, para. 15; *Colombia*, CCPR/C/79/Add.2, of 25 September 1992, paras. 5 and 6 and CCPR/C/79/Add.76, of 5 May 1997, para. 34; *Venezuela*, CCPR/C/79/Add.13, of 28 December 1992, paras. 7 and 10; *Croatia*, CCPR/C/79/Add.15 - A/48/40, of 28 December 1992, para. 362; *Brazil*, CCPR/C/79/Add.66, of 24 July 1999, para. 10; *Lebanon*, CCPR/C/79/Add.78, of 1 April 1997, para. 14; *Dominican Republic*, CCPR/CO/71/DOM, of 26 April 2001, para. 10; and *Guatemala*, CCPR/CO/72/GTM, of 27 August 2001, para. 10.

¹³²⁷ *Concluding observations on: Peru*, A/50/44, of 26 July 1995, paras. 62-73 and A/55/44 of 15 November 1999, paras. 59 and 62; *Cameroon*, CAT/C/CR/31/6, of 11 February 2004, para. 11; *Jordan*, A/50/44, 26 July 1995, paras. 159-182 and CAT/C/JOR/CO/2, of 25 May 2010; *Chile*, A/50/44, of 26 July 1995, paras. 52-61, CAT/C/CR/32/5, of 14 June 2004, para. 7, and CAT/C/CHL/CO/5, of 14 May 2009,

on Human Rights¹³²⁸ and the African Commission on Human and Peoples' Rights¹³²⁹ have characterized military criminal courts as having functional jurisdiction, restricted to strictly military offenses, that breach legal interests of a military nature, committed by active military personnel.

In several resolutions, the UN General Assembly and its former Commission on Human Rights – whether referring to the trial of civilians by military courts or the trial of military personnel for serious human rights violations – have confirmed the restrictive and functional nature of military jurisdiction.¹³³⁰

"Military justice does not constitute a 'personal court' granted to military or police personnel, given its membership to these institutions, it constitutes instead an 'exclusive court' centered around the knowledge of the violations committed by these against the legal assets of the Armed Forces and the National Police. In that vein, not all criminal offenses committed by military or police personnel should or can be tried within the fold of military justice, because if the offense is of common nature, its trial corresponds to the Judiciary, independently of the military condition of the active subject."

Constitutional Tribunal of Peru¹³³¹

para. 14; *Russia*, CAT/C/RUS/CO/4, of 6 February 2007, para. 24; and *Turkey*, CAT/C/TUR/CO/3, of 20 January 2011, para. 5.

¹³²⁸ Judgment of 4 May 2006, *Case of Ergin v. Turkey*, Doc. Cit.; Judgment of 10 May 2001, *Case of Cyprus v. Turkey*; and Judgment of 21 September 2006, *Case of Maszni v. Rumania*.

¹³²⁹ See, inter alia: *Resolution on the Right to Fair Trial and Legal Aid in Africa*, of 15 November 1999; Decision of 15 November 1999, Communication No. 151/96 (Nigeria); Decision of 7 May 2001, Communication 218/98 (Nigeria); Decision of 6 November 2000, Communication No. 223/98 (Sierra Leone); Decision of April 1997, Communication No. 39/90 (Cameroon); and Decision of 31 October 1998, Communications No. 137/94, 139/94, 154/96 and 161/97 (Nigeria).

¹³³⁰ See, for example, Assembly General Resolutions No. 39/121, 40/145, 41/161, 42/147 on the "Situation of human rights and fundamental freedoms in Chile", and Resolutions No. 50/199, 54/179 55/117 and 56/173 on the "Situation of human rights in the Democratic Republic of the Congo." See the Resoluciones of the former Commission on Human Rights, No. 1992/79, 1993/69, 1997/67 1998/71 and 1999/19, 2000/19 and 2001/22 on Equatorial Guinea; No. 1998/61, 1999/56, 2000/15, 2001/19 and 2002/14 on the Democratic Republic of the Congo; and No. 1994/67, "Civil Defence Forces," para. 2.

¹³³¹ Judgment of 16 March 2004, Case File No. 0017-2003-AI/TC (Original in Spanish, free translation).

Likewise, various international instruments for human rights confirm the functional nature, restrictive scope, and limited jurisdiction of the criminal military courts.¹³³²

The Inter-American Court of Human Rights has specified that: "[i]n a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces [...] [and] only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order."¹³³³ The Court highlighted that "the application of military justice must be strictly reserved to active-duty military members."¹³³⁴ Furthermore, the court pointed out that "[w]hen a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated."¹³³⁵ Among matters that naturally pertain to regular courts and that do not belong in the military courts, the Court has underlined the trial of military or police personnel who have committed a serious violation to human rights.

¹³³² It is worth mentioning: *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 16.2); *Inter-American Convention on Forced Disappearance of Persons* (Art. IX); *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* (Principles 22 and 29); and *Draft Principles Governing the Administration of Justice through Military Tribunals* (Principles 5, 7, 8 and 9, in UN Doc. E/CN.4/2006/58 of 13 January 2006).

¹³³³ Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 117. In the same vein, see the Judgments: of November 22, 2005, *Case of Palamara Iribarne v. Chile*; of September 15, 2005, *Case of the Mapiripán Massacre v. Colombia*; of November 25, 2005, *Case of Lori Berenson Mejía v. Peru*; of July 5, 2004, *Case of 19 Tradesmen v. Colombia*; of December 6, 2001, *Case of Las Palmeras v. Colombia*; of August 18, 2000, *Case of Cantoral Benavides v. Peru*; of May 11, 2007, *Case of the Rochela Massacre v. Colombia*; of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*; of November 29, 2006, *Case of La Cantuta v. Peru*; and of January 31, 2006, *Case of the Pueblo Bello Massacre v. Colombia*.

¹³³⁴ Judgment of November 22, 2005, *Case of Palamara Iribarne v. Chile*, Series C No. 135, para. 139. See also: Judgment of November 20, 2009, *Case of Usón Ramírez v. Venezuela*, Series C No. 207, paras. 111, 115 and 199 (8 and 9); and Judgment of September 29, 1999, *Case of Cesti Hurtado v. Peru*, Series C No. 56, para. 151.

¹³³⁵ Judgment of 30 May 1999, *Case of Castrillo Petruzzi et al v. Peru*, Series C No. 52, para. 128.

The functional nature of the military criminal courts has been expressly granted by the constitutions and legislations of many countries.¹³³⁶ Similarly, supreme and constitutional courts in Latin America have developed substantial case law on the functional nature of the military criminal court and the limited scope of its jurisdiction. It is worth noting the case law of the higher courts of Peru,¹³³⁷ Bolivia,¹³³⁸ Colombia,¹³³⁹ Guatemala,¹³⁴⁰ Paraguay¹³⁴¹ and Venezuela.¹³⁴²

"Military jurisdiction cannot be understood, as it was in the past, with an idea of privilege, prerogative, sinecure or special favor for the prosecution of members of the armed forces for crimes they may commit on the occasion of the service they are carrying out, in different material and legal conditions in relation to the other individuals upon whom the punitive action of the state may fall at a given moment, in order to favour impunity, since this would mean giving them a specialized treatment, contrary to the principle of equality and to the very notion of justice."

Constitutional Court of Colombia¹³⁴³

¹³³⁶ See, inter alia: Bolivia (Constitution of 2008, article 180); Colombia (Constitution, article 213; article 3 of the Code of Military Justice of 1999; article of of the Code of Military Justice 2000; and Law 589 of 2000); El Salvador (Constitution, article 213); Haiti (Constitution, artículos 42 and 267); Honduras (Constitution, articles 90 and 91 and Decree No. 58-93 of 30 March 1993); Guatemala (Constitution, article 219 and Decree 41-96); Nicaragua (Constitution, articles 34 and 93); Paraguay (Constitution, article 174); Peru (Constitution, article 173 and Law No. 26926 of 1998); Uruguay (Law No. 18,026 of 25 September 2006) and Venezuela (Constitution, articles 29, 49 and 261).

¹³³⁷ See, inter alia: Constitutional Tribunal, Judgment of 16 March 2004, Case File No. 0017-2003-AI/TC; and Judgment of 17 April 2002, Case File No. 218-02-HC/TC, *Case of Jorge Alberto Cartagena Vargas v. Primera Sala Penal de Ica de la Corte Superior de Justicia de Ica*.

¹³³⁸ Constitutional Rulings 0664/2004-R of 6 May 2004, Case File 2004-08469-17-RAC.

¹³³⁹ Constitutional Court, Judgment No. C-141/95, of 29 March 1995, Case File D-701, Judgment No. C-358/97 of 5 August 1997 Case File D-1445; and Supreme Court of Justice (Criminal Chamber), Judgment of 7 May 2009.

¹³⁴⁰ Constitutional Court, Judgment of 3 March 1997, *Gaceta No. 43*, Case File 1031-96 and 1155-96; Judgment of 29 December 1992, *Gaceta No. 25*, Case File No. 306-92; and Judgment of 27 89, *Gaceta No. 13*, Case File Nos. 142-89 and 143-89.

¹³⁴¹ Supreme Court of Justice of Paraguay, Judgment N° 84, 17 April 1998, Case *Juicio "Sumario instruido al Gral de Div. (SR) Lino César Oviedo Sila, y otros"*.

¹³⁴² Supreme Tribunal of Justice, Criminal Chamber, Judgment of 15 December 1981.

¹³⁴³ Judgment No. C-141/95, 29 March 1995, Case File D-701 (Original in Spanish, free translation from).

6. Military offenses and jurisdiction

Although international law restricts the scope of competence of the military criminal courts to military offenses, the international instruments do not define strict or typical military offense. Thus, for example, many treaties make references to, in matters of extradition, the notion of “purely military offenses”¹³⁴⁴ and “military offenses,”¹³⁴⁵ while others make references to “offences under military law which are not offences under ordinary criminal law.”¹³⁴⁶ All of these refer to national law and legislations, since these treaties do not define what should be understood by “military offense.”¹³⁴⁷

Although it does not strictly define military offenses, international law does prescribe that certain illicit conduct cannot be considered military offenses or offenses committed during military duty. This mainly pertains to serious violations of human rights made up of criminal offenses like extrajudicial executions, enforced disappearance, torture, inhumane acts, and sexual violence.

a. Military offenses

Traditionally, numerous national laws categorize any criminal offense set out in the code of military justice as a military offense, regardless of the military nature of the protected legal interest, as well as the civilian or military nature of the perpetrator or victim of the crime. This formalistic criteria used to qualify military

¹³⁴⁴ For example: article 3 of the *Convention on Extradition*, adopted in Montevideo in 1933; article 7 (1, c) of the *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*; article 11 (d) of the *European Convention on the Transfer of Proceedings in Criminal Matters*; and article 6 (b) of the *European Convention on the International Validity of Criminal Judgments*.

¹³⁴⁵ For example, article 20 of the *Treaty on International Penal Law*, adopted in Montevideo in 1920.

¹³⁴⁶ Article 4 of the *European Convention on Extradition*, of 1957. There is a similar clause in the *United Nations Model Treaty on Extradition* (article 3(c)). Likewise, it is worth mentioning the *Treaty on International Penal Law*, of Montevideo in 1920, which in article 20 refers to “essentially military crimes, excluding those governed under common law.”

¹³⁴⁷ In some treaties the remand is implicit, while in others it is explicit. For example, article 20 of the 1920 Montevideo *Treaty on International Penal Law* expressly remits to national law and establishes that the judgment of the nature of the offenses shall belong exclusively to the authorities of the State to which the request for extradition is addressed. The 1933 Montevideo *Convention on Extradition*, in article 4, has an identical clause.

offenses is the product of an obsolete understanding of military courts, perceived as a caste privilege, a personal court tied to the military status of the perpetrator or the victim of the crime. This rigid view of military offenses has historically been overcome both through the criminal law doctrine and through the case law of national courts.

"Military offenses increasingly tend to be conceived in a limited manner, as a safeguard and continuance of the vital values of the military's missions:"

René Paucot, general Counsel before the Court of Cassation of France (1969)¹³⁴⁸

Contemporary criminal doctrine has developed a substantive or material test to classify and define military offenses, based on the nature of the legal asset sought to be protected by the criminal definition and, consequently, the condition, be it military or police, of the perpetrator. Thus, the criminal doctrine has identified several types of criminal offenses: offences strictly military (military offences *stricto sensu*); broader military offences (military offences *lato sensu*); common offenses assimilated as military offenses, these are specified criminal offenses under ordinary criminal law and committed by military personnel in the performance of their duties or service (concept of the act relating to the service, and also known as "abuse of office", "crime in the line of duty," "offense committed during service", "service offense", "mission offense", "act related to armed service" or "offense within a military scope"; and militarized common crimes.¹³⁴⁹

¹³⁴⁸ Paucot, René, "Rapport général: Les délits militaires", in *Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, IV Congrès International, Madrid 9-12 Mai 1967, Les Délits Militaires*, Strasbourg, 1969, pag. 71 (Original in Spanish, free translation).

¹³⁴⁹ See, inter alia: Zlamala, Oskar, "Les infractions militaires", in *Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, IV Congrès International, Madrid 9-12 Mai 1967, Les Délits Militaires*, Strasbourg, 1969; Captain Alía Plana, Miguel, "Aproximaciones a la jurisdicción militar española", in: <http://derechomilitar.metropoliglobal.com/artidoc/aprox05.htm>; Millán Garrido, Antonio, "Algunas consideraciones generales sobre la Ley Orgánica 4/1987, de 15 de julio, de la competencia de la jurisdicción militar", in *REDEM*, N° 53, Tomo I, January-June 1989; Zaffaroni, Raúl and Cavallero, Juan Ricardo, *Derecho Penal Militar*, Editorial Jurídica Ariel, Buenos Aires, 1980, p. 191 et seq; Fernández Segado, Francisco, "La justicia militar en el Derecho comparado", in Consejo General del Poder Judicial, *Poder Judicial*, 2a. época, No. 23, Madrid, September

Strictly speaking (*stricto sensu*) military offenses¹³⁵⁰ are those criminal offenses that exclusively and solely infringe upon legal interests of a military nature and which can only be committed by military or police personnel (subject qualifying asset). These offenses are fundamentally an "infringement on military duties" and has highlighted by Zaffaroni and Cavallero, "naturally, these only concern those who are in the military".¹³⁵¹ Protection for the typical and exclusive military legal assets is sought through the classification of this conduct, as are the military duties, discipline, and command. In that regard, the Deputy General Auditor in the Military Court of Belgium and the Vice President of the International Society of Military Criminal Law and the Laws of War, John Gilissen, noted 1967 that military offenses increasingly tend to be regarded in a limited manner, as a safeguard and continuance of the vital values needed for an army to function.¹³⁵² Thus, for example, typical *stricto sensu* military offenses are: sentinel offences, desertion, abandonment of post, cowardice, insubordination, and desertion. These crimes constitute the *ratio essendi* for military criminal courts.

Military offenses in the broad sense of the term (*lato sensu*)¹³⁵³ are those criminal acts of a multi-offensive nature, as they infringe on legal interests protected both by ordinary criminal law and by military criminal law, but in which the military legal interest is more prevalent. Examples of these types of crimes are the theft of military material by military personnel.

1991; Fernández Segado, Francisco, "La competencia de la jurisdicción militar en tiempo de paz", in Consejo General del Poder Judicial, *Poder Judicial*, 2a. época, No. 36, Madrid, December 1994; Rodríguez-Villasante y Prieto, José Luis, "El principio de especialidad - Comentario al artículo 5º del CPM", in Ramón Blecua Fraga y Rodríguez-Villasante y Prieto, José Luis, *Comentarios al Código Penal Militar*, Ed. Civitas, 1988; López Dawson, Carlos, *Justicia Militar, una nueva mirada*, Comisión Chilena de Derechos Humanos, Santiago 1995; and Mera Figueroa, Jorge, "La modernización de la justicia militar: un desafío pendiente", Centro de Investigaciones Jurídicas, Universidad Diego Portales - Facultad de Derecho, Santiago de Chile. Recuperado de http://derecho.udp.cl/inf_invest.htm

¹³⁵⁰ Also known as "typically military offenses," "strictly military offenses," or "offenses strictly of military scope."

¹³⁵¹ Zaffaroni, Raúl y Cavallero, Juan Ricardo, *Derecho Penal Militar*, Op. Cit., p. 27.

¹³⁵² Gilissen, John, "Préface", in *Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, IV Congrès International, Madrid 9-12 Mai 1967, Les Délits Militaires*, Strasbourg, 1969, p. 8.

¹³⁵³ Also known as "mixed military offenses or complex".

Militarized common crimes are those criminal offenses within common law that, without impacting military legal assets or being committed by military or police personnel are subject to the jurisdiction of a military criminal court. Some legal scholars have classified these as "false military crimes [since] they are nothing more than common crimes typified under special laws."¹³⁵⁴ This notion has been unanimously rejected by the doctrine and case law of international courts and other international bodies that protect human rights¹³⁵⁵ and by criminal law doctrine and national case law.¹³⁵⁶

b. Duty crimes

"Duty crimes"¹³⁵⁷ are the criminal acts committed by military or police personnel by reason of the performance of their role and

¹³⁵⁴ Zaffaroni, Raúl y Cavallero, Juan Ricardo, *Derecho Penal Militar*, Op. Cit., p. 12.

¹³⁵⁵ See, inter alia: Inter-American Court of Human Rights, Judgment of May 30, 1999, Case of *Castrillo Petruzzi et al v. Peru*, Series C No. 52, Judgment of August 18, 2000, Case of *Cantoral Benavides v. Peru*, Series C No. 69, and Judgment of September 29, 1999, Case of *Cesti Hurtado v. Peru*, Series C No. 56; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Op. Cit.; Human Rights Committee, Concluding Observations on Peru (CCPR/C/79/Add.67 of 25 July 1996 and CCPR/CO/70/PER, 15 November 2000), *Lebanon* (CCPR/C/79/Add.78, of 1 April 1997) and *Chile* (CCPR/C/79/Add.104, of 30 March 1999), Views of 27 October 1987, *Raúl Cariboni v. Uruguay*, Communication No. 159/1983, Views of 6 November 1997, *Víctor Alfredo Polay Campos v. Peru*, Communication No. 577/1994, Views of 6 November 2003, *Safarmo Kurbanova v. Tajikistan*, Communication No. 1096/2002, Views of 17 March 2006, *Davlatbibi Shukurova v. Tajikistan*, Communication No. 1044/2002, Views of 28 March 2007, *Madani v. Algeria*, Communication No. 1172/200, Views of 20 July 2007, *Benhadj v. Algeria*, Communication No. 1173/2003, and Views of 31 October 2005, *Bee et al v. Equatorial Guinea*, Communications No. 1152/2003, 1190/2003 and 1190/2003; European Court of Human Rights, Judgment of 4 May 2006, Case of *Ergin*, Op. Cit., Judgment of 21 September 2006, Case of *Maszni* Op. Cit., and Judgment of 10 May 2001, Case of *Cyprus* Op. Cit.; and African Commission on Human and Peoples' Rights, Decision of 6 November 2000, Communication No. 223/98 (Sierra Leone), Decision of April 1997, Communication No. 39/90 (Cameroon) and Decision of 31 October 1998, Communications No. 137/94, 139/94, 154/96 and 161/97 (Nigeria).

¹³⁵⁶ See, for example, Zaffaroni, Raúl y Cavallero, Juan Ricardo, *Derecho Penal Militar*, Op. Cit.; Fernández Segado, Francisco, "La justicia militar en el Derecho comparado", Op. Cit.; Mera Figueroa, Jorge, "La modernización de la justicia militar: ...", Op. Cit. y Millán Garrido, Antonio, "Algunas consideraciones generales...", Op. Cit.

¹³⁵⁷ Among different domestic legal systems, this type of crime receives different names or terms of art: "abuse of office", "crime in the line of duty", "function crimes", "offense committed during service", "service offense", "mission crime", "act related to armed service" or "offense within a military scope," among others.

that, for the purposes of the jurisdiction of the military courts, are assimilated to military crimes. In order for the "duty crimes" (or "service-related criminal act") to be constituted it is not enough for the perpetrator to be part of the military or the police, or that the crime be committed in a military or police facility or during service, nor that the crime be committed with arms or service equipment. If that were the case, a personal or caste court would be established, opposite to the modern concept of a functional military criminal court, based on the own specialty and restrictive character of the court.

National jurisprudence and criminal doctrine have elaborated criteria to determine when one is faced with a functional or duty crime versus a crime in common law which, although committed by military personnel, has no relation with the service and, therefore, is of the ordinary criminal court's competency. Both national jurisprudence as well as criminal doctrine demand the following for there to be a case of abuse of office: i) a link between the military or police duty and the crime committed; ii) the role and service carried out at the time the crime was committed must be in and of itself in compliance with a legitimate development of the constitutional and legal mission assigned to the military or the police; and iii) a legal military asset must be affected. In that regard the Inter-American Court of Human Rights pointed out that "even though different legislations establish the competence of military jurisdiction on crimes whose origin is within the ordinary jurisdiction when they are committed by active soldiers, it is necessary to clearly establish the direct and proximal relationship with the military function or with the infringement of juridical rights characteristic of the military order."¹³⁵⁸

Other jurisdictions have also expressed similar views, namely Peru's Constitutional Tribunal¹³⁵⁹ and Supreme Court of Justice;¹³⁶⁰ the Constitutional Court of Bolivia;¹³⁶¹ and Colombia's

¹³⁵⁸ Judgment of November 23, 2009, *Case of Radilla Pacheco v. Mexico*, Series C No. 209, para. 284.

¹³⁵⁹ Judgment of 24 August 2004 Exp. No. 1154-2002-HC/TC; Judgment of 16 March 2004, Exp. No. 0017-2003-AI/TC; Judgment of 19 June 1998, Exp. No. 585-96-HC/TC; Judgment of 15 December 2006 Exp. No. 0012-2006-PI/TC; and Resolution of 15 October 1999, Exp. No. 757-99-HC/TC.

¹³⁶⁰ Supreme Court of Justice, First Transitory Criminal Chamber, Resolution of 14 December 2004, Case File No. 29-2004, "*La desaparición forzada de autoridades de Chuschi*". In the same vein, the Supreme Court of Peru has ruled on this in:

Supreme Court of Justice,¹³⁶² the Supreme Council for the Judiciary¹³⁶³ and the Constitutional Court.¹³⁶⁴ The Supreme Court of Justice of Peru has pointed out that in order for abuse of office to take place: "i) the perpetrator of the crime must be a member of the Armed Forces or the National Police; ii) the action taken is linked to the military or police function and it affects the Armed Forces or National Police as such; iii) the victim of the crime is the Armed Forces or National Police as the guardian institutions appointed by the Constitution and to whom a specific set of purposes and functions have been attributed."¹³⁶⁵

"Civilian courts must therefore be able, from the outset, to conduct inquiries and prosecute and try those charged with such violations. The initiation by a civilian judge of a preliminary inquiry is a decisive step towards avoiding all forms of impunity. The authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings."

Emmanuel Decaux, Special Rapporteur on the issue of the administration of justice through military tribunals¹³⁶⁶

Both the Constitutional Tribunal of Peru as well as the Constitutional Court of Colombia have pointed out that when there is doubt regarding whether or not there has been abuse of office, it must be resolved to understand it as an ordinary crime and, because of this, be competence of the ordinary jurisdiction.¹³⁶⁷

Resolution, Case File N° 18-2004, "*El homicidio de Indalecio Pomatanta Albarrán*"; and Resolution of 1 July 2005, Case File N° 08-2005, "*Efraín Aponte Ortiz*".

¹³⁶¹ Constitutional Rulings 0664/2004-R of 6 May 2004, Exp. No. 2004-08469-17-RAC.

¹³⁶² Criminal Chamber, Judgment of 11 October 1988 and Judgment of 3 May 1988.

¹³⁶³ Disciplinary Chamber, Judgment of 12 February 2009, Case File No. 110010102000200900097 01 – 1134C.

¹³⁶⁴ Judgment No. C-358/97 of 5 August 1997, Case File No. D-1445.

¹³⁶⁵ Corte Suprema de Justicia, Primera Sala Penal Transitoria, Resolución de 14 de diciembre de 2004, Competencia No. 29-2004, "*La desaparición forzada de autoridades de Chuschi*".

¹³⁶⁶ *Issue of the administration of justice through military tribunals – Report submitted by the Special Rapporteur of the Sub-commission for the Promotion and Protection of Human Rights, Emmanuel Decaux*, E/CN.4/2006/58 of 13 January 2006, para. 32.

¹³⁶⁷ Consatitutional Tribunal of Peru, Judgment of 15 December 2006, Case File No. 0012-2006-PI/TC; and Constitutional Cour of Colombia, Judgment C-358/97 of 5 August 1997, Case File No. D-1445.

7. Crimes excluded from the judicial scope of military courts

Under human rights international law, the knowledge of gross human rights violations, constituting a crime, committed by military or police personnel and the trial and punishment of its authors is of the exclusive competence of civilian criminal courts. It is an intrinsic consequence of the functional nature of the military criminal court, and its restrictive scope of competence, limited as a subject-matter (strictly military crime) as well as of the perpetrator (military).

a. International legal framework

Many instruments and international standards exclude the knowledge of gross human rights violations perpetrated by military or police personnel from the scope of jurisdiction of military criminal courts. Within those instruments that exclude military criminal courts from the scope of competence when there is knowledge of a serious human rights violation, it is worth noting: the *Inter-American Convention on Forced Disappearance of Persons*;¹³⁶⁸ the *International Convention for the Protection of All Persons from Enforced Disappearance*;¹³⁶⁹ the *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*;¹³⁷⁰ and the *Draft Principles Governing the Administration of Justice Through Military Tribunals*¹³⁷¹ (see Annex V). In regards to this last one, although it is still just a draft, the European Court of Human Rights has considered it reflects the evolution of International Human Rights Law in the area of military courts and has already applied it as a source of law.¹³⁷² Likewise, the UN Special Rapporteur on the Independence of Judges and Lawyers, Mrs. Gabriela Knaul has considered that the Draft Principles reflects the development of international law on this subject.¹³⁷³

Although the majority of human rights treaties do not have express clauses on military courts or military jurisdiction, the

¹³⁶⁸ Article IX.

¹³⁶⁹ Article 16 (2)

¹³⁷⁰ Articles 22 and 29.

¹³⁷¹ Article 9.

¹³⁷² Judgment of 4 May 2006, Case of *Ergin v. Turkey*, Op. Cit., and Judgment of 21 September 2006, Case of *Maszni v. Romania*, Op. Cit.

¹³⁷³ *Report of the Special Rapporteur on the independence of judges and lawyers*, A/68/285 of 7 August 2013.

international human rights bodies and courts have created very important doctrine and jurisprudence about the practice of prosecuting police and military members for gross human rights violations through military courts, in light of the obligations of the States to investigate, prosecute and punish these crimes and protect the right of the victims and family members to an effective remedy and legal protection.¹³⁷⁴

"Contrary to the functional concept of the jurisdiction of military tribunals, there is today a growing tendency to consider that persons accused of serious human rights violations cannot be tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons. Moreover, the military authorities might be tempted to cover up such cases by questioning the appropriateness of prosecutions, tending to file cases with no action taken or manipulating 'guilty pleas' to victims' detriment. Civilian courts must therefore be able, from the outset, to conduct inquiries and prosecute and try those charged with such violations. The initiation by a civilian judge of a preliminary inquiry is a decisive step towards avoiding all forms of impunity. The authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings."

Emmanuel Decaux, Special Rapporteur on the Administration of Justice by Military Courts¹³⁷⁵

Furthermore, even when the *International Covenant of Civil and Political Rights* (ICCPR) does not regulate explicitly the matter of military trials, the HRC has concluded repeatedly that in the matter of trials of military and police responsible of Human Rights violations by military courts, is not compatible with the obligations that the States have under the ICCPR, in particular the one that arise from articles 2 (3) (right of an effective remedy) and 14 (right of a fair trial by a competent, independent and impartial judge) violations.¹³⁷⁶ Moreover, the HRC has considered, in decisions

¹³⁷⁴ See, for example: *International Covenant on Civil and Political Rights*; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; *Inter-American Court of Human Rights*; and *Inter-American Convention to Prevent and Punish Torture*.

¹³⁷⁵ *Issue of the administration of justice through military tribunals...*, Op. Cit., para. 32.

¹³⁷⁶ *Concluding Observations on: Peru*, CCPR/C/79/Add.8, 25 September 1992, para. 8; *Bolivia*, CCPR/C/79/Add.74, 1 May 1997, para. 11; *Colombia*, CCPR/C/79/Add.2, 25 September 1992, paras. 5 and 6 and CCPR/C/79/Add.76, 5 May 1997, para. 18; *Venezuela*, CCPR/C/79/Add.13, 28 December 1992, paras. 7

related to individual cases, the military tribunals do not constitute an effective or ideal resource for victims of serious human rights violations and their families.¹³⁷⁷ In that same vein, the trial of military personnel for crimes of enforced disappearance, torture, or extrajudicial executions by military tribunals constitute a violation of the obligations under the ICCPR, on behalf of the State, of guaranteeing an effective resource for the victims of these crimes and a fair trial by a competent court.

Although the *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* does not have a clause that explicitly addresses military tribunals, the Committee against Torture has reiterated constantly that the suspected perpetrators of torture crimes or other inhumane acts must be tried by the ordinary jurisdiction, excluding military courts.¹³⁷⁸ Thus, for example, in the case of Mexico (2007), the Committee took "notes with concern that cases of torture committed by military personnel against civilians during the performance of their duties continue to be tried in military courts. [...] The State party should ensure that cases involving violations of human rights, especially torture and cruel, inhuman or degrading treatment, committed by military personnel against civilians, are always heard in civil courts, even when the violations are service-related."¹³⁷⁹

and 10; *Croatia*, CCPR/C/79/Add.15 - A/48/40, 28 December 1992, para. 362; *Brazil*, CCPR/C/79/Add.66, 24 July 1996, para. 10; *Lebanon*, CCPR/C/79/Add.78, 1 April 1997, para. 14; *Chile*, CCPR/C/79/Add.104, 30 March 1999, para. 9; *Dominican Republic*, CCPR/CO/71/DOM, 26 April 2001, para. 10; *Guatemala*, CCPR/CO/72/GTM, 27 August 2001, paras. 10 and 20; *El Salvador*, 18 April 1994, CCPR/C/79/Add.34, para. 5; *Ecuador*, 18 August 1998, CCPR/C/79/Add.92, para. 7; *Egypt*, 9 August 1993, CCPR/C/79/Add.23, para. 9; *Poland*, 29 July 1999, CCPR/C/79/Add.110, para. 21; *Cameroon*, 4 November 1999, CCPR/C/79/Add.116, para. 21; *Morocco*, 23 October 1991, A/47/40, para. 57; *Syria*, 28 May 2001, CCPR/CO/71/SYR, para. 17; *Russian Federation*, 29 July 1995, CCPR/C/79/Add.54, para.25; *Slovakia*, 4 August 1997, CCPR/C/79/Add.79, para. 20; and *Uzbekistan*, 26 April 2001, CCPR/CO/71/UZB, para. 15.

¹³⁷⁷ Views of 29 July 1997, *José Vicente and Amado Villafañe Chaparro and others v. Colombia*, Communication No. 612/1995; and Views of 13 November 1995, *Nydia Erika Bautista v. Colombia*, Communication No. 563/1993.

¹³⁷⁸ See, inter alia, *Conclusions and recommendations of the Committee against Torture* to: *Peru* (A/50/44, 26 July 1995, points E and D, and A/55/44, 16 November 1999, paras. 61 and 62); *Colombia* (A/51/44, 9 July 1996, points 4 and 5); *Jordan* (A/50/44, 26 July 1997); *Venezuela* (A/54/44, 5 May 1999); and *Guatemala* (A/51/44, 7 July 1996).

¹³⁷⁹ *Conclusions and recommendations of the Committee against Torture: Mexico*,

Likewise, the *American Convention on Human Rights* does not regulate in an explicit or expressed manner the issue of military tribunals. Nevertheless, both the IACHR and the Inter-American Court on Human Rights have concluded that the military criminal jurisdiction has as main role and *raison d'être* the maintenance of order and discipline in the military ranks and, thus, must limit itself strictly to military crimes committed by military personnel. They have both reiterated that the gross human rights violations are not part of the function of any military power in the world and should not be part of the competence of military tribunals.

"In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate death toll. Thus, the actions which brought about this situation cannot be considered as military felonies, but common crimes, so investigation and punishment must be placed on the ordinary justice, apart from the fact that the alleged active parties had been military or not."

Inter-American Court of Human Rights¹³⁸⁰

The Inter-American Court of Human Rights has considered repeatedly that the military criminal jurisdiction is not competent to deal with gross human rights violations committed by military or political personnel, since the competent judge that should be hearing these crimes is the ordinary jurisdiction.¹³⁸¹ The Court has

CAT/C/MEX/CO/4 of 6 February 2007, para. 14.

¹³⁸⁰ Judgment of August 16, 2000, Case of *Durand and Ugarte v. Peru*, Series C No. 68, para. 118.

¹³⁸¹ See, inter alia: Judgment of August 16, 2000, Case of *Durand and Ugarte v. Peru*, Series A No. 68; Judgment of November 29, 2006, Case of *La Cantuta v. Peru*, Series C No. 162; Judgment of November 26, 2013, Case of *Osorio Rivera and Family v. Peru*, Series C No. 274; Judgment of December 6, 2001, Case of *Las Palmeras v. Colombia*, Series C No. 90; Judgment of July 5, 2004, Case of *19 Merchants v. Colombia*, Series C No. 109; Judgment of September 15, 2005, Case of the *Mapiripán Massacre v. Colombia*, Series C No. 134; Judgment of November 22, 2005, Case of *Palamara Iribarne v. Chile*, Series C No. 135; Judgment of January 31, 2006, Case of the *Pueblo Bello Massacre v. Colombia*, Series C No. 140; Judgment of July 5, 2006, Case of *Montero Aranguren and others (Retén de Catia) v. Venezuela*, Series C No. 150; Judgment of September 26, 2006, Case of *Almonacid Arellano et al v. Chile*, Series C No. 154; Judgment of May 11, 2007, Case of the *Rochela Massacre v. Colombia*, Series C No. 163; Judgment of July 4, 2007, Case of *Escué Zapata v. Colombia*, Series C No. 165; Judgment of July 4, 2007, Case of *Zambrano Vélez and others v. Ecuador*, Series C No. 166; Judgment of November 26, 2008, Case of *Tiu Tojín v. Guatemala*, Series C No. 190; Judgment of November 23, 2009, Case of *Radilla Pacheco v. Mexico*, Series C No.

concluded that the practice of trying military personnel for gross human rights violations in military courts infringes on the obligations that the States have under articles 8 (competent court and due process) and 25 (right to judicial protection and effective remedy) of the *American Convention on Human Rights*. Thus, the Court recalled that: "the military criminal courts should have a restrictive and exceptional scope, bearing in mind that they should only judge members of the armed forces when they commit crimes or misdemeanours that, owing to their nature, affect rights and duties inherent to the military system. In this regard, when the military justice system assumes jurisdiction over a matter that should be heard by the ordinary justice system, the right to have a case tried by the appropriate judge is affected. This guarantee of due process should be examined taking into account the object and purpose of the American Convention, which is the effective protection of the individual. For these reasons, and due to the nature of the crime and the rights and freedoms damaged, the military criminal jurisdiction is not the competent jurisdiction to investigate and, if applicable, prosecute and punish the perpetrators of human rights violations."¹³⁸²

The Court has pointed out repeatedly that enforced disappearance,¹³⁸³ sexual violations,¹³⁸⁴ extrajudicial execution and massacres,¹³⁸⁵ torture,¹³⁸⁶ and cruel, inhumane, and degrading treatment¹³⁸⁷ in no case have any connection with the

209; Judgment of August 30, 2010, *Case of Fernández Ortega and others v. Mexico*, Series C No. 215; Judgment of August 31, 2010, *Case of Rosendo Cantú et al v. Mexico*, Series C No. 216; Judgment of November 26, 2010, *Case of Cabrera García and Montiel Flores v. Mexico*, Series C No. 220; Judgment of September 3, 2012, *Case of Vélez Restrepo and family members v. Colombia*, Series C No. 248; Judgment of October 24, 2012, *Case of Nadege Dorzema et al. v. Dominican Republic*, Series C No. 251; and Judgment of November 12, 2012, *Case of the Massacre of Santo Domingo v. Colombia*, Series C No. 259.

¹³⁸² Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 200.

¹³⁸³ See, inter alia, Judgment of November 26, 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 190.

¹³⁸⁴ See, inter alia, Judgment of August 31, 2010, *Case of Rosendo Cantú et al v. Mexico*, Series C No. 216, para. 161.

¹³⁸⁵ See, inter alia, Judgment of November 12, 2012, *Case of the Massacre of Santo Domingo v. Colombia*, Series C No. 259.

¹³⁸⁶ See, inter alia, Judgment of September 3, 2012, *Case of Vélez Restrepo and family v. Colombia*, Series C No. 248, para. 240.

¹³⁸⁷ See, inter alia, Judgment of November 26, 2010, *Case of Cabrera García and Montiel Flores v. Mexico*, Series C No. 220, para. 199.

military discipline or mission and, thus, are excluded from the scope of competence of the military criminal courts. The Court highlighted that, in accordance with its constant jurisprudence, "the military jurisdiction is not competent to investigate and, if applicable, prosecute and punish the perpetrators of alleged human rights violations; instead, those responsible must always be tried by the ordinary justice system. This conclusion applies not only to cases of torture, forced disappearance and rape, but to all human rights violations."¹³⁸⁸

[M]ilitary courts can in principle constitute an independent and impartial tribunal for the purposes of trying members of the military for certain crimes truly related to military service and discipline and that, by their nature, harm the juridical interests of the military, provided that they do so with full respect for judicial guarantees. Military tribunals may not, however, be used to try violations of human rights or other crimes that are not related to the functions that the law assigns to military forces and that should therefore be heard by the regular courts."

Inter-American Commission on Human Rights¹³⁸⁹

The IACHR has repeatedly confirmed that the practice of trying military and police personnel that have committed human rights violations in military courts violated the right to justice and infringes on the obligations under the *American Declaration of the Rights and Duties of Man* and the *American Convention on Human Rights*.¹³⁹⁰ In many individual case decisions, the Commission has

¹³⁸⁸ *Ibid.*, para. 198.

¹³⁸⁹ *Report on Terrorism and Human Rights*, Op. Cit., para. 232.

¹³⁹⁰ *Annual Report of the Inter-American Commission on Human Rights 1986–1987*, OEA/Ser.L/V/II.71; Doc. 9 rev. 1, chapter IV (b); *Annual Report of the Inter-American Commission on Human Rights 1992–1993*, OEA/Ser. L/V/II.83, Doc. 14, 12 March 1993, Chapter V (VII), para. 6; *Annual Report of the Inter-American Commission on Human Rights 1993*, OEA/Ser.L/V/II.85; Doc. 8 rev., 11 February 1994; Chapter V (IV), Final Recommendations; *Annual Report of the Inter-American Commission on Human Rights – 1997*, OEA/Ser.L/V/II.98, Doc. 6; Chapter VII, 17 February 1998; *Annual Report of the Inter-American Commission on Human Rights 1998*, OEA/Ser.L/V/II.102; Doc. 6 Rev., 16 April 1999, Chapter VII, Section 1 and Chapter VII, Section 3; *Report on the situation of human rights in Brazil*, 29 September 1997; OEA/Ser.L/V/II.97, Chapter III, paragraphs 78 and 95; *Second Report on the Situation of Human Rights in Colombia*, OEA/Ser. L/V/II.84, Doc. 39 rev, 14 October 1993; *Third Report on the Situation of Human Rights in Colombia* OEA/Ser.L/V/II.102; Doc. 9 Rev. 1, 26 February 1999; *Report on the Situation of Human Rights in Chile*, OEA/Ser.L/V/II.66, doc. 17, rev.1, OEA, 1985; *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 Rev. 1, 1997; *Report on the Situation of Human Rights in Guatemala*,

reiterated that the trial of military and police personnel for the violation of human rights on behalf of military and police courts constitutes a transgression of the right to an independent and impartial court and due process, as well as to an effective remedy.¹³⁹¹ For example, the IACHR considered that "the forced disappearance of a citizen can never be considered part of the legitimate functions of the agents who work with the security forces,"¹³⁹² and the fact that these types of crimes are competency of the military criminal courts constitutes a violation of articles 8 and 25 of the Convention.¹³⁹³ The IACHR has reiterated on various occasions that torture, enforced disappearance, and extrajudicial execution do not constitute a legitimate activity of their service in order to justify the use of the military criminal courts to try those responsible for gross human rights violations.¹³⁹⁴

Furthermore, the special proceedings of the former Commission on Human Rights and of the Human Rights Council of the United Nations have unanimously considered that the military courts are not competent to deal with gross violations of human rights and that these crimes are of the competence of the ordinary courts. The Working Group on Enforced or Involuntary Disappearances (WGEID) has concluded that the crime of forced disappearance is of exclusive competence of the ordinary jurisdiction, with exclusion

OEA/Ser.L/V/II.61 Doc. 47, 3 October 1983; *Third Report on the situation of Human Rights in Paraguay*, OEA/Ser./L/VII.110, 2001; *Annual Report of the Inter-American Commission on Human Rights 1992- 1993*, OEA/Ser.L/V/II.83, Doc. 14, 12 March 1993; and *Report on the Situation of Human Rights in Suriname*, OEA/Ser.L/V/II.61, Doc. 6 Rev. 1, 6 October 1983.

¹³⁹¹ See, inter alia: Report No. 55/01, *Aluisio Cavalcante and others (Brazil)*; Report No. 62/01, *Case of Massacre of Ríofrío*, Case 11.654 (Colombia); Report No. 63/01, Case 11.710, *Case of Carlos Manuel Prada González and Evelio Antonio Bolaño Castro (Colombia)*; Report No. 64/01 Case 11.712, *Case of Leonel De Jesús Isaza Echeverry et al (Colombia)*; Report No. 61/99, *José Félix Fuentes Guerrero et al (Colombia)*, Case 11.519; Report N° 7/00, *Amparo Tordecilla Trujillo (Colombia)*, Case 10.337; Report No. 10/95, Case 10.580 (Ecuador); Report No. 35/00, *Los Uvos (Colombia)*, Case 11.020; and Report No. 36/00 *Caloto (Colombia)*, Case 11.101.

¹³⁹² Report No. 7/00 of 24 February 2000, Case 10.337, *Amparo Tordecilla Trujillo (Colombia)*, para. 54.

¹³⁹³ *Ibidem*.

¹³⁹⁴ See, for example: Report No. 62/01, Case 11.654, *Massacre of Ríofrío (Colombia)*; Report No. 62/99, Case 11.540, *Santos Mendivelso Coconubo (Colombia)*; Report No. 5/98, Case 11.019, *Álvaro Moreno Moreno (Colombia)*; and Report No. 35/00, Case 11.020, *Los Uvos (Colombia)*.

of every other special jurisdiction, particularly military courts.¹³⁹⁵ On the other hand, the Working Group on Arbitrary Detention (WGAD) has concluded that the military criminal courts “should be incompetent to try military personnel if the victims include civilians.”¹³⁹⁶

“Because they have the distinct objective of dealing with matters related to military service, military tribunals should have jurisdiction only over military personnel who commit military offences or breaches of military discipline, and then only when those offences or breaches do not amount to serious human rights violations.”

Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers¹³⁹⁷

The Special Rapporteur on Torture has highlighted repeatedly that the crime of torture cannot be considered military crimes or crimes in the line of duty and that military justice “makes no sense at all in cases where members of the security forces have seriously violated a civilian’s basic human rights. Such an act is an offense against the public civil order and, consequently, should be tried by a civilian court. Torture is forbidden under all circumstances and this prohibition applies to all officials, whether military or civilian. It therefore cannot be seen as having any relationship to the specific functions of the military. As the civilian courts are responsible for the administration of justice in general with a view to protecting the civil public order, the civilian courts should be competent to try all offences against the civil public order, whoever may have committed them.”¹³⁹⁸ Likewise, the Special Rapporteur has specified that “serious crimes committed by military personnel against civilians, in particular torture and other cruel, inhuman or degrading treatment or punishment, should,

¹³⁹⁵ UM Docs. E/CN.4/1993/25, para. 46; E/CN.4/1990/13, para. 345; E/CN.4/1991/20, para. 408; E/CN.4/1992/18, para. 367; E/CN.4/1995/36, 21 December 1994, para. 54; and E/CN.4/2000/64/Add.1, 21 December 1999, paras. 29 and 63; and *Report of the Working Group on Enforced and Involuntary Disappearances – Addendum – Best practices in national criminal law on enforced disappearances*, A/HRC/16/48/Add.3 of 28 December 2010, para. 57.

¹³⁹⁶ UN Doc. E/CN.4/1999/63, 18 December 1998, para. 80. See also, UN Doc. E/CN.4/2002/79, 18 January 2002, para. 364.

¹³⁹⁷ *Report of the Special Rapporteur on the independence of judges and lawyers*, A/68/285, 7 August 2013, para. 89.

¹³⁹⁸ UN Doc. E/CN.4/1990/17, para. 271. See also UN Docs.: E/CN.4/1989/15, paras. 176 -177 and 187(b); E/CN.4/1990/17, paras 212 and 216(e); E/CN.4/1995/34, para. 926 (g); E/CN.4/1994/31, para. 666; E/CN.4/2001/66, para. 1316 (i); and E/CN.4/2002/76, Annex I (j).

regardless of whether they took place in the course of service, be subject to civilian justice.”¹³⁹⁹

The Special Rapporteur on Extrajudicial executions, summary or arbitrary has recommended the States to “provide for an independent, impartial and functioning civilian judiciary to deal with all cases of alleged violations of the right to life. [...] [and] to ensure that the security forces fully cooperate with the civilian justice system in its efforts to identify and bring to justice those responsible for human rights violations.”¹⁴⁰⁰ In repeated occasions, the Special Rapporteur has pointed out that the competency of the military tribunals must be strictly limited to military crimes and that gross human rights violations must exclusively be of the ordinary courts competence and it cannot be considered crimes in the line of duty.¹⁴⁰¹

In many reports, both general or country specific, the Special Rapporteur on the Independence of judges and lawyers highlighted that the military criminal court is not competent to try those responsible for gross human rights violations and that their competence should be limited to military crimes committed by military personnel.¹⁴⁰²

The international bodies and procedures for the protection of human rights have repeatedly considered that the investigation on human rights violation imputed to military personnel and conducted by Military Forces, exercising their authority of judicial Police, is not compatible with the international obligation to ensure independent and impartial investigations. They have unanimously recommended that the military forces be separated from these duties and that the faculties of Judicial Police be granted exclusively to the civil bodies. The following have also taken the same position: the HRC,¹⁴⁰³ the Committee Against Torture,¹⁴⁰⁴

¹³⁹⁹ UM Doc. E/CN.4/1998/38/Add.2, para. 88.

¹⁴⁰⁰ UM Doc. E/CN.4/1994/7, 7 December 1993, para. 697.

¹⁴⁰¹ See, inter alia, UM Docs. E/CN.4/1994/7/Add.2, of 15 November 1993, para. 99; E/CN.4/1995/111, of 16 January 1995, paras. 90 and 120 (f); and E/CN.4/1995/61/Add.1, of 1 November 1994, paras. 70 and 81(a).

¹⁴⁰² See, inter alia, UN Docs.: E/CN.4/1998/39/Add.1, paras. 80 and 133; E/CN.4/1998/39/Add.2, 30 March 1998, paras. 130, 132, 133, 140, 173 and 174; and E/CN.4/2002/72/Add.1 of 24 January 2002, paras. 78 and 192 (d).

¹⁴⁰³ UN Doc. CCPR/C/79/Add.76, 5 May 1997, paras. 32 and 34.

¹⁴⁰⁴ *Conclusions and recommendations of the Committee against Torture to: Ecuador, A/49/44* of 15 November 1993, para. 105; *Honduras, CAT/C/HND/CO/1* of

the WGEID,¹⁴⁰⁵ the Special Rapporteurs on Extrajudicial Executions, summary or arbitrary, and on Torture,¹⁴⁰⁶ the Special Rapporteur on the independence of judges and lawyers,¹⁴⁰⁷ the UN Office of the High Commissioner for Human Rights in Colombia,¹⁴⁰⁸ and the IACHR.¹⁴⁰⁹

b. Legal developments in Latin America

Many States in Latin America have introduced express clauses in their constitutions or legislation that assign jurisdiction over gross human rights violations to courts of ordinary jurisdiction and/or that excludes them from the scope of competence of military criminal courts. Thus, it is worth noting the Constitution of Bolivia of 1995¹⁴¹⁰ and 2009¹⁴¹¹, the 1998 Constitution of Ecuador,¹⁴¹² the Constitution of Haiti,¹⁴¹³ the Constitution of Nicaragua,¹⁴¹⁴ the Constitution of Paraguay,¹⁴¹⁵ and the Constitution of the Bolivarian Republic of Venezuela.¹⁴¹⁶

23 June 2009, para. 20; *Guatemala*, CAT/C/XXV/Concl.6 of 23 November 2000, para. 10.

¹⁴⁰⁵ UN Doc. E/CN.4/1989/18/Add.1, para. 133.

¹⁴⁰⁶ UN Doc. E/CN.4/1995/111, paras. 86 and 119.

¹⁴⁰⁷ UN Doc. E/CN.4/1998/39/Add.2, paras. 80 and 185.

¹⁴⁰⁸ UN Docs. E/CN.4/2003/13, 24 February 2003, para. 169 and E/CN.4/2004/13, of 17 February 2004, paras. 79 and 169.

¹⁴⁰⁹ *Second report on the situation of human rights in Colombia*, OEA/Ser.L/V/II.84, Doc. 39 rev., of October 14, 1993, Chapter III, letter F, and *Third report on the situation of human rights in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, of February 26, 1999, para. 19.

¹⁴¹⁰ Article 34: "Those who violate constitutional rights and guarantees are subject to the jurisdiction of ordinary courts."

¹⁴¹¹ Article 180.

¹⁴¹² Article 187. The Constitution of 2008 integrated military criminal justice into ordinary jurisdiction and article 160 establishes that "The members of the Armed Forces and of the National Police shall be tried by the bodies of the Judiciary; in the case of crimes committed within their specific mission, they shall be tried by specialized chambers in military and police matters, pertaining to the same Judiciary." Also, article 188 establishes that "the members of the Armed Forces and of the National Police shall be tried before ordinary courts."

¹⁴¹³ Article 42 (3): "Cases of conflict between civilians and military members, abuses, violence and other crimes perpetrated against a civilian by a military member in active duty are subject to the jurisdiction of ordinary courts."

¹⁴¹⁴ Article 93.

¹⁴¹⁵ Article 174.

¹⁴¹⁶ Article 29 (2), "Human rights violations and crimes against humanity shall be investigated and prosecuted by the ordinary courts." Article 261 furthermore establishes that "The commission of common crimes, violations of human rights and crimes against humanity, shall be tried by ordinary courts."

In matters of criminal or military criminal legislation, various countries are noteworthy. In Peru, Law No. No. 26926 of 1998, which incorporated genocide crimes, forced disappearances, and torture to the Criminal Code, stipulates in article 5 that these crimes "will be handled by the ordinary proceedings and before a civil court." In Colombia, article 3 of the Military Criminal Code of 1999¹⁴¹⁷, article 3 of the Military Code of 2010,¹⁴¹⁸ and Law No. 589 of 2000 confer competence to deal with torture, enforced disappearance, genocide, crimes against humanity, and war crimes to the ordinary jurisdiction, as well as conducts that are openly opposite to the constitutional function of the Security Forces and whose sole perpetration breaks the functional link of the agent and the service." In Guatemala, under the Decree 41-96, which modified article 2 of the Military Code, the ordinary jurisdiction knows the gross human rights violations. In Paraguay, the crimes of torture, genocide and enforced disappearance and war crimes are defined in the Criminal Code¹⁴¹⁹ and are subject to the jurisdiction of ordinary courts. Likewise, the Paraguayan Military Criminal Code prescribes that "crimes provided and punished by the code of the civil court are exempted. If it refers to a provided and punished crime both by this and the Military Code, it will not be considered a military crime, unless it is committed by active military personnel in their service as such."¹⁴²⁰ In Uruguay, Law No. 18.026 of September 25th, 2006, which includes in criminal legislation as crimes the genocide, crimes against humanity, war crimes, "political homicide", torture, enforced disappearance, "severe deprivation of liberty", and "sexual aggression against persons deprived of their liberty", prescribes in its article 11 that these crimes "will not be considered military offenses and will be excluded from military jurisdiction for their trial."

¹⁴¹⁷ Article 3 establishes: "[...] in no case will the crimes of torture, genocide and enforced disappearance, understood in the terms defined by international conventions and treaties ratified by Colombia, be understood as related to service."

¹⁴¹⁸ Article 3 establishes "[...] in no case shall the crimes of torture, genocide, enforced disappearance, crimes against humanity or crimes against international humanitarian law understood in the terms defined by international conventions and treaties ratified by Colombia, be related to service, nor conducts that are openly contrary to the constitutional function of the Armed Forces and which by their mere commission break the functional nexus with the agent in service."

¹⁴¹⁹ Articles 309, 319, 236 and 320 of the Criminal Code (Law No. 1.160 of 1997).

¹⁴²⁰ Article 5 of Law No. 843 of 1980.

Based on the principle of competente judge, the functionality of the military criminal court and the restrictive notion of a "strictly military crime", Supreme Courts of Justice and Constitutional Courts have concluded that gross human rights violations are of the ordinary court's competence and are not part of the scope of competence of the military courts.

Therefore, the Constitutional Tribunal of Peru has held that "not all criminal acts committed by military or police personnel can or should be tried in a military justice setting, because if the nature of the act is common, its trial belongs to the Judicial Power, regardless of the military nature of the perpetrator."¹⁴²¹ Likewise, the Constitutional Tribunal considers that "if there is doubt regarding the classification of a specific conduct as functional crime (in the case of Criminal Legislature), these doubts must be resolved in favour of enshrining this conduct in the ordinary criminal legislation."¹⁴²² Likewise, the Constitutional Tribunal has specified that "those interpretations that argue, for example, that a legal principle such as 'life' can be susceptible to protection under the Military Criminal Code, must be discarded as unconstitutional, since in this case this legal principle does not constitute an institutional principle, of the Armed Forces, nor has the Constitution established a specific role in its favor, as happens with some contents of the legal principle of national defense. In this way, the legal principle of life cannot be protected by the Military Criminal Code but must instead be protected by ordinary legislation."¹⁴²³

For its part, the Supreme Court of Justice of Peru has held that human rights violations – such as extrajudicial execution, torture and enforced disappearance – are crimes that do not violate military legal interests and that cannot be considered offenses committed in the line of duty ("*delitos de función*").¹⁴²⁴ The Supreme Court has concluded that "the commission of these

¹⁴²¹ Judgment of 16 March 2004, Exp. No. 0017-2003-AI/TC (Original in Spanish, free translation).

¹⁴²² Judgment of 15 December 2006, Exp. No. 0012-2006-PI/TC (Original in Spanish, free translation).

¹⁴²³ *Ibidem*.

¹⁴²⁴ First Transitory Criminal Chamber, Resolution of 14 December 2004, concerning the conflict of jurisdiction between Military Tribunal and Ordinary Court, Case File No. 29-2004, Case "*Enforced disappearances of authorities of Chuschi*" (Original in Spanish, free translation).

horrendous crimes and abuses against human rights, as defined under international human rights law and international criminal law, can never be considered an 'act in the line of duty.'¹⁴²⁵

In Bolivia, the Constitutional Tribunal has held that "military tribunals are not competent to hear crimes that are not committed against the office, in the line of duty; if we held the contrary, this would allow the legal interests considered fundamental values, interests and expectations, without which social life would be impossible, precarious, or undignified, recognized as rights in art. 7 of the [Political Constitution of the State] and the international human rights Covenants and norms would not be effectively protected in regular criminal law, at least, would be made effective under regular criminal courts."¹⁴²⁶

In Chile, in a case of a citizen who was abducted and tortured by military intelligence services during the dictatorship, the Supreme Court held that this conduct could not be considered abuses of office committed in the line of duty. The Court emphasized that "the irregular detention of civilians cannot be considered a part of military duties."¹⁴²⁷

On several occasions, the Colombian Constitutional Court has ruled on the scope of military jurisdiction. In a 1995 judgment, the Court held that "[t]he order to sexually assault an individual or to inflict torture on a person cannot be called an order of military service under any circumstance. These actions, which are examples used as points of reference, are completely removed from the object of the public powers conferred in military service members and to their set of legal duties."¹⁴²⁸ In another judgment, from 1997, the Constitutional Court would point out that "conduct that constitutes crimes against humanity are manifestly contrary to human dignity and to the rights of the individual, and therefore have no connection whatsoever to the constitutional functions of the Security Forces, so any order to commit a crime of this nature does not warrant any obedience whatsoever. [...] A crime against

¹⁴²⁵ Permanent Criminal Chamber, Resolution the conflict of jurisdiction between Military Tribunal and Ordinary Court, Case File No. 18-2004, Case "*Homicide of Indalecio Pomatanta Albarrán*" (Original in Spanish, free translation).

¹⁴²⁶ Constitutional Judgment 0664/2004-R of 6 May 2004, Case File No. 2004-08469-17-RAC (Original in Spanish, free translation).

¹⁴²⁷ Criminal Chamber, Judgment of 17 November 2004, Case *Miguel Ángel Sandoval (Juan Miguel Contreras Sepúlveda et al)*, Case File No. 517-04.

¹⁴²⁸ Sentencia C-578 de 1995 (Original in Spanish, free translation).

humanity is so far removed from the constitutional function of the public Security Forces that it can never have any relation with the acts arising from the line of duty in military service, since the mere commission of these criminal actions dissolves any link between the conduct of the agent and the discipline and function of the military or police as such. Therefore, it should be heard in courts of ordinary jurisdiction."¹⁴²⁹ In a later judgment in 2001, the Constitutional Court of Colombia would establish that "any conduct in open contempt for the principle of human dignity and that flagrantly entails violating the constitutional rights associated with it, can never be considered actions related to carrying out military service."¹⁴³⁰

Under the previous Colombian Constitution, of 1886, the Supreme Court of Justice (*Corte Suprema de Justicia*), in several cases under its jurisdiction, rejected the use of military tribunals to try police or military service members implicated in enforced disappearances and extrajudicial executions. The Court considered that such actions could not be reputed to be committed "within the scope of military service" and that only courts of ordinary jurisdiction were competent to hear these cases.¹⁴³¹ So, under the new constitutional regime created in 1991, the Supreme Court of Justice has held that "[c]riminal courts of military jurisdiction are exclusively reserved for investigating and prosecuting the members of the Armed Forces that have committed military offenses, which excludes grave human rights violations, in the understanding that every action or omission that violates or severely threatens any of the fundamental rights protected in international instruments such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights. These offenses will always be heard by ordinary [non-military] judges."¹⁴³²

In Mexico, when resolving an *amparo* constitutional remedy brought by an Argentine former military officer against the agreement under which his extradition was ordered so that he

¹⁴²⁹ Judgment No. C-358/97 of 5 August 1997, Case File No. D-1445 (Original in Spanish, free translation).

¹⁴³⁰ Judgment SU-1184-2001 of 13 November 2001, Case File No. T-282730 (Original in Spanish, free translation).

¹⁴³¹ Judgments of 13 March 1989 and 20 April 1989.

¹⁴³² Criminal Chamber, Judgment of 7 May 2009 (Original in Spanish, free translation).

could be prosecuted in Spain, the Supreme Court of Justice held that the crime of genocide could not be considered a functional offense committed in the line of duty. The Supreme Court held: "[The crime] of genocide [...] of which the defendant is [accused], [was allegedly committed] during the Argentine dictatorship between the years of nineteen seventy-six and nineteen eighty-three, against a group of persons considered opponents of the military regime to which they pertained, that is, part of the civilian population that opposed the dictatorial regime to which they pertained and therefore it cannot be considered that these actions have put in danger the military's legal interest or a legal interest protected by the armed forces in compliance with their constitutional mission since – we must insist – the actions for which his prosecution is sought was directed against a civilian population, putting their personal security at risk."¹⁴³³

In August 2012, the Supreme Court of Justice of Mexico declared article 57 (section II, paragraph a) of the Code of Military Justice¹⁴³⁴ unconstitutional. The article had protected the jurisdiction of military courts over grave human rights violations committed against civilians.¹⁴³⁵ The Supreme Court held that this provision was incompatible with the obligations established under articles 2 and 8(1) of the *American Convention on Human Rights* and that, in accordance with the case law of the Inter-American Court of Human Rights,¹⁴³⁶ the scope of military courts' jurisdiction was restricted to crimes and offenses against military discipline. Likewise, the Supreme Court found that courts of

¹⁴³³ Judgment of 10 June 2003, *Case Amparo en revisión promovido por Ricardo Miguel Cavallo – Amparo en Revisión 140/2002*, (Original in Spanish, free translation).

¹⁴³⁴ Article 57 of the Code of Military Justice (*Código de Justicia Militar*) defines as "crimes against military discipline" all common crimes committed by military service members, among other circumstances: during military service or on occasion of acting military service; in territory declared in a state of siege or in a place subject to martial law; or in connection with a strictly military offense, codified as a crime in the *Código de Justicia Militar*.

¹⁴³⁵ Rulings on the *Amparo en Revisión No. 133/1012*, "*Inconstitucionalidad del artículo 57, fracción II, inciso a) del Código de Justicia Militar y legitimación del ofendido y sus familiares para promover amparo*".

¹⁴³⁶ Judgment of November 23, 2009, *Case of Radilla Pacheco v. Mexico*, Series C No. 209; Judgment of August 30, 2010, *Case of Fernández Ortega et al v. Mexico*, Series C No. 215; Judgment of August 31, 2010, *Case of Rosendo Cantú et al v. Mexico*, Series C No. 216; and Judgment of November 26, 2010, *Case of Cabrera García and Montiel Flores v. Mexico*, Series C No. 220.

ordinary jurisdiction were the ones with competence to try and punish the members of the Armed Forces responsible for crimes committed against civilians and not courts of military jurisdiction.

In the Dominican Republic, when resolving a conflict of jurisdiction in a case of homicide against a civilian, attributed to two non-commissioned police officers, the Supreme Court held that the competence of police tribunals is restricted to special infractions of the police order, set out in the Police Code of Justice (*Código de Justicia Policial*) and not to all the crimes penalized by this code. Thus, the Court sent the case to the courts of ordinary jurisdiction. The Court found that "it is a principle of law that the soldiers, among whom the police must be included [...], should not be taken out of the jurisdiction of ordinary courts except in exceptional cases, which entails – as a mandatory consequence – that during normal times – not times of war but of peace – in principle the military and police tribunals should only hear special offenses of a purely military or police order, committed by military and police officers."¹⁴³⁷

The Supreme Court of Justice of Uruguay, in a case of wounds inflicted on a civilian by a member of the Navy, decided that the case was subject to courts of ordinary jurisdiction and not to military courts, based on the principle of equality before the courts and the restrictive notion of military offenses.¹⁴³⁸

8. Military offenses and war crimes

A new tendency seeks to base the *raison d'être* of military courts on the specialized law governing war crimes and serious breaches of international humanitarian law. According to this tendency, these offenses under international law are military offenses, "crimes in the line of duty", or, at least, require that the judge have legal training arising from military criminal law. Thus, extrajudicial executions or, to utilize the language of international humanitarian law, arbitrary or wilful killings; torture; enforced disappearance; sexual violence; and forced and illegal displacement of civilian populations would be military offenses or

¹⁴³⁷ Judgment of 26 December 2001, case: *Homicide of Pedro M. Contreras* (Original in Spanish, free translation)

¹⁴³⁸ Judgment of 28 July 1986, *Case Clavero Iglesias, José – Conflict of jurisdiction*, No. 154/84.

offenses subject to military jurisdiction, when they are committed within a context of armed conflict and related to it.

To equate war crimes or breaches of international humanitarian law to strictly military offenses or to "crimes in the line of duty" has no conceptual basis or legal logic whatsoever, from the perspective of substantive criminal law.

War crimes are crimes against international law, which means they violate rights or legal interests protected by international law. They constitute *delicti juris gentium*, which threaten the community of legal interests recognized as such by the community of nations or the international public order.¹⁴³⁹

The different legal nature of war crimes and of military offenses is reflected, moreover, in the legal regime applicable to each one of these figures. Indeed, the suppression of war crimes is subject to certain rules – universal jurisdiction, non-applicability of statutes of limitation, *aut dedere aut judicare*, the obligation to extradite, no amnesties, no defense against criminal liability for following superior orders, among others – which are not applicable to military offenses. For example, military offenses are subject to statutes of limitations. Likewise, in principle, multilateral agreements exclude military offenses from the scope of extraditable offenses.¹⁴⁴⁰ Regarding military offenses, compliance with superior orders is a classic ground for exclusion from criminal liability generally recognized in national laws.

War crimes fundamentally seek to protect legal interests pertaining to the international legal order that, as the International Criminal Tribunal for the former Yugoslavia pointed out, protect general values in order to guarantee respect for

¹⁴³⁹ See, inter alia: Quintano Ripollés, Antonio, *Tratado de derecho penal internacional e internacional penal*, Instituto "Francisco de Vitoria", Madrid, 1955, págs. 26 et seq.; and Huet, André y Koering-Joulin, Renée, *Droit Pénal International*, Col. Thémis, Ed. PUF, Paris, 1993, pp. 25 et seq.

¹⁴⁴⁰ See, for example, *United Nations Model Treaty on Extradition; Treaty on International Penal Law*, of Montevideo in 1920; and *European Convention on Extradition*, of 1957. However, this principle is nuanced by some bilateral treaties (See: Huet, André Huet y Koering-Joulin, Renée, *Droit pénal international*, Presses universitaires de France, Paris, 1993, pag. 365) and multilateral treaties. (See, for example, the Extradition Accord, of Caracas, adopted by Ecuador, Bolivia, Peru, Colombia and Venezuela in 1911. Article 2 (22, e) incorporated desertion of the Marines and the Army committed at sea among the list of extraditable offenses.)

human dignity.¹⁴⁴¹ The UN General Assembly has implicitly reiterated this in several resolutions since 1946.¹⁴⁴² Thus, for example, in Resolution 2583 (XXIV) of 1969, the General Assembly recalled that the investigation of war crimes and the prosecution and punishment of their perpetrators “constitute an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security.”¹⁴⁴³ The IACHR has also held that “war crimes[] represent very serious offenses to human dignity and a flagrant denial of the fundamental principles enshrined in the Charters of the Organization of American States and the United Nations [...] [T]o judge these types of crimes[] contribute[s] considerably to strengthening protection of human rights, and, even more significantly, to consolidating the rule of law and the fundamental freedoms of human beings in the world community.”¹⁴⁴⁴

War crimes seek to protect international legal interests such as the “laws and customs of war,” applicable both in international and internal armed conflicts. But also, international humanitarian law and international criminal law, by prohibiting and criminalizing a series of acts as war crimes, also seek to protect essential legal interests arising from human rights and that even in times of war cannot be suspended, such as for example the rights to not be arbitrarily deprived of life, to not be tortured or subjected ill-

¹⁴⁴¹ Judgment of 14 January 2000, *The Prosecutor v. Vlatko Kupreškic et al*, Case No. IT-95-16-T, para. 702.

¹⁴⁴² See, inter alia, Resolutions: 3 (I) “Extradition and Punishment of War Crimes” of 13 February 1946; 95(I) “Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal” of 11 December 1946; 170 (II) “Surrender of War Criminals and Traitors” of 31 October 1947; 2338 (XXII) “Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity” of 18 December 1967; 2391 (XXIII) “Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity” of 25 November 1968; 2712 (XXV) “Question of the punishment of war criminals and of persons who have committed crimes against humanity” of 14 December 1970; 2840 (XXVI) “Question of the punishment of war criminals and of persons who have committed crime against humanity” of 18 December 1971; and 3020 (XXVII) “Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity” of 18 December 1972.

¹⁴⁴³ Resolution 2583 (XXIV) “Question of the punishment of war criminals and of persons who have committed crimes against humanity,” of 15 December 1969.

¹⁴⁴⁴ Resolution No. 1/03 “On Trial for International Crimes,” 24 October 2003.

treatment, or to a fair trial by an independent and impartial tribunal.¹⁴⁴⁵ For example, arbitrary or wilful killing of a civilian or a combatant removed from the field of combat constitutes, above all else, a breach of the right to not be arbitrarily deprived of life, that is, of a legal right arising under ordinary law and not a military legal interest.

Thus, there is no legal basis for considering war crimes as military offenses – that is, crimes that would violated military legal interests – from the point of view of the legal interest protected by the prohibition of a certain behaviour or conduct. As Mr. André Andries, the former First Advocate-General before the Court of Cassation of Belgium, in the *XIV Convention of the International Society for Military Law and the Law of War*, the option of confiding the prosecution of war crimes and breaches of international humanitarian law to military tribunals is problematic, insofar as these crimes find their basis in the need to protect a worldwide legal order, while the *raison d'être* for military criminal jurisdiction is maintaining military discipline in the pursuit of national interests, or in other words government interests.¹⁴⁴⁶

On the other hand, from the point of view of the active subject of the criminal offense, the conflation of war crimes and military offenses of “abuses of office” committed in the line of duty creates serious problems. The commission of war crimes is not circumscribed to the offenses of this nature committed by a State's Armed Forces. Likewise, these crimes can be committed by other actors in the conflict who have, even if temporarily, the status of “combatants,” but who are not members of the State's Armed Forces, such as: dissident forces; armed opposition groups; “civilian” leaders who direct the parties to a conflict and

¹⁴⁴⁵ See, for example: Article 8 of the Rome Statute of the International Criminal Court; Article 4 of the Statute of the International Criminal Tribunal for Rwanda; Articles 2 and 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia; Articles 3 and 4 of the Statute of the Special Court for Sierra Leone; Common Article 3 of the Geneva Conventions of 12 August 1949; Article 130 of the Geneva Convention on the treatment due to prisoners of war; Article 147 of the Geneva Convention on the protection due to civilians in times of war; and Article 85 of the Additional Protocol to the Geneva Conventions of 12 August 1949 relative to the Protection of the Victims of International Armed Conflicts (Protocol I).

¹⁴⁴⁶ Andries, André, “Lois et procédures nationales”, in *XIV Quatorzième Congrès, Athènes (Grèce), 10-15 mai 1997, Investigation et poursuites des violations du droit des conflits armés, Volume I*, Recueils de la Société internationale de droit militaire et de droit à la guerre, Bruxelles, 1999, pag. 332.

take part in hostilities; etc. Although they may not be considered civilians for the purposes of the application of international humanitarian law – in particular the regime for the protection of civilians and the civilian population – and they have “combatant” status, they retain their civilian status for criminal justice purposes (with the exception made, in the framework of international armed conflicts, for the figure of War Prisoners).

Inter-American case law and doctrine regarding the prosecution of members of armed opposition groups by military courts in situations of armed conflict is useful. Both the Inter-American Commission and Court have held that the members of armed groups must be tried by courts of ordinary jurisdiction and not by military tribunals. The IACHR has held that the most fundamental requirements of a fair trial “apply to the investigation, prosecution and punishment of crimes, including those relating to terrorism, regardless of whether such initiatives may be taken in time of peace or times of national emergency, including armed conflict.”¹⁴⁴⁷ Thus, the IACHR has found that the “right to be tried by a competent, independent and impartial tribunal in conformity with applicable international standards” demands “trial by regularly constituted courts that are demonstrably independent from other branches of government and comprised of judges with appropriate tenure and training, and generally prohibits the use of *ad hoc*, special, or military tribunals or commissions to try civilians.”¹⁴⁴⁸

For its part, the Inter-American Court of Human Rights has held that “the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have.”¹⁴⁴⁹ Likewise, the Court has held that “the impartiality of the judge is affected by the fact that the armed forces have the dual function of combating insurgent groups with

¹⁴⁴⁷ *Report on Terrorism and Human Rights*, Op. Cit., para. 261.

¹⁴⁴⁸ *Ibidem*.

¹⁴⁴⁹ Judgment of May 30, 1999, *Case of Castrillo Petruzzi and others v. Peru*, Series C No. 52, para. 130. In the same vein, see: Judgment of September 29, 1999, *Case of Cesti Hurtado v. Peru*, Series C No. 56.

military force, and of judging and imposing sentence upon members of such groups”¹⁴⁵⁰.

Finally, the argument according to which the prosecution of war crimes and graves breaches of international humanitarian law requires that the judge have legal knowledge arising from military courts is baseless. First, there is no correlation between the legal interests protected through prosecution of war crimes and those protected by military criminal law. Secondly, in the investigation and prosecution of certain war crimes may require specialized knowledge of the military and of international humanitarian law; these areas of expertise do not arise out of military criminal law. Certainly, concepts such as “proportionality of the use of force,” “imperative military objectives,” “legitimate targets,” or “prohibited arms and ammunition,” among others, are dispositive to establish whether the action is legal under international humanitarian law or constitutes a war crime. In the majority of these cases, specialized knowledge is required on the part of prosecutors and judges. However, this knowledge have nothing to do with military criminal law – whether substantive or procedural – and fundamentally emanate from international humanitarian law and from tactical and operational military knowledge. Prosecutors and judges are in the same situation when in order to investigate, hear or decide a crime – whether due to the crime’s characteristics, the modalities of its commission or the characteristics and conditions of the active subject of the criminal offense – it is necessary to draw upon knowledge or expertise on psychology, sociology, economics, medicine, graphology and accounting, in order to administrate justice. Financial or environmental crimes, as well as money laundering, frequently require an expertise that justice system administrators do not have. This knowledge is usually provided through the figure of a technical, scientific expert witness.

The experience of international tribunals that have prosecuted or are prosecuting war crimes – such as the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the Special Court for Sierra Leone and the International Criminal Court – are a good example of this. None of these courts has judges coming

¹⁴⁵⁰ Judgment of August 18, 2000, Case of *Cantoral Benavides v. Peru*, Series C No. 69, para. 114. See also: Judgment of November 25, 2004. Case of *Lori Berenson Mejía v. Peru*, Series C No. 119, para. 145.

from military courts among its members, nor do they have judges with specialized knowledge of military criminal law. The prosecutors who have acted before these international courts have not had and do not have these special conditions or knowledge either. A few of them do have extensive expertise in international humanitarian law. When specialized knowledge of technical and operational military matters, prosecutors and judges in these international courts have sought out the testimony of expert witnesses.

In several countries the suppression of war crimes, independent of the military status of the active subject of the illegal conduct, is assigned to ordinary criminal courts and not military tribunals. Thus, for example, in Austria¹⁴⁵¹, Belgium, Denmark, Norway¹⁴⁵² and Sweden, the prosecution of graves breaches of the Geneva Conventions is carried out through the application of the regular Criminal Code by courts of ordinary jurisdiction. In the Americas, several countries have developed a legal framework, whether through legislation or case law, that places courts of ordinary jurisdiction in charge of hearing cases of war crimes. In Colombia,¹⁴⁵³ Costa Rica,¹⁴⁵⁴ El Salvador,¹⁴⁵⁵ Guatemala,¹⁴⁵⁶ Nicaragua,¹⁴⁵⁷ Panama,¹⁴⁵⁸ Paraguay¹⁴⁵⁹ and Uruguay,¹⁴⁶⁰ war crimes – at least those committed against civilians or combatants removed from combat – are crimes under ordinary criminal law and are subject to the jurisdiction of ordinary courts. In Argentina, through the enactment of the new Code of Military Justice in

¹⁴⁵¹ Article 84 of the Political Constitution and Criminal Code (ordinary).

¹⁴⁵² 1994 reform to the 1981 Code of Criminal Procedure.

¹⁴⁵³ The war crimes are included as criminal offenses in the ordinary Criminal Code and in article 3 of the 2010 Code of Military Offenses (*Código Penal Militar*), those criminal offenses “that breach international humanitarian law” are not considered as crimes against duty (*delitos de función*), and they are excluded from the scope of military tribunals’ jurisdiction.

¹⁴⁵⁴ Article 378 of the Criminal Code.

¹⁴⁵⁵ Article 362 of the Criminal Code.

¹⁴⁵⁶ Article 378 of the Criminal Code.

¹⁴⁵⁷ Articles 489 *et seq* of the Criminal Code.

¹⁴⁵⁸ Articles 437 *et seq* of the Criminal Code.

¹⁴⁵⁹ Article 320 of the Criminal Code.

¹⁴⁶⁰ Law No. 18.026 of 25 September 2006, which codifies war crimes, establishes in article 11 that “crimes and offenses listed in the instant law may not be considered as committed in the exercise of military duties, shall not be considered military offenses and shall be excluded from courts of military jurisdiction when they are prosecuted.” (Original in Spanish, free translation).

2008,¹⁴⁶¹ which withdrew military criminal jurisdiction in times of peace, and the modifications incorporated into the Criminal Code and Code of Criminal Procedure of the Nation,¹⁴⁶² all crimes committed by military members – independent of the nature of the criminal offense and of whether they are committed in wartime – are subject to the jurisdiction of ordinary courts.¹⁴⁶³

The region's high courts of justice have also created case law excluded breaches of international humanitarian law from the scope of military tribunals' jurisdiction.¹⁴⁶⁴ The Constitutional Tribunal of Peru has held that "the international community recognizes the existence of a non-derogable nucleus of rights, established in peremptory norms of international law. These norms are derived from international human rights law, international humanitarian law and international criminal law."¹⁴⁶⁵ When examining article 90(1) of the Code of Military and Police Justice (*Código de Justicia Militar Policial*),¹⁴⁶⁶ which codified the homicide of a person protected by international humanitarian law as an abuse of office (*delito de función*) committed in the line of duty, and placed it under the jurisdiction of military courts, the Constitutional Tribunal highlighted that "as can be observed, the aforementioned criminal law does not present all of the requirements that would make it a crime against military duty or

¹⁴⁶¹ Law No. 26.394 of 26 August 2008.

¹⁴⁶² Addendum I to Law No. 26.394 of 26 August 2008.

¹⁴⁶³ The new Argentine legislation establishes as a principle that "[c]rimes committed by military members in times of war or on occasion of other armed conflicts shall be investigated and tried according to the ordinary legal regime foreseen for peacetime, except when the difficulties arising from the conditions of war or of the operations initiated are manifest and unsurmountable and the delay in adjudication may cause prejudice to the operative efficiency or in the capacity of combat" (Annex II of the Law 26.394 of 26 August 2008) (Original in Spanish, free translation).

¹⁴⁶⁴ See, for example, in Colombia: Superior Council of the Judiciary, Disciplinary Chamber, Judgment of 12 February 2009, Case FileNo. 110010102000200900097 01 – 1134C; and Constitucional Court, Judgment SU-1184-2001 of 13 November 2001, Case File T-282730.

¹⁴⁶⁵ Judgment of 9 December 2004, *Recurso Extraordinario - Gabriel Orlando Vera Navarrete*, Case File No. 2798-2004-HC/TC, para. 6 (Original in Spanish, free translation)..

¹⁴⁶⁶ Article 90 (1): "The military or police officer that, in relation with an international or non-international armed conflict: 1. Kills a person protected by international humanitarian law shall be punished with a sentence of deprivation of liberty for no less than twenty years and no more than thirty years." (Original in Spanish, free translation).

delito de función. Thus, this criminal law intends to sanction the conduct of the military or police officer (*on duty*), if in an international or internal armed conflict (*in active service or on occasion of it*), he KILLS a person protected by international humanitarian law, affected the legal right to LIFE (*which is not an institutional legal interest of the Armed Forces or the National Police*)¹⁴⁶⁷.

Likewise, when examining other criminal offenses,¹⁴⁶⁸ several of which referred to serious breaches of international humanitarian law, the Constitutional Tribunal of Peru held that these crimes “by seeking to affect legal rights that do not pertain to, and are not particular to, the Armed Forces or National Police, such as physical, psychic or moral integrity, sexual liberty, freedom of circulation, property, and effective judicial protection, *inter alia*,”¹⁴⁶⁹ these crimes cannot be within the scope of the jurisdiction of military courts. Thus, the Constitutional Tribunal concluded that these laws, classifying these criminal offenses as abuses of office committed in the line of duty, were unconstitutional.

¹⁴⁶⁷ Judgment of 15 December 2006, Case File No. 00012-2006-PI/TC, para.74.

¹⁴⁶⁸ These are the offenses criminalized in subsections 2 through 9 of article 90 and in articles 91, 92, 93, 95, 96, 97, 98, 99, 100, 101, 102 and 103 of the Code of Military and Police Justice (*Código de Justicia Militar Policial*).

¹⁴⁶⁹ Judgment of 15 December 2006, *Constitutional Action against the Military Code of Justice*, Case FileNo. 00012-2006-PI/TC, para. 75.

CHAPTER X: APPLICABILITY OR NON-APPLICABILITY OF STATUTORY LIMITATIONS

"[I]t falls upon the State to prosecute those responsible for crimes against humanity and, if necessary, adopt restrictive measures to prevent, for example, the use of statutory limitations that seriously violate human rights. The application of these standards allows for the effectiveness of the legal system and is justified by the prevailing interests of the fight against impunity. The goal, clearly, is to prevent the application of certain criminal law mechanisms to the repulsive objective of obtaining impunity. This must always be prevented and avoided, since that encourages the repetition of criminal conduct, it serves as a breeding ground for revenge, and corrodes two fundamental values of a democratic society: truth and justice."

Constitutional Tribunal of Peru¹⁴⁷⁰

1. General considerations

The issue of impunity of gross human rights violations and crimes under international law often puts a strain on the legal applicability or non-applicability of statutory limitations in criminal matters. As has been evident, the applicability of statutory limitations in criminal matters frequently operates as a mechanism that prevents placing perpetrators of gross violations of human rights in the arms of justice.

2. Crimes not subject to statutory limitations pursuant to International Law

International law states that certain types of international crimes are not subject to statutory limitations. However, it should be noted that the non-applicability of statutory limitations is not predicated for all international crimes, since this is not an inherent element to all international criminal offenses. Under international law only war crimes, crimes against humanity, genocide and the crime of *apartheid* are not subject to statutory limitations. Extrajudicial executions, torture, and enforced disappearance - even when they are international crimes - are not subject to statutory limitations *per se*. Notwithstanding, when these acts are committed in a massive or systematic manner, or within the

¹⁴⁷⁰ Judgment of March 18, 2004, Exp. No. 2488-2002-HC/TC, *Case of Genaro Villegas Namuche*, para. 23 of the considerations.

context of an armed conflict and in relation to it, they legally enter another illegal entity, namely, a crime against humanity or a war crime, and therefore the nature changes and they no longer are subject to statutory limitations.

The charters that arose from the Nuremberg and Tokyo trials did not include any express provision on the non-applicability of statutory limitations to war crimes and crimes against humanity. Neither did the resolutions of the UN General Assembly confirming the principles of international law recognized by the Charter, and the Judgment of the Nuremberg Tribunal¹⁴⁷¹ and about the crime of genocide¹⁴⁷²; the *Convention for the Prevention and Punishment of the Crime of Genocide*, adopted by the General Assembly in 1948¹⁴⁷³; nor did the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, drafted by the UN International Law Commission in 1950, at the request of the General Assembly.¹⁴⁷⁴ Notwithstanding, there was a precedent in what has been termed the Nuremberg Law: Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945*, of the Allied Control Council. This law prohibited the application of statutory limitations for the crimes committed between January 30, 1933 and July 1, 1945.¹⁴⁷⁵

In the 1960s, the question of the non-applicability of statutory limitations to war crimes and crimes against humanity began to be the subject of debate within the United Nations, as well as the Council of Europe. The underlying reason was the risk that many perpetrators of war crimes or crimes against humanity committed during World War II were benefiting from the application by national courts of statutes of limitation, where they were prosecuted. In response, several countries, particularly European countries, incorporated into their legislation provisions prohibiting

¹⁴⁷¹ Resolution No. 95 (I) December 11, 1946.

¹⁴⁷² Resolution No. 96 (I) of December 11, 1946.

¹⁴⁷³ Resolution No. 260 A (III) of December 9, 1948.

¹⁴⁷⁴ Resolution 177 (II) "Formulation of the principles recognized by the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal," November 21, 1947.

¹⁴⁷⁵ Law No. 10 of the Allied Control Council, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, December 20, 1945, Article II, 5: "In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment."

the application of statutes of limitation to war crimes and crimes against humanity.¹⁴⁷⁶

In 1965, the United Nations Economic and Social Council (ECOSOC) noted "the convenience of affirming in international law, the principle that there is no period of limitation for war crimes and crimes against humanity [and insisted] all States to take the necessary measures to prevent applicability of periods of limitations to war crimes and crimes against humanity."¹⁴⁷⁷ Before that and at the request of the Commission on Human Rights,¹⁴⁷⁸ the UN Secretary General presented a study on the question of the applicability of statutes of limitation to war crimes and crimes against humanity before the Commission on Human Rights and the ECOSOC.¹⁴⁷⁹ The study found that, although statutory limitations in criminal matters was known to several national legal systems, many countries did not know of the applicability of statutory limitations or did not know of it for the most serious crimes. Similarly, the study also stressed that "war crimes [...] and crimes against humanity are international crimes and fundamentally different from offences under ordinary municipal law,"¹⁴⁸⁰ and that they were governed by international law, as they were "crimes against the international public order."¹⁴⁸¹

The study of the Secretary-General concludes that the application of statutory limitations in criminal matters "[n]or it is, by any means, a principle recognized by all States."¹⁴⁸² It also claimed that "silence on this point of all international instruments drawn up since the Second World War on punishment of war crimes, [...] and crimes against humanity, which form the new international

¹⁴⁷⁶ Among other countries: Austria, Belgium, Bulgaria, China, Czechoslovakia, Denmark, USA, France, Hungary, Ireland, Israel, Italy, Federal Republic of Germany, Netherlands, Poland, Union of Soviet Socialist Republics and the Ukrainian Soviet Socialist Republic.

¹⁴⁷⁷ Resolution No. 1158 (XLI), "On the punishment of war criminals and of persons who have committed crimes against humanity", of August 5, 1966, considering paragraph No. 6 and considering paragraph No. 1.

¹⁴⁷⁸ Resolution No. 3 (XXI), "Question of punishment of war Criminals and of persons who have committed crimes against humanity", of April 9, 1965.

¹⁴⁷⁹ *Question of punishment of war criminals and of persons who have committed crimes against humanity: question of the non-applicability of statutory limitation to war crimes and crimes against humanity- Study submitted by the Secretary General*, UN Doc. E/CN.4/906, of February 15, 1966.

¹⁴⁸⁰ *Ibid.*, para. 157.

¹⁴⁸¹ *Ibidem*.

¹⁴⁸² *Ibid.*, para. 158.

criminal law, can be interpreted only as recognition of the principle that there is no period of limitation for such crimes."¹⁴⁸³ Finally, the Secretary General questioned whether the principle that there is no period of limitation was not "a rule of jus cogens, a peremptory rule, a fundamental rule of international public order".¹⁴⁸⁴

"Thus, the principle that there is no period of limitation does not derive only from the intention of the international 'legislator', who has clearly and urgently stressed the need for the sure and effective punishment of serious crimes under international law; it does not derive only from the universal conscience, which revolts against the idea that such crimes can go unpunished; it does not derive only from the state of positive municipal law, which has often hesitated, or even refused, to recognize the institution of statutory limitation in the case of serious crimes; it derives also, and above all, from the fact that none of the reasons usually advanced in favor of statutory limitation for crimes under ordinary municipal law justifies such limitation for the international crimes in question. The latter crimes cannot, from either the legal or the moral standpoint, be placed on the same footing as the former. If a crime under municipal law, however serious, goes unpunished through the operation of the statute of limitations, the fact does not usually make itself felt even in the narrow social environment, in which the crime was committed; the criminal, lawfully released for one or another of the reasons underlying the statute of limitations (remorse, forgiveness, loss of validity of proofs, etc.) quietly resumes his place in society and lives at peace with it. In contrast, impunity for a crime against peace or against humanity or for a serious war crime, whether acquired through statutory limitation or through any other means, arouses violent reactions on a very large, scale; consequently, the result might be to expose the guilty party, now immune from any legal prosecution, to the 'private justice' of the victims or of those bound to them by ties of blood, land, race, religion and so on. Because of the 'exceptional' gravity, the 'gigantic' magnitude and, above all, the 'incomprehensible' motives of such international crimes, all these people, whose numbers can be readily imagined in each case, tend to be 'unable ever to forget' and to be undeterred by any obstacle, legal or otherwise, from ensuring that, once the guilty are 'unmasked,' they are punished as they deserve."

Secretary General of the United Nations (1966)¹⁴⁸⁵

The debates at the United Nations, as well as at the Council of Europe, led to the adoption of two international instruments: the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* of 1968; and the *European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes*. It is important to note that, in adopting the Convention and recalling its previous

¹⁴⁸³ *Ibidem*.

¹⁴⁸⁴ *Ibid.*, para. 159.

¹⁴⁸⁵ *Ibid.*, para. 159.

resolutions and other international instruments on the suppression of war crimes and crimes against humanity, the UN General Assembly noted "that none of the solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity made provision for a period of limitation" and acknowledged that "it is necessary and timely to affirm in international law, through this Convention, the principle of that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application."¹⁴⁸⁶

There is broad consensus about the retroactive vocation of the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, because it codified an existing rule of international law, with which the principle of the non-applicability of statutory limitations applies to these unlawful acts, even if they were committed before the entry into force of the Convention. This has been reiterated by the Inter-American Court of Human Rights,¹⁴⁸⁷ the European Court of Human Rights,¹⁴⁸⁸ and national courts.¹⁴⁸⁹

The *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* of 1968 imposes the following obligations upon State parties:

- a. adopt the necessary measures (legislative or otherwise) to ensure that statutory limitations not apply to the prosecution or punishment, established by law or otherwise, not apply to war

¹⁴⁸⁶ Resolution No. 2391 (XXIII), of November 26, 1968, Preamble.

¹⁴⁸⁷ Judgment of September 26, 2006, *Case of Almonacid Arellano et al. v. Chile*, Series C No. 154.

¹⁴⁸⁸ See for example, Judgment of May 17, 2010, case of *Kononov v. Letonia*, Communication No. 36376/04; Decision of Inadmissibility of January 17, 2006, Communications Nos. 23052/04 and 24018/04, *Case of Kolk and Kislyiy v. Estonia*; and Decision of Inadmissibility of November 15, 2001, Communication No. 54210/00, *Case of Maurice Papon V. France*.

¹⁴⁸⁹ See in Latin America, for example: Supreme Court of Justice of Peru (Judgment of July 20, 2009, Case file AV No. 23-2001, *Proceeding against Alberto Fujimori*); Superior Court of Justice of Lima (First Special Criminal Chamber, decision of September 15, 2010, Exp.28-2001, *Motion to dismiss the criminal proceeding (Santiago Enrique Martín Rivas, et. al., accused)*; and Supreme Court of Justice of the Nation of Argentina (Judgment of November 2, 1995, Case of *Erich Priebke* N°16.063/94 and Judgment of August 24, 2004, *Remedy of fact deduced by the State and Government of Chile in the case Arancibia Clavel, Enrique Lautaro s/ aggravated homicide, illicit association, and others -case N° 259-*).

crimes and crimes against humanity, and that where they exist, such limitations be abolished;¹⁴⁹⁰

b, adopt all necessary measures (legislative or otherwise) with a view to making possible the extradition, in accordance with international law, of the perpetrators, participants, accomplices, or instigators of war crimes or crimes against humanity, whether State officials or private individuals, and agents who have tolerated the commission of such crimes.¹⁴⁹¹

c. apply these provisions to the perpetrators, participants, accomplices and instigators of war crimes or crimes against humanity, whether State officials or private individuals, and to the agents who have tolerated the commission of such crimes, whatever the date of commission of these crimes.¹⁴⁹²

The logical consequence is that the authorities of the State party to the Convention cannot impose periods of limitation for crimes against humanity and war crimes, and should take legal action against the perpetrators and other participants in these crimes.

The principle of non-applicability of statutory limitations to war crimes, crimes against humanity, genocide and the crime of *apartheid* has been widely reaffirmed in various international instruments. In 1973, by adopting the *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*,¹⁴⁹³ the UN General Assembly implicitly reaffirmed the principle of non-applicability of statutory limitations. In fact, Principle 1 states that "[w]ar crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment." Subsequently, the principle of non-applicability of statutory limitations has been reaffirmed by the *Rome Statute of the International Criminal Court*¹⁴⁹⁴; 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*

¹⁴⁹⁰ Article IV.

¹⁴⁹¹ Article III.

¹⁴⁹² Articles I and II.

¹⁴⁹³ Resolution 3074 (XXVIII) of the General Assembly, of December 3, 1973.

¹⁴⁹⁴ Article 29.

*Violations of International Humanitarian Law*¹⁴⁹⁵; *the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*¹⁴⁹⁶ and *the Rules of Customary International Humanitarian Law*.¹⁴⁹⁷ (See Annex VI).

The *International Convention for the Protection of All Persons from Enforced Disappearance* implicitly reaffirmed the principle of non-applicability of statutory limitations for crimes against humanity. Indeed, Article 5 provides that "[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law," and Article 8, which provides guarantees to prevent the application of statutory limitations from becoming a source of impunity, states that such a means is "[w]ithout prejudice to Article 5," that is, the non-applicability of statutory limitations to crimes of enforced disappearance when characterized as a crime against humanity. During the drafting and negotiation of this Treaty, "[e]mphasis was placed on the non-applicability of statutory limitations to enforced disappearances that constituted crimes against humanity."¹⁴⁹⁸

The practice of the United Nations, especially relating to the establishment of *ad hoc* or hybrid criminal tribunals, has also reaffirmed the principle of non-applicability of statutory limitations for the most serious crimes under International law. In East Timor, section 17 of Regulation 2000/15 of the United Nations Transitional Administration provides that genocide, war crimes, crimes against humanity and torture "shall not be subject to any statutes of limitations."¹⁴⁹⁹ *The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the regime of Democratic Kampuchea*, of 2001 excludes the applicability of statutory limitations for genocide and

¹⁴⁹⁵ Article 6.

¹⁴⁹⁶ Principle 23 (2).

¹⁴⁹⁷ Rule No. 160 (in *Customary International Humanitarian Law, Volume I: Rules*, Doc. Cit., p. 614).

¹⁴⁹⁸ *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2003/71 of February 12, 2003, para. 43.

¹⁴⁹⁹ Regulations No. 2000/15 adopted by the Transitional Administration of the United Nations for East Timor on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, June 6, 2000, Section 17(1).

crimes against humanity.¹⁵⁰⁰ Although the statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda do not include an explicit clause on the non-applicability of statutory limitations, the jurisprudence of these tribunals have reaffirmed this principle in regard to war crimes, crimes against humanity, and genocide.¹⁵⁰¹

Beyond the question of the legally binding nature of the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* of 1968 for States parties, there is an international consensus that the principle of the non-applicability of statutory limitations to war crimes, crimes against humanity and genocide is a peremptory norm of international law. The Inter-American Court of Human Rights has stated that the non-applicability of statutory limitations to crimes against humanity is inherent to the nature of this international crime. In this regard, the Court has specified that "crimes against humanity are intolerable in the eyes of the international community and offend humanity as a whole. The damage caused by these crimes still prevails in the national society and the international community, both of which demand that those responsible be investigated and punished. In this sense, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity clearly states that 'no statutory limitation shall apply to [said internationally wrongful acts], irrespective of the date of their commission.'" ¹⁵⁰² The Court considered "that the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (*ius cogens*), which is not created by said Convention, but it is acknowledged by it," ¹⁵⁰³ and in that sense, a State cannot invoke what is not a part of this Convention to "not comply with this imperative norm."¹⁵⁰⁴

The Inter-American Commission on Human Rights (IACHR) has stated that the principle of non-applicability of statutory limitations

¹⁵⁰⁰ Articles 4 and 5.

¹⁵⁰¹ See, for example, International Criminal Tribunal for the former Yugoslavia, Judgment of December 10, 1998, *The Prosecutor v. Furundzija*, Case No. IT-95-17/1, para. 155 and 157.

¹⁵⁰² Judgment of September 26, 2006, *Case of Almonacid Arellano et al. V. Chile*, Series C No. 154, para. 152.

¹⁵⁰³ *Ibid.* para. 153.

¹⁵⁰⁴ *Ibidem.*

to crimes against humanity is a norm of *jus cogens*.¹⁵⁰⁵ Similarly, the Human Rights Committee (HRC) recalled that, under international law, crimes against humanity are not subject to statutes of limitations.¹⁵⁰⁶

Meanwhile, in the case *Kononov v. Latvia*,¹⁵⁰⁷ the European Court of Human Rights found that "in 1944, international law was silent on the issue [of the application of statutory limitations]. Previous international declarations on the responsibility for war crimes and obligation to prosecute and punish, war crimes did not refer to any applicable limitation periods. While Article II(5) of Control Council Law No. 10 addressed the issue as regards war crimes committed on Germany territory prior to and during the Second World War, neither the Charters of the IMT Nuremberg/Tokyo, nor the Genocide Convention of 1948, the Geneva Convention of 1949 or the Nuremberg Principles contained any provisions concerning the prescriptibility of war crimes (as confirmed by the preamble to the 1968 convention). [...] [So] in 1944 no limitation period was fixed by international law as regards the prosecution of war crimes. Neither have developments in international law since 1944 imposed any limitation period on the war crimes charges."¹⁵⁰⁸

In several cases, the European Court of Human Rights stressed that crimes against humanity are not subject to statutes of limitation, regardless of the date on which they were committed.¹⁵⁰⁹

The International Committee of the Red Cross (ICRC) has concluded that the non-application of statutory limitations to war

¹⁵⁰⁵ See, *inter alia*, *Declaration of the Inter-American Commission on Human Rights on the obligation of the Haitian State to investigate serious human rights violations committed during the regime of Jean Claude Duvalier, May 12, 2011, paras. 10 etc.*

¹⁵⁰⁶ See, *inter alia*, *Concluding Observations of the Human Rights Committee: Spain, CCPR/C/ESP/CO/5*, of January 5, 2009, para. 9.

¹⁵⁰⁷ Concerning an officer of the Soviet army tried and convicted by a Latvian court, between 1998 and 2003, for war crimes (killings of civilians) committed in 1944, when Latvia was under the sovereignty of the Union of Soviet Socialist Republics (USSR) and which invoked, among others, statutes of limitation.

¹⁵⁰⁸ Judgment of May 17, 2010, case of *Kononov v. Latvia*, Communication No. 36376/04, para. 231 and 232.

¹⁵⁰⁹ Decision of Inadmissibility of January 17, 2006, Communications No. 23052/04 and 24018/04, *Case of Kolk and Kislyiy V. Estonia*; Decision of Inadmissibility of November 15, 2001, Communication No. 54210/00, *Case of Maurice Papon V. France*.

crimes is a rule of customary international humanitarian law.¹⁵¹⁰ In this regard, the ICRC has noted that "[t]he State practice establishes this rule as a norm of customary international law applicable in relation to war crimes committed both in international and non-international armed conflicts."¹⁵¹¹

The *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* of 1968, as noted by the Special Rapporteur of the UN International Law Commission, Mr. Doudou Thiam, is "simply declaratory in character [...], since] the offences involved are crimes by their very nature, statutory limitations are not applicable to them, regardless of when they were committed."¹⁵¹² It is important to recall that the Convention refers to war crimes and crimes against humanity, "irrespective of their date of commission"¹⁵¹³ and requires States parties to abolish the application of statutes of limitations for these crimes when present in domestic legislation (Article IV). In its judgment in the Touvier Case,¹⁵¹⁴ the criminal chamber of the Court of Cassation of France considered that there was not, in the light of the European Convention on Human Rights, a right to the application of statutory limitations and decided on the annulment of the judgment of the Court of 1st instance, which had closed the file upon invoking the application of statutory limitations and non-retroactivity of criminal law.¹⁵¹⁵ In its decision, the Chamber relied on the regulation of non-retroactivity of criminal law referred to in Article 15(2) of the *International Covenant on Civil and Political Rights* and 7(2) of the *European Convention on Human Rights*.

From the perspective of comparative law, a generalized practice is identifiable of excluding the application of statutory limitations for crimes of genocide, crimes against humanity and war crimes,

¹⁵¹⁰ *Customary International Humanitarian Law, Volume I: Rules*, Op. Cit., p. 614.

¹⁵¹¹ *Ibidem*.

¹⁵¹² *Fourth Report on the draft Code of Offences against the Peace and Security of Mankind*, UN Doc. A/CN.4/398, March 11, 1986, para. 172.

¹⁵¹³ Article I.

¹⁵¹⁴ Paul Touvier, French man prosecuted for crimes against humanity committed during World War II. The statute of limitation for the crimes for which he was being charged had lapsed, according to French criminal law, prior to the enactment of French law on the non-applicability of crimes against humanity (1964).

¹⁵¹⁵ Court of Cassation of France, Criminal Chamber, Judgment of June 30, 1976. This jurisprudence was reiterated by the Court, in its ruling of January 26, 1986, in the proceeding against Klaus Barbie.

either explicitly¹⁵¹⁶ or by reference to international State obligations.¹⁵¹⁷ The prohibition regarding the application of

¹⁵¹⁶ Bosnia and Herzegovina, crimes of genocide, crimes against humanity, war crimes or for other crimes pursuant to international law (Article 19 of the Criminal Code); Bulgaria, crimes against peace and against humanity (Art. 31 (7) of the Constitution of Bulgaria 1991; Croatia, genocide, war of aggression, war crimes or other crimes that are not subject to statutory limitations pursuant to international law (Articles 18 and 24 of the Criminal Code); Czech Republic, some crimes such as war crimes and crimes against humanity (Section 67a of the Criminal Code); Hungary, war crimes, crimes against humanity, some cases of aggravated homicide, certain cases of kidnapping and violence against a superior officer or official in service and some acts of terrorism (Section 33 (2) of the Criminal Code); Estonia, crimes against humanity and war crimes (Section 5 (4) of the Criminal Code); Poland, war crimes and crimes against humanity (Article 43 of the Constitution of 1977 and Article 105 of the Criminal Code of June 6, 1997); Slovenia, genocide, war crimes and 'criminal offenses in which prosecution cannot be prevented by the protection of international agreements' (Article 116 of the Criminal Code); Slovakia, genocide, crimes against humanity and war crimes (Article 67 of the Criminal Code); Russia, crimes against peace and security of mankind (Article 60(8) of the Criminal Code); Kyrgyzstan, crimes against peace and security of mankind and war crimes (Article 67(6) of the Criminal Code); Republic of Moldova, 'crimes against peace and security of mankind, war crimes or other crimes mentioned in international treaties to which the Republic of Moldova is a party (Article 60(8) of the Criminal Code); Tajikistan, crimes against peace and security of mankind (Article 75 (6) and 81 (5) of the Criminal Code) Armenia, crimes against peace and security of mankind and crimes under international agreements to which Armenia is a party (Article 75(5) of the Criminal Code.); Azerbaijan, 'crimes against peace and security of mankind and war crimes' (Article 75(5) of the Criminal Code.); Belarus, crimes against peace and security of mankind and war crimes (Article 85 of the Criminal Code); Burkina Faso, genocide and crimes against humanity (Article 317 of the Criminal Code); Mali, genocide, crimes against humanity and war crimes (Article 32 of the Criminal Code); Rwanda, Article 20 of Law No. 33 bis/2003 of 06/09/2003 that represses the crimes of genocide, crimes against humanity and war crimes; France, genocide and crimes against humanity (Article 213-5 of the Criminal Code of 1994); Italy, crimes punishable by life imprisonment (Article 157 of the Criminal Code); Switzerland, genocide, war crimes and other crimes against the physical integrity of persons (Article 75bis of the Criminal Code); and Belgium, the 1993 Act as amended by the Act of April 23, 2003 on the repression of serious violations of international humanitarian law and Article 144 of the Criminal Code (the law was amended by the law of August 5, 2003 on violations of international humanitarian law, but left unchanged the provision on the application of statutory limitations).

¹⁵¹⁷ Georgia, Articles 71, 76 of the Criminal Code; Moldova, Article 60(8) of the Criminal Code; Armenia, Article 75(5) of the Criminal Code; Bosnia and Herzegovina, Article 19 of the Criminal Code; Guatemala, Article 8 of the Law of National Reconciliation; Croatia, Articles 18 and 24 of the Criminal Code; Slovenia, Article 116 of the Criminal Code; South Africa, *Implementation of the Rome Statute of the Law of the International Criminal Court Act* (No. 27 of 2002) (Article 29 of the Rome Statute has been incorporated into the Law); Argentina, Law 25.778 of August 20, 2003 (giving constitutional status to the *Convention on the Non-*

statutory limitations to crimes of genocide, crimes against humanity and war crimes has also been ratified into domestic law of countries with different legal systems.¹⁵¹⁸

"[I]t is noteworthy to mention the established principle of non-applicability of statutory limitations to crimes against humanity. Had the concept of competence and jurisdiction continued to be interpreted in the classic or usual manner, and had the basic idea of prescription been maintained, any attempts to obtain justice when faced with serious violations of human rights would remain an illusion in many cases"

Ombudsman of Peru¹⁵¹⁹

In Latin America, high courts of justice have reaffirmed the principle of non-applicability of statutory limitations to these serious crimes, often calling upon its nature as a rule of customary international law. As such, the jurisprudence of the higher courts of Peru¹⁵²⁰, Argentina¹⁵²¹, Bolivia¹⁵²², Chile¹⁵²³, Colombia¹⁵²⁴,

Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity); Spain, Article 131(4) of the Criminal Code, as amended by the Organic Law 15/2003 of November 25, 2003; Germany, Article 5 of the Act to introduce the Code of Crimes Against International Law of June 26, 2002; Kingdom of the Netherlands, Article 13 of the International Crimes Act of June 19, 2003; and New Zealand, *International Crimes and International Criminal Court Act* of 2000 (Article 29 of the Rome Statute is repeated in section 12).

¹⁵¹⁸ See, for example: Israel, District Tribunal of Jerusalem, judgment of December 12, 1961 and the Supreme Court of Israel, Judgment of May 29, 1962, case of *Attorney General of Israel v. Eichmann*; France, Court of Cassation, Judgment of June 30, 1976, Case of *Touvier*, and Judgment of December 20, 1985, Case of *Klaus Barbie*; Italy, Military Court of Appeals of Rome, judgment of 22 July 1997, Case of *Haas and Priebke* (this judgment was upheld by the Military Court of Appeals on March 7, 1998 and by the Supreme Court of Cassation on November 16, 1998); Indonesian *Ad Hoc* Tribunal on Human Rights in East Timor, judgment of August 14, 2002, Case No. 01/PID.HAM/Ad.Hoc/2002/ph.JKT.PST; and Hungary, Constitutional Court, Judgment No. 53/1993 of October 13, 1993.

¹⁵¹⁹ Defensoría del Pueblo, *Informe Defensoria No. 57: Amnistía Vs. Derechos Humanos – Buscando justicia*, Lima, 2001, pp. 17 and 18 (original in Spanish, Free translation).

¹⁵²⁰ Constitutional Tribunal, Judgment of March 21, 2011, Case file N° 0024-2010-PI / TC LIMA, 25% of the *total number of congressmen*; Superior Court of Justice of Lima, First Special Criminal Court, decision of September 15, 2010, Exp.28-2001, motion to dismiss the criminal proceedings (Enrique Santiago Martin Rivas, et. al., Defendants).

¹⁵²¹ Supreme Court of the Nation, see, among others: Judgment of November 2, 1995, Case of *Erich Priebke* No. 16,063/94; Judgment of August 24, 2004, Remedy of fact deduced by the State and the Government of Chile in the case of *Arancibia Clavel, Enrique Lautaro s / homicide and conspiracy* and others-case No. 259; and Judgment of July 14, 2005, Case file S. 1767. XXXVIII, *Action brought by the defense of Hector Julio Simon - Simón, Julio Héctor and other s / unlawful*

Guatemala¹⁵²⁵, México¹⁵²⁶, Panama¹⁵²⁷ and Paraguay¹⁵²⁸ are worth mention.

"[E]ven when the Peruvian government had not yet ratified the instrument declaring the non-applicability of statutory limitations to crimes against humanity, it constituted the customary rule of international law in force at the time of the facts in this process (1991 and 1992)."

Superior Court Justice of Lima¹⁵²⁹

In Peru, the Constitutional Tribunal said that "it should be clear that the rule of non-applicability of statutory limitations to crimes against humanity, and consequently the mandate of prosecution, regardless of the date the offense was committed, does not have an entry into force in Peruvian legislation as a result of the entry into force of the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (November 9, 2003), rather it arises under a peremptory norm of general international law [...] it should be noted that the

deprivation of liberty, etc. case No. 17,768. See also: Criminal and Federal Correctional Chamber of Argentina, Judgment of September 9, 1999, Case No. 30514, in the proceedings against Massera and others on objections.

¹⁵²² Supreme Court of Justice, Judgment of April 21, 1993, *Case of Leaders of the Movement of the Revolutionary Left - Garcia Meza Tejada, Luis, et al.*

¹⁵²³ Supreme Court of Justice, Criminal Chambers, judgment of December 13, 2006, *Case of Molco Choshuenko (Paulino Flores Rivas and others)*, Docket No. 559-04.

¹⁵²⁴ See, *inter alia*: Constitutional Court, Judgment C-580/02 of July 31, 2002, Case file LAT-218 and Judgment C-620/11 of August 18, 2011, case file LAT-363; Supreme Court of Justice, Criminal Chamber, Judgment of May 13, 2010 (Act No. 156), Proceeding No. 33,118, *Case Cesar Perez Garcia "The Massacre of Segovia"*; and the State Council, Contentious Administrative Chamber (Section III, Subsection C, Judgment of September 17, 2013, Case File 25000-23-26-000-2012-00537-01/45092).

¹⁵²⁵ See, *inter alia*, Constitutional Court, Judgment of August 6, 2013, File No. 1386-203, *Unconstitutionality Incident - Jose Efraim Rios Montt*.

¹⁵²⁶ Supreme Court of Justice, Judgment of June 10, 2003, *Amparo in review No. 140/2002 Complainant: Ricardo Miguel Cavallo*.

¹⁵²⁷ Supreme Court of Justice, Second Criminal, Judgment of January 26, 2007, Case File 636-E.

¹⁵²⁸ Supreme Court of Justice: decision and judgment of December 31, 1996, Case No. 585/96, *Cavalry Captain Modesto Napoleon Ortigoza*; and Judgment No. 195 of May 5, 2008, *Case of unconstitutionality Objection in the trial Basilio Pavon, Merardo Palacios, Osvaldo Vera and Walter Bower s/ bodily injury in the exercise of public functions*, Year: 2003 No. 5182.

¹⁵²⁹ Superior Court of Justice of Lima, First Special Criminal Court, decision of September 15, 2010, Case File 28-2001, *motion to dismiss the criminal proceedings (Santiago Enrique Martin Rivas, et. al., Defendants* (Original in Spanish, free translation).

aforementioned rule of non-applicability of statutory limitations is a rule of *jus cogens* derived from International Law of Human Rights, applicable at all times, to which no pact contradicts, with *erga omnes* force, and fully effective in the Peruvian legal system."¹⁵³⁰

In Argentina, the Supreme Court noted that the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* "only affirms the non-applicability of statutory limitations, what matters is the recognition of a norm already in force (*jus cogens*) based on international public law of customary origin [...and that the non-applicability of statutory limitations given] its nature as a customary norm of international law prior to the ratification of the Convention of 1968 was *jus cogens*, whose primary function 'is to protect States from agreements that contradict general values and interests of the international community of States as a whole, to ensure respect for these general rules of law from violations that may go against the very essence of the legal system.'"¹⁵³¹ The Court also stated "international custom already considered that crimes against humanity have no statutes of limitation, even before the convention, also this custom was common subject of international law prior to the incorporation of the Convention into domestic law."¹⁵³²

In Chile, a country that had not ratified the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, the Supreme Court noted that "although the aforementioned rule established in the Convention is not in effect in Chile, nothing would prevent the recognition of a norm of customary law and of other similar means from binding the State, so long as the elements are present that enable it to establish the existence of an international legal custom."¹⁵³³ Moreover, the Court also emphasized "the 'universality' of the principle of non-

¹⁵³⁰ Judgment of March 21, 2011, case file. N ° 0024-2010-PI / TC LIMA, Doc. Cit., p. 62 (Original in Spanish, free translation).

¹⁵³¹ Judgment of August 24, 2004, *Remedy of fact deduced by the State and the Government of Chile in the cause Arancibia Clavel, Enrique Lautaro s/homicide and conspiracy and others*-case No. 259. para. 28 (Original in Spanish, free translation).

¹⁵³² *Ibid.*, para 29(Original in Spanish, free translation).

¹⁵³³ Supreme Court of Justice, Criminal Chamber, Judgment of December 13, 2006, Case of Molco Choshuencho (Paulino Flores Rivas et al.), Case File No. 559-04, paragraph 13 "Considering clauses" (Original in Spanish, free translation).

applicability of statutory limitations [... and that] the Convention did not limit itself to stating this rule, but rather affirmed it, by means of its positivization, as it operated at said date as customary international law."¹⁵³⁴

In Colombia, a country which applies statute of limitations in criminal matters and that does not provide legal provisions on the non-applicability of statutory limitations on criminal matters, the Supreme Court of Justice has considered that non-applicability of statutory limitations stems from the principles of international law. Thus, the Court stated that "it cannot be acceptable that given the negligence or legislative difficulty in enacting domestic laws that had been adapted in this direction [concerning *inter alia* the non-applicability of statutory limitations to serious crimes under international law], an intent is made to ignore that at the international level, prior to such proceedings, statutory limitations were already in place for the commission of genocide and that it had been categorized as a heinous crime against humanity, and that investigations can be carried out at any time and, because of this, no rules and statutes of limitations apply regarding the exercise of criminal, civil or administrative action. [...] In short, the Colombian State has the duty to respect and enforce, through its institutions, the investigation and prosecution of serious violations of human rights, because it is their obligation with humanity on a global level as defined by the Treaties and International conventions on the matter which it has signed, under the principle *pacta sunt servanda*, as well as to the treaties it has not signed but nevertheless are binding because they refer to Principles of International Law, for belonging to the United Nations, for its acceptance of the subsidiary jurisdiction regarding International Judicial Bodies and in its jurisprudence has recalled and reiterated these obligations."¹⁵³⁵

In another judgment, the Supreme Court of Justice of Colombia said that "the non-applicability of statutory limitations to these crimes is a Principle of International Law, and as such was specifically established in this multilateral treaty [*Convention of Non-Applicability of Statutory Limitations to War Crimes and*

¹⁵³⁴ *Ibid.*, para 16 "Considering clauses" (Original in Spanish, free translation).

¹⁵³⁵ Supreme Court of Justice, Criminal Chamber, Judgment approved by Act No. 428 of December 16, 2010, Proceeding (second instance) No. 33039, *Uber Enrique Banquez Martinez - Justice and Peace*, (Original in Spanish, free translation)..

Crimes Against Humanity] as a core element of effective suppression and prevention of the most serious crimes under international law, grounded in the protection of human rights and fundamental freedoms and with the objective of ensuring its universal application whatever the date of commission. [...] Reason for which, although the Colombian State did not ratify the mentioned Treaty, this was not an obstacle to recognizing that regarding crimes against humanity such as genocide, statutes of limitations do not apply, that is, they can be investigated at any time.”¹⁵³⁶

3. Application of Statutory Limitations

As previously noted, international law establishes the non-applicability of statutory limitations as a regime limited to certain kind of crimes. The non-applicability of statutory limitations is not asserted upon all international crimes. Traditionally, extrajudicial execution, torture, and enforced disappearance, even when they are international crimes are subject to statutes of limitation *per se*, unless these crimes can be characterized legally, due to the circumstances in which they were committed, as crimes against humanity, war crimes, or genocide.

a. Emerging trend regarding the non-applicability of statutory limitations to gross human rights violations

However, it is important to note that beyond the prohibition of the application of statutory limitations to war crimes, crimes against humanity, and genocide, there is an emerging trend - both international and domestic - to extend this prohibition to other gross human rights violations.

While the *International Covenant on Civil and Political Rights* contains no provision on the matter, the HRC has urged several States to not apply statutes of limitations for serious human rights violations. Thus, in the case of Argentina, the HRC held that “[g]ross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability

¹⁵³⁶ Supreme Court of Justice, Criminal Chamber, Judgment of May 13, 2010 (Act No. 156), Case File No. 33,118, *Cesar Perez Garcia ("The Massacre of Segovia")* (Original in Spanish, free translation).

as far back in time as necessary to bring their perpetrators to justice.”¹⁵³⁷

In its Concluding observations on El Salvador, the HRC noted that although “the Criminal Code was amended in 1998 to exclude the application of statutory limitations to a range of serious offences such as torture and enforced disappearance, the Committee is concerned that such a statute has been applied to serious human rights violations that took place in the past, such as the murder of six Jesuit priests and their co-workers.”¹⁵³⁸ The HRC reiterated its recommendation to the Salvadoran government that it “review its rules on the statute of limitations and bring them fully into line with its obligations under the Covenant so that human rights violations can be investigated and those responsible prosecuted and punished in proportion to the seriousness of the violations committed.”¹⁵³⁹

In the case of Panama, the HRC recommended that “[t]he statute of limitations on offences involving serious human rights violations should be abolished.”¹⁵⁴⁰ In the case of Uruguay, upon examining Judgment No. 20 of the Supreme Court of Justice of February 2013, which declared the unconstitutionality of Articles 2 and 3 of Law No. 1883 (Expiry of the Punitive Claims of the State) but which did not recognize the non-applicability of statutory limitations, the HRC considered “the Court’s decision to be unfortunate and believes that its failure to recognize the inapplicability of a statute of limitations to crimes against humanity and other serious human rights violations, such as enforced disappearances, torture and extrajudicial killings, runs counter to international human rights law.”¹⁵⁴¹

Although the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* contains no express provisions on the applicability or non-applicability of statutory limitations, the Committee against Torture has expressed reservations about the

¹⁵³⁷ *Concluding Observations of the Human Rights Committee: Argentina*, CCPR / CO / 70 / ARG, November 3, 2000, para. 9.

¹⁵³⁸ *Concluding Observations of the Human Rights Committee: El Salvador*, CCPR/C/SLV/CO/6, of November 18, 2010, para. 6.

¹⁵³⁹ *Ibidem*.

¹⁵⁴⁰ *Concluding Observations of the Human Rights Committee: Panama*, CCPR/C/PAN/CO/3 of 17 April 2008, para. 7.

¹⁵⁴¹ *Concluding observations on the fifth periodic report of Uruguay*, CCPR/C/URY/CO/5 of December 2, 2013, para. 19.

applicability of statutes of limitation for the crime of torture. The Committee has noted that "[on account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them. For many victims, passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those who have not received redress. States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress."¹⁵⁴²

In many country observations, the Committee against Torture has recommended codifying the non-applicability of statutory limitations for the crime of torture. As such, in the case of Morocco, the Committee expressed concern about "[t]he application to acts of torture of the prescription period provided for by ordinary law, which would appear to deprive victims of their imprescriptible right to initiate proceedings"¹⁵⁴³ and recommended to the State Party to "[i]nclude in the Code of Criminal Procedure provisions organizing the imprescriptible right of any victim of an act of torture to initiate proceedings against any torturer."¹⁵⁴⁴ In the case of Chile, the Committee recommended that the State Party "[c]onsider eliminating or extending the current 10-year statute of limitations for the crime of torture, taking into account its seriousness"¹⁵⁴⁵. With regard to Turkey, the Committee recommended that "[r]epeal the statute of limitations for crimes involving torture."¹⁵⁴⁶ Likewise, regarding Slovenia¹⁵⁴⁷, France¹⁵⁴⁸,

¹⁵⁴² *General Comment No. 3 (2012): Application of Article 14 by States parties*, CAT/C/GC/3 of December 13, 2012, para. 40.

¹⁵⁴³ *Concluding Observations of the Committee against Torture: Morocco*, February 5, 2004, CAT/C/CR/31/2, para. 5 (f).

¹⁵⁴⁴ *Ibid.*, para. (d).

¹⁵⁴⁵ *Concluding Observations of the Committee against Torture: Chile*, 05/2004, CAT/C/CR/32/5, paragraph 7 (f).

¹⁵⁴⁶ *Concluding Observations of the Committee against Torture: Turkey*, May 27, 2003, CAT/C/CR/30/5, "Recommendation," para. 7 (c).

¹⁵⁴⁷ *Concluding Observations of the Committee against Torture, Slovenia*, May 27, 2003, CAT/C/CR/30/4, para. 6 (b).

¹⁵⁴⁸ *Concluding Observations of the Committee against Torture: France*, CAT/C/FRA/CO/3 April 3, 2006, para. 13.

Guatemala¹⁵⁴⁹, the Committee recommended that States declare the non-applicability of statutory limitations to the crime of torture and to codify in their criminal legislation the crime of torture as "an offense with no statute of limitations."

Similarly, the Committee against Torture highlighted as a positive aspect the incorporation into national legislation of provisions regarding the non-applicability of statutory limitations to the crime of torture, such as in El Salvador¹⁵⁵⁰, Paraguay¹⁵⁵¹ and Venezuela.¹⁵⁵²

Meanwhile, the International Criminal Tribunal for the former Yugoslavia has indicated that one of the consequences of an imperative nature regarding the prohibition of torture is "[...] the fact that torture can not be covered by a statute of limitations."¹⁵⁵³

The Inter-American Court of Human Rights has repeatedly stated that "[...] provisions on prescription [...] 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."¹⁵⁵⁴ In this regard, the Court noted that "[...] no domestic law or

¹⁵⁴⁹ *Concluding observations on the combined sixth and fifth periodic reports of Guatemala and adopted by the Committee at its 50th session (6 to May 31, 2013), CAT/C/GTM/CO/5-6 of June 24, 2013*, para. 8.

¹⁵⁵⁰ *Committee against Torture - Report on the fifty-fifth session Supplement No. 44 (A/55/44)*, June 20, 2000, para. 158.

¹⁵⁵¹ *Committee against Torture - Report on the fifty-second session Supplement No. 44 (A/52/44)*, September 10, 1997, para. 193.

¹⁵⁵² *Concluding Observations of the Committee against Torture: Venezuela*, CAT/C/CR/29/2, December 23, 2002, "Positive aspects", para 6(c).

¹⁵⁵³ Judgment of 10 December 1998, *The Prosecutor v. Furundzija*, Case No. IT-95-17/1, para. 157.

¹⁵⁵⁴ Judgment of March 14, 2001, *Case of Barrios Altos v. Perú*, Series C No. 75, para. 41. See also, , *inter alia*: Judgment of September 3, 2001, *Case of Barrios Altos, Interpretation of the Judgment on the Merits*, Series C No. 83, para. 15; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Perú*, Series C No. 202, para. 182; Judgment of November 29, 2006, *Case of La Cantuta v. Perú*, Series C No. 162, para. 152; Judgment of February 27, 2002, *Trujillo Oroza v. Bolivia*, Series C No. 92, para. 106; Judgment of August 29, 2002, *Case of the Caracazo v. Venezuela*, Series C No. 95, para. 119; Judgment of November 24, 2010, *Case of Gomes Lund et al. ("guerrilha do Araguaia") v. Brazil*, Series C No. 219, para. 171; and Judgment of November 29, 2009, *Case of the Dos Erres Massacre v. Guatemala*, Series C No. 211, para. 129.

provision can prevent a State from complying with the obligation to investigate and punish those responsible for serious human rights violations [...]. In particular, when dealing with serious human rights violations the State shall not argue prescription of or any similar measure designed to eliminate responsibility, to excuse itself from its duty."¹⁵⁵⁵

The European Court of Human Rights has held that it is of utmost importance for the purposes of an effective remedy, that criminal proceedings relating to crimes such as torture, involving serious human rights violations, not be subject to statutes of limitation.¹⁵⁵⁶

It is important to note that this trend has been established in *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*. Indeed, Article 6 states that "[w]here so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law."

From the perspective of comparative law, there is a tendency establishing the non-applicability of statutory limitations for gross human rights violations. Several countries have incorporated into their political constitutions provisions on the non-applicability of statutory limitations to gross human rights violations, such as Ecuador¹⁵⁵⁷, Ethiopia¹⁵⁵⁸, Honduras¹⁵⁵⁹, Paraguay¹⁵⁶⁰ and

¹⁵⁵⁵ Judgment of November 29, 2009, *Case of the Dos Erres Massacre v. Guatemala*, Series C No. 211, para. 129.

¹⁵⁵⁶ Judgment of November 2, 2004, *Case of Abdülşamet Yaman v. Turkey*, Application No. 32446/96, para. 55.

¹⁵⁵⁷ Article 23 of the Constitution (1998) prohibits the use of the statutory limitations for crimes such as genocide, torture, enforced disappearance, kidnapping, murder for political or conscience reasons.

¹⁵⁵⁸ Article 28 of the Constitution (1994) states that there are no statutes of limitations for crimes against humanity, genocide, summary executions, enforced disappearances and torture.

¹⁵⁵⁹ Article 325 of the Constitution (1982) establishes that "Statutory limitations are not applicable in cases in which by willful action or omission and by political motivation the death of a person or more persons is of consequence." (Original in Spanish, free translation).

¹⁵⁶⁰ Ibid.

Venezuela¹⁵⁶¹. In several countries, it has been codified into law, for example, in: El Salvador¹⁵⁶², Guatemala¹⁵⁶³, Hungary¹⁵⁶⁴, Nicaragua¹⁵⁶⁵, Panama¹⁵⁶⁶, Switzerland¹⁵⁶⁷, Uruguay¹⁵⁶⁸ and Venezuela.¹⁵⁶⁹ Also jurisprudentially, several courts of justice have declared the non-applicability of statutory limitations to serious human rights violations, as in Argentina,¹⁵⁷⁰ Costa Rica,¹⁵⁷¹ and Colombia.¹⁵⁷²

¹⁵⁶⁰ Article 5 of the Constitution - and Article 102(3) of the Criminal Code of 1997 provides that genocide, torture, enforced disappearance of persons, kidnapping and homicide for political reasons are not subject to statutory limitations.

¹⁵⁶¹ Article 29 of the Constitution of the Bolivarian Republic of Venezuela (1999) prohibits the application of statutory limitations to serious human rights violations, crimes against humanity and war crimes.

¹⁵⁶² Article 99 of the Criminal Code of El Salvador prohibits the application of statutory limitations for crimes of genocide, torture, enforced disappearances and political, ideological, racial, sexual or religious persecution.

¹⁵⁶³ Article 8 of the Law on National Reconciliation of Guatemala excludes the application of statutory limitations for genocide, torture, enforced disappearance and "those crimes that not subject to statutory limitations or that do not allow for the extinction of criminal responsibility in accordance with domestic law or international treaties ratified by Guatemala." (Original in Spanish, free translation).

¹⁵⁶⁴ Section 33(2) of the Criminal Code prohibits the application of statutory limitations for war crimes, crimes against humanity, some cases of murder and some of kidnapping, and other crimes.

¹⁵⁶⁵ Articles 16 and 131 of the Criminal Code exclude from the application of statutory limitations, among others crimes: slavery and the slave trade; crimes against international order (genocide, *apartheid*, war crimes, torture and enforced disappearance); crimes of international trafficking; sexual offenses against children and adolescents; and "any other offense that can be prosecuted in Nicaragua, pursuant to the international instruments ratified by the country." (Original in Spanish, free translation).

¹⁵⁶⁶ Article 120 of the Criminal Code (2007) prohibits the application of statutory limitations for the crime of enforced disappearance, in addition to crimes against humanity.

¹⁵⁶⁷ Article 75bis of the Criminal Code prohibits the application of statutory limitations for genocide and war crimes and other crimes against the physical integrity of persons.

¹⁵⁶⁸ Law No. 18.026 of 2006 established the non-applicability of statutory limitations to crimes of "political murder", enforced disappearance, torture, "severe deprivation of liberty", "sexual aggression against persons deprived of liberty," in addition to genocide, crimes against humanity, and war crimes.

¹⁵⁶⁹ Article 181 of the Criminal Code (2000) prohibits the application of statutory limitations in cases of enforced disappearances.

¹⁵⁷⁰ For example, this has been done by the Federal Chamber of Appeals of La Plata, Chamber II, in a case of torture (Resolution of July 17, 2014, FLP 259/2003/17 / CA3).

In Peru,¹⁵⁷³ several courts have declared the inadmissibility of statutes of limitations in cases of gross violations of human rights, recognizing the non-lapsable nature of these crimes. However, this has not been a widespread practice of the Judicial Branch, as has been found by the Ombudsman.¹⁵⁷⁴ As such, following a mission to Peru in 2010, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Professor Martin Scheinin, expressed concern about "[t]he judicial rulings in Peru that have as an effect the prevention of criminal justice in cases of serious human rights violations. Such outcomes are the result of the application of a statute of limitations or of the principle of *non bis in idem*[...]."¹⁵⁷⁵ The Special Rapporteur recommended the Peruvian authorities to "[e]nsure that obstacles for prosecution and conviction for grave human rights violations in the course of counter-terrorism operations, such as those based on a statute of limitations in domestic law, are overcome in accordance with the jurisprudence of the Inter-American Court of Human Rights and applicable international human rights law."¹⁵⁷⁶

¹⁵⁷¹ For example, this has been done by the Constitutional Court regarding enforced disappearance (Judgment No.230-96 of January 12, 1996, mandatory consultation, Case file. 6543-S-95 Vote No. 0230-96).

¹⁵⁷² For example, this has been done by the Constitutional Court regarding enforced disappearance (Judgment C-580/02 of July 31, 2002, Case LAT-218).

¹⁵⁷³ For example, this has been done by: the National Criminal Court in the case of "arbitrary execution of residents of Cayara" (Resolution of June 6, 2006); the First Special Criminal Chamber of the Superior Court of Justice in the case of "Barrios Altos" (Resolution of May 9, 2005, Case file. No. 28-2001- "F-1") regarding the enforced disappearance and extrajudicial execution; The Superior Anti-Corruption Court "A" of the Superior Court of Lima in the case of "The Colina" (Resolution of May 9, 2005) regarding extrajudicial executions; and the First Criminal Chamber of the Superior Court of Ancash in the case of "The enforced disappearance of Pedro Haro and César Mautino".

¹⁵⁷⁴ *Informe Defensorial No. 97: A dos años de la Comisión de la Verdad y Reconciliación*, Lima, September 2005; *Informe Defensorial No. 112: "El difícil de la reconciliación. Justicia y reparación para las víctimas de la violencia"*, Lima, December 2006; and *Informe Defensorial No. 128: El Estado frente a las víctimas de la violencia. ¿Hacia dónde vamos en políticas de reparación y justicia?*, Lima, December 2007.

¹⁵⁷⁵ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin – Addendum; Mission to Peru*, A/HRC/16/51/Add.3, of December 15, 2010, para. 17

¹⁵⁷⁶ *Ibid.*, para. 43, c.

b. Conditions in which statutory limitations are valid

The application of the statutory limitations without the observance of the conditions stipulated by international law is a fraudulent administration of justice. It is also worth noting that if the legal system of a country - either by regulation or by judicial processes - does not apply statutory limitations or does not recognize or respect it in regard to crimes under international law for which statutory limitations are applicable, statutory limitations for these crimes can not legitimately be invoked. Indeed, what is international law prohibits the application of statutory limitations for war crimes, crimes against humanity, genocide and the crime of *apartheid*, but in no way prohibits the declaration of non-applicability of statutory limitations for other crimes.

The application of statutory limitations is a procedural legal obstacle, which prevents, due to the passage of time, the start of a criminal action or the continuation of legal proceedings. The application of statutory limitations to a criminal action may constitute an obstacle to the prosecution of perpetrators of gross human rights violations when the crime was committed a long time ago. It can also be an obstacle to obtaining redress in criminal proceedings¹⁵⁷⁷ or when developments in the criminal proceedings affect other legal avenues for obtaining compensation. This, for example, happens when the application of statutory limitations affects or extends to civil or administrative proceedings for reparation. Similarly, the lack of investigation and criminal prosecution generally has an effect on any claims for reparation at the civil or administrative level, because the application of statutory limitations has an impact on gathering of evidence to prove the existence of the criminal act and the causal link required for reparation.

Several international norms and standards stipulate the conditions under which statutory limitations are valid, both procedurally and substantively: the *Declaration on the Protection of All Persons from Enforced Disappearance*¹⁵⁷⁸; the *International Convention for the Protection of All Persons from Enforced Disappearance*¹⁵⁷⁹; the

¹⁵⁷⁷ For example, when reparation is sought by way of civil party, a private accusation or by way of a claim for extra-contractual responsibility within the criminal proceeding.

¹⁵⁷⁸ Article 17.

¹⁵⁷⁹ Article 8.

*Inter-American Convention on Forced Disappearance of Persons*¹⁵⁸⁰; the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*¹⁵⁸¹ and 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*¹⁵⁸² (see Annex VI).

"[A]pplication of statutory limitations to a criminal action, which provides for the defense of the individual against the excesses of State power cannot be used to endorse a cover-up by the State of facts that should be investigated. [...] The application of statutory limitations in a criminal action, as much as it serves as a guarantee for human dignity, cannot stem from a purely formal perspective, since this would denature it. Rather, this involves a guarantee in favor of the human person, and not against it. [...] An interpretation consistent with the Constitution of the norms of application of statutory limitations for criminal proceedings to which the Court has arrived, involves the act of not counting the lapse of time from which facts were obtained from effective investigation, by means of an incompetent judiciary and unconstitutional amnesty laws. In turn, if it is determined that such acts constitute crimes against humanity, the statute of limitations for the criminal action is not applicable."

Constitutional Tribunal of Peru¹⁵⁸³

Furthermore, international jurisprudence has noted the conditions for which statutory limitations are valid. In that sense, the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* states that "States should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription."¹⁵⁸⁴

The conditions and procedural safeguards can be summarized as follows:

- The statutory limitations should be prolonged and proportionate to the extreme gravity of the crime. The HRC has stated that "[i]mpediments to the establishment of legal responsibility

¹⁵⁸⁰ Article VII.

¹⁵⁸¹ Principles 22 and 23.

¹⁵⁸² Article 7.

¹⁵⁸³ Judgment of May 5, 2011, Case file No. 03693-2008-PHC/TC, Junín, *Case of Francisco Marcañaupa Osorio*.

¹⁵⁸⁴ Principle 22.

should also be removed, such as the [...] unreasonably short periods of statutory limitation in cases where such limitations are applicable.”¹⁵⁸⁵

- Statutory limitations should be suspended and it cannot begin to run while no effective remedies exist and these have not been re-established.
- In cases of crimes of a continuing nature or whose execution is permanent, such as enforced disappearance and arbitrary detention, the statutory period can only begin to run as of the time of completion of the commission of the crime.
- During the period of the statutory limitation, the right to an effective remedy for the victims and their families should be guaranteed.

The substantial or material conditions of the validity of the application of statutory limitations are fundamentally determined by the activity of the investigative and judicial authorities. When an investigation does not meet the standards of due diligence and effectiveness; when it is not genuinely used to clarify the facts, identify those responsible, their level of participation and motives; or when it is aimed at allowing the crime to go unpunished (See Chapter V "The obligation to investigate") - in violation of international obligations of the State - cannot be considered to be a valid application of statutory limitations. For example, the European Court of Human Rights has stated that a statutory limitation applied as a result of the inactivity of the investigating authorities cannot be considered legitimate.¹⁵⁸⁶ In addition, a declaration of the applicability of a statutory limitation that stems from the undue delay of criminal proceedings, or inefficiency, negligence or omission on the part of the judicial authorities is invalid, as noted by the IACHR.¹⁵⁸⁷ In all these cases, it is evident that there is a fraudulent administration of justice.

¹⁵⁸⁵ *General Observations No. 31 on the Nature of the General Legal Obligations imposed on State Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, May 26, 2004, para. 18.

¹⁵⁸⁶ Judgment of November 13, 2013, *Case of Anca Mocanu et al. v. Romania*, Communications Nos. 10865/09, 45886/07 and 32431/08, para. 224.

¹⁵⁸⁷ Report No. 54/01 of April 16, 2001, *Case of 12.051, Maria da Penha Maia Fernandes V. Brazil*, para. 44; and Report No. 55/01 of April 16, 2001, *Cases 11.286, 11.407, 11.406, 11.416, 11.413, 11.417, 11.412 and 11.415, Aluísio Cavalcante et al. v. Brazil*, paras. 127 and 128.

CHAPTER XI: THE PRINCIPLE OF LEGALITY AND NON-RETROACTIVITY

“Extrajudicial execution, enforced disappearance and torture are cruel, atrocious crimes, and constitute grave human rights violations, which may not go unpunished: that is, the perpetrators of acts that violate human rights, as well as their accomplices, cannot evade the legal consequences of their actions. Impunity may be *de jure*, when the letter of a law exempts criminals who have violated human rights from punishment under the law; and also *de facto*, when, despite the existence of laws enacted to punish the guilty, they are freed from adequate punishment for the threat or commission of violent crimes.”

Constitutional Tribunal of Peru¹⁵⁸⁸

1. General considerations

Under international law, both treaty-based and customary, the States have the obligation to prosecute and punish, through their national criminal courts, the perpetrators of gross human rights violations, crimes against humanity, genocide and war crimes. As noted in Chapter VI “The obligation to prosecute and punish,” this international obligation entails the duty to codify crimes under international law as criminal offences in domestic criminal law. Although various international instruments and treaties expressly contain this obligation,¹⁵⁸⁹ this is a direct and logical consequence

¹⁵⁸⁸ Judgment of 18 March 2004, Exp. No. 2488-2002-HC/TC, Piura, *Caso Gerardo Villegas Namuche*, Fundamento 3, para. 5.

¹⁵⁸⁹ It is worth highlighting: *Convention on the Prevention and Punishment of the Crime of Genocide* (Art. V); *International Convention for the Elimination of Racial Discrimination* (Art. 3); *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (Art.5); *International Convention for the Protection of All Persons from Enforced Disappearance* (Arts. 4 y 25); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 4); *Inter-American Convention on Forced Disappearance of Persons* (Art. III); *Inter-American Convention to Prevent and Punish Torture* (Art. 6); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (Art. 3); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (Art. 5); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 4); and *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 1).

of the *jus cogens* nature of the prohibition of committing such crimes, as well as the States' duty to guarantee.

After World War II, many countries incorporated several of these international offences in their domestic legislation, particularly crimes against humanity and war crimes.¹⁵⁹⁰ With the ratification of the treaties on genocide, torture and enforced disappearance and, in particular, with the enactment of the *Rome Statute of the International Criminal Court*, numerous States have incorporated the majority of these crimes in their national criminal legislation.¹⁵⁹¹ However, in practice numerous countries have not incorporated crimes under international law in their domestic criminal law, or they have done it partially. In several countries in

¹⁵⁹⁰ See, inter alia: Australia, *War Crimes Act* of 1945; Bangladesh, *International Crimes (Tribunals) Act No. XIX* of 1973; Barbados, *Geneva Conventions Act* of 1980; Belgium, *Act of 16 June 1993 concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II* of 18 June 1977; Congo, Law No. 8 - 98 of 31 October 1998 concerning the punishment of Genocide, Crimes against Humanity and War Crimes; Costa Rica, Criminal Code of 1970; El Salvador, Criminal Code of 1998; Spain, Organic Law No. 10 of 1995; Ethiopia, Criminal Code of 1957; France, Law of 1964 on the non-applicability of statutes of limitations for Crimes against Humanity and Criminal Code of 1994; Guatemala, Decree No 48-1995 de 1995; Hungary, Criminal Code of 1978; India, *Geneva Conventions Act* of 1960; Luxembourg, *Law of 9 January 1985 relating to the suppression of serious breaches of the Geneva Conventions*; Morocco, *Geneva Convention Act* of 1970; New Zealand, *Geneva Conventions Act* of 1958; Nigeria, *Geneva Conventions Act* of 1960; Paraguay, Criminal Code of 1997; Peru, Law No. 26,926 of 1998; Portugal, Criminal Code of 1996; United Kingdom, *Geneva Conventions Act* of 1957 and *War Crimes Act* of 1991; Venezuela, Criminal Code of 1964; and Zimbabwe, *Geneva Conventions Act* of 1981.

¹⁵⁹¹ See, inter alia: Germany, Law included crimes under international law in the Criminal Code, of 2002; Argentina, Law No. 26,200 of 2007, for the implementation of the Rome Statute; Australia, *International Criminal Court Act* of 2002; Bosnia and Herzegovina, *Law for the implementation of the Rome Statute and cooperation with the International Criminal Court* of 2009; Burkina Faso, Law No. 52-2009/AN of 2009; Burundi, Law No. 1/004 of 2003; Canada, *Crimes Against Humanity and War Crimes Act* of 2000; Philippines, *Act No. 9851 on Crimes against International Humanitarian Law, Genocide and Other Crimes against Humanity*, 2009; Fiji, Decree No. 44 of 2009; France, Law No. 2010-930 of 2010 adapting the Criminal Code to the Rome Statute; Kenya, *International Crimes Act* of 2008; New Zealand, *International Crimes and International Criminal Court Act* of 2000; Netherlands, *International Crimes Act* of 2003; Portugal, Law No. 31/2004; Republic of Korea, *Act No. 8719 on the Punishment of Crimes within the Jurisdiction of the International Criminal Court*, of 2007; South Africa, *Implementation of the Rome Statute of the International Criminal Court Act*, of 2002; Trinidad & Tobago, *International Criminal Court Act*, of 2006; Uganda, *International Criminal Court Act*, of 2010; and Uruguay, Law No. 18,026 of 2006.

Latin America, crimes under international law were incorporated into national criminal law belatedly.¹⁵⁹²

In the prosecution and punishment of the perpetrators of crimes under international law, national courts often face a considerable obstacle: the absence of national criminal legislation that codified these courses of conduct as crimes at the time of the material facts, even if at that time they already were international criminal offences. This gap in national criminal legislation has frequently been invoked by investigators and judicial authorities in order to not investigate, prosecute and punish the perpetrators and co-participants of crimes under international law. Also, in many cases, prosecutors and judges only investigate the facts and prosecute their authors for lesser crimes or other crimes that do not reflect the crimes' essence under international law.

In this context, and with regards to the crime of enforced disappearance, the Inter-American Court of Human Rights has held that in the absence of a specific criminal offence, "the protection offered by criminal laws on offenses such as abduction or kidnapping, torture and homicide is insufficient. Forced disappearance of persons is a different offense, distinguished by the multiple and continuing violation of various rights protected by the Convention. [...] the failure to define forced disappearance of persons as an autonomous offense has prevented the development of effective criminal proceedings that encompass the constituent elements of forced disappearance of persons, and this allows impunity to be perpetuated."¹⁵⁹³

These situations and practices have various adverse consequences in terms of the framework established by international law for these crimes in terms of individual criminal liability, amnesty and similar measures, the non-applicability on statutes of limitation, universal jurisdiction, extradition, international cooperation,

¹⁵⁹² For example, in Colombia, genocide, torture, enforced disappearance and various war crimes were incorporated as offences under domestic criminal law in July 2000 (Law No. 589 of 6 July 2000, *Por medio de la cual se tipifica el genocidio, la desaparición forzada, el desplazamiento forzado y la tortura*; and Law No. 599 of 24 July 2000, *Por medio de la cual se expide el Código Penal*) and in Uruguay, genocide, crimes against humanity, war crimes and enforced disappearance were incorporated in criminal legislation in 2006 (Law No. 18,026 of 25 September 2006).

¹⁵⁹³ Judgment of August 12, 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, paras. 181 and 183.

refuge and asylum. These situations and practices have generally been a source for impunity. The UN Expert on the question of impunity, Mr. Louis Joinet, called this a form of *de facto* impunity.¹⁵⁹⁴ As Sylvie Stoyanka Jundo has pointed out, "[a] breach of international humanitarian law cannot be committed with impunity based on the fact that that act or omission was not prohibited by national law at the time it was committed."¹⁵⁹⁵

In contexts in which, belatedly, these crimes under international law have been defined as criminal offenses in domestic legislation, prosecutors and judges face a legal dilemma: can they retroactively apply national criminal law to offenses that, when committed, already constituted crimes under international law, without violating the principles of *nullum crimen sine lege* and of the non-retroactive nature of criminal law? International law and comparative law have determined that the answer to this crucial question is yes.

2. The principle of legality

The principle of legality - *nullum crimen sine lege* - means that in order to criminalize a behavior as a penal offense, the specific conduct that is sought to be punished must be strictly defined by law as a crime and its definition as a criminal offense must be precise and unambiguous.¹⁵⁹⁶ In this sense, the Inter-American

¹⁵⁹⁴ Report by the Expert on the question of impunity of perpetrators of human rights violations (civil and political), E/CN.4/Sub.2/1995/18.

¹⁵⁹⁵ Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 regarding the protection of victims of non-international armed conflicts (Protocol II) and on Article 3 of these Conventions, Ed. ICRC, October 1987, para. 4607.

¹⁵⁹⁶ See, among others, Human Rights Committee (General Comment No. 29, *States of Emergency* (art. 4), para. 7, CCPR/C/21/Rev.1/Add.11, of 31 August 2001; and the *Concluding Observations of the Human Rights Committee on: Democratic People's Republic of Korea*, CCPR/CO/72/PRK, of 27 August 2001, para. 14; *Belgium*, CCPR/CO/81/BEL, of 12 August 2004, para. 24; *Iceland*, CCPR/CO/83/ISL, of 25 April 2005, para. 10; *Estonia*, CCPR/CO/77/EST, of 15 April 2003, para. 8; *Canada*, CCPR/C/CAN/CO/5, of 20 April 2006, para. 12; and *Morocco*, CCPR/CO/82/MAR, of 1 December 2004, para. 20); Inter-American Court of Human Rights (Judgment of May 30, 1999, Case of *Castillo Petruzzi et al v. Peru*, Series C No. 52, paras. 119-121, and Judgment of 31 August 2004, Case of *Ricardo Canese v. Paraguay*, Series C No. 111, para. 174); and Inter-American Commission on Human Rights (*Second report on the situation of human rights in Peru*, OEA/Ser.L/V/II.106 Doc. 59 rev. of June 2, 2000, para. 80, and *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. of October 22, 2002, "Recommendations," No. 10(a)).

Court of Human Rights has warned that “crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from conduct that is either not a punishable offense or is punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty.”¹⁵⁹⁷

“Concerning the principle of legality in the penal sphere, [...] the elaboration of criminal categories involves a clear definition of the criminalized conduct, establishing its elements, and the factors that distinguish it from behaviors that are either not punishable or punishable but not with imprisonment.[...] Under the rule of law, the principles of legality and non-retroactivity govern the actions of all the State’s bodies in their respective fields, particularly when the exercise of its punitive power is at issue.[...] In a democratic system, precautions must be strengthened to ensure that punitive measures are adopted with absolute respect for the basic rights of the individual, and subject to careful verification of whether or not unlawful behavior exists. [...] In this regard, when applying criminal legislation, the judge of the criminal court is obliged to adhere strictly to its provisions and observe the greatest rigor to ensure that the behavior of the defendant corresponds to a specific category of crime, so that he does not punish acts that are not punishable by law.”

Inter-American Court of Human Rights¹⁵⁹⁸

For its part, the Human Rights Committee (HRC) has established that the principle of legality of crimes entails “the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty.”¹⁵⁹⁹ Therefore, vague, ambiguous

¹⁵⁹⁷ Judgment of May 30, 1999, Case of *Castillo Petruzzi et al v. Peru*, Series C No. 52, para. 121.

¹⁵⁹⁸ Judgment of November 18, 2004, Case of *De La Cruz Flores v. Peru*, Series C No. 115, paras. 79 – 82.

¹⁵⁹⁹ *General Comment 29, States of Emergency (art. 4)*, Op. Cit., para. 7.

and imprecise definitions run contrary to international human rights law and the "general conditions provided by international law."¹⁶⁰⁰

The principle of *nullum crimen sine lege* is closely linked to the right to "security of person,"¹⁶⁰¹ since it seeks to safeguard the right of individuals to know what actions can be penalized and which cannot.¹⁶⁰² Essentially, criminal law provides a standard of conduct which the individual must respect.¹⁶⁰³

However, the principle that crimes must be previously established by law is not limited to the application of national laws. The principle of *nullum crimen sine lege* is a principle of criminal law, which refers both to domestic law and to international law.¹⁶⁰⁴ Although the principle of legality has been translated into the national legal systems with continental law legal traditions, through the formula "*nullum crimen sine lege nulla poena sine lege*" ("no crime without law, no punishment without law"), in common law legal systems this was translated under the legal maxim *nullum crimen sine jure*. In international law, the principle that crimes must be established by law has been summed up

¹⁶⁰⁰ Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, E/CN.4/1998/39/Add.1, para. 129. See also, *Concluding Observations of the Human Rights Committee on: Portugal (Macao)*, CCPR/C/79/Add.115, of 4 November 1999, para. 12; *Algeria*, CCPR/C/79/Add.95, of 18 August 1998, para. 11; *Egypt*, CCPR/C/79/Add.23, of 9 August 1993, para. 8; *Peru*, CCPR/C/79/Add.67, of 25 July 1996, para. 12; *Democratic People's Republic of Korea*, CCPR/CO/72/PRK, of 27 August 2001, para. 14; *Belgium*, CCPR/CO/81/BEL, of 12 August 2004, para. 24; *Iceland*, CCPR/CO/83/ISL, of 25 April 2005, para. 10; *Estonia*, CCPR/CO/77/EST, of 15 April 2003, para. 8; and *Canada*, CCPR/C/CAN/CO/5, of 20 April 2006, para. 12. See also, from the Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights, 1983-1984*, OEA/Ser.L/V/II.63 doc. 10 of 28 September 1984, p.85, para. 7, and *Second report on the situation of human rights in Peru*, OEA/Ser.L/V/II.106 Doc. 59 rev. of June 2, 2000, para. 80.

¹⁶⁰¹ Article 3 of the *Universal Declaration of Human Rights* and article I of the *American Declaration on the Rights and Duties of Man*.

¹⁶⁰² Inter-American Commission on Human Rights, *Second report on the situation of human rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 80.

¹⁶⁰³ Report of the International Law Commission on work completed in its 48th period of sessions, 6 May to 26 July 1996, UN General Assembly, *Official documents, 51st period of sessions, Supplement No. 10 (A/51/10)*, p. 19.

¹⁶⁰⁴ Article 15 of the *International Covenant on Civil and Political Rights*, article 9 of the *American Convention on Human Rights*, article 7 of the *European Convention on Human Rights*, and Principle I of the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*.

through the term *nullum crimen sine lege*. However, given that this legal principle encompasses both national and international law, and that it also forms part of customary international law, several authors consider that the maxim *nullum crimen sine jure* better reflects the nature and scope of the principle of legality.¹⁶⁰⁵

In this regard, the International Criminal Tribunal for the former Yugoslavia has recalled that “[t]he principles *nullum crimen sine lege* and *nulla poena sine lege* are well recognised in the world’s major criminal justice systems as being fundamental principles of criminality. Another such fundamental principle is the prohibition against *ex post facto* criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions. Associated with these principles are the requirement of specificity and the prohibition of ambiguity in criminal legislation. These considerations are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognised.”¹⁶⁰⁶

The International Criminal Tribunal for the former Yugoslavia has found that the scope of these principles is different, essentially because of “the different methods of criminalisation of conduct in national and international criminal justice systems.”¹⁶⁰⁷ While at the national level, it is national law that defines prohibited behaviours and sets the moment in which it becomes illegal, at the international level the criminalization of certain conduct is done through treaties or through custom. In this sense, Rodolfo Mattarollo explains that “[i]n international criminal law [...] the principle of legality [...] has particular characteristics and has been expressed in a manner specifically its own: *nullum crimen sine iure*, which means that accusations must have a basis in law and not be arbitrary, even if the penalties are not formulated in an express and specific manner. The principle of legality in international criminal law starts from a fundamental distinction

¹⁶⁰⁵ See, inter alia : Boot, Matchled, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Ed. Intersentia, 2001; and Mattarollo, Rodolfo, “Recent Argentine jurisprudence in the matter of crimes against humanity,” in International Commission of Jurists, *ICJ Review*, No. 62-63, Geneva, July 2003, p. 26.

¹⁶⁰⁶ Judgment of 16 November 1998, *The Prosecutor v. Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (“Celebici Case”), Case No. IT-96-21-T, para. 402.

¹⁶⁰⁷ *Ibid.*, para. 403.

between **norms of conduct** and **norms of repression**. Custom can give rise to norms of conduct: a certain conduct becomes prohibited because the majority of the States refrain from performing out of a sense of fulfilling a legal obligation. [...] This principle requires the existence of a text, but only vis-à-vis a given norm of conduct and as proof the underlying custom that gave rise to it. This is necessary for defining specific conduct as criminal and not merely illicit, a distinction which custom, unformulated in a text, does not always make clear. The norm of repression is the consequence of the customary norm of conduct. To require identification of a customary norm of repression in the the same way would be like requiring a custom of transgression."¹⁶⁰⁸

"'Customary international law', 'the legal principles recognised by civilised nations' and 'the legal principles recognised by the community of nations' constitute a *lex* which classifies certain types of behaviour as prosecutable and punishable according to the norms of the community of nations (through international organisations or the States belonging to the international community), irrespective of whether the domestic law contains a comparable criminal offence or whether the relevant treaties have been incorporated into domestic law. The gravity of war crimes and crimes against humanity [...] is irreconcilable with leaving their punishability within the ambit of domestic laws. [...] [Article 15(2) of the *International Covenant on Civil and Political Rights* and Article 7(2) of the *European Convention on Human Rights* authorise] the States that incorporate into domestic law the international legal norms concerning war crimes and crimes against humanity subsequent to the commission of these crimes, the second paragraphs of the above-mentioned Articles amount to authorising retrospective criminal legislation in the State's domestic legal system. It is the international, rather than the domestic, law which must have declared, at the time of their commission, these acts to be punishable."

Constitutional Court of Hungary¹⁶⁰⁹

On the other hand, international treaties that established crimes under international law do not prescribe the sentences to be imposed and limit themselves to establishing the criterion of

¹⁶⁰⁸ Mattarollo, Rodolfo, "Recent Argentine jurisprudence in the matter of crimes against humanity", *Op. Cit.*, pages. 25 - 26.

¹⁶⁰⁹ Constitutional Court of Hungary, Judgment No. 53/1993 of 13 October 1993 (excerpts re-printed in European Court of Human Rights, Judgment of 19 September 2008, case of *Korbely v. Hungary*, Application No. 9174/02, para. 18).

proportionality of sentences to the seriousness of the crime.¹⁶¹⁰ This aspect is left to national legislation or to international tribunals, as the case may be. The absence of penalties in international instruments does not violate the principle of legality in the framework of international law. Ever since the Statutes for the Nuremburg and Tokyo Tribunals, all the way through the international treaties against terrorism, the Convention against Genocide, the UN and OAS conventions on torture and on enforced disappearances, almost all of the international criminal law treaties do not establish specific punishments for the crimes they establish and define. Thus, Professor Cherif Bassiouni points out that none of the 315 international criminal law instruments created between 1815 y 1988 include the respective sanctions, and he thus concludes that "its absence confirms a customary rule of international law practice that penalties by analogies are valid."¹⁶¹¹

3. The principle and right to non-retroactive application of criminal law

The prohibition of the retroactive application of criminal law, or the principle of non-retroactivity of criminal law, is a principle of contemporary criminal law and is established as a fundamental right in numerous international human rights instruments.¹⁶¹² Likewise, this principle is established under international humanitarian law¹⁶¹³ and international criminal law.¹⁶¹⁴ The case

¹⁶¹⁰ See, for example: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 4,2); *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 7); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (Art. 3,3); *Inter-American Convention to Prevent and Punish Torture* (Art. 6); and *Inter-American Convention on Forced Disappearance of Persons* (Art. III).

¹⁶¹¹ Bassiouni, Cherif, in *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1992, pag. 111.

¹⁶¹² *Universal Declaration of Human Rights* (Art. 11); *International Covenant on Civil and Political Rights* (Art. 15); *International Convention on the Protection of All Migrant Workers and their Families* (Art. 19); *American Convention on Human Rights* (Art. 9); *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Art. 7); *African Charter on Human and Peoples' Rights* (Art. 7); *Arab Charter on Human Rights* (Art. 15); and *The Charter of Fundamental Rights of the European Union* (Art. 49).

¹⁶¹³ Article 99 of the *Geneva Convention (III) relative to the Treatment of Prisoners of War of 1949*; Article 67 of the *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*; Article 75 (4,c) of the *Protocol Additional to the*

law of international human rights bodies and courts has amply reiterated this principle and right.¹⁶¹⁵

In accordance with this essential principle, no one may be prosecuted and convicted for an act or omission that did not amount to a crime at the time it was committed. The principle of non-retroactive application of criminal law is an essential safeguard under international law, a "defence of the individual against arbitrariness"¹⁶¹⁶ and is a consequence of the principle of legality (*nullum crimen sine jure*). But also, it is an essential element of the rule of law, as the Inter-American Court of Human Rights has pointed out: "[u]nder the rule of law, the principles of

Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I); and Article 6 (2,c) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II).

¹⁶¹⁴ See, for example: *Rome Statute of the International Criminal Court* (Art. 22); *Draft Code of Crimes against the Peace and Security of Mankind* and the reports of the UN International Law Commission of 1993 (Supplement No. 10 (A/48/10), p.81) and 1994 (Supplement No. 10 (A/49/10), p. 321); *Report presented by the Secretary-General in accordance with paragraph 2 of Resolution 808 (1993) of the Security Council*, S/25704 of 3 May 1993; International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgment of 12 November 2002, *The Prosecutor v. Enver Hadzihasanovic et al*, Case No. IT-901-47-PT; and Special Tribunal for Lebanon, Appellate Chamber, Judgment of 16 February 2011, Case STL- I I-OI/I.

¹⁶¹⁵ See, inter alia: Human Rights Committee, Views of 19 March 2004, *David Michael Nicholas v. Australia*, Communication No. 1080/2002; Inter-American Court of Human Rights: Judgment of November 18, 2004, *De la Cruz Flores v. Peru*, Series C No. 115, Judgment of August 31, 2004, *Case of Ricardo Canese v. Paraguay*, Series C No. 111, Judgment of November 25, 2005, *Case of García Asto and Ramírez Rojas v. Peru*, Series C No. 137, Judgment of June 20, 2005, *Case of Fermín Ramírez v. Guatemala*, Series C No. 126, and Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154; and European Court of Human Rights, Judgment of 13 July 1995, *Case of Tolstoy Miloslavsky v. United Kingdom*, Judgment of 25 May 1993, *Case of Kokkinakis v. Greece*, Judgment of November 22, 1995, *Case of S.W. v. United Kingdom*, Application No. 20166/92, Judgment of 19 September 2008, *Case of Korbely v. Hungary*, Application No. 9174/02, Judgment of 22 March 2001, *Case of Streletz, Kessler and Krenz v. Germany*, Applications No. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, *Case of K.H.W.V. v. Germany*, Application No. 37201/97, Judgment of 12 October 2007, *Case of Jorgic v. Germany*, Application No. 74613/01, and Judgment of 17 May 2010, *Case of Kononov v. Lithuania*, Application No. 36376/04.

¹⁶¹⁶ "Fourth report on the draft code of offences against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur," in *Yearbook of the International Law Commission, 1986 – Summarized notes from the sessions of the thirty-eighth period of sessions 5 May – 11 July 1986, Volume II, First Part*, A/CN.4/SER.A/1986/Add. I (Part 1), para. 155.

legality and non-retroactivity govern the actions of all bodies of the State in their respective fields, particularly when the exercise of its punitive power is at issue.”¹⁶¹⁷

The principle of non-retroactive application of criminal law is also tied to the right to legal certainty, as the Inter-American Court of Human Rights has held, since it has the purpose of ensuring that an individual is not punished for conduct that was not a crime when it was committed.¹⁶¹⁸ In this sense, the Inter-American Court has held that “for the sake of legal certainty, the punitive norm must exist and be known, or could be known before the occurrence of the act or omission that violates it, and which it is intended to penalize.”¹⁶¹⁹

The principle of the prohibition of retroactive application of criminal law is absolute and has legal effects in all circumstances and at all times, including during states of emergency. Indeed, the main human rights treaties establish the right to not be convicted for acts or omissions that were not crimes at the moment they were committed, as a right that cannot be derogated at any time or under any circumstances.¹⁶²⁰ Likewise, the International Committee of the Red Cross (ICRC) has considered that the principle of non-retroactivity of criminal law is a norm of customary international humanitarian law, applicable both to international armed conflicts and to internal armed conflicts.¹⁶²¹

4. Retroactive application of national criminal law for crimes under international law

International norms, standards and jurisprudence clearly establish that the retroactive application of national criminal law to offenses that, even if they were not illegal under national laws, constituted

¹⁶¹⁷ Judgment of August 31, 2004, Case of *Ricardo Canese v. Paraguay*, Series C No. 111, para. 174.

¹⁶¹⁸ See, inter alia: Judgment of August 31, 2004, Case of *Ricardo Canese v. Paraguay*, Series C No. 111, para. 175; Judgment of November 18, 2004, Case of *De la Cruz Flores v. Peru*, Series C No. 115, para. 105; Judgment of May 30, 1999, Case of *Castillo Petruzzi et al v. Peru*, Series C No. 52, para. 120.

¹⁶¹⁹ Judgment of November 18, 2004, Case of *De la Cruz Flores v. Peru*, Series C No. 115, para. 104.

¹⁶²⁰ *International Covenant on Civil and Political Rights* (art. 4), *American Convention on Human Rights* (art. 27) and *European Convention on Human Rights* (art. 15).

¹⁶²¹ *Customary International Humanitarian Law, Volume I: Rules*, Doc. Cit., p. 371 et seq.

crimes under international law at the time they were committed, does not violate the principles of *nullum crimen sine jure* and of non-retroactive application of criminal law.

a. International norms and standards

International norms and standards establish that no one may be prosecuted and punished for acts or omissions that were not criminal offenses according to national legislation or international law at the time they were committed.¹⁶²² (See Annex VII).

International Covenant of Civil and Political Rights, Article 15:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. [...]

"2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

The *travaux préparatoires* of the *International Covenant on Civil and Political Rights* (ICCPR) are very useful for understanding the scope of article 15 of the Covenant. The purpose of the inclusion of a reference to international law was to keep the perpetrators of crimes under international law from remaining in impunity and evading justice, when these illegal acts were not defined and

¹⁶²² Article 11 (2) of the *Universal Declaration of Human Rights*; article 15 of the *International Covenant on Civil and Political Rights*; article 9 of the *American Convention on Human Rights*; article 7 of the *European Convention on Human Rights*; article 99 of *Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention)*; article 67 of the *Geneva Convention on the protection due to civilians in times of war (Fourth Geneva Convention)*; article 75 (4.c) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I); article 6 (2.c) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II); article 6 (c) of the *Charter of the International Tribunal at Nuremberg*; article 13 of the *Draft Code of Crimes against the Peace and Security of Mankind* (1996); article 22 of *Rome Statute of the International Criminal Court*; and article 12 of Regulation No. 2000/15 de 6 June 2000, on the establishment of panels with exclusive jurisdiction over serious criminal offences, of the United Nations Transitional Administration in East Timor (UNTAET).

incorporated as crimes in a State's national criminal laws.¹⁶²³ During the debates of the Third Committee of the United Nations General Assembly, a consensus was formed among the States around the understanding that the expression "international law" addressed both international treaties and customary international law.¹⁶²⁴ The notion of "general principles of law recognized by the community of nations," employed in the second paragraph of article 15, has a similar scope to the reference to "international law" in the first paragraph of article 15. Thus, as Manfred Nowak has pointed out, according to this provision "[a] person may be held guilty of an act or omission that was not punishable by national law at the time the offence was committed so long as this was punishable under international treaty law or customary international law in effect in force at the time the offence was committed."¹⁶²⁵ Nonetheless, it is clear that the second paragraph of article 15 is focused on crimes established by customary international law. These include genocide, crimes against humanity, war crimes and grave human rights violations such as slavery, torture, enforced disappearance and extrajudicial execution.

American Convention on Human Rights, Article 9:

"No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. [...]"

This clause of article 9 of the *American Convention on Human Rights* was present from the beginning of the drafting and negotiation of the treaty. It is worth emphasizing that in the draft of the *Convention on Human Rights*, approved by the Fourth Meeting of the Inter-American Council of Jurists,¹⁶²⁶ the following text was introduced in article 7: "[n]o one shall be convicted of for any actions or omissions that did not constitute a criminal offenses, under the applicable law, at the time they were committed." In its Opinion on this draft, the IACHR considered that

¹⁶²³ Ver, Nowak, Manfred, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, Ed. Engel, Publisher, 2nd Revised Edition, Germany/France/USA, 2005, pag. 360.

¹⁶²⁴ *Ibidem*.

¹⁶²⁵ *Ibidem*.

¹⁶²⁶ Doc. C-43, 1959, in Inter-American Commission on Human Rights, *Inter-American Yearbook on Human Rights* 1968, Washington 1973, p. 67.

the text of article 7 should remain.¹⁶²⁷ This text would be approved as article 9 of the *American Convention*. Article 9 of the *American Convention* was not subject to grand debate or differences of opinion during the process of drafting and negotiating the treaty. In this sense, the *travaux préparatoires* are not particularly useful. However, it may be relevant to highlight the speech of the President of the Commission, who negotiated this norm, Ambassador Gonzalo García Bustillos. During the 13 November 1969 session, faced with a proposed amendment to clarify the notion of “applicable law,” formulated by the Colombian Delegation, President García Bustillos clarified “it was not necessary to specify ‘national or international law,’ since the term ‘applicable law’ encompassed it all.”¹⁶²⁸ Doctrine has also held that the notion of “applicable law,” used in article 9 of the *American Convention*, includes both national and international law.¹⁶²⁹

In the field of international humanitarian law, Protocol I stipulates that “no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed,”¹⁶³⁰ while Protocol II establishes that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed.”¹⁶³¹ In its commentary on this clause of Protocol I, the International Committee of the Red Cross (ICRC) indicated that “[i]n matters of criminal law national courts apply primarily their own national legislation; in many countries they can only apply

¹⁶²⁷ *Opinion of the Inter-American Commission on Human Rights regarding the Draft Convention on Human Rights prepared by the Inter-American Council of Jurists (Civil and Political Rights, Part I)*, OEA/Ser.L/V/II.15/doc.26 (in Inter-American Commission on Human Rights, *Inter-American Yearbook on Human Rights* 1968, Washington 1973, p. 327).

¹⁶²⁸ *Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica 7-22 de noviembre de 1969 – Actas y Documentos*, OEA/Ser.K/XVI/1.2, [Inter-American Specialized Conference on Human Rights, San José, Costa Rica 7-November 22, 1969 – Minutes and Documents] (original in Spanish, free translation).

¹⁶²⁹ See, inter alia: Faúndez Ledesma, Héctor, *Administración de Justicia y Derecho Internacional de los Derechos Humanos (El Derecho a un juicio Justo)*, Ed. Universidad Central de Venezuela – Facultad de Ciencias Jurídicas y Políticas, Caracas, 1992, pag. 361; and O'Donnell, Daniel, *Protección internacional de los derechos humanos*, Comisión Andina de Juristas, Lima 1989, 2ª Edición, pag. 131.

¹⁶³⁰ Article 75 (4, c).

¹⁶³¹ Article 6 (2, c).

provisions of international conventions insofar as those provisions have been incorporated in the national legislation by a special legislative act. Thus in several European countries the punishment of war crimes and crimes against humanity has, since the Second World War, frequently encountered obstacles which could only be overcome by invoking the need to repress crimes rightly condemned by all nations, even in the absence of rules of application. This reference to international law has often been called the 'Nuremberg clause'¹⁶³². Regarding the clause of Protocol II, the ICRC has specified that the drafting was inspired by article 15 of the ICCPR, even through the formula "under national or international law" used by the human rights treaty was not used.¹⁶³³ However, the ICRC considers that the formula of Protocol II encompasses international law and specified that "[a] breach of international law should not go unpunished on the basis of the fact that the act or omission (failure to act) concerned was not an offence under the national law at the time it was committed."¹⁶³⁴ Thus, the ICRC established that the rule according to which "[n]o one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed"¹⁶³⁵ is a norm of customary international humanitarian law, applicable both to international armed conflicts and to internal armed conflicts.

The *Charter of the International Military Tribunal at Nuremberg* established in article 6(c) that: "Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or

¹⁶³² Commentary on article 75 of Protocol I, para. 3103, in ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 (<https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=E46340B132AC1B86C12563CD004367BF>).

¹⁶³³ See Commentary on article 6 of Protocol II, para. 4604 in: ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977

(<https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=C6692EB184B56F56C12563CD0043A476>).

¹⁶³⁴ *Ibid.*, para. 4607.

¹⁶³⁵ Rule No. 101, in *Customary International Humanitarian Law, Volume I: Rules*, Op. Cit., p. 371.

religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." (Emphasis added). The International Military Tribunal at Nuremberg held that, as regards crimes against humanity and war crimes, the principle of non-retroactive application of criminal law. The case law of international tribunals and the majority of international doctrine¹⁶³⁶ have reaffirmed this conclusion, since these behaviours already were considered crimes under customary international law. As the UN International Law Commission pointed out, "[t]he controversy stirred up by the Nürnberg Judgment has today died down. Subsequent international instruments have established the general principles as sources of international law together with custom and treaties."¹⁶³⁷

The *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, adopted by the UN International Law Commission in 1950, establish several relevant principles on this subject. It is worth highlighting Principles I and II. Principle I stipulates that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." Principle II stipulates that "[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law." In this regard, the International Law Commission specified that "the general rule underlying Principle I is that international law may impose duties on individuals directly without any interpositions of internal law. The findings of the [Nuremberg] Tribunal were very definite on the question whether rules of international law may apply to

¹⁶³⁶See, inter alia: Donnedieu de Vabres, H., *Le procès de Nuremberg*, Ed. Domat-Montchrestien, Paris, 1948, pag. 243; Biddle, F. "Le procès de Nuremberg", en *Revue internationale de droit pénal*, 19º año, París, 1948; Kelsen, H. "Will the judgment in the Nuremberg trial constitute a precedent in International Law?", in *The International Law Quarterly*, Londres, Vol. I, 1947; David, Eric, "L'actualité juridique de Nuremberg", in *Le Procès de Nuremberg – Conséquences et actualization*, Ed. Bruylant, Bélgica, 1988, pages. 99 et seq; Bassiouni, Cheriff, *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1992, pag. 129; and Lombois, Claude, *Droit pénal international*, Second edition, Dalloz, Paris, 1979, paras. 49 and 50.

¹⁶³⁷ *Yearbook of the International Law Commission, 1987 - Volume II, Part One*, A/CN.4/SER.A/1987/Add.I, p. 7, "Commentary", para. 2.

individuals. 'That international law imposes duties and liabilities upon individuals as well upon States,' said the judgment of the Tribunal [...]. It added: 'Crimes against International law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced.'¹⁶³⁸

With regards to Principle II, the International Law Commission established that "[t]his principle is a corollary to Principle I. Once it is admitted that individuals are responsible for crimes under international law, it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of any particular country."¹⁶³⁹ The International Law Commission recalled that the Nuremberg Tribunal, in its judgment, had concluded that international law legally bound the individuals even when national legislation did not obligate them to observe the rules of international law.¹⁶⁴⁰

The *Draft Code of Crimes against the Peace and Security of Mankind*, elaborated by the International Law Commission starting in the 1950s by mandate from the UN General Assembly,¹⁶⁴¹ is another of the relevant standards on the subject. Although it was never adopted by the General Assembly, since several States were opposed to the creation of an International Criminal Tribunal with jurisdiction over all the Member States of the United Nations,¹⁶⁴² the *Draft Code of Crimes against the Peace and Security of Mankind* (its version, partial and referring to the substantive part, that is: crimes, regime of criminal liability and general principles of law) has been considered part of customary international law.¹⁶⁴³

The successive versions of the *Draft Code of Crimes against the Peace and Security of Mankind* adopted by the International Law

¹⁶³⁸ *Yearbook of the International Law Commission, 1950*, Vol. II, para. 99.

¹⁶³⁹ *Ibid.*, para. 100.

¹⁶⁴⁰ *Ibidem*.

¹⁶⁴¹ Resolution 177 (III) of 21 November 1947.

¹⁶⁴² The draft *Statute of the International Criminal Court* would be adopted by the International Law Commission in 1994 (See 1994 Report of the International Law Commission in Official documents of the General Assembly, 49th period of sessions, Supplement N.10 (A/49/10)).

¹⁶⁴³ See, inter alia, International Criminal Tribunal for the former Yugoslavia, Judgment of 16 November 1998, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* ("Celebici Case"), Case No. IT-96-21-T, para. 56.

Commission, between 1986 and 1996, established a similar clause, although with different language, that stipulated that although no one could be convicted by virtue of the Code for acts committed before the entrance in effect of the Code, this would not impede the trial or the conviction of every individual responsible for acts that, at the time they were committed, were considered crimes by virtue of international law.¹⁶⁴⁴ The final draft of the Code (1996) foresaw two clauses of transcendental importance regarding the question of the notion of applicable law and retroactivity. Indeed, article 1 "Scope and application of the present code," paragraph 2, established that "[c]rimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law." For its part, article 13 of the Draft Code stipulated that "1. No one shall be convicted under the present Code for acts committed before its entry into force. 2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law."

b. International jurisprudence

i) Human rights bodies and courts

The HRC address the issue of the retroactive application of national law for crimes under international law in the case of *Klaus Dieter Baumgarten v. Germany*. The case refers to the conviction of the Deputy Minister of Defence and Head of Border Troops (*Chef der Grenztruppen*) of the former German Democratic Republic (GDR) for various murders and attempted murders by border guards, when individuals attempted to cross the border between the former GDR and the Federal Republic of Germany (FRG), in crimes known as the Berlin Wall executions. At the time of the material facts, these homicides were not considered crimes by the courts of the German Democratic Republic because domestic laws allowed the use of lethal force to prevent people from fleeing to West Germany.¹⁶⁴⁵ In 1996, Baumgarten was

¹⁶⁴⁴ See, article 7 of Draft Code of 1986; Article 8 (2) of the Draft Code of 1987; article 8 of the Draft Code of 1989; and articles 1 and 13 of the Draft Code of 1996.

¹⁶⁴⁵ Article 258 of the Criminal Code and articles 17 and 20 of the Law of the People's Police of the Democratic Republic of Germany and Orders No. 80/79 of 6 October 1979, 80/80 of 10 October 1980, 80/81 of 6 October 1981, 80/83 of 10

convicted for these crimes by the Regional Court for Berlin (Landgericht Berlin), which rejected the applicability of the former GDR's laws that justified the murders and exempted the perpetrators from criminal liability. Baumgarten went to the HRC, invoking the retroactive application of criminal law, arguing that in virtue of the criminal law in effect in the GDR at the time of the material facts for which he was convicted in 1996 were not punishable under law. He also argued that these acts also were not "criminal under international law, nor under the general principles of law recognized by the community of nations."¹⁶⁴⁶

The HRC observed that "the specific nature of any violation of article 15, paragraph 1, of the Covenant requires it to review whether the interpretation and application of the relevant criminal law by the domestic courts in a specific case appear to disclose a violation of the prohibition of retroactive punishment or punishment otherwise not based on law. In doing so, the Committee will limit itself to the question of whether the author's acts, at the material time of commission, constituted sufficiently defined criminal offences under the criminal law of the GDR or under international law."¹⁶⁴⁷ The HRC found that, independent of what was established under domestic law at the time of the murders, the GDR had the obligation – as a State party to the ICCPR – to guarantee the right to not be arbitrarily deprived of life and therefore "are required to prevent arbitrary killing by their own security forces." Thus, the HRC found that the Berlin Wall executions constituted a "disproportionate use of lethal force [that] was criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts."¹⁶⁴⁸ Finally, the HRC concluded that there had not been any violation of article 15 of the ICCPR.

In some Concluding Observations on countries, the HRC has urged the States to retroactively apply criminal law to actions that constituted grave human rights violations at the time they were committed. For example, in an Argentine case about the situation created by the country's amnesty laws (Laws of "Due Obedience"

October 1983, 80/84 of 9 October 1984, 80/85 of 18 October 1985, 80/86 of 15 October 1986 and 80/88 of 26 September 1988.

¹⁶⁴⁶ Views of 31 July 2003, case of *Klaus Dieter Baumgarten v. Germany*, Communication No. 960/2000, para. 5.6.

¹⁶⁴⁷ *Ibid.*, para. 9.3.

¹⁶⁴⁸ *Ibid.*, para. 9.4.

and “Full Stop,” as well as presidential pardons), the HRC found that “[g]ross violations of civil and political rights during the military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice.”¹⁶⁴⁹

The Inter-American Court of Human Rights address the issue of the retroactive application of domestic law for crimes under international law in the Case of *Almonacid Arellano v. Chile*.¹⁶⁵⁰ The case concerns the detention and extrajudicial execution of Luis Alfredo Almonacid Arellano – a member of the Communist Part, provincial secretary of the Labor Central Union (*Central Unitaria de Trabajadores*) and a Magisterio union leader— by the national police (*Carabineros*) in September 1973, days after the military coup led by General Augusto Pinochet Ugarte. Criminal proceedings were opened for the Almonacid Arellano murder, but the case was dismissed without prejudice in 1974. Subsequently, the military regime enacted a self-amnesty law.¹⁶⁵¹ In 1992, the widow of Luis Alfredo Almonacid Arellano filed a criminal complaint for the murder of her husband before ordinary courts and requested for the proceedings temporarily dismissed in 1974 to be reopened. The case was reopened, the civilian judge ruled he lacked jurisdiction and the proceedings were sent to military criminal courts. In 1997, after torturous and drawn out filings, the military court declared the total and definitive dismissal of the case with prejudice, applying the self-amnesty law. In 1998, the Supreme Court of Justice upheld the military court’s decision and ordered for the case to be closed and archived. Almonacid Arellano’s family members went to the Inter-American System alleging a violation of their right to judicial protection (articles 8 and 25 of the *American Convention*) and of the obligations to respect human rights and to adopt domestic law measures accordingly (articles 1 and 2 of the *American Convention*).

When it examined the case, the Inter-American Court of Human Rights first examined the nature and characterization of the crime of which Almonacid Arellano was a victim, e.g., “whether the

¹⁶⁴⁹ *Concluding Observations of the Human Rights Committee: Argentina*, 3 November 2000, CCPR/CO/70/ARG, para. 9.

¹⁶⁵⁰ Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154.

¹⁶⁵¹ Decree Law No. 2,191 of 18 April 1978.

murder of Mr. Almonacid-Arellano is a crime against humanity.”¹⁶⁵² The Court concluded that, in light of international law in effect at the time of the material facts,¹⁶⁵³ “there is sufficient evidence to conclude that in 1973, year in which Mr. Almonacid-Arellano died, the commission of crimes against humanity, including murder committed in the course of a generalized or systematic attack against certain sectors of the civil population, was in violation of a binding rule of international law. Said prohibition to commit crimes against humanity is a *ius cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law.”¹⁶⁵⁴

Upon analyzing the context in which the murder of Almonacid Arellano was committed, the Court confirmed that it had been proved that “between September 11, 1973 and March 10, 1990 Chile was ruled by a military dictatorship which, by developing a state policy intended to create fear, attacked massively and systematically the sectors of the civilian population that were considered as opponents to the regime. This was achieved by a series of gross violations of human rights and of international law, among which there are at least 3,197 victims of summary executions and forced disappearances, and 33,221 detainees, most of whom were tortured [...]. Likewise, the Court considered proven that the most violent time of that repressive period was that of the first months of the *de facto* government. Approximately 57 percent of all deaths and disappearances occurred during the first months of the dictatorship. The execution of Mr. Almonacid-Arellano took place precisely during that time.”¹⁶⁵⁵

¹⁶⁵² Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154, para. 90.

¹⁶⁵³ The Court cited, among other instruments: the *Hague Convention on the Laws and Customs of Land War* of 1907; *Agreement for the Prosecution and Punishment of the War Criminals of the European Axis*, of 1945; the *Charter of the International Military Tribunal at Nuremberg*; the *Statute of the International Military Tribunal for the Prosecution of the Principal War Criminals of the Far East*; the *Control Council Law No. 10*; UN General Assembly Resolution 95(I), of 11 December 1946 and 177 (II) of 21 November 1947; the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (UN International Law Commission, 1950, A/CN.4/34); and the *Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity*.

¹⁶⁵⁴ Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154, para. 99.

¹⁶⁵⁵ *Ibid.*, para. 129.

After recalling that under international law these crimes were not subject to amnesties or other similar measures and that the Chilean State could not invoke its domestic laws (such as de Decree-Law for self-amnesty) in order to exempt itself from the international obligation to prosecute and punish the perpetrators of crimes against humanity, the Court found that "the State may not invoke the statute of limitations, the non-retroactivity of criminal law or the *ne bis in idem* principle to decline its duty to investigate and punish those responsible."¹⁶⁵⁶

The Court explained that the "the *ne bis in idem* principle, although it is acknowledged as a human right in Article 8(4) of the American Convention, [] is not an absolute right, and therefore, is not applicable where: i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice. A judgment rendered in the foregoing circumstances produces an 'apparent' or 'fraudulent' *res judicata* case. On the other hand, the Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle."¹⁶⁵⁷

In the case of *Gelman v. Uruguay*, the Inter-American Court reiterated its case law by holding that "the State should ensure that no other analogous norm, such as a statute of limitations, non-retroactivity of the criminal law, *res judicata*, *ne bis in idem* or any other similar law exonerating responsibility, be applied and that the authorities refrain from carrying out acts that would implicate the obstruction of the investigative process."¹⁶⁵⁸

¹⁶⁵⁶ *Ibid.*, para. 151.

¹⁶⁵⁷ *Ibid.*, para. 154.

¹⁶⁵⁸ Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 254.

The IACHR has ruled on the issue of the retroactive application of national criminal law within contexts of amnesty laws applied to grave human rights violations. In a Chilean case, in which the State alleged that the repeal of the amnesty Decree-Law would not have legal effects against the perpetrators of the violations due to the principle of non-retroactivity of criminal law contemplated in articles 9 of the *American Convention* and 19(3) of the Chilean Constitution, the IACHR concluded that: "the principle of non-retroactive application of the law, under which no one can be convicted retroactively for actions or omissions that were not considered criminal under applicable law at the time they were committed, cannot be invoked with respect to those granted amnesty because at the time the acts in question were committed they were classified and punishable under Chilean law in force."¹⁶⁵⁹

For its part, since the year 2000, the European Court of Human Rights has heard various cases in which issues arising from the principle of legality of crimes and international law are in play, as well as the retroactive application of domestic criminal law for crimes under international law.¹⁶⁶⁰

The Case of *Streletz, Kessler and Krenz v. Germany*¹⁶⁶¹ dealt with the prosecution and punishment of three officials from the former government of the GDR for the murder of several citizens, when they attempted to flee to the Federal Republic of Germany (FRG), and at the time their actions were authorized under East German legislation. Here the European Court held that, even under the criminal laws of the GDR at the time of the murders for which Streletz, Kessler and Krenz were convicted, the murders still constituted crimes, for which there was a legal basis for prosecuting and convicting them.¹⁶⁶² But the Court also found that, at the time of the crimes these behaviours constituted "offences defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights"¹⁶⁶³ and could even be considered crimes against

¹⁶⁵⁹ Report No.133/99, Case 11.725, *Carmelo Soria Espinoza* (Chile), 19 November 1999, para. 76.

¹⁶⁶⁰ Cases of *Kononov v. Lithuania*, *Kolk and Kislyiy v. Estonia*, *Streletz, Kessler and Krenz v. Germany* and *K.-H.W. v. Germany*.

¹⁶⁶¹ Judgment of 22 March 2001, *Case of Streletz, Kessler and Krenz v. Germany*, Applications No. 34044/96, 35532/97 and 44801/98.

¹⁶⁶² *Ibid.*, para. 55.

¹⁶⁶³ *Ibid.*, para. 105.

humanity.¹⁶⁶⁴ Thus, according to the Court, it was foreseeable for the three men convicted that their actions were punishable under both domestic and international law.

Furthermore, the Court held that "it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law."¹⁶⁶⁵ The Court also found that "a State practice [...] which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7 § 1 of the Convention. That practice [...] was imposed on all organs of the GDR, including its judicial bodies, cannot be described as "law" within the meaning of Article 7 of the Convention."¹⁶⁶⁶ The Court concluded that the "appearance of legality" to institute a practice that flagrantly violates fundamental rights could not be protected by article 7 of the Convention.¹⁶⁶⁷

In the case of *Kolk and Kislyiy Vs. Estonia*¹⁶⁶⁸ - two individuals convicted in 2003 by an Estonian court for crimes against humanity (deportation of the civilian population) committed in 1949, when Estonia was under the sovereignty of the Union of Soviet Socialist Republic and the 1946 Criminal Code of the Russian Federal Soviet Republic was in force, which did not include crimes against humanity among the crimes it catalogued, the European Court found that at the time of material facts, the crimes committed by Kolk and Kislyiy constituted crimes under the *Charter of the International Military Tribunal at Nuremberg*. Likewise, the European Court recalled that, in accordance with UN General Assembly Resolution 95 (I) of 11 December 1946, the Statute and the Judgment of the Nuremberg Tribunal had been recognized as general principles of international law and that the *Principles of International Law Recognized in the Charter of the*

¹⁶⁶⁴ *Ibid.*, para. 106.

¹⁶⁶⁵ *Ibid.*, para. 81.

¹⁶⁶⁶ *Ibid.*, para. 87.

¹⁶⁶⁷ *Ibidem*.

¹⁶⁶⁸ Decision of Non-Admissibility of 17 January 2006, case of *Kolk and Kislyiy v. Estonia*, Applications No. 23052/04 and 24018/04.

Nuremberg Tribunal and the Judgment of the Tribunal, adopted by the UN International Law Commission in 1950, established that “[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment” (Principle I). The European Court also cited the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*.

The European Court reiterated that “[a]rticle 7 § 2 of the Convention expressly provides that this Article shall not prejudice the trial and punishment of a person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations. This is true of crimes against humanity, in respect of which the rule that they cannot be time-barred was laid down by the Charter of the Nuremberg International Tribunal”¹⁶⁶⁹. Likewise, the European Court indicated that even if the petitioners’ actions were considered legal under Soviet law at the time, that did not keep Estonian courts from considering that – at the time they were committed – these actions constituted crimes against humanity under international law. The European Court found that there was “no reason to come to a different conclusion. It is noteworthy in this context that the Soviet Union was a party to the London Agreement of 8 August 1945 by which the Nuremberg Charter was enacted. Moreover, on 11 December 1946 the United Nations General Assembly affirmed the principles of international law recognised by the Charter. As the Soviet Union was a member State of the United Nations, it cannot be claimed that these principles were unknown to the Soviet authorities. The Court thus considers groundless the applicants’ allegations that their acts had not constituted crimes against humanity at the time of their commission and that they could not reasonably have been expected to be aware of that.”¹⁶⁷⁰ To conclude, the European Court rejected Kolk and Kislyiy’s petition and concluded that the principles of legality and non-retroactivity of criminal law had not been violated.

¹⁶⁶⁹ *Ibid.*, p. 9.

¹⁶⁷⁰ *Ibidem*.

In the case of *Kononov v. Latvia*,¹⁶⁷¹ between 1998 and 2003 a Soviet army official was prosecuted and convicted by a Latvian court (Riga Regional Court) for war crimes (killings of civilians) committed in 1944, when Latvia was under the sovereignty of the Union of Soviet Socialist Republics (USSR). The Court found that the laws and customs of war, as well as numerous international instruments, and in particular the *Nuremberg Charter*, all of which were in force at the time of the material facts, criminalized the actions committed by Kononov in 1944.¹⁶⁷² The Court emphasized that article 7 of the *European Convention* "is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law."¹⁶⁷³ However, the Court specified that the notion of "law" employed by article 7 implied "written and unwritten law and which implies qualitative requirements, notably those of accessibility and foreseeability."¹⁶⁷⁴ The Court also recalled that, however clear the language of a criminal law provision may be, in any legal system, "there is an inevitable element of judicial interpretation"¹⁶⁷⁵ and that case law is the source of law that contributes to the progressive development of criminal law. The Court highlighted that article 7 cannot be interpreted to restrain judicial interpretation, provided "the resultant development is consistent with the essence of the offence and could reasonably be foreseen."¹⁶⁷⁶ Thus, the Court concluded that article 7 requires the existence of a legal basis at the time of the material facts, whether in domestic legislation or under international law, in order to convict someone.¹⁶⁷⁷

The European Court concluded that, in light of the state of international law at the time of the material facts, the actions

¹⁶⁷¹ Judgment of 17 May 2010, Case of *Kononov v. Latvia*, Application No. 36376/04.

¹⁶⁷² *Ibid.*, paras. 52 – 142 and para. 205 *et seq.*

¹⁶⁷³ *Ibid.*, para. 185.

¹⁶⁷⁴ *Ibidem.*

¹⁶⁷⁵ *Ibid.*, paras. 185.

¹⁶⁷⁶ *Ibidem.*

¹⁶⁷⁷ *Ibid.*, para. 198.

attributed to Kononov constituted crimes under international law,¹⁶⁷⁸ with regards to which customary international law imposed upon States the obligation to prosecute individuals who had committed violations of the laws and customs of war through their domestic courts. In terms of the foreseeability that the conduct would be banned under international law, the Court held that "in the context of a commanding officer and the laws and customs of war, the concepts of accessibility and foreseeability must be considered together. [...] [T]he scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed."¹⁶⁷⁹

The laws and customs of war in effect in 1944 "constituted detailed *lex specialis* regulations fixing the parameters of criminal conduct in a time of war, primarily addressed to armed forces and, especially, commanders."¹⁶⁸⁰ Given the position that Kononov held as commander of a military unit, the Court found that "he could have been reasonably expected to take such special care in assessing the risks that the operation in Mazie Bati entailed"¹⁶⁸¹ and that, given the manifestly illegal nature of the abuses and death inflicted upon the villagers, even the most superficial reflection upon these behaviours demonstrated that, at the least, these actions could breach the laws and customs of war, as they were interpreted at that time, and could constitute war crimes, so that Kononov could foresee that they would compromise his individual criminal liability.¹⁶⁸² The Court concluded that "[Kononov]'s acts constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war."¹⁶⁸³

The Court held that "where national law did not provide for the specific characteristics of a war crime, the domestic court could rely on international law as a basis for its reasoning, without infringing the principles of *nullum crimen* and *nulla poena sine lege*".¹⁶⁸⁴ The Court also found that when international law had not

¹⁶⁷⁸ *Ibid.*, paras. 205 *et seq.*

¹⁶⁷⁹ *Ibid.*, para. 235.

¹⁶⁸⁰ *Ibid.*, para. 238.

¹⁶⁸¹ *Ibidem.*

¹⁶⁸² *Ibidem.*

¹⁶⁸³ *Ibid.*, para. 235.

¹⁶⁸⁴ *Ibid.*, para. 208.

defined the punishment applicable to one war crime or another with sufficient clarity, a domestic court could, after finding the defendant guilty, sentence the defendant to a punishment based on domestic criminal law.¹⁶⁸⁵

ii) International criminal tribunals

The international criminal tribunals have faced and addressed issues regarding the principle of legality of crimes and related to behaviours that were not crimes under domestic law, but did constitute crimes under international law, at the moment they were committed.

The International Criminal Tribunal for the former Yugoslavia has held that customary international law creates individual criminal liability for the commission of acts classified as crimes under customary international law.¹⁶⁸⁶ In a judgment in which it rejected the argument of non-retroactivity, the Tribunal recalled that “[t]he very concept of customary international law is that norms of customary international law are binding *per se* and do not need explicit adoption by states.”¹⁶⁸⁷ In another judgment, the Tribunal stated it understood “the principle of *nullum crimen sine lege*, a constitutive element of the principle of legality, in relation to the factual criminality of a particular *conduct*. In interpreting the principle of *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance. This interpretation of the principle is supported by the subsequent declaratory formulation of the principle of *nullum crimen sine lege* in Article 22 of the ICC Statute: ‘A person shall not be criminally responsible under this Statute unless the *conduct* in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.’ This interpretation is further supported by the relevant practice between States in the field of extradition. In order to determine whether the requirement of

¹⁶⁸⁵ *Ibid.*, para. 212.

¹⁶⁸⁶ See, inter alia: Judgment of November 29, 2002, *The Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-T, para. 193.

¹⁶⁸⁷ Trial Chamber (II), Decision on Motion by Vojislav Seselj challenging jurisdiction and form of indictment, 26 May 2004, *The Prosecutor v. Vojislav Seselj*, Case No. T-03-67-PT, para.15.

double criminality is fulfilled, the test to be applied is not so much whether a certain conduct is qualified in the respective national jurisdiction in the same way, but whether the conduct in itself is criminalised [...]. In order to meet the principle of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanctions is not of material importance.”¹⁶⁸⁸

In another judgment, the Tribunal recognized the retroactive application of Croatia’s criminal law between 1997 and 2004 to acts committed prior to this domestic legislation, but that at the time constituted crimes under international law, as legitimate under international law.¹⁶⁸⁹ In this decision, in accordance with article 11 *bis* of its Rules of Procedure and Evidence, the Tribunal declined to exercise jurisdiction, in favour of Croatian courts, so that they could prosecute two individuals for actions that constituted crimes under international law at the time they were committed, but that were not classified as crimes in domestic law at that time.

The Special Tribunal for Lebanon has found that under international law, the retroactive application of domestic criminal law for actions that at the time they were committed constituted crimes under international law is legitimate. The Special Tribunal held that “[a]ccording to the principle of legality, everybody must know in advance whether specific conduct is consonant with, or a violation of, penal law.”¹⁶⁹⁰ It also found that “Article 15 of the ICCPR allows at the very least that fresh national legislation [...] defining a crime that was already contemplated in international law may be applied to offences committed before its enactment without breaching the *nullum crimen* principle. This implies that individuals are expected and required to know that a certain conduct is criminalised in international law: at least from the time

¹⁶⁸⁸ Trial Chamber, Decision on Joint Challenge to Jurisdiction, of 25 July 2003, *The Prosecutor v. Enver Hadzihanovic, Mehmed Alagic and Amir Kubura*, Case No. IT-01-47-PT, para. 62.

¹⁶⁸⁹ Trial Chamber, Decision of 14 September 2005, *The Prosecutor v. Rahim Ademi y Mirko Norac*, Case No. IT-04-78-PT.

¹⁶⁹⁰ Special Tribunal for Lebanon, Appellate Chamber, Interlocutory Decision on the Applicable Law of 16 February 2011, Case STL- I I-OI/I, para. 132.

that the same conduct is criminalised also in a national legal order, a person may thus be punished by domestic courts even for conduct predating the adoption of national legislation."¹⁶⁹¹

Citing the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, the Special Tribunal for Lebanon specified that "when determining the question of 'foreseeability' of a criminal offence, [...] non-codified international customary law could give an individual "reasonable notice" of conduct that could entail criminal liability. This facet of the *nullum crimen* principle should not be surprising: international crimes are those offences that are considered so heinous and contrary to universal values that the whole community condemns them through customary rules. Individuals are therefore required and expected to know that, as soon as national authorities take all the necessary legislative (or judicial) measures necessary to punish those crimes at the national level, they may be brought to trial even if their breach is prior to national legislation (or judicial pronouncements)."¹⁶⁹² The Special Tribunal thus highlighted that "[w]hat matters is that an accused must, at the time he committed the act, have been able to understand that what he did was criminal, even if "without reference to any specific provision.' Similarly, '[a]lthough the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law,' it may nevertheless be used to 'refute any claim by the Defence that it did not know of the criminal nature of the acts.'"¹⁶⁹³

In the first international criminal prosecution for the war crime of recruitment and enlistment of children under 15 years old, the Special Court for Sierra Leone found that, when interpreting the principle of legality of crimes and dealing with crimes under international law, it is essential to emphasize to emphasize of the material conduct in and of itself, more than the description of the national legal rule.¹⁶⁹⁴ In this regard, the Special Court specified that the criminal nature of the conduct must be foreseeable and accessible for the author of the conduct.¹⁶⁹⁵ It also highlighted

¹⁶⁹¹ *Ibid.*, para. 133.

¹⁶⁹² *Ibid.*, para. 134.

¹⁶⁹³ *Ibid.*, para. 136.

¹⁶⁹⁴ Appeals Chamber, Decision of 31 May 2004, *The Prosecutor v. Sam Hinga Norman*, Case SCSL-2003-14-AR72 (E), para. 25.

¹⁶⁹⁵ *Ibidem*.

that “[a] norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international law. What, indeed, would be the meaning of a customary rule if it only became applicable upon its incorporation into an international instrument such as the Rome Treaty?”¹⁶⁹⁶ In this context, the Special Court established that in order to establish individual criminal responsibility, by virtue of customary international law, it is not necessary for it to be explicitly established in the provisions of a treaty.¹⁶⁹⁷

5. Legal developments in Latin America

The national criminal courts of countries in different regions of the world, with different legal systems and traditions, have faced the issue of the retroactive application of domestic criminal law in cases of crimes under international law. This issue has been examined by national courts and tribunals, whether within the framework of criminal proceedings against alleged perpetrators of crimes under international law, or relating to legal affairs, such as universal jurisdiction, non-applicability of statutes of limitations, extradition and amnesty. In all cases, national courts have concluded and reaffirmed that, in light of international law and the obligations arising from it, the retroactive application of criminal law to actions that at the time were crimes under international law, whether treaty-based or customary, does not violate the principle of non-retroactivity of criminal law. This is how it has been done, for example, in the Courts and Tribunals of Australia,¹⁶⁹⁸ Belgium,¹⁶⁹⁹ Canada,¹⁷⁰⁰ Bosnia and Herzegovina,¹⁷⁰¹ Spain,¹⁷⁰² the United States of America,¹⁷⁰³ France,¹⁷⁰⁴

¹⁶⁹⁶ *Ibid.*, para. 38.

¹⁶⁹⁷ *Ibid.*

¹⁶⁹⁸ High Court of Australia, *Polyukhovich v. The Commonwealth of Australia and Another*, (1991) 172 *Commonwealth Law Reports* 501 F.C. 91/026.

¹⁶⁹⁹ Order of 6 November 1998, of Judge Damien Vandermeersch of the Court of First Instance of Belgium, Case N° 216/98 (proceedings against Augusto Pinochet Ugarte).

¹⁷⁰⁰ Superior Court, Criminal Division, Judgment of 22 May 2009, *Her Majesty the Queen v. Désiré Munyaneza*, Case No. 500-73-002500-052.

¹⁷⁰¹ See, inter alia: Judgment of 20 September 2010, *Appeal of Branimir Glavaš*, Case No. SU-10-431/10; Judgment of 29 October 2009, *Prosecutor v. Zoran Maric*, Case No. X-KR-05/96-3; Judgment of 3 July 2009, *Prosecutor v. Momir Svaic*, Case No. X-KR-07/478; and Judgment of 29 September 2008, *Prosecutor v. Sreten Lazarevic et al.*, Case No. X-KR-06/243.

¹⁷⁰² National Tribunal, Decision of 5 November 1998, Appeal Case File No. 173/98 – First Section – Case 1/98 (Central Investigating Court No. 6) (Proceedings

Hungary,¹⁷⁰⁵ Indonesia,¹⁷⁰⁶ and Israel.¹⁷⁰⁷ In Latin America, various Courts and Tribunals have ruled on this, and in the same way.

The Peruvian justice system was called upon to rule on the issue of the application of national criminal law in cases of enforced disappearance. The 1991 Criminal Code defined enforced disappearance as a crime in article 323. However, in the section of the Criminal Code where the crime of enforced disappearance was repealed through Law No. 25475 of 6 May 1992. Later, through law No. 25592 of 2 July 1992, enforced disappearance was re-introduced as a crime in criminal legislation, and later regulated through Law No. 26962 of 21 February 1998 under the heading "Crimes against Human Rights" in the Criminal Code. Therefore, between 7 May and 2 July 1991, enforced disappearance was not considered a crime under Peruvian criminal law.

In a case of enforced disappearance that happened after the respective criminal offense was repealed from domestic law, and before it was re-introduced in the 1991 Criminal Code, the Peruvian Constitutional Tribunal held, given the permanent nature of the crime of enforced disappearance, that "[t]he *lex previa* protection derived from the principle of *nullum crimen sine lege*, does not apply to the case of a permanent crime when the domestic rule of criminal law has not entered into effect before the start of its execution, but that is applicable while it continues to be executed. In this sense, the fact that the typical figure of enforced disappearance of persons has not always had legal effect is not an obstacle to carrying out the corresponding criminal proceedings

against Pinochet Ugarte); Decision of 4 November 1998, Appeal Case File No. 84/98 – First Section – Case 19/97 (Central Investigating Court No. 5) (Proceedings against members of the Argentinean Military Junta); and National Tribunal, Judgment of 19 April 2005, Case File No. 139/97, Case No. 19/97 (Proceedings against Adolfo Scilingo) .

¹⁷⁰³ Court of Appeals, 6th Circuit, *Demjanjuk v. Petrovsky*, Judgment of 31 October 1985 (776 F.2d 571), *John Demjanjuk, Petitioner-Appellant, v. Joseph Petrovsky, et al., Respondents-Appellees*, No. 85-3435)

¹⁷⁰⁴ Court of Cassation of France, Criminal Chamber, Judgment of 30 June 1976, proceedings against Paul Touvier; and Judgment of 26 January 1986, proceedings against Klaus Barbie.

¹⁷⁰⁵ Constitutional Court, Judgment No. 53/1993 of 13 October 1993.

¹⁷⁰⁶ The Ad Hoc Human Rights Tribunal for East Timor, Judgment of 14 August 2002, Case No. 01/PID.HAM/AD.Hoc/2002/ph.JKT.PST.

¹⁷⁰⁷ Supreme Court of Israel, Judgment of 29 May 1962, *Attorney General of Israel v. Eichmann*.

for the crime and punishing those responsible.”¹⁷⁰⁸ This focus has been reiterated in several of the Constitutional Tribunal’s judgments.¹⁷⁰⁹

In Argentina, the Supreme Court of Justice ruled on this issue in the case of Enrique Arancibia Clavel, and agent of the exterior section of the National Directorate of Intelligence (*Dirección Nacional de Inteligencia – DINA*) of the Chilean military regime, who participated in the murders and enforced disappearances of various Chilean individuals in Buenos Aires, Argentina, between 1974 and 1978, and was part of a DINA group entrusted to persecute, assassinate and disappear opposition politicians and members of the overthrown government of Salvador Allende living in exile. Arancibia Clavel was prosecuted by the Argentine justice system for homicide and illicit association to commit crimes against humanity. In November 2000, the Federal Oral Criminal Court No. 6 (*Tribunal Oral Federal en lo Criminal Federal No. 6*) convicted him for homicide of the Chilean general Carlos Prats and for illegal association to commit crimes against humanity.¹⁷¹⁰ Arancibia Clavel’s defense counsel appealed the judgment before the National Chambers of Criminal Cassation (*Cámara Nacional de Casación Penal*), which confirmed the conviction for homicide, but dismissed the charge for crime of illegal association, considering that the statute of limitations had run out. The Chamber of Criminal Cassation’s decision was challenged.

In 2004, when issuing its judgment in the case, the Supreme Court of Justice considered “that if the homicides, torture and torment, enforced disappearance of persons, are crimes against humanity, forming part of an association destined to commit them [it is impossible that] it is not since such an affirmation would constitute a contradiction, insofar as the latter would be a preparatory act punishable from the others.”¹⁷¹¹ The Court also

¹⁷⁰⁸ Judgment of 9 December 2004, Case File No. 2798-04-HC/TC, Lima, *Case of Gabriel Orlando Vera Navarrete*, para. 22 (Original in Spanish, fre translation).

¹⁷⁰⁹ See, for example, Judgment of 18 March 2004, Case File No. 2488-2002-HC/TC, Piura, *Caso Gerardo Villegas Namuche*; Judgment of 4 September 2013, Case File No. 02249 2013-PHC/TC, Lima, *Caso Juan Fernando Aragón Guibovich*; and Judgment of 30 March 2007, Case File No. 0442-2007-HC/TC, Lima, *Caso Collins Collantes Guerra*.

¹⁷¹⁰ Judgment of 27 November 2000, Case File No. 259, *Arancibia Clavel, Enrique Lautaro s/ Homicidio calificado y asoc. Ilícita y otros*.

¹⁷¹¹ Corte Suprema de Justicia de la Nación, Judgment of 24 August 2004, *Recurso de hecho deducido por el Estado y el Gobierno de Chile en la causa Arancibia*

pointed out “that the ratification in recent years of the *Inter-American Convention on Forced Disappearance of Persons* has only meant on the part of our country, [...] the reaffirmation via treaties of the nature of this state practice as a crime against humanity, which had been affirmed since before, since the evolution of international law following World War II allows us to affirm that at the time of these alleged crimes international human rights law already condemned the forced disappearance of persons as crimes against humanity.”¹⁷¹² The Court concluded that “crimes such as genocide, torture, enforced disappearances of persons, homicide, and any other type of actions that seek to persecute and exterminate political opposition – among which we should count forming part of a group carrying out that persecution – may be considered crimes against humanity, because they violate human rights (el derecho de gentes) as established in art. 118 of the National Constitution. [...] [And] consequently, forming part of a group dedicated to perpetrating these crimes, independent of the functional role the individual may occupy, is also a crime against humanity.”¹⁷¹³

The Supreme Court of Justice indicated that “the statute of limitations for criminal charges is closely linked to the principle of legality, therefore it could not be susceptible to the application of an *ex post facto* law that would alter how it works, in prejudice of the defendant [...] Doubtless, statutes of limitations are part of the concept of ‘criminal law,’ since this encompasses not just the precept, the punishment, the notion of the crime and guilt, but also the complex of the ordering provisions of the regime for extinguishing punitive powers.”¹⁷¹⁴ The Court found that although “the common basis for statutes of limitation [...] of criminal claims or of sentencing, is the uselessness of the punishment in the instant case [nonetheless there is an] exception to this rule, [which] applies for those acts that constitute crimes against humanity, since they are scenarios that have continued to be experienced by society as a whole, given their magnitude and significance. This means not only that they must remain in force

Clavel, Enrique Lautaro *s/ homicidio calificado y asociación ilícita y otros —causa N° 259*, para. 13 (Original in Spanish, fre translation).

¹⁷¹² *Ibidem* (Original in Spanish, fre translation).

¹⁷¹³ *Ibid.*, paras. 16 and 17 (Original in Spanish, fre translation).

¹⁷¹⁴ *Ibid.*, para. 19 (Original in Spanish, fre translation).

for national society, but also for the international community itself.”¹⁷¹⁵

The Court recalled that the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* “only affirms non-applicability of statutory limitations, which matters for the recognition of a norm already in force (*jus cogens*) in light of public international law of customary origins. Thus, the prohibition of non-retroactivity of criminal laws is not forced, but rather a principle installed through international custom is reinforced, which already had legal effects at the time of the commission of the crimes [...] In fact we are not dealing with the retroactive effects *per se* of the international treaty-based norm, since its nature as a norm of customary international law was *jus cogens* prior to the ratification of the Convention of 1968, whose primary function ‘is to protect the States from agreements concluded against certain general values and interests of the international community of States as a whole, in order to ensure respect for those general rules of law whose failure may affect the very essence of the legal system.’”¹⁷¹⁶ In this vein, the Court concluded that “before the convention, international custom already considered statutes of limitation inapplicable to crimes against humanity, and this custom was also a common matter of international law before the incorporation of the convention into domestic law [...] Consequently, the crimes for which Arancibia Clavel was convicted, were already not subject to statutory limitations under international law at the time they were committed, so therefore this is not retroactive application of the convention, but rather this was already a rule of customary international law in effect since the 1960s, to which the Argentine State adhered.”¹⁷¹⁷

In Chile, in 2006, the Criminal Chamber of the Supreme Court of Justice ruled on the declaration of the application of the statute of limitations for criminal proceedings ordered by a trial court¹⁷¹⁸ and confirmed on appeal, in a case of three members of the *Cuerpo de Carabineros* (national police forces) prosecuted for the

¹⁷¹⁵ *Ibid.*, paras. 20 and 21 (Original in Spanish, fre translation).

¹⁷¹⁶ *Ibid.*, para. 28 (Original in Spanish, fre translation).

¹⁷¹⁷ *Ibid.*, paragraph 29 (Original in Spanish, fre translation).

¹⁷¹⁸ Criminal Tribunal of Mariquina, Judgment of 7 de agosto de 2003, Case No. 23.375.

extrajudicial executions of two students and militants in the *Movimiento de Izquierda Revolucionaria - MIR* (Leftist Revolutionary Movement), in the town of Choshuenco, in December 1973. The appeals judgment was challenged through a cassation remedy, based on the argument that the double homicide had been committed in the context of an internal armed conflict and, therefore, was a war crime, according to the doctrine and principles of general international law, and thus it was not subject to statutory limitations and was not subject to amnesty. When issuing the judgment convicting the defendants,¹⁷¹⁹ and recalling that at the time of the crime the Geneva Conventions had legal effect in Chile and that the prohibition against committing war crimes and crimes against humanity was a *jus cogens* norm, the Criminal Chamber of the Supreme Court concluded that "the classification of the crime of homicide committed against the two victims murdered at the end of 1973 by officials of the State of Chile, in the instant case, as a 'crime against humanity,' is not opposed to the principle of legality in criminal law, because the conduct of which they are accused already were crimes under national law as 'homicide' and under international law, as a crime against humanity."¹⁷²⁰

In Colombia, given that the crimes of genocide, torture, enforced disappearance and various war crimes were classified as crimes in the year 2000,¹⁷²¹ on numerous occasions the Supreme Court of Justice and national courts have ruled on the issue of retroactive application of domestic criminal law for material facts that constituted crimes under international law at the time they were committed.

The Supreme Court of Justice created precedents in its case law on the matter in two decisions in 2009. In the first decision in 2009, the Supreme Court of Justice held that article 29 of the Political Constitution, which establishes the principle of non-retroactive application of criminal law, should be interpreted in

¹⁷¹⁹ Judgment of 13 December 2006, Case *Molco de Choshuenco* (Paulino Flores Rivas y otros), Case File No. 559-04.

¹⁷²⁰ *Ibid.*, para. 25 (Original in Spanish, fre translation).

¹⁷²¹ Law No. 589 of 6 July 2000, *Through which genocide, forced displacement, forced disappearance, and torture and introduced into law; and other provisions are created*, and Law No. 599 of 24 July 2000, *Through which the Criminal Code is enacted*.

accordance with article 15 of the ICCPR.¹⁷²² Recalling that human rights treaties form part of the “constitutional block” (*“bloque de constitucionalidad”*) and prevail over other rules in the domestic legal order, the Court emphasized that the principle of non-retroactivity in criminal law, in accordance with article 15, is not contrary to “the trial and punishment of a person for actions or omissions that, at the time they were committed, were crimes according the general principles of law recognized by the international community” (Emphasis by the Court). The Court found that “[u]nder these parameters, the work of the office of the prosecutor, not only in the investigation and verification phase but also in formulation of criminal charges for the conduct, as well as the work of judges who in a way intervene in the processes of justice and peace, should be oriented by these principles and *superior mandates*.”¹⁷²³

In a later judgment in 2009, the Supreme Court of Justice held that, given the their nature as *jus cogens* norms, war crimes and crimes against humanity are part of the domestic legal order, independent of whether the Colombian State has ratified or adhered to the corresponding international instruments.¹⁷²⁴ Therefore, the Court held that “it is an obligation of the Colombian State to ensure that the serious violations of international humanitarian law are punished for what they are, that is, as attacks that do not only affect the life, physical integrity, dignity and liberty of the people, among other relevant rights, but that also undermine fundamental values recognized by all of humanity and compiled in the set of norms that make up what is known as international humanitarian law.”¹⁷²⁵ The Court also held that “the lack of incorporation of a rule that strictly defines crimes against humanity into domestic law, does not preclude its recognition at the national level.”¹⁷²⁶

In Paraguay, in a case of an extradition request by Argentina of a citizen of that country for cases of torture and enforced disappearance classified as crimes against humanity, the Criminal Chamber of the Supreme Court of Justice ruled on the issue of

¹⁷²² Criminal Chamber, Decision of 31 July 2009, *Proceedings against Wilson Salazar Carrascal*, Case File 32.539.

¹⁷²³ *Ibidem* (Original in Spanish, free translation).

¹⁷²⁴ Judgment of 21 September de 2009, Case File No. 32022.

¹⁷²⁵ *Ibidem* (Original in Spanish, free translation).

¹⁷²⁶ *Ibidem* (Original in Spanish, free translation).

non-retroactivity of criminal law, among other issues.¹⁷²⁷ In the extradition proceeding, the defense invoked the expiration of the statute of limitations for bringing criminal proceedings and argued that the Argentine legislation under which the extradition was requested was subsequent to the crimes bring charged, "so it is therefore inapplicable, because the law does not have retroactive effects."¹⁷²⁸ In addition to retaining the nature of crimes not subject the statutory limitations, the Supreme Court of Justice held that according to international law, criminal law could be applied retroactively for facts that at the moment they were committed constituted international crimes. Thus, the Supreme Court of Justice, conceded the requested extradition.

Uruguayan courts have ruled on the issue of the retroactive application of criminal law. In a first case, a court found that the crime of enforced disappearance, introduced in the Criminal Code in 2006, was applicable to crimes committed in 1976.¹⁷²⁹ The court based its conclusions on article 15 of the ICCPR and article 9 of the *American Convention on Human Rights*, as well as the nature of enforced disappearance as an international crime at the time of the material facts. The court found that "the *ex post facto* existence of a criminal offense of enforced disappearance in national legislation is not an obstacle to prosecuting the perpetrators of enforced disappearances committed when this conduct was already considered a crime under international law."¹⁷³⁰

In the proceedings brought against Juan María Bordaberry for the crimes of murder and enforced disappearance of various opposition members during the military regime, another court ruled on the issue of retroactive application of criminal law. On 9 February 2010, the Criminal Court of First Instance (*Juzgado de Primera instancia en lo Penal de 7º turno*) convicted Bordaberry for the crimes of "Affront to the Constitution" (for the facts of the military coup), enforced disappearance and "political murder." The court also ruled that the crimes of enforced disappearance and

¹⁷²⁷ Decesion No. 960 of 31 December 2009, Case "Request for provisional arrest for extradition of the Argentine citizen Abelardo Eduardo Britos", Case File No. 1184/09.

¹⁷²⁸ *Ibidem* (Original in Spanish, free translation).

¹⁷²⁹ Criminal Tribunal No. 19 (Montevideo), Judgment No 036 of 26 March 2009, Case *José Niño Gavazzo Pereira et al. (Plan Condor)*.

¹⁷³⁰ *Ibidem* (Original in Spanish, free translation).

“political murder” attributed to Bordaberry constituted crimes against humanity. At the time the crimes were committed, enforced disappearance and “political murder” were not classified as crimes in Uruguayan criminal law, but they were incorporated into the catalogue of crimes in 2006 with Law No. 18,026 of 25 September 2006, which incorporated the crime of genocide, crimes against humanity, war crimes and other crimes under international law. The court found that crimes against humanity are offenses under international law, independent of whether national legislation has defined them or not: “[t]heir prosecution and punishment is based on the fact that such crimes are injurious to universal human values, so their suppression is a norm of *jus cogens*.”¹⁷³¹ Likewise, it ruled that “[i]t is irrelevant whether the domestic legal order permitted such crimes or not. Since the moment international *jus cogens* norms began to exist, principles acknowledged by all civilized nations, limiting the sovereignty of the States, linked to the protection of the human person. Crimes against humanity are not subject to statutory limitations, in recognition of the gravity of same, which interests the entire international community in their prosecution. For the same reason, the perpetrators cannot be benefitted by institutions such as amnesty or other similar measures, insofar as any of these solutions would undermine the international obligations to penalize crimes of such importance. Nor can they grant asylum to the criminals responsible for these offenses.”¹⁷³² Finally, the court found that the enforced disappearances and homicides attributed to Bordaberry already constituted crimes against humanity, under international law, when they were committed.

¹⁷³¹ Original in Spanish, free translation.

¹⁷³² Original in Spanish, free translation.

CHAPTER XII: DOUBLE JEOPARDY, FORMER ADJUDICATION, AND IMPUNITY

"The Judge must strive to bring arbitrary methods back into line with the Rule of Law. If they fail to do so, they become accessories to those who exercise unchecked power, as well as co-perpetrators of all human rights violations. These violations degrade the political situation and demand a firm response from civilized society condemning any legal pronouncements which disregard human rights. No Judge is capable of passing judgment on a law which not only is unjust, but which, furthermore, is criminal. Fortunately, human rights supersede all written prescriptions."

José Antonio Martín Pallín¹⁷³³

1. General Considerations

The question of the impunity of gross human rights violations and for crimes under international law frequently holds under tension the judicial institutions of the *res judicata* (autrefois convict - autrefois acquit) and of double jeopardy (*ne bis in idem* or *non bis in idem*). Both figures are established by criminal law and anchored in the Rule of Law as principles guaranteeing legal certainty and protecting against misuse and abuse of the punitive power of the State.

However, both legal precepts are frequently used illegitimately with the purpose of validating the impunity of those responsible for gross violations of human rights. In these situations, the international case law considers that "fraudulent administration of justice," "apparent *res judicata*," or "fraudulent *res judicata*," which are characteristic of impunity, take place. Against this, international law stipulates clear conditions and limits for the application of these legal precepts, and avoids their arbitrary use with the purpose of giving the appearance of "legality" to impunity.

2. The principles of *ne bis in idem* and *res judicata*

Under international law it is clearly prohibited for national courts to try and/or punish a person twice for the same offense.¹⁷³⁴ The

¹⁷³³ "Judges committed to Justice and Law", in International Commission of Jurists and Commission consultative des droits de l'homme, *International Meeting – Justice -Not impunity*, Ed. ICJ, 1993, pag. 140.

Human Rights Committee (HRC) has defined the principle of double jeopardy, or *ne bis in idem*, as follows: "no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal."¹⁷³⁵ It need not be pointed out that the principle of *ne bis in idem* applies to all offenses or crimes, not withstanding their nature or gravity.

The principle of double jeopardy, as pointed out by the Inter-American Commission on Human Rights (IACHR), is one of "the most fundamental principles governing criminal prosecutions that are afforded protection under international human rights law."¹⁷³⁶ The International Committee of the Red Cross (ICRC) has concluded that this principle integrates the rule of customary International Humanitarian Law, according to which "[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees,"¹⁷³⁷ applicable in both international and non-international armed conflicts.

¹⁷³⁴ See, *inter alia*: article 14 (7) of the *International Covenant on Civil and Political Rights*; article 18 (7) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; article 8 (4) of the *American Convention on Human Rights*; article 4 of Protocol No. 7 of the *European Convention on Human Rights*; article 76 (4,h) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I); article 20 of the *Rome Statute of the International Criminal Court*; article 10 (1) of the *International Criminal Tribunal of the Former Yugoslavia*; article 9 (1) of the *International Criminal Tribunal for Rwanda*; article 9 (1) of the *Special Court for Sierra Leone*; and article 5 of the *Statute of the Special Tribunal for Lebanon*.

¹⁷³⁵ General Comment No. 32: Article 14, *The right to equality before courts and tribunals and to a fair trial*, para. 54.

¹⁷³⁶ *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, para. 222.

¹⁷³⁷ Rule No. 100, in *Customary international humanitarian law, Volume I, Rules*, Op. Cit, p. 352.

However, the Inter-American Court of Human Rights has recalled that “the *ne bis in idem* principle, although it is acknowledged as a human right in Article 8(4) of the American Convention, it is not an absolute right, and therefore, is not applicable [in some circumstances].”¹⁷³⁸ Indeed, it is necessary to point out that international law specifies the content, scope, and limits of this principle. Some aspects are related to the principle itself, while others are related to the substantive and procedural conditions of the validity of the *res judicata*, and in particular to the observance of international obligations to try and prosecute those responsible for serious violations of human rights and crimes under international law.

The prohibition of trying someone again for the same crime is applied after the final sentence regardless of conviction, dismissal, or acquittal. In order for the principle of double jeopardy to apply, all judicial review or appeal against the judgment must be exhausted or, in lieu of this, the deadlines set forth by law for such reviews must expire and/or the necessary petitions must be filed. As specified by the HRC, “it is not at issue if a higher court quashes a conviction and orders a retrial. Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.”¹⁷³⁹

In the case of individuals declared guilty in absentia, when they request a retrial, the principle of double jeopardy only applies to the second and final ruling¹⁷⁴⁰.

If the prohibition prevents new trials or judgments for the same crime or material facts by courts of the same country, the principle of double jeopardy does not apply to the trials and sentences of courts from different countries, as acknowledged by international law.¹⁷⁴¹ The UN International Law Commission has confirmed that

¹⁷³⁸ Judgement of September 26, 2006, *Case of Almonacid-Arellano et al v. Chile*, Series C No. 154, para. 154.

¹⁷³⁹ *General Comment No. 32*, Doc. Cit., para. 56. Also see: Views of 26 March 1992, Communication No. 277/1988, *Teran Jijon v. Ecuador*, para. 5.4.

¹⁷⁴⁰ *General Comment No. 32*, Doc. Cit., para. 54.

¹⁷⁴¹ Human Rights Committee, *General Comment No. 32*, Doc. Cit., para. 57; Views of 2 November 1987, Communication No. 204/1986, *A.P. v. Italy*, para. 7 (3); and Wies of 28 July 1997, Communication No. 692/1996, *A.R.J v. Australia*, para. 6 (4). Also see: International Law Commission, *Report of the Commission Law*

"international law did not make it an obligation for States to recognize a criminal judgment handed down in a foreign State."¹⁷⁴² However, the Commission's concern that a duly tried person, declared guilty and sanctioned with a proportional punishment, could be the object of a double sanction, which would "exceed the requirements of justice,"¹⁷⁴³ has emphasized the need to acknowledge the validity of the principle of double jeopardy, but not as a hard and fast rule. The HRC has found the same, by pointing out that although the principle of double jeopardy is not guaranteed "with respect to the national jurisdictions of two or more States [t]his understanding should not [...] undermine efforts by States to prevent retrial for the same criminal offence through international conventions."¹⁷⁴⁴

3. Conditions for the validity of former adjudication and double jeopardy

In order for a judgment to have the authority of *res judicata* and, consequently, for the principle of double jeopardy (*ne bis in idem*) to apply, it is essential that the judicial decision be the result of the actions of a competent, independent and impartial court and that the proceedings be carried out with strict adherence to the right to a fair trial.¹⁷⁴⁵ Regarding this close relationship between the subordination of the institution of *res judicata* and the principle of fair trial, the Inter-American Court of Human Rights has pointed out that: "[a]ll litigation is a series of juridical proceedings that are chronologically, logically and teleologically interlinked. Some underpin or are the foundation of those that follow, and all are instituted for one ultimate purpose: to settle a difference by means of a judgment. Each kind of juridical proceeding has its own

Commission on the work of its 48th session - 6 May to 26 July 1996, A/51/10 (Supplement No. 10), p. 36.

¹⁷⁴² *Report of the International Law Commission on the work of its 48th session - 6 May to 26 July 1996, Doc. Cit., pg. 37.*

¹⁷⁴³ *Ibidem.*

¹⁷⁴⁴ *General Comment No. 32, Doc. Cit., para. 57.*

¹⁷⁴⁵ See, among others: Human Rights Committee, Views of 6 November 1997, Communication No. 577/1994, *Polay Campos vs. Peru*; Inter-American Court of Human Rights, Judgement of May 1999, Case *Castillo Petruzzi et al. vs. Peru*, Series C No. 52; Inter-American Commission on Human Rights, Report No. 15/87 of 30 June 1987, Case No. 9635 (Argentina); and African Commission on Human and Peoples' Rights, decisions on the cases *Media Rights Agenda vs. Nigeria*, Communication No. 224/98 and *Avocats sans Frontières (Gaëtan Bwampamye)*, Communication No. 231/99.

procedures, governed by rules that determine their institution and their effects. Finally, every proceeding must conform to the rules that require that it be instituted and that make the proceeding legal, a condition sine qua non for the proceeding to have legal effects. The validity of each juridical proceeding influences the validity of the whole, since each one is built upon the one that preceded it, and will in turn be the foundation of the one that follows it. That sequence of juridical proceedings culminates in the judgment that settles the controversy and establishes the legal truth with the authority of *res judicata*. If the proceedings upon which the judgment rests have serious defects that strip them of the efficacy they must have under normal circumstances, then the judgment will not stand. It will not have the necessary underpinning, which is litigation conducted by law. The concept of nullification of a proceeding is a familiar one. With it, certain acts are invalidated and any proceedings that followed the proceeding, in which the violation that caused the invalidation occurred, are repeated. This, in turn, means that a new judgment is handed down. The legitimacy of the judgment rests upon the legitimacy of the process.¹⁷⁴⁶

The Inter-American Court of Human Rights has specified that “the principle of *res judicata* provides protection from another judgment only when this judgment is reached with due respect for the guarantees of due process.”¹⁷⁴⁷ In the same sense, German J. Bidart Campos has stated that “according to judicial law derived from the jurisprudence of the Court, the regular and basic forms of due process are indispensable conditions for the ruling dictated by the court to possess both immutability and the effect of *res judicata*. When due process has not been respected, or when procedural malice or fraud have been committed, the ruling lacks the force and effectiveness of *res judicata*.”¹⁷⁴⁸ Modern procedural doctrine considers that, under the light of comparative law and the

¹⁷⁴⁶ Judgment of 30 May 1999, *Case of Castillo Petruzzi et al. v. Peru*, Series C No. 52, paras. 218 and 219.

¹⁷⁴⁷ Judgment of 11 May 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 197

¹⁷⁴⁸ Bidart Campos, German J., *Tratado elemental de derecho constitucional argentino, Tomo I: El derecho constitucional de la libertad*, EDIAR edition, Buenos Aires 1992, p. 468 (Original in Spanish, free translation).

evolution of law, the judicial institution of former adjudication must be approached from a teleological perspective.¹⁷⁴⁹

Similarly, in order for the ruling of a national court to have the authority of *res judicata* – and, thus, for double jeopardy (*ne bis in idem*) to be applicable – it is essential that the judicial proceedings be carried out, in good faith and with due diligence, in compliance with good faith in the obligation to investigate, prosecute, and punish those responsible for gross human rights violations and serious crimes under international Law (See Chapter V “The obligation to investigate” and VI “The obligation to prosecute and punish”).

The judicial institution of *res judicata* cannot, consequently, be brandished as an excuse for failure to comply with an international obligation. If the judicial institution of *res judicata* constitutes a judicial guarantee, closely related to the principle of double jeopardy (*ne bis in idem*), it is equally true that this judicial institution must be approached from a substantive perspective, that is, in light of international norms and standards regarding the right to a fair trial and the prosecution of gross human rights violations, and not as a mere procedural formality.

This means, on the one hand, that it must be examined whether the judicial ruling, to which former adjudication looks to be attributed, has been the result of the actions of a competent court, independent and impartial, with full respect of judicial guarantees and the rights of the accused, as well as those of the victims and family members that have taken part in the proceedings. In this sense, the validity of *res judicata* is governed and conditioned by the fulfillment of the requisites and the enforcement of the standards regarding due process or fair trial. The intangibility of *res judicata* is conditioned by the judicial ruling to which it is being attributed being the result of a process before an independent, impartial, and competent court and the observance of the judicial guarantees in the proceedings. In the case of rulings or judgments that result from proceedings that have not complied with international standards of fair trial and due process or that have been dictated by courts that do not meet the conditions of independence, impartiality, and/or competency, the principle of

¹⁷⁴⁹ Cappelletti, Mauro, *Le pouvoir des juges*, Collection droit public positif, Ed. Economica - Presses Universitaires d'Aix-Marseille, France, 1990, p. 128.

double jeopardy will not be applicable, nor will former adjudication be legitimately valid. In these cases, as reiterated by international jurisprudence, the process may be reopened and retrial may take place, without violating the principle of double jeopardy or the authority of *res judicata*.¹⁷⁵⁰

International jurisprudence has understood that in these cases, the right to an effective remedy and to reparation imply that these persons must be released or that their conviction must be reviewed in accordance with the requirements of a fair trial, including reopening the case and holding a new trial, and they must be compensated.¹⁷⁵¹

Such measures have been ordered by international jurisprudence in the case of:

- Persons tried and condemned by “secret” or “anonymous” judges¹⁷⁵²;

¹⁷⁵⁰ See, *inter alia*: Human Rights Committee: Views of 6 November 1997, Communication No. 577/1994, *Polay Campos v. Peru*; Views of 28 October 1981, Communication No. 63/1979, *Raul Sendic Antonaccio v. Uruguay*; Inter-American Court on Human Rights, Judgment of 30 May 1999, Case *Castillo Petruzzi et al. v. Peru*, Series C No. 52, and Judgment of 25 November 2004, *Case of Lori Berenson Mejia v. Peru*, Series C No. 119; Inter-American Commission on Human Rights, Report No. 15/87 of 30 June 1987, Case 9635 (Argentina); African Commission on Human and Peoples’ Rights, decisions on the cases *Media Rights Agenda vs. Nigeria*, Communication No. 224/98 and *Avocats sans Frontières (Gaëtan Bwampamye)*, Communication No. 231/99.

¹⁷⁵¹ See, *inter alia*: Human Rights Committee, Views of 28 October 1981, Communication No. 63/1979, *Raul Sendic Antonaccio v. Uruguay* and Views of 14 August 2000, Communication No. 688/1996, *Teillier Arredondo v. Peru*; European Court of Human Rights, Judgment of 8 April 2004, Case of *Assanidze v. Georgia*, Application No. 71503/01, Judgment of 8 July 2004, Case of *Ilascu et al. v. Moldavia y Russia*, Application No. 48787/99, Judgment of 18 December 2003, Case of *Üküncü and Günes v. Turkey*, Application No. 42775/98, Judgment of 23 October 2003, Case of *Gençel v. Turkey*, Application No. 53431/99, Judgment of 18 May 2004, Case of *Somogyi v. Italy*, Application No. 67972/01, and Judgment of 24 March 2005, Case of *Stoichkov v. Bulgaria*, Application No. 9808/02; Inter-American Court on Human Rights, Judgment of 17 September 1997, Case of *Loayza Tamayo v. Peru*, Series C No. 33 and Judgment of 25 November 2004, Case of *Lori Berenson Mejia v. Peru*, Series C No. 119; African Commission on Human and Peoples’ Rights, Case of *Organization for the Civil Liberties of the Constitutional Rights Project v. Nigeria*, Communication 102/93, Case of *Center for the Freedom of Expression v. Nigeria*, Communication 206/97, Case of *Organization for the Civil Liberties of the Constitutional Rights Project v. Nigeria*, Communications 143/95, 150/96, and Case of *Organization for the Civil Liberties of the Constitutional Rights Project v. Nigeria*, Communication 148/96.

¹⁷⁵² See, *inter alia*: Human Rights Committee, Views of 20 August 2000, Communication No. 981/2001, *Casafranca de Gomez v. Peru*; Views of 9 January

- Persons tried and condemned in proceedings lacking the basic guarantees of a fair trial, for example when the principle of presumption of innocence, the right to a public hearing (without reasonable and objective motives to restrict this right), the right to be tried without undue delay, the right to examine and counter-examine witnesses, or to challenge the evidence submitted, have been violated¹⁷⁵³;
- Civilians tried and condemned by military courts¹⁷⁵⁴; and of
- Persons tried and condemned by special courts, that do not meet the basic conditions of independence and impartiality of a judicial entity or whose existence is not founded on reasonable and objective motives that justify a trial and/or court different from an ordinary jurisdiction.¹⁷⁵⁵

1998, Communication, 577/1994, *Polay Campos v. Peru*; Views of 27 July 2000, Communication No 688/1996, *Maria Sybila Arredondo c. Peru*. Inter-American Court on Human Rights, Case of *Castillo Petruzzi et al. v. Peru*, Doc. Cit., and Case *Lori Berenson Mejia v. Peru*, Doc. Cit.

¹⁷⁵³ See, *inter alia*: Human Rights Committee, Views of 30 March 2005, Communication No. 971/2001, *Vazgen Arutyuniantz v. Uzbekistan*, Views of 20 July 2000, Communication No. 770/1997, *Gridin v. The Russian Federation* and Views of 11 July 2006, Communication No.1298/2004, *Manuel Francisco Becerra Barney v. Colombia*. See, also, Inter-American Court on Human Rights, Judgment of 31 August 2004, Case of *Ricardo Canese v. Paraguay*, Series C No. 111; and Inter-American Commission on Human Rights, Report No. 15/87 of 30 June 1987, Case No. 9635 (Argentina).

¹⁷⁵⁴ See, *inter alia*: Human Rights Committee, Views of 27 October 1987, Communication No. 159/1983, *Rail Cariboni v. Uruguay* and Views of 6 November 1997, Communication No. 577/1994, *Victor Alfredo Polay Campos v. Peru*; Inter-American Court on Human Rights, Case of *Castillo Petruzzi et al. v. Peru*, Doc. Cit., and Judgment of 18 August 2000, Case of *Cantoral Benavides v. Peru*, Series C No. 69; Inter-American Commission on Human Rights, Report No. 22/78 of 18 November 1978, Case 2266 (Argentina); European Court of Human Rights, Judgment of 4 May 2006, Case of *Ergin v. Turkey* (No. 6), Application No. 47533/99 and Judgment of 21 September 2006, Case of *Maszni v. Romania*, Application No. 59892/00; African Commission on Human and Peoples' Rights, Judgment of 6 November 2000, Communication No. 223/98 (Sierra Leone) and Judgment of 15 November 1999, Communication No. 206/97 (Nigeria).

¹⁷⁵⁵ See, *inter alia*: Human Rights Committee, Views of 20 July 1994, Communication No. 328/1988, *Roberto Zelaya Blanco v. Nicaragua* and Views of 4 April 2001, Communication No. 819/1998, *Joseph Kavanagh v. Ireland*; European Court of Human Rights, Judgment of 9 June 1998, Case *Incal v. Turkey*, Application No. 22678/93 and Judgment of 28 October 1998, Case *Çiraklar v. Turkey*, Application No. 19601/92.

"[T]he possibility of denying legal effects to amnesty laws, as well as questioning the principles of *res judicata* and of '*ne bis in ídem*,' is admissible in the model of a constitutional and democratic state under the rule of law. [...] The absolute application of the principles of former adjudication and *ne bis in ídem*, as well as the possibility of surpassing the obstacles that allow impunity, should be evaluated taking into account the principle of constitutional supremacy, the personalist option of the Constitution that subordinates the State's action and the exercise of power to the defense of human rights, as well as the necessary deliberation over constitutional principles in conflict to arrive at a harmonious resolution of each concrete case. [...] This resolution is part of the only option that exists for resolving this conflict within the framework of a constitutional State under the rule of law. It is the simple result of balancing the conflicting principles or the balance between legal rights, allowing a reasonable and proportional restriction of the principles of *res judicata*, '*ne bis in ídem*,' and statutes of limitations. The exceptional nature of this restriction would be given by the fact that we are dealing with amnesty laws that are the result of the abuse of power, intended to remove the perpetrators of grave human rights violations from the reach of the courts, and at the same time affecting the rights to access to justice, to truth, to due process and to reparation. [...] From the necessary balance of constitutional rights, taking into account the principles of unity of the Constitution and of practical concordance (*concordancia práctica*), it is clear that the guarantees of *res judicata*, '*ne bis in ídem*,' and statutes of limitations may not prevail, in this case, over article 1 of the Constitution and therefore over life and personal integrity. These are exceptional circumstances where if these principles prevailed, it not only would affect the aforementioned rights, but these principles would also be diverted from the purposes for which they were created, given that they would no longer be of service to legal certainty and the prohibition of excesses, but rather would only ensure impunity for grave human rights violations, since they would prevent the investigation and punishment of such conduct."

Office of the Ombudsman of Peru¹⁷⁵⁶

The substantive perspective of the judicial institution of former adjudication means, on the one hand, that the judicial decision, to which *res judicata* effects are sought to be attributed, must be examined to determine whether it has been the result of proceedings genuinely geared towards investigating gross human

¹⁷⁵⁶ Defensoría del Pueblo, *Informe Defensorial No. 57: Amnistía v. Derechos Humanos – Buscando justicia*, Lima, 2001, pp. 21 and 30 (Original in Spanish, free translation).

rights violations, as well as prosecuting and punishing those responsible. In legal proceedings against alleged perpetrators of serious human rights violations, *res judicata* and the principle of *ne bis in idem* cannot be invoked when the judicial proceedings did not follow a real attempt to bring those responsible to justice, or if the purpose of the proceedings was to shield the defendant from criminal responsibility for the gross violations of human rights ("fraudulent *res judicata*").¹⁷⁵⁷

4. Double jeopardy, *res judicata*, and fraudulent administration of justice

a. International norms and standards

The *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* constitutes one of the few instruments that expressly address the issue of illegitimate use of the legal institutions of former adjudication and double jeopardy. Principle 22, "Nature of restrictive measures" stipulates that "States should adopt and enforce safeguards against any abuse of [the principle of] *non bis in idem*." Furthermore, Principle 26 (b) stipulates that: "[t]he fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

¹⁷⁵⁷ See, *inter alia*: Inter-American Court on Human Rights, Judgment of 24 November 2004, *Case of Carpio Nicolle et al. v. Guatemala*, Series C No. 117, Judgment of 29 November 2006, *Case of La Cantuta v. Peru*, Series C No. 162, Judgment of 26 September 2006, *Case of Almonacid Arellano et al. v. Chile*, Series C No. 154, and Judgment of 12 September 2005, *Case of Gutierrez Soler v. Colombia*, Series C No. 132; Inter-American Commission on Human Rights, Report No. 36/96 of 15 October 1996, Case 10.843, *Hector Marcial Garay Hermosilla et al. (Chile)*. See also: International Law Commission, *Report of the International Law Commission to the General Assembly on the work of its 48th session - 6 May to 26 July 1996*, Doc. Cit., pg. 72; the *Rome Statute of the International Criminal Court* (article 20.3); *International Criminal Tribunal of the Former Yugoslavia* (article 10); and *International Criminal Tribunal for Rwanda* (article 9).

In the arena of international criminal Law, the UN International Law Commission considers that the principle of double jeopardy and the institution of *res judicata* cannot be called upon legitimately under international Law, when the perpetrator of a serious international crime (crime against humanity, war crime, or genocide) has not been properly prosecuted or punished for that same crime, the court has not operated in an independent and impartial manner, or the process sought after exonerating the person concerned from criminal responsibility.¹⁷⁵⁸ This criterion has been withheld in the statutes of the international tribunals of Former Yugoslavia, Rwanda, Sierra Leone, and Lebanon, as well as from the International Criminal Court¹⁷⁵⁹ (See Annex VIII).

Many countries have introduced specific clauses in their national legislation, in matters of repression of serious international crimes, to avoid the fraudulent application of former adjudication and double jeopardy. The independent Expert for the United Nations on matters of impunity highlighted that "Canada's Crimes Against Humanity and War Crimes Act of 2000 provides that a person may not plead *autrefois acquit* or *autrefois convict*, or pardon, if he or she was tried by a foreign court and the proceedings were for the purpose of shielding him or her from criminal responsibility, or were not otherwise conducted independently or impartially and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice."¹⁷⁶⁰

b. International jurisprudence

The Inter-American Court of Human Rights has considered that the *res judicata* cannot be retained as valid, if the judicial decision was a result of a process that was not carried out in good faith and following due diligence, in compliance with the obligation to

¹⁷⁵⁸ Report of the International Law Commission on the work of its 48th session - 6 May to 26 July 1996, Doc. Cit., pg. 36-38.

¹⁷⁵⁹ Article 10 of the Statute of the International Criminal Tribunal of the Former Yugoslavia; article 9 of the Statute of the International Criminal Tribunal of Rwanda; and article 9 of the Statute of the Special Court for Sierra Leone; article 5 of the Statute of the Special Tribunal for Lebanon; and article 20 of the Rome Statute of the International Criminal Court.

¹⁷⁶⁰ Independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity, taking into account the Set of Principles for the protection and promotion of human rights through action to combat impunity - Professor Diane Orentlicher, UN Doc. E/CN.4/2004/88 of 27 February 2004, para. 37.

investigate, try, and punish those responsible for gross human rights violations and crimes under international law. The Court has pointed out, in a general and repetitive way, that “the State must remove all obstacles, both factual and legal, that hinder the effective investigation into the facts and the development of the corresponding legal proceedings,”¹⁷⁶¹ and that the State cannot invoke *res judicata* or the principle of double jeopardy to excuse itself from complying with its obligation to investigate, try, and punish those responsible for serious violations of human rights.¹⁷⁶²

In the case of *La Cantuta v. Peru*, the Inter-American Court of Human Rights found that “the *non bis in idem* principle is not applicable when the proceeding in which the case has been dismissed or the author of a violation of human rights has been acquitted, in violation of international law, has the effect of discharging the accused from criminal liability, or when the proceeding has not been conducted independently or impartially pursuant to the due process of law. A judgment issued in the circumstances described above only provides ‘fictitious’ or ‘fraudulent’ grounds for double jeopardy.”¹⁷⁶³

In a case of extrajudicial killings in Guatemala, the Court specified that there was “fraudulent former adjudication” when the application of this legal institution is “resulting from a trial in which the rules of due process have not been respected, or when judges

¹⁷⁶¹ Judgment of 22 September 2009, *Case Anzualdo Castro v. Peru*, Series C No. 202, para. 182.

¹⁷⁶² See, *inter alia*: Judgment of 14 March 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, paras. 41-44. Judgment of 3 September 2001, *Case of Barrios Altos, Interpretation of Judgment on Merits*, Series C No. 83, para. 15; Judgment of 27 February 2002, *Case of Trujillo Oroza v. Bolivia*, Series C No. 92, para. 106; Judgment of 29 August 2002, *Case of the Caracazo v. Venezuela*, Series C No. 95, para. 119; Judgment of 29 November 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 152; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 182; Judgment of 24 November 2010, *Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Series C No. 219, para. 171; and Judgment of 29 November 2009, *Case of the Massacre of Dos Erres v. Guatemala*, Series C No. 211, para. 129.

¹⁷⁶³ Judgment of 29 November 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 153. Also see: Judgment of 24 November 2004, *Case of Carpio Nicolle et al. v. Guatemala*, Series C No. 117; Judgment of 26 September 2006, *Case of Almonacid Arellano et al. v. Chile*, Series C No. 154; and Judgment of 12 September 2005, *Case of Gutierrez Soler v. Colombia*, Series C No. 132. Also see: Inter-American Commission on Human Rights, Report No. 36/96 of 15 October 1996, Case 10.843, *Hector Marcial Garay Hermosilla et al. (Chile)*, para. 106 *et seq.*

have not acted with independence and impartiality.”¹⁷⁶⁴ Therefore, when a ruling is contaminated by such serious defects, the Court concluded, “the State cannot invoke the judgment delivered in proceedings that did not comply with the standards of the American Convention.”¹⁷⁶⁵ In another case, the Court prohibited the claim of “‘sham double jeopardy’ resulting from a first trial wherein there have been breaches of the due process of the law [...] [such as] to claim exemption of the obligation to investigate and punish, [...] because judicial decisions originating in such internationally illegal events cannot be the first step to double jeopardy.”¹⁷⁶⁶

“Many States have used statutes of limitations in their domestic legislation, or the principle of former adjudication or *res judicata* as an excuse to justify the failure to comply with their obligations such as, for example, the duty to identify, prosecute and punish the perpetrators of human rights violations. This amounts to a flagrant contradiction of the judgments of the international bodies of the Inter-American System.”

Robert Goldman¹⁷⁶⁷

In a Chilean case, the Court specified that “if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle.”¹⁷⁶⁸

Res judicata cannot be held as valid if the judicial decision is founded on the application of an internal rule incompatible with the obligation to investigate, try, and punish those responsible for serious violations of human rights and crimes under international

¹⁷⁶⁴ Judgment of 22 November 2004, *Case Carpio Nicolle et al. v. Guatemala*, Series C No. 117, para. 131.

¹⁷⁶⁵ *Ibid.*, para. 132.

¹⁷⁶⁶ Judgment of 12 September 2005, *Case Gutierrez Soler v. Colombia*, Series C No. 132, para. 98.

¹⁷⁶⁷ “La aplicación de la justicia en contextos transicionales. La efectividad y necesidad de judicializar los casos de violaciones de los derechos humanos”, Doc. Cit., p. 30 (Original in Spanish, freely translation).

¹⁷⁶⁸ Judgment of September 26, 2006, *Case of Almonacid-Arellano et al v. Chile*, Series C No. 154, para. 154.

Law. Thus, for example, a decision of dismissal dictated by a national court, applying an amnesty law incompatible with the international obligations of a State and that infringes upon the right to an effective remedy of the victims, has no validity and cannot be invoked to escape or exonerate the execution of good faith of the international obligation to try and sanction those responsible for gross human rights violations.¹⁷⁶⁹

c. Legal developments in Latin America

In Peru, in a judgment rendering amnesty laws no. 26479 and 26492 absolutely invalid, the Constitutional Tribunal found that “the constitutionally protected content of double jeopardy must be identified in relation to its two dimensions (formal and substantive).”¹⁷⁷⁰ The Tribunal pointed out that the “procedural dimension (or adjective) of double jeopardy” consists of the following elements: “a) The defendant must have been convicted or acquitted; b) The conviction or acquittal must be based on a final judicial decision; c) The new criminal prosecution must be based on the breach of the same legal right that motivated the initial conviction or acquittal.” Thus, from the formal dimension, “in order for the prohibition of retrial for the same crime to contest a second criminal prosecution, it is necessary to provide a triple identity: a) The identity of a physical person; b) The identity of the object; and c) The identity of the cause for prosecution.”¹⁷⁷¹

From a substantive perspective, the Tribunal pointed out that “if double jeopardy is sought to prevent the arbitrary exercise of a State’s right to punish pursuant to its laws - *jus puniendi* – not all criminal retrials that a State may conduct are automatically prohibited. Therefore, those scenarios in which retrial is not compatible with the legally protected interests as a nucleus of

¹⁷⁶⁹ Inter-American Court of Human Rights, Judgment of 26 September 2006, Case of *Almonacid Arellano et al. v. Chile*, Series C No. 154; and the Inter-American Commission on Human Rights: Report No. 36/96, Case 10.843 (Chile), 15 October 1996; Report No. 34/96, Cases 11.228, 11.229, 11.231 and 11.282 (Chile), 15 October 1996, para. 105; Report No. 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), 7 April 1998; and Report No. 133/99, Case 11.725, *Carmelo Soria Espinoza (Chile)*, 19 November 1999.

¹⁷⁷⁰ Judgment of 15 November 2007, Case File No. 03938- 2007-PA/TC, *Recurso de agravio constitucional, Demanda de amparo promovida por Julio Rolando Salazar Monroe* (Original in Spanish, free translation).

¹⁷⁷¹ *Ibid.* (Original in Spanish, free translation).

rights falls outside of the protected domain, whether because it is alien to the interest it seeks to guarantee, because it forms part of the constitutional protected content of another fundamental rights, or because this is the result of its interpretation with other constitutional provisions that contain constitutionally relevant objectives. [...] [I]t is separate from the nature of the right, e.g. the legally interests protected by the procedural dimension of the *ne bis in idem* principle, which seeks to oppose a resolution or judgment (acquittal) issued in a first criminal proceedings that is manifestly null."¹⁷⁷²

The Tribunal also held that "[g]iven that the primary and basic demand of of the procedural dimension of *ne bis in idem* is the prevent the State from arbitrarily prosecuting an individual more than once for the same crime, [...] such arbitrariness is not present in cases in which the establishment and implementation of criminal proceedings are carried out as a result of the annulment of the first proceedings, after confirming that the latter was declared by a judicial authority lacking subject matter jurisdiction to prosecute a given offense. And so it is that the guarantee of the constitutionally protected interest is not applicable due to the sole fact that the *factual* existence of a first proceeding is opposed to it, but that it is essential that this be legally valid."¹⁷⁷³ The Tribunal concluded that "[t]he determination of whether the first proceedings [...] are legally valid should be made in accordance with the criteria established in this judgment. That is, after analyzing whether in the instant case the first criminal proceeding had (or did not have) the purpose of removing the appellant from criminal responsibility, or had not been heard by a court of justice that respects the guarantees of independence, competence and impartiality."¹⁷⁷⁴

In another case, the Peruvian Constitutional Tribunal indicated that although under national law, "the right to *res judicata* also is configured based on judicial resolutions issued in application of an amnesty law [...] However, it is important that the amnesty law should not just be valid but also constitutionally legitimate. A law may be valid but not necessarily legitimate from the perspective of

¹⁷⁷² *Ibid.* (Original in Spanish, free translation).

¹⁷⁷³ *Ibid.* (Original in Spanish, free translation).

¹⁷⁷⁴ *Ibid.* (Original in Spanish, free translation).

the Constitution.”¹⁷⁷⁵ Thus, the Tribunal specified that “[a]n amnesty law is subject to both formal and material limitations. [...] and that] regardless of the constitutional power in question [amnesty or pardons], its exercise should be oriented toward guaranteeing and protecting fundamental rights as manifestations of the principle-right of human dignity (article 1 of the Constitution) and to serving the obligations derived from article 44 of the Fundamental Law, that is, the guarantee the full effect of human rights. This duty is not the same as the duty to respect them. The latter entails the obligation to not affect said rights and its basis is found in the specific recognition of one of them.”¹⁷⁷⁶

Thus, the Tribunal emphasized that “[a]mnesty laws also cannot be issued in opposition to the international obligations emanating from international human rights treaties and accords ratified by the Peruvian State. The capacity of the human rights treaties to substantively limit the amnesty laws is founded in article 55 and in the Final and Transitory Provision IV of the Constitution. In accordance with the former, once they are ratified, these treaties form part of national law and, therefore, bind public officials. In accordance with the latter, the treaties serve in the process of setting limits to the constitutionally guaranteed arena of fundamental rights.”¹⁷⁷⁷

Upon recalling that amnesty laws in cases of gross human rights violations lack legal effect, because they are incompatible with the State’s international obligations, the Tribunal concluded that “the judicial resolutions issued in support [of amnesty laws] do not have constitutional *res judicata* effects and, therefore, the right [to former adjudication], recognized in article 139(13) of the Constitution has not been breached.”¹⁷⁷⁸

The Tribunal highlighted that *res judicata* “[i]s not applicable, when it is confirmed that through the exercise of the power to enact amnesty laws, the criminal legislator sought to cover up the commission of crimes against humanity. It is also inapplicable when the exercise of this power is used to ‘guarantee’ impunity for

¹⁷⁷⁵ Judgment of 2 March 2007, Case File No. 679-2005-PA/TC – Lima, *Santiago Enrique Martin Rivas.*, para. 16 of Grounds (*Fundamentos*) (Original in Spanish, free translation).

¹⁷⁷⁶ *Ibid.*, paras. 24 and 26 of Grounds (Original in Spanish, free translation).

¹⁷⁷⁷ *Ibid.*, para. 28 of Grounds (Original in Spanish, free translation).

¹⁷⁷⁸ *Ibid.*, para. 50 of Grounds (Original in Spanish, free translation).

grave human rights violations.”¹⁷⁷⁹ The Tribunal concluded, “[t]he amnesty laws No. 26479 and No. 26492 are void and lack legal effect *ab initio*. Therefore, the judicial resolutions issued for the purpose of guaranteeing impunity for human rights violations committed by the members of the so-called *Grupo Colina* are also null and void. As annulled judicial resolutions, they do not have constitutional *res judicata* effects under articles 102 (6) and 139 (13) of the Constitution, insofar as they are not in accordance with the objective order of values, with constitutional principles and with the fundamental rights that the Constitution establishes.”¹⁷⁸⁰

In a case about proceedings in ordinary courts for facts that constitute human rights violations, which resulted in dismissal with prejudice issued by a criminal court of military jurisdiction, the Constitutional Tribunal held that the *res judicata* status of the judicial resolution issued by the military court could not be invoked because it lacked subject matter jurisdiction (*ratione materiae*).¹⁷⁸¹ The Tribunal held that “the guarantee that offers this right [to not be tried twice or more for the same crime] is not applicable just because factually there is a first trial in the court has handed down a final decision to dismiss the case with prejudice, but rather this decision must have been issued through a legally valid proceeding.”¹⁷⁸² In the instant case, the Tribunal confirmed that “the trial brought against the appellant for crimes against humanity [...] did not have the purpose of truly investigating and punishing the crimes effectively,”¹⁷⁸³ and was processed by a military tribunal, “whose subject matter jurisdiction is circumscribed to the prosecution and punishment of so-called crimes of duty”¹⁷⁸⁴ and, thus, lacked jurisdiction over grave human rights violations. The Tribunal concluded that “the beginning of a new criminal proceeding, this time before the ordinary courts of justice, does not violate the constitutionally protected content of the right to not be tried twice for the same offense, and therefore, the right to *res judicata*.”¹⁷⁸⁵

¹⁷⁷⁹ *Ibid.*, para. 53 of Grounds (Original in Spanish, free translation from).

¹⁷⁸⁰ *Ibid.*, para. 60 of Grounds (Original in Spanish, free translation from).

¹⁷⁸¹ Judgment of November 29, 2005, Case File No. STC 4587-2004-AA/TC, Lima, *Santiago Martín Rivas* (Original in Spanish, free translation)

¹⁷⁸² *Ibid.*, para. 76 (Original in Spanish, free translation).

¹⁷⁸³ *Ibid.*, para. 78 (Original in Spanish, free translation).

¹⁷⁸⁴ *Ibid.*, para. 79 (Original in Spanish, free translation).

¹⁷⁸⁵ *Ibid.*, para. 87 (Original in Spanish, free translation).

For its part, the National Criminal Chamber (*Sala Penal Nacional*) has held that “[m]aterial justice requires exceptions to the application of the principle of *ne bis in idem* in the context of the State duty to investigate, prosecute and punish human rights violations. [...] Individuals’ right to protection from successive proceedings initiated by the State should be considered together with the demand that those who violate international human rights law are brought to justice.”¹⁷⁸⁶ Likewise, the Chamber pointed out that “international law recognizes an exception to the application of the principle of *ne bis in idem* when justice has been carried out in an illegitimate way. The principle of *ne bis in idem* is not absolute under international law. In order to speak of a trial that has *res judicata* effects, the decision must be legitimate. In general, there are three types of trials that are considered so illegitimate that they permit a second proceeding: a) trials that were not impartial or independent; b) trials that were carried out in order to remove the accused from international criminal responsibility; and c) trials that were not diligently conducted. Such ‘sham trials’ constitute an exception to the principle of *ne bis in idem*, in accordance with the doctrine of bad faith.”¹⁷⁸⁷

In Argentina, in the case of the former general Rafael Videla, accused in ordinary jurisdiction of the crime of abduction of children after the dismissal of a previous proceeding for the crimes that could be attributed to him in his exercise of command, the Supreme Court of Justice held that “the principle of *ne bis in idem* was born to guarantee the individual security typical of the rule of law [...] and that] [a]t the national level, the guarantee may be understood as prevent multiple, simultaneous or successive criminal prosecutions for the same material facts [...]. It does not only have to do with an individual who is convicted twice for the same material fact, but rather it is enough to incur in the violation of the guarantee if the person is placed at *risk* – through new proceedings – that he or she could be convicted.”¹⁷⁸⁸ The Supreme

¹⁷⁸⁶ Judgment of 30 November 2005, Case File No. 17-05-D, *Excepción de cosa juzgada, Caso Carlos Alberto Tello Aliaga y otros / Delitos v. el cuerpo y la salud-Homicidio calificado – Asesinato / Agraviado Niberto Duran Ugarte y otros*, p. 5 (Original in Spanish, free translation).

¹⁷⁸⁷ *Ibid.*, p. 7 (Original in Spanish, free translation).

¹⁷⁸⁸ Judgment of 21 August 2003, Case *Videla, Jorge Rafael s/ incidente de excepción de cosa juzgada y falta de jurisdicción. 21/08/2003— Fallos: 326:2805*(Original in Spanish, free translation).

Court held that *res judicata* requires the presence of three basic elements: the identity of the person being prosecuted (*eadem persona*); the identity of the object of prosecution (*eadem res*); and the identity of the cause of the prosecution (*eadem causa petendi*). The Supreme Court held that the first proceeding, carried out by virtue of the rules of the Code of Military Justice, did not meet any of the characteristics of the principle of the competent judge (*juez natural*) and that “generic acquittal” was inconsistent with the principles of criminal law, which are founded on specific and individualized unlawful acts.

The Supreme Court of Justice of Argentina, by declaring the “Full Stop” and “Due Obedience” Laws unconstitutional and without legal effects,¹⁷⁸⁹ specified “that those who were benefitted by such laws may not invoke the prohibition of stricter retroactive effects of criminal law, nor may they invoke *res judicata*.”¹⁷⁹⁰

In Colombia, the Constitutional Court has held that “[d]espite the importance of *res judicata*, it is clear that this concept cannot be absolute since at times it may conflict with the material justice of a concrete case. It is enough to imagine the existence of a judgment that made use of *res judicata*, but contains a clear injustice. [...] In any case the principle of *ne bis in idem* is not absolute, and may be limited. [...] [Although] the principle of *ne bis in idem* supposes the immutability or irrevocability of former adjudication for the benefit of the defendant, but that ‘*this does not mean in any way that this hypothesis has an absolute nature, since the effectiveness of the superior values of material justice and legal certainty make it necessary for there to be exceptions to res judicata.*’ And specifically, regarding the limitation to this principle arising in international law, and especially international human rights law.”¹⁷⁹¹ The Court pointed out that “the rights of the victims of illegal acts and the principle of *ne bis in idem* arose as a guarantee of individual safety typical of the rule of law, the correlative duty of the State to investigate and punish crimes in order to realize justice and achieve a just order (Political Constitution, Preamble

¹⁷⁸⁹ Resolution of 14 June 2005, *Case of Simón, Julio Héctor et al re/illegitimate deprivation of liberty, etc.*, Case File No. 17.768, Considering 31 (Original in Spanish, free translation).

¹⁷⁹⁰ *Ibid.*, (Original in Spanish, free translation).

¹⁷⁹¹ Judgment C-004/03 of 20 January 2003, Case File D-4041, paras. 8 and 12 of Considerations and Grounds (*Consideraciones y Fundamentos*) (Original in Spanish, free translation).

and arts. 2 and 229) obviously are constitutional values that may clearly conflict with *ne bis in idem*, and that may thus authorize or even demand a limitation to this constitutional guarantee for the defendant [...]. [T]he normative force of *ne bis in idem* indicates that the acquitted individual should not have to be tried again, despite new evidence and facts; however, the State duty to investigate the crimes and protect the rights of the victims in order to achieve a just order seems to mean that the individual should be tried again, above all if the case involves crimes that amount to human rights violations. [...] [T]he normative force of the constitutional rights of the victims and the imperative that the Charter imposes on the authorities to achieve the full force of a just order (Political Constitution, article 2) means that cases of human rights violations or serious breaches of international humanitarian law, if new facts or evidence arise that could allow the court to find the perpetrators of these atrocious behaviors, then the investigations can be reopened, including if there are decisions to acquit with *res judicata* effects. The reason is that an absolute prohibition to reopen these investigations is an obstacle to achieving a just order and it entails an extremely onerous sacrifice of the victims' rights. Consequently, in cases of impunity for violations of human rights or international humanitarian law, the search for justice and the rights of the victims outweigh the protection of legal certainty and the guarantee of *ne bis in idem*, and therefore the existence of a decision to acquit with *res judicata* effects should not keep a court from reopening the investigation of these acts, if new evidence or material facts arise that were not known at the time of the debates."¹⁷⁹²

¹⁷⁹² *Ibid.*, paras. 13 *et seq* of Considerations and Grounds (Original in Spanish, free translation).

ANNEXES

ANNEX I: UPDATED SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

Preamble

Recalling the Preamble to the Universal Declaration of Human Rights, which recognizes that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind,

Aware that there is an ever-present risk that such acts may again occur,

Reaffirming the commitment made by Member States under Article 56 of the Charter of the United Nations to take joint and separate action, giving full importance to developing effective international cooperation for the achievement of the purposes set forth in Article 55 of the Charter concerning universal respect for, and observance of, human rights and fundamental freedoms for all,

Considering that the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity,

Aware that there can be no just and lasting reconciliation unless the need for justice is effectively satisfied,

Equally Aware that forgiveness, which may be an important element of reconciliation, implies, insofar as it is a private act, that the victim or the victim's beneficiaries know the perpetrator of the violations and that the latter has acknowledged his or her deeds,

Recalling the recommendation set forth in paragraph 91 of Part II of the Vienna Declaration and Programme of Action, wherein the World Conference on Human Rights (June 1993) expressed its concern about the impunity of perpetrators of human rights violations and encouraged the efforts of the Commission on Human Rights to examine all aspects of the issue,

Convince, therefore, that national and international measures must be taken for that purpose with a view to securing jointly, in the interests of the victims of violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity, Pursuant to the

Vienna Declaration and Programme of Action, the following principles are intended as guidelines to assist States in developing effective measures for combating impunity.

DEFINITIONS

A. Impunity

“Impunity” means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.

B. Serious crimes under international law

As used in these principles, the phrase “serious crimes under international law” encompasses grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery.

C. Restoration of or transition to democracy and/or peace

This expression, as used in these principles, refers to situations leading, within the framework of a national movement towards democracy or peace negotiations aimed at ending an armed conflict, to an agreement, in whatever form, by which the actors or parties concerned agree to take measures against impunity and the recurrence of human rights violations.

D. Truth commissions

As used in these principles, the phrase “truth commissions” refers to official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years.

E. Archives

As used in these principles, the word “archives” refers to collections of documents pertaining to violations of human rights

and humanitarian law from sources including (a) national governmental agencies, particularly those that played significant roles in relation to human rights violations; (b) local agencies, such as police stations, that were involved in human rights violations; (c) State agencies, including the office of the prosecutor and the judiciary, that are involved in the protection of human rights; and (d) materials collected by truth commissions and other investigative bodies.

I. COMBATING IMPUNITY: GENERAL OBLIGATIONS

PRINCIPLE 1: General obligations of States to take effective action to combat impunity

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.

II. THE RIGHT TO KNOW

A. General principles

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 systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.

Principle 3: The duty to preserve memory

A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction.

and, in particular, at guarding against the development of revisionist and negationist arguments.

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.

Principle 5: guarantees to give effect to the right to know

States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know.

Appropriate measures to ensure this right may include non-judicial processes that complement the role of the judiciary. Societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence. Regardless of whether a State establishes such a body, it must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law.

B. Commissions of inquiry**Principle 6: The establishment and role of truth commissions**

To the greatest extent possible, decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought. Special efforts should be made to ensure that men and women participate in these deliberations on a basis of equality. In recognition of the dignity of victims and their families, investigations undertaken by truth commissions should be conducted with the object in particular of securing recognition of such parts of the truth as were formerly denied.

Principle 7: Guarantees of independence, impartiality and competence

Commissions of inquiry, including truth commissions, must be established through procedures that ensure their independence, impartiality and competence. To this end, the terms of reference of commissions of inquiry, including commissions that are international in character, should respect the following guidelines:

- a) They shall be constituted in accordance with criteria making clear to the public the competence and impartiality of their members, including expertise within their membership in the field of human rights and, if relevant, of humanitarian law. They shall also be constituted in accordance with conditions ensuring their independence, in particular by the irremovability of their members during their terms of office except on grounds of incapacity or behaviour rendering them unfit to discharge their duties and pursuant to procedures ensuring fair, impartial and independent determinations.
- b) Their members shall enjoy whatever privileges and immunities are necessary for their protection, including in the period following their mission, especially in respect of any defamation proceedings or other civil or criminal action brought against them on the basis of facts or opinions contained in the commissions' reports.
- c) In determining membership, concerted efforts should be made to ensure adequate representation of women as well as of other appropriate groups whose members have been especially vulnerable to human rights violations.

Principle 8: Definition of a commission's terms of reference

To avoid conflicts of jurisdiction, the commission's terms of reference must be clearly defined and must be consistent with the principle that commissions of inquiry are not intended to act as substitutes for the civil, administrative or criminal courts. In particular, criminal courts alone have jurisdiction to establish individual criminal responsibility, with a view as appropriate to passing judgement and imposing a sentence. In addition to the guidelines set forth in principles 12 and 13, the terms of reference of a commission of inquiry should incorporate or reflect the following stipulations:

- a) The commission's terms of reference may reaffirm its right: to seek the assistance of law enforcement authorities, if required, including for the purpose, subject to the terms of

principle 10 (a), of calling for testimonies; to inspect any places concerned in its investigations; and/or to call for the delivery of relevant documents.

b) If the commission has reason to believe that the life, health or safety of a person concerned by its inquiry is threatened or that there is a risk of losing an element of proof, it may seek court action under an emergency procedure or take other appropriate measures to end such threat or risk.

c) Investigations undertaken by a commission of inquiry may relate to all persons alleged to have been responsible for violations of human rights and/or humanitarian law, whether they ordered them or actually committed them, acting as perpetrators or accomplices, and whether they are public officials or members of quasi-governmental or private armed groups with any kind of link to the State, or of non-governmental armed movements. Commissions of inquiry may also consider the role of other actors in facilitating violations of human rights and humanitarian law.

d) Commissions of inquiry may have jurisdiction to consider all forms of violations of human rights and humanitarian law. Their investigations should focus as a matter of priority on violations constituting serious crimes under international law, including in particular violations of the fundamental rights of women and of other vulnerable groups.

e) Commissions of inquiry shall endeavour to safeguard evidence for later use in the administration of justice.

f) The terms of reference of commissions of inquiry should highlight the importance of preserving the commission's archives. At the outset of their work, commissions should clarify the conditions that will govern access to their documents, including conditions aimed at preventing disclosure of confidential information while facilitating public access to their archives.

Principle 9: Guarantees for persons implicated

Before a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees:

a) The commission must try to corroborate information implicating individuals before they are named publicly;

- b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission's file.

Principle 10: Guarantees for victims and witnesses testifying on their behalf

Effective measures shall be taken to ensure the security, physical and psychological well-being, and, where requested, the privacy of victims and witnesses who provide information to the commission.

- a) Victims and witnesses testifying on their behalf may be called upon to testify before the commission only on a strictly voluntary basis.
- b) Social workers and/or mental health-care practitioners should be authorized to assist victims, preferably in their own language, both during and after their testimony, especially in cases of sexual assault.
- c) All expenses incurred by those giving testimony shall be borne by the State.
- d) Information that might identify a witness who provided testimony pursuant to a promise of confidentiality must be protected from disclosure. Victims providing testimony and other witnesses should in any event be informed of rules that will govern disclosure of information provided by them to the commission. Requests to provide information to the commission anonymously should be given serious consideration, especially in cases of sexual assault, and the commission should establish procedures to guarantee anonymity in appropriate cases, while allowing corroboration of the information provided, as necessary.

Principle 11: Adequate resources for commissions

The commission shall be provided with:

- a) Transparent funding to ensure that its independence is never in doubt;
- b) Sufficient material and human resources to ensure that its credibility is never in doubt.

Principle 12: Advisory functions of the commissions

The commission's terms of reference should include provisions calling for it to include in its final report recommendations concerning legislative and other action to combat impunity. The terms of reference should ensure that the commission incorporates women's experiences in its work, including its recommendations. When establishing a commission of inquiry, the Government should undertake to give due consideration to the commission's recommendations.

Principle 13: Publicizing the commission's reports

For security reasons or to avoid pressure on witnesses and commission members, the commission's terms of reference may stipulate that relevant portions of its inquiry shall be kept confidential. The commission's final report, on the other hand, shall be made public in full and shall be disseminated as widely as possible.

C. Preservation of and access to archives bearing witness to violations

Principle 14: Measures for the preservation of archives

The right to know implies that archives must be preserved. Technical measures and penalties should be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law.

Principle 15: Measures for facilitating access to archives

Access to archives shall be facilitated in order to enable victims and their relatives to claim their rights. Access shall be facilitated, as necessary, for persons implicated, who request it for their defence. Access to archives should also be facilitated in the interest of historical research, subject to reasonable restrictions aimed at safeguarding the privacy and security of victims and other individuals. Formal requirements governing access may not be used for purposes of censorship.

Principle 16: Cooperation between archive departments and the courts and non-judicial commissions of inquiry

Courts and non-judicial commissions of inquiry, as well as investigators reporting to them, must have access to relevant archives. This principle must be implemented in a manner that

respects applicable privacy concerns, including in particular assurances of confidentiality provided to victims and other witnesses as a precondition of their testimony. Access may not be denied on grounds of national security unless, in exceptional circumstances, the restriction has been prescribed by law; the Government has demonstrated that the restriction is necessary in a democratic society to protect a legitimate national security interest; and the denial is subject to independent judicial review.

Principle 17: Specific measures relating to archives containing names

a) For the purposes of this principle, archives containing names shall be understood to be those archives containing information that makes it possible, directly or indirectly, to identify the individuals to whom they relate.

b) All persons shall be entitled to know whether their name appears in State archives and, if it does, by virtue of their right of access, to challenge the validity of the information concerning them by exercising a right of reply. The challenged document should include a cross-reference to the document challenging its validity and both must be made available together whenever the former is requested. Access to the files of commissions of inquiry must be balanced against the legitimate expectations of confidentiality of victims and other witnesses testifying on their behalf in accordance with principles 8 (f) and 10 (d).

Principle 18: Specific measures related to the restoration of or transition to democracy and/or peace

a) Measures should be taken to place each archive centre under the responsibility of a specifically designated office;

b) When inventorying and assessing the reliability of stored archives, special attention should be given to archives relating to places of detention and other sites of serious violations of human rights and/or humanitarian law such as torture, in particular when the existence of such places was not officially recognized;

c) Third countries shall be expected to cooperate with a view to communicating or restituting archives for the purpose of establishing the truth.

III. THE RIGHT TO JUSTICE

A. General principles

Principle 19: Duties of states with regard to the administration of justice

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

Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein.

B. Distribution of jurisdiction between national, foreign, international and internationalized courts

Principle 20: Jurisdiction of international and internationalized criminal tribunals

It remains the rule that States have primary responsibility to exercise jurisdiction over serious crimes under international law. In accordance with the terms of their statutes, international and internationalized criminal tribunals may exercise concurrent jurisdiction when national courts cannot offer satisfactory guarantees of independence and impartiality or are materially unable or unwilling to conduct effective investigations or prosecutions.

States must ensure that they fully satisfy their legal obligations in respect of international and internationalized criminal tribunals, including where necessary through the enactment of domestic legislation that enables States to fulfil obligations that arise through their adherence to the Rome Statute of the International Criminal Court or under other binding instruments, and through implementation of applicable obligations to apprehend and surrender suspects and to cooperate in respect of evidence.

Principle 21: Measures for strengthening the effectiveness of international legal principles concerning universal and international jurisdiction

States should undertake effective measures, including the adoption or amendment of internal legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable principles of customary and treaty law. States must ensure that they fully implement any legal obligations they have assumed to institute criminal proceedings against persons with respect to whom there is credible evidence of individual responsibility for serious crimes under international law if they do not extradite the suspects or transfer them for prosecution before an international or internationalized tribunal.

C. Restrictions on rules of law justified by action to combat impunity

Principle 22: Nature of restrictive measures

States should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, *non bis in idem*, due obedience, official immunities, repentance, the jurisdiction of military courts and the irremovability of judges that fosters or contributes to impunity.

Principle 23: Restrictions on prescription

Prescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply to crimes under international law that are by their nature imprescriptible. When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.

Principle 24: Restrictions and other measures relating to amnesty

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 prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question.

b) Amnesties and other measures of clemency shall be without effect with respect to the victims' right to reparation, to which principles 31 through 34 refer, and shall not prejudice the right to know.

c) 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, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, 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.

d) 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 guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights, 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.

Principle 25: Restrictions on the right of asylum

Under article 1, paragraph 2, of the Declaration on Territorial Asylum, adopted by the General Assembly on 14 December 1967, and article 1 F of the Convention relating to the Status of Refugees of 28 July 1951, States may not extend such protective status, including diplomatic asylum, to persons with respect to whom there are serious reasons to believe that they have committed a serious crime under international law.

Principle 26: Restrictions on extradition/*non bis in idem*

a) Persons who have committed serious crimes under international

law may not, in order to avoid extradition, avail themselves of the favourable provisions generally relating to political offences or of the principle of non-extradition of nationals. Extradition should always be denied, however, especially by abolitionist countries, if the individual concerned risks the death penalty in the requesting country. Extradition should also be denied where there are substantial grounds for believing that the suspect would be in danger of being subjected to gross violations of human rights such as torture; enforced disappearance; or extra-legal, arbitrary or summary execution. If extradition is denied on these grounds, the requested State shall submit the case to its competent authorities for the purpose of prosecution.

b) The fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Principle 27: Restrictions on justifications related to due obedience, superior responsibility, and official status

a) The fact that the perpetrator of violations acted on the orders of his or her Government or of a superior does not exempt him or her from responsibility, in particular criminal, but may be regarded as grounds for reducing the sentence, in conformity with principles of justice.

b) The fact that violations have been committed by a subordinate does not exempt that subordinate's superiors from responsibility, in particular criminal, if they knew or had at the time reason to know that the subordinate was committing or about to commit such a crime and they did not take all the necessary measures within their power to prevent or punish the crime.

c) The official status of the perpetrator of a crime under international law - even if acting as head of State or Government - does not exempt him or her from criminal or

other responsibility and is not grounds for a reduction of sentence.

Principle 28: Restrictions on the effects of legislation on disclosure or repentance

The fact that a perpetrator discloses the violations that he, she or others have committed in order to benefit from the favourable provisions of legislation on disclosure or repentance cannot exempt him or her from criminal or other responsibility. The disclosure may only provide grounds for a reduction of sentence in order to encourage revelation of the truth. When disclosures may subject a perpetrator to persecution, principle 25 notwithstanding, the person making the disclosure may be granted asylum - not refugee status - in order to facilitate revelation of the truth.

Principle 29: Restrictions on the jurisdiction of military courts

The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.

Principle 30: Restrictions on the principle of the irremovability of judges

The principle of irremovability, as the basic guarantee of the independence of judges, must be observed in respect of judges who have been appointed in conformity with the requirements of the rule of law. Conversely, judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions by law in accordance with the principle of parallelism. They must be provided an opportunity to challenge their dismissal in proceedings that meet the criteria of independence and impartiality with a view toward seeking reinstatement.

IV. THE RIGHT TO REPARATION/GUARANTEES OF NON-RECURRENCE

A. The right to reparation

Principle 31: Rights and duties arising out of the obligation

to make reparation

Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.

Principle 32: Reparation procedures

All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings subject to the restrictions on prescription set forth in principle 23. In exercising this right, they shall be afforded protection against intimidation and reprisals. Reparations may also be provided through programmes, based upon legislative or administrative measures, funded by national or international sources, addressed to individuals and to communities. Victims and other sectors of civil society should play a meaningful role in the design and implementation of such programmes. Concerted efforts should be made to ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparations programmes. Exercise of the right to reparation includes access to applicable international and regional procedures.

Principle 33: Publicizing reparation procedures

Ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private as well as public communication media. Such dissemination should take place both within and outside the country, including through consular services, particularly in countries to which large numbers of victims have been forced into exile.

Principle 34: Scope of the right to reparation

The right to reparation shall cover all injuries suffered by victims; it shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law.

In the case of forced disappearance, the family of the direct victim has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person and, in the event of decease, that person's body must be returned to the family as soon as it has been identified, regardless of whether the perpetrators have been identified or prosecuted.

B. Guarantees of non-recurrence of violations**Principle 35: General principles**

States shall ensure that victims do not again have to endure violations of their rights. To this end, States must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions. Adequate representation of women and minority groups in public institutions is essential to the achievement of these aims. Institutional reforms aimed at preventing a recurrence of violations should be developed through a process of broad public consultations, including the participation of victims and other sectors of civil society. Such reforms should advance the following objectives:

- a) Consistent adherence by public institutions to the rule of law;
- b) The repeal of laws that contribute to or authorize violations of human rights and/or humanitarian law and enactment of legislative and other measures necessary to ensure respect for human rights and humanitarian law, including measures that safeguard democratic institutions and processes;
- c) Civilian control of military and security forces and intelligence services and disbandment of parastatal armed forces;
- d) Reintegration of children involved in armed conflict into society.

Principle 36: Reform of state institutions

States must take all necessary measures, including legislative and administrative reforms, to ensure that public institutions are organized in a manner that ensures respect for the rule of law and protection of human rights. At a minimum, States should undertake the following measures:

- a) Public officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, police, intelligence and judicial sectors, shall not continue to serve in State institutions. Their removal shall comply with the requirements of due process of law and the principle of non-discrimination. Persons formally charged with

individual responsibility for serious crimes under international law shall be suspended from official duties during the criminal or disciplinary proceedings;

b) With respect to the judiciary, States must undertake all other measures necessary to assure the independent, impartial and effective operation of courts in accordance with international standards of due process. Habeas corpus, by whatever name it may be known, must be considered a non-derogable right;

c) Civilian control of military and security forces as well as of intelligence agencies must be ensured and, where necessary, established or restored. To this end, States should establish effective institutions of civilian oversight over military and security forces and intelligence agencies, including legislative oversight bodies;

d) Civil complaint procedures should be established and their effective operation assured;

e) Public officials and employees, in particular those involved in military, security, police, intelligence and judicial sectors, should receive comprehensive and ongoing training in human rights and, where applicable, humanitarian law standards and in implementation of those standards.

Principle 37: Disbandment of parastatal armed forces/demobilization and social reintegration of children

Parastatal or unofficial armed groups shall be demobilized and disbanded. Their position in or links with State institutions, including in particular the army, police, intelligence and security forces, should be thoroughly investigated and the information thus acquired made public. States should draw up a reconversion plan to ensure the social reintegration of the members of such groups. Measures should be taken to secure the cooperation of third countries that might have contributed to the creation and development of such groups, particularly through financial or logistical support. Children who have been recruited or used in hostilities shall be demobilized or otherwise released from service. States shall, when necessary, accord these children all appropriate assistance for their physical and psychological recovery and their social integration.

Principle 38: Reform of laws and institutions contributing to

impunity

Legislation and administrative regulations and institutions that contribute to or legitimize human rights violations must be repealed or abolished. In particular, emergency legislation and courts of any kind must be repealed or abolished insofar as they infringe the fundamental rights and freedoms guaranteed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Legislative measures necessary to ensure protection of human rights and to safeguard democratic institutions and processes must be enacted. As a basis for such reforms, during periods of restoration of or transition to democracy and/or peace States should undertake a comprehensive review of legislation and administrative regulations.

ANNEX II: SELECTION OF NORMS AND STANDARDS ON CRIMES UNDER INTERNATIONAL LAW

TORTURE

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 1

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 1

1. For the purposes of this Convention, the term "torture" means 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.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Inter-American Convention to Prevent and Punish Torture

Article 2

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

ENFORCED DISAPPEARANCE***International Convention for the Protection of All Persons from Enforced Disappearance***

Article 2

For the purposes of this Convention, "enforced disappearance" is considered to be 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.

Declaration on the Protection of All Persons from Enforced Disappearance

Preamble

Deeply concerned that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals

acting on behalf of, or with the support, director indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law,

Inter-American Convention on Forced Disappearance of Persons

Article II

For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

CRIMES AGAINST HUMANITY

Charter of the International Military Tribunal at Nuremberg

Article 6 (c)

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal

Principle VI (c, Crimes against humanity)

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Draft Code of Crimes against the Peace and Security of Mankind (1996)

Article 18

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

- a) Murder;
- b) Extermination;
- c) Torture;
- d) Enslavement;
- e) Persecution on political, racial, religious or ethnic grounds;
- f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- g) Arbitrary deportation or forcible transfer of population;
- h) Arbitrary imprisonment;
- i) Forced disappearance of persons;
- j) Rape, enforced prostitution and other forms of sexual abuse;
- k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia

Article 5, Crimes Against Humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;

- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

***Statute of the International Criminal Tribunal for the
Prosecution of Persons Responsible for Genocide and Other
Serious Violations of International Humanitarian Law
Committed in the Territory of Rwanda and Rwandan
Citizens Responsible for Genocide and Other Such Violations
Committed in the Territory of Neighbouring States, between
1 January 1994 and 31 December 1994***

Article 3, Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation;
- e) Imprisonment;
- f) Torture;
- g) Rape;
- h) Persecutions on political, racial and religious grounds;
- i) Other inhumane acts.

Rome Statute of the International Criminal Court

Article 7, Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means 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 as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i) Enforced disappearance of persons;
- j) The crime of apartheid;
- k) k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health;

2. For the purpose of paragraph 1:

- a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- f) "Forced pregnancy" means the unlawful confinement

of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime

i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Statute of the Special Court for Sierra Leone

Article 2, Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation;
- e) Imprisonment;
- f) Torture;
- g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

- h) Persecution on political, racial, ethnic or religious grounds;
- i) Other inhumane acts.

International Convention for the Protection of All Persons from Enforced Disappearance

Article 5

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law

Inter-american Convention on Forced Disappearance of Persons

Preamble

REAFFIRMING that the systematic practice of the forced disappearance of persons constitutes a crime against humanity;

Declaration on the Protection of All Persons from Enforced Disappearance

Preamble

Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity.

ANNEX III: SELECTION OF NORMS AND STANDARDS ON RIGHTS TO AN EFFECTIVE REMEDY AND REPARATION

A. UN NORMS AND STANDARDS

Universal Declaration of Human Rights

Article 8

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.

International Covenant on Civil and Political Rights

Article 2 (3)

Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 9 (5)

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 14 (6)

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law,

unless it is proved that the non disclosure of the unknown fact in time is wholly or partly attributable to him.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system 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.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

International Convention on the Elimination of All Forms of Racial Discrimination

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Convention on the Rights of the Child

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture

or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

International Convention for the Protection of All Persons from Enforced Disappearance

Article 12

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

Article 17

2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation: [...] f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.

Article 24

1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:

- a) Restitution;
- b) Rehabilitation;
- c) Satisfaction, including restoration of dignity and reputation;
- d) Guarantees of non-repetition.

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Article 83

Each State Party to the present Convention undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other

competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c) To ensure that the competent authorities shall enforce such remedies when granted.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

Principle 4

Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

Principle 5

Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

Principle 4

Effective protection through judicial or other means shall be guaranteed to individuals and groups who are in danger of extra-legal, arbitrary or summary executions, including those who receive death threats.

Principle 16

Families of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.

Principle 20

The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time.

Declaration on the Protection of All Persons from Enforced Disappearance

Article 9

1. The right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required to prevent enforced disappearances under all circumstances [...].

2. In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found.

3. Any other competent authority entitled under the law of the State or by any international legal instrument to which the State is a party may also have access to such places.

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

Article 9

1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.

2. To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or

freedoms, as well as enforcement of the eventual decision and award, all without undue delay.

3. To the same end, everyone has the right, individually and in association with others, *inter alia*:

a) To complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay;

b) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments;

c) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.

4. To the same end, and in accordance with applicable international instruments and procedures, everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms.

5. The State shall conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred in any territory under its jurisdiction.

Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Principle 1

The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter "torture or other ill-treatment") include the following:

(a) Clarification of the facts and establishment and

acknowledgement of individual and State responsibility for victims and their families;

(b) Identification of measures needed to prevent recurrence;

(c) Facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.

Principle 2

States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards and the findings shall be made public.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Principle 7

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

***B. 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

The General Assembly,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and General Assembly resolution 40/34 of 29 November 1985 by which the Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims.

Noting that the Rome Statute of the International Criminal Court requires the establishment of "principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation", requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims" and to permit the participation of victims at all "stages of the proceedings determined to be appropriate by the Court",

Affirming that the Basic Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international

human rights law and international humanitarian law which are complementary though different as to their norms,

Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

Noting that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines.

Adopts the following Basic Principles and Guidelines:

I. OBLIGATION TO RESPECT, ENSURE RESPECT FOR AND IMPLEMENT INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

- (a) Treaties to which a State is a party;
- (b) Customary international law;
- (c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

- (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
- (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
- (c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;
- (d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

II. SCOPE OF THE OBLIGATION

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described below.

III. GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law

constituting crimes under international law, 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. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. STATUTES OF LIMITATIONS

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

V. VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions

that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. TREATMENT OF VICTIMS

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. VICTIMS' RIGHT TO REMEDIES

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

VIII. ACCESS TO JUSTICE

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance

with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. REPARATION FOR HARM SUFFERED

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall

provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international

humanitarian law training and in educational material at all levels.

23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

X. ACCESS TO RELEVANT INFORMATION CONCERNING VIOLATIONS AND REPARATION MECHANISMS

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which

victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. NON-DISCRIMINATION

25. The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.

XII. NON-DEROGATION

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

XIII. RIGHTS OF OTHERS

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

C. INTER-AMERICAN NORMS AND

American Declaration of the Rights and Duties of Man

Article XVIII.

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

American Convention on Human Rights

Article 25

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties..

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted

Article 63 (1)

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured part.

Inter-American Convention to Prevent and Punish Torture

Article 8

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Inter-American Convention on Forced Disappearance of Persons

Article X

In no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency be invoked to justify the forced disappearance of persons. In such cases, the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who

has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom.

In pursuing such procedures or recourse, and in keeping with applicable domestic law, the competent judicial authorities shall have free and immediate access to all detention centers and to each of their units, and to all places where there is reason to believe the disappeared person might be found including places that are subject to military jurisdiction.

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women

Article 4

Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others: [...] g. The right to simple and prompt recourse to a competent court for protection against acts that violate her rights; [...]

Article 7

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: [...] g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; [...]

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas

Principle V

All persons deprived of liberty shall have the right, exercised by themselves or by others, to present a simple, prompt, and effective recourse before the competent, independent, and impartial authorities, against acts or omissions that violate or threaten to violate their human rights. In particular, persons deprived of liberty shall have the right to lodge complaints claims about acts of torture, prison violence, corporal punishment, cruel, inhuman, or degrading treatment or punishment, as well as

concerning prison or internment conditions, the lack of appropriate medical or psychological care, and of adequate food.

ANNEX IV: SELECTED NORMS AND STANDARDS ON INVESTIGATION

A. UN NORMS AND STANDARDS

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

International Convention for the Protection of All Persons from Enforced Disappearance

Article 11 (3)

Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.

Article 12

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.
2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 of this article shall undertake an investigation, even if there has been no formal complaint.
3. Each State Party shall ensure that the authorities referred to in paragraph 1 of this article:
 - (a) Have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation;
 - (b) Have access, if necessary with the prior authorization of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present.
4. Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation. It shall ensure in particular that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.

Article 18

1. Subject to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as

relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:

- (a) The authority that ordered the deprivation of liberty;
- (b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;
- (c) The authority responsible for supervising the deprivation of liberty;
- (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
- (e) The date, time and place of release;
- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.

2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1 of this article, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

Article 19

1. Personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.

2. The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.

Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Principle 1

The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter "torture or other ill-treatment") include the following:

- a) Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families;
- b) Identification of measures needed to prevent recurrence;
- c) Facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.

Principle 2

States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards and the findings shall be made public.

Principle 3

- a) The investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry. The persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-

treatment to appear and testify. The same shall apply to any witness. To this end, the investigative authority shall be entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence.

b) Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.

Principle 4

Alleged victims of torture or ill-treatment and their legal representatives shall be informed of, and have access to, any hearing, as well as to all information relevant to the investigation, and shall be entitled to present other evidence.

Principle 5

a) In cases in which the established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of abuse or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

b) A written report, made within a reasonable time, shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. Upon completion, the report shall be made public. It shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The State shall, within a

reasonable period of time, reply to the report of the investigation and, as appropriate, indicate steps to be taken in response.

Principle 6

a) Medical experts involved in the investigation of torture or ill-treatment shall behave at all times in conformity with the highest ethical standards and, in particular, shall obtain informed consent before any examination is undertaken. The examination must conform to established standards of medical practice. In particular, examinations shall be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials.

b) The medical expert shall promptly prepare an accurate written report, which shall include at least the following:

i) Circumstances of the interview: name of the subject and name and affiliation of those present at the examination; exact time and date; location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g., detention centre, clinic or house); circumstances of the subject at the time of the examination (e.g., nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner or threatening statements to the examiner); and any other relevant factors;

ii) History: detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, times when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms;

iii) Physical and psychological examination: record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries;

iv) Opinion: interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and/or further examination shall be given;

v) Authorship: the report shall clearly identify those carrying out the examination and shall be signed.

c) The report shall be confidential and communicated to the subject or his or her nominated representative. The views of the subject and his or her representative about the examination process shall be solicited and recorded in the report. It shall also be provided in writing, where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment. It is the responsibility of the State to ensure that it is delivered securely to these persons. The report shall not be made available to any other person, except with the consent of the subject or on the authorization of a court empowered to enforce such a transfer.

Declaration on the Protection of All Persons from Enforced Disappearance

Article 13

1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.

2. Each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.

3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.

4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.

5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.

6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.

Article 16

1. Persons alleged to have committed any of the acts referred to in article 4, paragraph 1, above, shall be suspended from any official duties during the investigation referred to in article 13 above. [...]

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

Principle 9

There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

Principle 10

The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved and to demand the production of evidence.

Principle 11

In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

Principle 12

The body of the deceased person shall not be disposed of until an adequate autopsy is conducted by a physician, who shall, if possible, be an expert in forensic pathology. Those conducting the autopsy shall have the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred. If the body has been buried and it later appears that an investigation is required, the body shall be promptly and competently exhumed for an autopsy. If skeletal remains are discovered, they should be carefully exhumed and studied according to systematic anthropological techniques.

Principle 13

The body of the deceased shall be available to those conducting the autopsy for a sufficient amount of time to enable a thorough investigation to be carried out. The autopsy shall, at a minimum, attempt to establish the identity of the deceased and the cause and manner of death. The time and place of death shall also be determined to the extent possible. Detailed colour photographs of the deceased shall be included in the autopsy report in order to document and support the findings of the investigation. The autopsy report must describe any and all injuries to the deceased including any evidence of torture.

Principle 14

In order to ensure objective results, those conducting the autopsy must be able to function impartially and independently of any potentially implicated persons or organizations or entities.

Principle 15

Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation. Those potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect. over complainants, witnesses and their families, as well as over those conducting investigations.

Principle 16

Families of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.

Principle 17

A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The Government shall, within a reasonable period of time, either reply to the report of the investigation, or indicate the steps to be taken in response to it.

Code of Conduct for Law Enforcement Officials

Article 8

Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them. Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

Commentary: [...] b) The article seeks to preserve the balance between the need for internal discipline of the agency on which public safety is largely dependent, on the one hand, and the need for dealing with violations of basic human rights, on the other. Law enforcement officials shall report violations within the chain of command and take other lawful action outside the chain of command only when no other remedies are available or effective. It is understood that law enforcement officials shall not suffer administrative or other penalties because they have reported that a violation of this Code has occurred or is about to occur.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

Principle 6

Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

Principle 11

Rules and regulations on the use of firearms by law enforcement officials should include guidelines that: [...] (f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

Principle 22

Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a

detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.

Principle 23

Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

Principle 24

Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

Principle 25

Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.
2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.
3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials

involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report there on shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty

Rule 57

Upon the death of a juvenile during the period of deprivation of liberty, the nearest relative should have the right to inspect the death certificate, see the body and determine the method of disposal of the body. Upon the death of a juvenile in detention, there should be an independent inquiry into the causes of death, the report of which should be made accessible to the nearest relative. This inquiry should also be made when the death of a juvenile occurs within six months from the date of his or her release from the detention facility and there is reason to believe that the death is related to the period of detention.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

Article 8

1 . States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:

- a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses;
- b) Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;
- c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;
- d) Providing appropriate support services to child victims throughout the legal process;
- e) Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;
- f) f) Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
- g) g) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.

2. States Parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim.

3. States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.

4. States Parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol.

5. States Parties shall, in appropriate cases adopt measures in order to protect the safety and integrity of those persons and/or organizations involved in the prevention and/or protection and rehabilitation of victims of such offences.

6. Nothing in the present Article shall be construed as prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial

Declaration on the Elimination of Violence against Women

Article 4

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: [...]

c) 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;

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

Article 6

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims

Guidelines on the Role of Prosecutors

Guideline 11

Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

Guideline 12

Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

Guideline 13

In the performance of their duties, prosecutors shall:

a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are

informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Guideline 15

Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

Guideline 16

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedom

Article 9

5. The State shall conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred in any territory under its jurisdiction

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

Article 3

The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

as provided for under the respective bodies of law, includes, inter alia, the duty to: [...]

b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

Article 4

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, 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. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

B. INTER-AMERICAN NORMS AND STANDARDS

Inter-American Convention to Prevent and Punish Torture

Article 8

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

Article 10

No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means

Inter-American Convention on Forced Disappearance of

Persons

Article X

In no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency be invoked to justify the forced disappearance of persons. In such cases, the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom.

In pursuing such procedures or recourse, and in keeping with applicable domestic law, the competent judicial authorities shall have free and immediate access to all detention centers and to each of their units, and to all places where there is reason to believe the disappeared person might be found including places that are subject to military jurisdiction.

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women

Article 7

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: [...] b) apply due diligence to prevent, investigate and impose penalties for violence against women; [...] f) establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas

Principle XXIII (3)

Member States of the Organization of American States shall carry out serious, exhaustive, impartial, and prompt investigations in relation to all acts of violence or situations of emergency that have occurred in places of deprivation of liberty, with a view to uncovering the causes, identifying those responsible, and imposing the corresponding punishments on them. States shall take

appropriate measures and make every effort possible to prevent the recurrence of acts of violence or situations of emergency in places of deprivation of liberty.

ANNEX V: SELECTED NORMS AND STANDARDS ON MILITARY COURTS

Declaration on the Protection of All Persons from Enforced Disappearance

Article 16 (2)

They shall be tried only by the competent ordinary courts in each state, and not by any other special tribunal, in particular military courts.

Inter-American Convention on Forced Disappearance of Persons

Article IX

Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.

The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties. Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations.

Updated Set of principles for the protection and promotion of human rights through action to combat impunity

Principle 22

States should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, non bis in idem, due obedience, official immunities, repentance, the jurisdiction of military courts and the irremovability of judges that fosters or contributes to impunity.

Principle 29

The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under

the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.

Draft Principles Governing the Administration of Justice Through Military Tribunals

Principle No. 8, *Functional authority of military courts*

The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.

Principle No. 9, *Trial of persons accused of serious human rights violations*

In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.

ANNEX VI: SELECTED NORMS AND STANDARDS ON APPLICABILITY AND NON-APPLICABILITY OF STATUTES OF LIMITATION

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity

Article I

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

- a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;
- b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid , and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

Article II

If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.

Article III

The States Parties to the present Convention undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law, of the persons referred to in article II of this Convention

Article IV

The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles I and II of this Convention and that, where they exist, such limitations shall be abolished.

Rome Statute of the International Criminal Court

Article 29

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

International Convention for the Protection of All Persons from Enforced Disappearance

Article 5

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

Article 8

Without prejudice to article 5,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

- a) Is of long duration and is proportionate to the extreme seriousness of this offence;
- b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.

2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation.

Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity

Principle 1

War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.

Declaration on the Protection of All Persons from Enforced Disappearance

Article 17

1. Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.
2. When the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established.
3. Statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and commensurate with the extreme seriousness of the offence.

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

Article 6

Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

Article 7

Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

Updated Set of principles for the protection and promotion of human rights through action to combat impunity

Principle 22. Nature of restrictive measures

States should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, non bis in idem, due obedience, official immunities, repentance, the jurisdiction of military courts and the irremovability of judges that fosters or contributes to impunity.

Principle 23. Restrictions on prescription

Prescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply to crimes under international law that are by their nature imprescriptible. When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.

Customary Rules of International Humanitarian Law

Rule 160

Statutes of limitation may not apply to war crimes.

Inter-American Convention on Forced Disappearance of Persons

Article VII

Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.

However, if there should be a norm of a fundamental character preventing application of the stipulation contained in the previous paragraph, the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the corresponding State Party.

ANNEX VII: SELECTED NORMS AND STANDARDS ON RETROACTIVE EFFECTS OF NATIONAL CRIMINAL LAW

Universal Declaration of Human Rights

Article 11 (2)

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

International Covenant on Civil and Political Rights

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

American Convention on Human Rights

Article 9

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

European Convention on for the Protection of Human Rights and Fundamental Freedoms

Article 7

1.No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2.This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Article 19 (1)

1. No migrant worker or member of his or her family shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when the criminal offence was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time when it was committed. If, subsequent to the commission of

Convention on the Rights of the Child

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

Article 75 (4, c):

[N]o one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Article 6 (2,c)

[N]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law.

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Charter of the International Military Tribunal at Nuremberg

Article 6 (c)

Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Draft Code of Crimes against the Peace and Security of Mankind

Article 1

Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

Article 13

1. No one shall be convicted under the present Code for acts committed before its entry into force.
2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

ANNEX VIII: SELECTED NORMS AND STANDARDS ON *RES JUDICATA* AND *NE BIS IN IDEM*

Updated Set of principles for the protection and promotion of human rights through action to combat impunity

Principle 22, Nature of restrictive measures

States should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, non bis in idem, due obedience, official immunities, repentance, the jurisdiction of military courts and the irremovability of judges that fosters or contributes to impunity.

Principle 26 (b), Restrictions on extradition/non bis in idem

The fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Draft Code of Crimes against the Peace and Security of Mankind

Article 12 (1 y 2, a) *Non bis in idem*

1. No one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court.

2. An individual may not be tried again for a crime of which he has been finally convicted or acquitted by a national court except in the following cases:

a) By an international criminal court, if:

i) The act which was the subject of the judgement in the national court was characterized by that court as an ordinary crime and not as a crime against the peace and security of

mankind; or

ii) The national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted; [...].

Statute of the International Criminal Tribunal for the Former Yugoslavia

Article 10 (1 y 2), *Non-bis-in-idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

a) The act for which he or she was tried was characterized as an ordinary crime; or

b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Statute of the International Criminal Tribunal for Rwanda

Article 9 (1 y 2) Non bis in idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Rome Statute of the International Criminal Court

Article 20 (3) Non bis in idem

No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the court with respect to the same conduct unless the proceedings in the other court:

- a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court; or
- b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Statute of the Special Court for Sierra Leone

Article 9, Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 to 4 of the present Statute may be subsequently tried by the Special Court if:

- a) The act for which he or she was tried was characterized as an ordinary crime; or
- b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

Statute of the Special Tribunal for Lebanon

Article 5, Non bis in idem

1. No person shall be tried before a national court of Lebanon for

acts for which he or she has already been tried by the Special Tribunal.

2. A person who has been tried by a national court may be subsequently tried by the Special Tribunal if the national court proceedings were not impartial or independent, were designed to shield the accused from criminal responsibility for crimes within the jurisdiction of the Tribunal or the case was not diligently prosecuted.

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November 2015 (for an updated list, please visit www.icj.org/commission)

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Prof. Sir Nigel Rodley, United Kingdom

Vice-Presidents:

Prof. Robert Goldman, United States

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