

# **INTERNATIONAL LAW COMMISSION**

**INITIAL  
RECOMMENDATIONS  
FOR A CONVENTION ON  
CRIMES AGAINST  
HUMANITY**

**AMNESTY  
INTERNATIONAL**



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# I. EXECUTIVE SUMMARY

In 2013 the International Law Commission (ILC), a subsidiary body of international law experts established by the United Nations General Assembly in 1947, decided to include the topic "crimes against humanity" in its program of work. A year later the ILC appointed professor Sean Murphy as Special Rapporteur on that matter.<sup>1</sup> In early 2015 the Special Rapporteur submitted his first report addressing "[t]he potential benefits of developing draft articles that might serve as the basis of an international convention on crimes against humanity".<sup>2</sup>

Amnesty International calls on the ILC to consider the following recommendations:

## 1. Universal jurisdiction

The Convention should require states to exercise universal jurisdiction to try persons for crimes against humanity, that is jurisdiction over crimes committed outside their territories which are not linked to the state in any way by the nationality of the suspect or the victims or by harm to the state's own national interests.

## 2. *Aut dedere aut judicare* (extradite or prosecute)

The Convention should provide that states parties shall exercise jurisdiction whenever a person suspected of criminal responsibility for crimes against humanity is found in any territory subject to their jurisdiction, unless the person is extradited to another state or surrendered to an international criminal court.

## 3. Amnesties and similar measures of impunity

The Convention should provide that amnesties and other similar measure of impunity (like pre-conviction pardons) for crimes against humanity are prohibited.

## 4. Military courts

The Convention should provide that persons suspected of criminal responsibility for crimes against humanity shall be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of military jurisdictions.

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<sup>1</sup> Report of the International Law Commission, Sixty-sixth session, Supplement No. 10 (A/69/10), para.266.

<sup>2</sup> ILC, First report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, A/CN.4/680, 17 Feb. 2015, para.2.

## 5. Reservations

The Convention on crimes against humanity should not allow reservations to the treaty.

# II. INTRODUCTION

Amnesty International welcomes the development of a Convention on crimes against humanity and urges that it be developed to be consistent with and complement and supplement the Rome Statute of the International Criminal Court (the Rome Statute). Such a treaty, which could for example consolidate state obligations to investigate and prosecute crimes against humanity at national level, has the potential to help end impunity.

The recommendations in this document reflect conventional and customary norms, the jurisprudence of international criminal and human rights courts, and the authoritative interpretations of obligations by human rights bodies and mechanisms. Reliance on these sources is consistent with the ILC's mandate of promoting "the progressive development of international law and its codification".<sup>3</sup>

In any event, Amnesty International would oppose any provision that is retrogressive to the Rome Statute, defeats other obligations under international law or merely represents the lowest common denominator.

Finally, this initial paper, which to some extent restates positions held by the organization in the past, is presented as part of a series focussing on the draft Convention on crimes against humanity and will be followed by a more extensive analysis of the current proposals and other papers on subsequent proposals made by the Special Rapporteur.

# III. INITIAL RECOMMENDATIONS

## 1. UNIVERSAL JURISDICTION

**Recommendation: The Convention should require states parties to try persons for crimes against humanity committed outside their territories which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.**

Amnesty International recommends the adoption of the ILC approach in the 1996 Draft Code of Crimes against the Peace and Security of Mankind (hereafter 'the 1996 Draft Code'),

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<sup>3</sup> Statute of the ILC, adopted by the G.A. in Res.174 (II) of 21 Nov. 1947, as amended by res.485 (V) of 12 Dec. 1950, 984 (X) of 3 Dec. 1955, 985 (X) of 3 Dec. 1955 and 36/39 of 18 Nov. 1981.

which the organization believes reflects customary international law, regarding the scope of jurisdiction corresponding to crimes against humanity.

The 1996 Draft Code provides in Article 8:

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] and 20 [war crimes], **irrespective of where or by whom those crimes were committed**<sup>4</sup> (emphasis added)

In its explanation on Article 8 the ILC stated: "The Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts". Moreover, the Commentary also adds:

The phrase "irrespective of where or by whom those crimes were committed" is used in the first provision of the article to avoid any doubt as to the existence of universal jurisdiction for those crimes.<sup>5</sup>

This approach is consistent with the Preamble to the Rome Statute:

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes<sup>6</sup>

The Preamble to the Rome Statute appears therefore to recognise both the existence of universal jurisdiction over crimes under international law - including crimes against humanity - and the duty, not just the power or right, to exercise this jurisdiction for these crimes. This position appears to be supported by state practice (123 states are parties to the Rome Statute so far).

A preliminary survey of legislation on universal jurisdiction around the world, issued by Amnesty International in 2011 and updated a year later, to assist the Sixth Committee in its discussion on the 'scope and application of the principle of universal jurisdiction', concludes that not less than 78 UN member states have provided for universal jurisdiction over crimes against humanity.<sup>7</sup>

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<sup>4</sup> Draft Code of Crimes against the Peace and Security of Mankind, Article 8. Adopted by the ILC at its forty-eighth session, in 1996, Yearbook of the ILC, 1996, vol.II, Part Two.

<sup>5</sup> Draft Code of Crimes against the Peace and Security of Mankind with commentaries, Commentary to Article 8, para.7.

<sup>6</sup> Rome Statute, Preamble, para.6.

<sup>7</sup> Amnesty International, Universal Jurisdiction: A preliminary survey of legislation around the world (IOR 53/004/2011) and Universal Jurisdiction: A preliminary survey of legislation around the world – 2012 update (IOR 53/019/2012). See also: Redress and FIDH, Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member

Amnesty International considers therefore that the Convention should require states parties to try persons for crimes against humanity committed outside their territories which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.

In any case, as provided in the Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment (Torture Convention)<sup>8</sup> and the International Convention for the Protection of All Persons from Enforced Disappearance (Enforced Disappearance Convention)<sup>9</sup>, the new Convention should also provide that each state party shall take such measures as may be necessary to establish its jurisdiction over crimes against humanity when the crimes are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state; when the person suspected of criminal responsibility is a national of that state; and when the victim is a national of that state. In any event, the Convention on crimes against humanity should not exclude any additional criminal jurisdiction exercised in accordance with national law.

### 1.1. PHYSICAL PRESENCE SHOULD NOT BE A REQUIREMENT FOR THE INVESTIGATION OF CRIMES AGAINST HUMANITY

Amnesty International opposes trials *in absentia* - except in certain narrowly defined circumstances.<sup>10</sup> However, the mere opening of a criminal investigation on crimes against humanity should not necessarily require the physical presence of the person suspected of criminal responsibility. In other words, investigations may take place in the absence of a suspect, but presence would be required before the trial starts.

The *Institut de droit international* seems to be of a similar opinion. In its resolution on 'Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes' it concluded in 2005 that:

**"[a]part from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws".**<sup>11</sup> (emphasis added)

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States of the European Union, December 2010.

<sup>8</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 Dec. 1984, entered into force 26 June 1987), UNTS, vol.1465, p.85, Art.5.

<sup>9</sup> International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 Dec. 2006, entered into force 23 Dec. 2010), UNTS, vol.2716, p.3, Art.9.

<sup>10</sup> Amnesty International, Making the Right Choices II, June 1997, at IV(c)(2) ("Amnesty International believes that trials *in absentia* of an accused, except in the case of an accused who has deliberately absented himself or herself after the trial has begun, or for as long as an accused continues to disrupt the proceedings, are unjust").

<sup>11</sup> *Institut de droit international*, 'Universal criminal jurisdiction with regard to the crime of genocide,

The Constitutional Court of South Africa, in a case where acts of torture were allegedly perpetrated in Zimbabwe, by and against Zimbabwean nationals, and where none of the alleged perpetrators were present in South Africa, has recently explained:

Requiring presence for an investigation would render nugatory the object of combating crimes against humanity. If a suspect were to enter and remain briefly in the territory of a state party, without a certain level of prior investigation, it would not be practicable to initiate charges and prosecution. An anticipatory investigation does not violate fair trial rights of the suspect or accused person. A determination of presence or anticipated presence requires an investigation in the first instance. Ascertaining a current or anticipated location of a suspect could not occur otherwise. Furthermore, any possible next step that could arise as a result of an investigation, such as a prosecution or an extradition request, requires an assessment of information which can only be attained through an investigation. By way of example, it is only once a docket has been completed and handed to a prosecutor that there can be an assessment as to whether or not to prosecute<sup>12</sup>

## 1.2. HIERARCHY AMONG THE VARIOUS BASES OF JURISDICTION

The question of which state should exercise jurisdiction first with regard to crimes under international law, including crimes against humanity, has been presented as an unresolved one - though Amnesty International has so far not seen any dispute between states eager to try persons suspected of criminal responsibility.

The African Union (AU) and the European Union (EU) set up a technical *ad hoc* expert group to clarify the understanding on the principle of universal jurisdiction following concerns expressed by the AU regarding the exercise of universal jurisdiction by European states in cases involving African nationals allegedly responsible for crimes under international law.<sup>13</sup> The 2009 AU-EU Report on the Principle of Universal Jurisdiction states:

Positive international law recognises no hierarchy among the various bases of jurisdiction that it permits. In other words, a state which enjoys universal jurisdiction over, for example, crimes against humanity is under no positive legal obligation to accord priority in respect of prosecution to the state within the territory of which the criminal acts occurred or to the state of nationality of the offender or victims<sup>14</sup>

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crimes against humanity and war crimes', 2005, para.3(b).

<sup>12</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, para.48.

<sup>13</sup> The experts were Professor Antonio Cassese (Italy), Dr Mohammed Bedjaoui (Algeria), Professor Pierre Klein (Belgium), Dr Chaloka Beyani (Zambia), Dr Roger O'Keefe (Australia) and Professor Chris Maina Peter (Tanzania).

<sup>14</sup> The AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of the European Union (8672/1/09 REV 1), 16 April 2009, para.14.

In the *Kumar Lama* case in the United Kingdom, based on universal jurisdiction as provided by the Convention against Torture, the High Court reached the following conclusion in response to a claim of the accused of an alleged hierarchy of jurisdictions contemplated by the Convention:

[t]he Convention against Torture does not establish a hierarchy of possible jurisdictions or embody any principle of *forum conveniens*. While it is correct that, in any given case, it may be more convenient or effective to prosecute in one jurisdiction rather than another, for example because of the availability of evidence, this is no more than a reflection of the circumstances of the particular case.<sup>15</sup>

The Report of the United Nations Fact-Finding Mission on the Gaza Conflict, also known as the *Goldstone Report*, concluded that:

The exercise of criminal jurisdiction on the basis of the universality principle concerns especially serious crimes regardless of the place of commission, the nationality of the perpetrator or the nationality of the victim. This form of jurisdiction is concurrent with others based on more traditional principles of territoriality, active and passive nationality, and it is not subsidiary to them<sup>16</sup>

The International Committee of the Red Cross, in its study on customary international humanitarian law, shares the same view: "The universality principle is additional to other bases of criminal jurisdiction: territoriality principle (based on where the crime occurred); active personality principle (based on the nationality of the perpetrator); passive personality principle (based on the nationality of the victim); and protective principle (based on the protection of national interests or security)".<sup>17</sup>

Leading commentators of the Convention against Torture have also held that: "[S]tates are not permitted to make the exercise of universal jurisdiction dependent on any legal act of another State. All attempts by States in the Working Group to establish an *order of priority* among the different grounds of jurisdiction mentioned in Article 5 or to make universal jurisdiction *dependent on a request for extradition* by another State have been rejected by well-informed decisions arrived at after extensive discussions".<sup>18</sup> (emphasis in the original)

In sum, Amnesty International considers that a Convention on crimes against humanity should - like in the Torture Convention or the Enforced Disappearance Convention - not recognise any hierarchy among the various bases of jurisdiction. However, as the organization explained several years ago when the authorities of Chile claimed jurisdiction to investigate

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<sup>15</sup> [2014] *EWCA Crim.1729*, 7 Aug. 2014, para.71(3).

<sup>16</sup> A/HRC/12/48 25 September 2009, para.1849.

<sup>17</sup> J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (ICRC, Cambridge) (Rule 157) 604.

<sup>18</sup> M. Nowak & E. McArthur, *The United Nations Convention against Torture, A Commentary* (Oxford, 2008) 317.

the then Senator-for-life Augusto Pinochet, detained in London pursuant to a warrant of arrest issued by a Spanish investigating judge, "[i]n the unlikely event that more than one state claimed priority to investigate and prosecute a suspect for the same crimes under international law based on the same conduct, the state with custody seeking to exercise universal jurisdiction would normally have a better claim than the territorial state to act on behalf of the international community, since the presence of the suspect outside the territorial state creates a presumption that the authorities of the territorial state are not acting with due diligence to investigate and prosecute. Failure to transmit an extradition request would be compelling evidence that the territorial state was not serious".<sup>19</sup>

## 2. *AUT DEDERE AUT JUDICARE* (EXTRADITE OR PROSECUTE)

**Recommendation: The Convention should provide that states parties *shall* exercise jurisdiction whenever a person suspected of criminal responsibility for crimes against humanity is found in any territory subject to their jurisdiction, unless the person is extradited to another state or surrendered to an international criminal court.**

### 2.1. *AUT DEDERE AUT JUDICARE* IN PAST ILC WORKS

Under the *aut dedere aut judicare* rule states are required either to exercise jurisdiction over a person suspected of certain categories of crimes found in any territory under its jurisdiction (which would necessarily include universal jurisdiction in certain cases) or extradite the person to a state able and willing to do so, or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime.<sup>20</sup>

Nearly two decades ago the ILC concluded that the *aut dedere aut judicare* rule applies to crimes against humanity, as well as to genocide, war crimes and crimes against UN personnel. Article 9 of the 1996 Draft Code states:

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual.

However, the ILC study on *aut dedere aut judicare* of 2014 found that the customary nature of the obligation to extradite or prosecute could not *per se* be inferred from the existence of

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<sup>19</sup> Amnesty International, Universal Jurisdiction: The duty of states to enact and implement legislation (IOR 53/002/2001), September 2001, p.40.

<sup>20</sup> See: Amnesty International, Universal Jurisdiction: The duty of states to enact and implement legislation, Chapter I (Definitions), (IOR 40/003/2001) and 'International Law Commission: The obligation to extradite or prosecute (*aut dedere aut judicare*)' (IOR 40/001/2009). See also: 'Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)"', Study by the Secretariat, A/CN.4/630, 18 June 2010.

customary rules proscribing specific crimes under international law.<sup>21</sup> Nevertheless, the Final Report points out that such a conclusion may not "[b]e construed as implying that either the Working Group or the Commission as a whole has found that the obligation to extradite or prosecute has not become or is not yet crystallising into a rule of customary international law, be it a general or regional one."<sup>22</sup>

Amnesty International argues that the *aut dedere aut judicare* rule has, at least regarding crimes against humanity, crystallised into a rule of customary international law.

## 2.2. SCOPE AND APPLICATION OF THE RULE AT THE INTERNATIONAL COURT OF JUSTICE (ICJ) AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)

In the *Questions relating to the Obligation to Prosecute or Extradite* case the ICJ explained the hierarchy or precedence of the two terms of the rule contained in article 7 of the Convention against Torture by saying that:

[i]f the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.<sup>23</sup>

The ICJ recalled: "Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect".<sup>24</sup>

In the *Furundžija* case the ICTY concluded that *aut dedere aut judicare* arises from the *jus cogens* nature of the prohibition of torture. The Tribunal stated:

Furthermore, at the individual level, that is, that of criminal liability, it would seem that 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

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<sup>21</sup> ILC, Final Report, Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), A/CN.4/L.844, 5 June 2014, para.10

<sup>22</sup> ILC, Final Report, para.12.

<sup>23</sup> ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, 20 July 2012, ICJ Reports 2012, para.95.

<sup>24</sup> ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), para.94.

are present in a territory under its jurisdiction.<sup>25</sup>

The *aut dedere aut judicare* rule has been enshrined in several states' legislation regarding genocide, crimes against humanity, or war crimes, like in Cabo Verde,<sup>26</sup> Finland,<sup>27</sup> Luxemburg,<sup>28</sup> Mexico,<sup>29</sup> and Peru,<sup>30</sup> among others.

### 2.3. THE 'THIRD ALTERNATIVE' FORMULA

In the Commentary to article 9 of the 1996 Draft Code the ILC "recognizes a possible third alternative course of action by the custodial State which would fulfil its obligation to ensure the prosecution of an alleged offender who is found in its territory. The custodial State could transfer the alleged offender to an international criminal court for prosecution".<sup>31</sup>

The so-called 'third alternative' formula had also been recognized by the International Committee of the Red Cross (ICRC) which, while commenting on the application of the *aut dedere aut judicare* provision contained in the Geneva Conventions, said that: "[t]here is nothing in the paragraph [Art.49, para.2, I Convention] to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties".<sup>32</sup>

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<sup>25</sup> ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1, Trial Chamber, Judgment, 10 Dec. 1998, para.156.

<sup>26</sup> *Código Penal de Cabo Verde*, Decreto Legislativo n.º4/2003, 18 Nov. 2003, art.4.

<sup>27</sup> Criminal Code of Finland (39/1889, amendments up to 927/2012 included), Section 8.

<sup>28</sup> *Code d'instruction criminelle, Loi du 27 février 2012 portant adaptation du droit interne aux dispositions du Statut de Rome de la Cour pénale internationale*, Art.7-4 8 "Lorsqu'une personne qui se sera rendue coupable à l'étranger d'une des infractions prévues par les articles 112-1, 135-1 à 135-6, 135-9, 135-10, 136bis à 136quinquies, 260-1 à 260-4, 379, 382-1, 382-2, 384 et 385-2 du Code pénal, pourra être poursuivie et jugée au Grand-Duché, lorsqu'une demande d'extradition est introduite et que l'intéressé n'est pas extradé").

<sup>29</sup> *Código Penal Federal*, Art.2 ("Se aplicará, asimismo: I. Por los delitos que se inicien, preparen o cometan en el extranjero, cuando produzcan o se pretenda que tengan efectos en el territorio de la República; o bien, por los delitos que se inicien, preparen o cometan en el extranjero, siempre que un tratado vinculativo para México prevea la obligación de extraditar o juzgar, se actualicen los requisitos previstos en el artículo 4o. de este Código y no se extradite al probable responsable al Estado que lo haya requerido...").

<sup>30</sup> *Código de Justicia Militar y Policial*, Dec. Leg. No.1094, 1 Sept. 2010, Art.3 ("Extradición y entrega. La extradición y la entrega de los miembros de las Fuerzas Armadas o Policía Nacional se regulan conforme a la ley de la materia. La ley peruana podrá aplicarse cuando solicitadas éstas, no se extradite al agente a la autoridad competente del Estado extranjero").

<sup>31</sup> Draft Code, commentary to Article 9, para.8, p.32.

<sup>32</sup> ICRC, *The Geneva Conventions of 12 August 1949, Commentary*, I Geneva Convention, (ICRC, Geneva 1952), 366.

In recent years a number of criminal or criminal procedure laws have been enacted or amended so as to permit the application of *aut dedere aut iudicare* under the 'third alternative' formula with regard to crimes against humanity. Argentina,<sup>33</sup> Germany,<sup>34</sup> the Philippines,<sup>35</sup> Switzerland,<sup>36</sup> Timor Leste,<sup>37</sup> and Uruguay,<sup>38</sup> are examples, among others.

Amnesty International considers that *aut dedere aut iudicare*, in its 'third alternative' formula, as enshrined in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance,<sup>39</sup> should be incorporated into a Convention on crimes against

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<sup>33</sup> *Ley 26.200 de Implementación del Estatuto de Roma*, Boletín oficial (Official Gazette): 9 Jan. 2007, Art.4 ("Principio aut dedere aut iudicare. Cuando se encuentre en territorio de la República Argentina o en lugares sometidos a su jurisdicción una persona sospechada de haber cometido un crimen definido en la presente ley y no se procediera a su extradición o entrega a la Corte Penal Internacional, la República Argentina tomará todas las medidas necesarias para ejercer su jurisdicción respecto de dicho delito").

<sup>34</sup> German Code of Criminal Procedure, as amended in 2013, Section 153f.

<sup>35</sup> Republic Act No. 9851, an Act defining and penalizing crimes against international humanitarian law, genocide and other crimes against humanity, organizing jurisdiction, designating special courts, and for related purposes of 11 Dec. 2009, art.17 (Jurisdiction. – The State shall exercise jurisdiction over persons, whether military or civilian, suspected or accused of a crime defined in this Act, regardless of where the crime is committed, provided, any one of the following conditions is met (...) In the interest of justice, the relevant Philippine authorities may dispense with the investigation or prosecution of a crime punishable under this Act if another court or international tribunal is already conducting the investigation or undertaking the prosecution of such crime. Instead, the authorities may surrender or extradite suspected or accused persons in the Philippines to the appropriate international court, if any, or to another State pursuant to the applicable extradition laws and treaties").

<sup>36</sup> *Code pénal suisse* du 21 décembre 1937 (Etat le 1er juillet 2014), "Art.264m. 1 Quiconque commet à l'étranger un des actes visés aux titres 12bis et 12ter ou à l'art. 264k est punissable s'il se trouve en Suisse et qu'il n'est pas extradé ni remis à un tribunal pénal international dont la compétence est reconnue par la Suisse".

<sup>37</sup> *Código Penal* (aprovado pelo Decreto-Lei No. 19/2009), (Artigo 8º. Factos praticados fora do território nacional. Salvo tratado ou convenção em contrário, a lei penal timorense é aplicável a factos praticados fora do território de Timor-Leste nos seguintes casos... b) Quando constituírem os crimes previstos dos artigos 123º a 135º, 161º a 169º e 175º a 178º desde que o agente seja encontrado em Timor-Leste e não possa ser extraditado ou seja decidida a sua não entrega;").

<sup>38</sup> *Ley N° 18.026 de cooperación con la Corte Penal Internacional en materia de lucha contra el genocidio, los crímenes de guerra y de lesa humanidad*, 4 Oct. 2006, Article 4(2) ("Cuando se encontrare en territorio de la República o en lugares sometidos a su jurisdicción, una persona sospechada haber cometido un crimen de los tipificados en los Títulos I a IV de la Parte II de la presente ley, el Estado uruguayo está obligado a tomar las medidas necesarias para ejercer su jurisdicción respecto de dicho crimen o delito, si no recibiera solicitud de entrega a la Corte Penal Internacional o pedidos de extradición, debiendo proceder a su enjuiciamiento como si el crimen delito se hubiese cometido en territorio de la República, independientemente del lugar de su comisión, la nacionalidad sospechada o de las víctimas").

<sup>39</sup> Enforced Disappearance Convention, Arts.9(2) and 11(1).

humanity. The wording of the provision should reflect the ICJ Judgment in the *Belgium v. Senegal* case, making it clear that submission of the case to its competent authorities for the purpose of prosecution is the international obligation (or, in certain circumstances, the surrender of the suspect to an international criminal court), while extradition to a third state is an option.

### 3. AMNESTIES AND OTHER SIMILAR MEASURES OF IMPUNITY

**Recommendation: The Convention should provide that amnesties and other similar measures of impunity for crimes against humanity are prohibited.**

Amnesty International considers that international criminal law has evolved, at national and international level, in a way that it is reasonable to conclude that a prohibition on amnesties and other similar measures of impunity for crimes under international law, including crimes against humanity, has crystallized as a rule under customary international law. In addition, such a prohibition is probably a legal consequence arising out the peremptory character of the prohibition of certain conduct under international law.

Amnesty International has consistently opposed all measures of impunity, without exception, since they prevent the emergence of truth, a final judicial determination of guilt or innocence and full reparation to victims and their families.<sup>40</sup>

#### 3.1. THE PROHIBITION OF AMNESTIES ARISING FROM A CRIME PROHIBITED BY A PEREMPTORY NORM OF INTERNATIONAL LAW (*JUS COGENS*)

The ICTY, in the *Furundžija* case, found that:

The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise 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<sup>41</sup>

In the case of *Ould Dah v. France* the European Court of Human Rights, after concluding that

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<sup>40</sup> Amnesty International, Sierra Leone, Special Court for Sierra Leone: Denial of right to appeal and prohibition of amnesties for crimes under international law (AFR 51/012/2003), 1 Nov. 2003.

<sup>41</sup> ICTY, *Prosecutor v. A. Furundžija*, para.155.

"the prohibition of torture has attained the status of a peremptory norm or *jus cogens*", states:

The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law. In addition, the Court notes that international law does not preclude a person who has benefited from an amnesty before being tried in his or her originating State from being tried by another State, as can be seen for example from Article 17 of the Statute of the International Criminal Court, which does not list this situation among the grounds for dismissing a case as inadmissible.<sup>42</sup>

The Supreme Court of Argentina in the *Mazzeo* case also found that there may be no bar for the investigation and prosecution of crimes against humanity, like statute of limitations and pre-conviction pardons, whose prohibition has reached a *jus cogens* character.<sup>43</sup>

The Federal Court of Rio, Brazil, was of a similar view in the case of *Rubens Beyrodt Paiva*, in 2014 - a case of enforced disappearance committed in 1974 amounting to a crime against humanity.<sup>44</sup>

### 3.2. THE PROHIBITION OF AMNESTIES FOR CRIMES AGAINST HUMANITY AS A RULE UNDER CUSTOMARY INTERNATIONAL LAW

The Special Court for Sierra Leone, established by agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000), noted:

We found support for the statement that it is a crystallized norm of international law that a government cannot grant amnesty for serious crimes under international law<sup>45</sup>

The Central High Court in Addis Ababa concluded in the *Col. Mengistu Haile Mariam et al.* case that:

It is, however, a well established custom and belief that war crimes and crimes

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<sup>42</sup> ECHR, *Ould Dah v. France* case, Decision of 17 March 2009.

<sup>43</sup> Corte Suprema de Justicia de la Nación, *Mazzeo, Julio L. y otros s/ rec. de casación e inconstitucionalidad*, 13 July 2007, para.19 ("[e]s la propia imposibilidad de declinar el juzgamiento de crímenes de lesa humanidad [por prescripción, indulto o cosa juzgada] la que se ha transformado en una norma del denominado derecho internacional imperativo o *ius cogens*").

<sup>44</sup> Tribunal Regional Federal da 2ª Região, 181-Habeas Corpus Criminal, Turma Espec.I, Penal, Previdenciário e Propriedade Industrial ("[T]ais crimes, evidentemente, se enquadram na descrição de crimes contra a humanidade e o dever do Brasil de processar e punir seus agentes deriva do caráter cogente do Direito Internacional ao qual o Brasil se encontrava sujeito desde a época dos fatos").

<sup>45</sup> SCSL, Appeals Chamber, *Prosecutor v. Moinina Fofana*, Decision on preliminary motion on lack of jurisdiction: illegal delegation of jurisdiction by Sierra Leone, 25 May 2004, para.3.

against humanity are not subject to amnesty and aren't barred by limitation<sup>46</sup>

The Inter-American Court of Human Rights has repeatedly stated, since 2001, that amnesties and other similar measures of impunity for human rights violations are prohibited under the Inter-American Convention on Human Rights. In the *Almonacid Arellano v. Chile* case the Court went further and found that:

The crime committed against Mr. Almonacid-Arellano cannot be susceptible of amnesty pursuant to the basic rules of international law since it constitutes a crime against humanity<sup>47</sup>

The African Commission on Human and Peoples' Rights concluded in the *Zimbabwe Human Rights NGO Forum v Zimbabwe* case that:

There has been consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights has become a rule of customary international law<sup>48</sup>

The International Committee of the Red Cross (ICRC), regarding amnesties, has found the following rule to reflect customary international law: [A]t 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.<sup>49</sup> The Commentary to the rule reads as follows:

[w]hen it adopted paragraph 5 of Article 6 of Additional Protocol II, the USSR declared, in the reasoning of its opinion, that it could not be interpreted in such a way that it allow war criminals or other persons guilty of crimes against humanity to escape severe punishment. The ICRC agrees with this interpretation<sup>50</sup>

The Report of the Special Rapporteur on the Question of torture and other cruel, inhuman or degrading treatment or punishment - Sir Nigel Rodley - states:

In the light of the consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights has become a

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<sup>46</sup> *Col. Mengistu Haile Mariam et al.* case, Central High Court, Addis Abeba, May 23rd, 1995. The Court also added: "Neither the Transitional Government of Ethiopia nor any other party has the power to call for national reconciliation and thereby grant amnesty or pardon in relation to war crimes and crimes against humanity".

<sup>47</sup> IACtHR, *Almonacid Arellano et al. v. Chile*, Judgment, 26 Sept. 2006, para.129.

<sup>48</sup> African Commission on Human and Peoples' Rights, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Decision of 15 May 2006, para.201.

<sup>49</sup> J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 159, p.611.

<sup>50</sup> J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, p.612.

rule of customary international law, the Special Rapporteur expresses his opposition to the passing, application and non-revocation of amnesty laws (including laws in the name of national reconciliation, the consolidation of democracy and peace, and respect for human rights), which prevent torturers from being brought to justice and hence contribute to a culture of impunity<sup>51</sup>

### 3.3. THE PROHIBITION OF AMNESTIES AND OTHER SIMILAR MEASURES AS CONTRAVENING HUMAN RIGHTS AND OTHER TREATIES

The Rome Statute of the International Criminal Court, in its Preamble, seems to preclude amnesties and other similar measures for those suspected of criminal responsibility for genocide, crimes against humanity and war crimes. Paragraph four states:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation

The European Court of Human Rights in the case of *Abdülşamet Yaman v. Turkey*, held:

[w]here a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an “effective remedy” that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible<sup>52</sup>

In the *Barrios Altos v. Peru* case, the Inter-American Court of Human Rights said:

Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible<sup>53</sup>

The Human Rights Committee (HRC), in its recent Concluding Observations on Chile welcomed:

[t]he explanation provided by the State party to the effect that the Amnesty Decree-Law is no longer applied by the courts in Chile. However, the Committee reiterates its concern about the fact that the Decree-Law remains in force, which leaves open the possibility that it might be applied<sup>54</sup>

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<sup>51</sup> UN Doc. A/56/156, Question of torture and other cruel, inhuman or degrading treatment or punishment, by Nigel Rodley, Special Rapporteur, 3 July 2001, para.33.

<sup>52</sup> ECHR, *Abdülşamet Yaman v. Turkey*, Judgment of 2 Nov. 2004, para.55

<sup>53</sup> IACtHR, *Barrios Altos v. Peru* case, Judgment, 14 May 2001, para.44.

<sup>54</sup> HRC, Concluding observations, Chile, CCPR/C/CHL/CO/6, 13 Aug. 2014, para.9.

In its Concluding Observations on Uganda the UN Committee on the Rights of the Child (CRC) noted:

The Committee recognises that the Amnesty Act of 2000 has contributed to the return, demobilization and reintegration of thousands of children forcefully recruited by the LRA, however is concerned that the criteria for granting amnesties are not in compliance with the international legal obligations of the State party, notably the Rome Statute of the International Criminal Court. The Committee is concerned that serious violations of international law such as the recruitment and use of children in hostilities may consequently remain in impunity<sup>55</sup>

Likewise, the Committee against Torture (CAT) noted in its Concluding Observations on Spain:

[t]he State party should ensure that acts of torture, which also include enforced disappearances, are not offences subject to amnesty<sup>56</sup>

Professor Diane Orentlicher is of the view that "[t]here is wide agreement among international jurists that treaties that explicitly require States Parties to penalize certain offenses and to pursue criminal prosecutions when those crimes occur would be breached by an amnesty preventing such prosecutions".<sup>57</sup>

#### 3.4. OTHER SOURCES

The Control Council Law No.10 (1945) provided, regarding crimes against peace, war crimes and crimes against humanity:

[I]n 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<sup>58</sup>

The 1973 UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity states:

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

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<sup>55</sup> CRC/C/OPAC/UGA/CO/1, 17 Oct. 2008, para.III.

<sup>56</sup> CAT, Concluding observations, Spain, CAT/C/ESP/CO/5, 9 Dec. 2009, para.21(2).

<sup>57</sup> D. Orentlicher, Immunities and Amnesties, in *Forging a Convention for Crimes against Humanity*, ed. by Leyla N. Sadat (Cambridge 2013) 218.

<sup>58</sup> Article II(5).

guilty, to punishment

And further:

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<sup>59</sup>

The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989) state that:

Governments 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 cooperate 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 offence was committed<sup>60</sup>

The UN Secretary-General, in the report 'The rule of law and transitional justice in conflict and post-conflict societies', made the following recommendation to the Security Council:

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<sup>61</sup>

The 1992 Declaration on the Protection of all Persons from Enforced Disappearance provides:

Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, [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<sup>62</sup>

### 3.5. THE CONTEMPORARY PROHIBITION OF AMNESTIES AND OTHER SIMILAR

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<sup>59</sup> Adopted by General Assembly resolution 3074 (XXVIII) of 3 December 1973, paras.1 and 8.

<sup>60</sup> Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, para.18.

<sup>61</sup> UN Doc. S/2004/616, 23 Aug. 2004, para.64(c). See also: UN Doc. S/1999/836, 30 July 1999, para.7 ("[t]he United Nations holds the understanding that the amnesty and pardon in article IX of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of humanitarian law").

<sup>62</sup> Adopted by General Assembly resolution 47/133 of 18 December 1992, art.18.

## MEASURES UNDER NATIONAL LAW

After the adoption of the Rome Statute in 1998 several states enacted legislation providing for a general prohibition for amnesties and other similar measures of impunity for crimes under international law, including crimes against humanity. Amnesty International considers that such a trend reflects an increasing *opinio juris*.

For example, the 2009 *Loi 052/2009* of Burkina Faso, which implements the Rome Statute into domestic law, provides that neither amnesty nor pardon are applicable to genocide, crimes against humanity or war crimes.<sup>63</sup>

The 2000 Arusha Peace and Reconciliation Agreement for Burundi - a peace agreement between most parties to the armed conflict in the country - provided: "Amnesty shall be granted to all combatants of the political parties and movements for crimes committed as a result of their involvement in the conflict, but not for acts of genocide, crimes against humanity or war crimes, or for their participation in coups d'état."<sup>64</sup>

The 2009 Criminal Code of Burundi provides:

Le génocide, le crime contre l'humanité et le crime de guerre ne peuvent faire objet d'aucune loi d'amnistie<sup>65</sup>

The Agreement between the Royal Government of Cambodia and the United Nations, related to the investigation and prosecution of crimes committed during the period of Democratic Kampuchea, which includes genocide, crimes against humanity and grave breaches of the Geneva Conventions, states:

The 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<sup>66</sup>

The 2008 *Loi No.08-020* of the Central African Republic granted an amnesty to security forces, civil servants, as well as to armed opposition groups since 2003. The *Loi* provides:

Sont exclues de la présente Loi d'Amnistie, les incriminations visées par le Statut de Rome, notamment: les crimes de génocide; les crimes contre l'humanité; les crimes

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<sup>63</sup> *Loi 052/2009 portant détermination des compétences et de la procédure de mise en œuvre du Statut de Rome relatif à la Cour pénale internationale par les juridictions burkinabé*, Art.14 ("Les infractions et les peines prévues par la présente loi sont imprescriptibles. Elles ne sont susceptibles ni d'amnistie ni de grâce").

<sup>64</sup> Signed in Arusha, 28 Aug. 2000, Art.26(I)(L).

<sup>65</sup> *Loi n°1/05 du 22 avril 2009, Code Pénal du Burundi*, Art.171.

<sup>66</sup> Agreement between the UN and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, Art.11(1).

de guerre ou toute autre crime relevant de la compétence de la Cour Pénale Internationale<sup>67</sup>

The 2011 *Loi 011-022* of Comoros states that genocide, crimes against humanity and war crimes are not subject to amnesty nor to pardon.<sup>68</sup>

The *Loi 2003-309* of Côte d'Ivoire granted an amnesty to all those responsible for a number of attempted *coups d'état* and rebellions. However it expressly excludes gross human rights violations, serious violations of international humanitarian law, crimes set out in articles 5 to 8 of the Rome Statute and those at the African Charter on Human and Peoples' Rights.<sup>69</sup>

The 2014 Amnesty Law of the Democratic Republic of Congo excludes crimes against humanity and other crimes under international law. It provides as follows:

Sont exclus du champ d'application de la présente loi, le crime de génocide, les crimes contre l'humanité, les crimes de guerre, le terrorisme, les infractions de torture, de traitements cruels, inhumains ou dégradants, les infractions de viol et autres violences sexuelles, l'utilisation, la conscription ou l'enrôlement d'enfants et toutes autres violations graves, massives et caractérisées des droits humains<sup>70</sup>

The Constitution of Ecuador (2008) states that neither amnesty nor pardon may apply to genocide, crimes against humanity, war crimes or aggression.<sup>71</sup>

The Penal Code of Panama, enacted in 2007, states that neither pardon nor amnesty may apply to crimes against humanity - which also encompasses genocide and war crimes-, as well as enforced disappearance.<sup>72</sup>

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<sup>67</sup> *Loi No.08-020 portant amnistie générale à l'endroit des personnalités, des militaires, des éléments et responsables civils des groupes rebelles*, 13 Oct. 2008, Art.2.

<sup>68</sup> *Loi 011-022 du 13 décembre 2011, portant de Mise en œuvre du Statut de Rome*, Art.14 ("Les infractions et les peines prévues par la présente loi sont imprescriptibles. Elles ne sont susceptibles ni d'amnistie ni de grâce").

<sup>69</sup> *Loi n° 2003-309 du 8 août 2003 portant amnistie*, Art.4 ("La présente loi d'amnistie ne s'applique pas: b) aux infractions constitutives de violations graves des droits de l'homme et du droit international humanitaire; d) aux infractions visées par les articles 5 à 8 du Traité de Rome sur la Cour Pénale Internationale (CPI) et la Charte Africaine des Droits de l'Homme et des Peuples").

<sup>70</sup> *Loi n°014/006 du 11 février 2014 portant amnistie pour faits insurrectionnels, faits de guerre et infractions politiques*, Art.4.

<sup>71</sup> *Constitución de la República del Ecuador*, Art.80 ("Las acciones y penas por delitos de genocidio, lesa humanidad, crímenes de guerra, desaparición forzada de personas o crímenes de agresión a un Estado serán imprescriptibles. Ninguno de estos casos será susceptible de amnistía").

<sup>72</sup> *Código Penal de Panamá*, Art.115(3) ("No se aplicará el indulto ni la amnistía en los delitos contra la Humanidad y en el delito de desaparición forzada de personas").

The Philippines 'Act defining and penalizing enforced or involuntary disappearance' contains a provision banning amnesty for enforced disappearance. It says:

Persons who are charged with and/or guilty of the act of enforced or involuntary disappearance shall not benefit from any special amnesty law or other similar executive measures that shall exempt them from any penal proceedings or sanctions<sup>73</sup>

The 2006 Law implementing the Rome Statute into national law in Uruguay, *Ley 18.026*, contains a prohibition on amnesties and pardons (the wording suggests even post-conviction pardons) for genocide, crimes against humanity and war crimes.<sup>74</sup>

The 1999 Constitution of Venezuela, as amended in 2009, provides that human rights violations, crimes against humanity and war crimes will be investigated and prosecuted. In addition, neither amnesty nor pardon may apply to them.<sup>75</sup>

To conclude, Amnesty International considers that a Convention on crimes against humanity should provide that amnesties and similar measures of impunity that prevent the emergence of truth, a final judicial determination of guilt or innocence, and full reparations to victims and their families, are prohibited.

#### 4. MILITARY COURTS

**Recommendation: The Convention should provide that persons suspected of criminal responsibility for crimes against humanity may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of military jurisdictions.**

Military courts - as well as military commissions - are often used as a means of escaping genuine investigation and prosecution of crimes under international law or human rights violations. Amnesty International has concluded - after more than five decades of fighting impunity - that only ordinary civilian courts should be competent to prosecute those suspected of criminal responsibility for genocide, crimes against humanity, war crimes, torture, enforced disappearance, extrajudicial executions and human rights violations.<sup>76</sup>

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<sup>73</sup> Republic Act No.10353, 23 July 2012, Sec.23.

<sup>74</sup> *Ley 18.026 of 4 Oct. 2006*, Art.8 ("Improcedencia de amnistía y similares. Los crímenes y penas tipificados en los Títulos I a III de la Parte II de la presente ley, no podrán declararse extinguidos por indulto, amnistía, gracia, ni por ningún otro instituto de clemencia, soberana o similar, que en los hechos impida el juzgamiento de los sospechosos o el efectivo cumplimiento de la pena por los condenados").

<sup>75</sup> Constitution of the Bolivarian Republic of Venezuela, Art.29 ("[L]as acciones para sancionar los delitos de lesa humanidad, violaciones graves a los derechos humanos y los crímenes de guerra son imprescriptibles (...) Dichos delitos quedan excluidos de los beneficios que puedan conllevar su impunidad, incluidos el indulto y la amnistía").

<sup>76</sup> Amnesty International, Fair Trials Manual (POL 30/002/2014), 9 April 2014. The Manual is also available in Arabic, French, Spanish, and Russian.

Indeed, there is a growing acceptance that military courts should not have jurisdiction to try members of the military and security forces for human rights violations or crimes under international law.

Amnesty International has already explained its position in the 'Fair Trial Manual': military courts should be used only to try military personnel - and never civilians - for breaches of military discipline, those that only military personnel may commit, to the exclusion of any crime under international law, including crimes against humanity, or human rights violation.<sup>77</sup>

#### 4.1. HUMAN RIGHTS TREATIES AND TREATY BODIES PRONOUNCEMENTS

The Inter-American Convention on Forced Disappearances contains an explicit prohibition on military courts for alleged perpetrators of the said crime. It reads as follows:

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<sup>78</sup>

Fifteen states are parties to this regional instrument. Only one state, Mexico, made a reservation to article IX at the time of depositing the instrument of ratification in 2002, but it was withdrawn 12 years later.

In its Concluding Observations on Chile the HRC made the following recommendation:

[t]hat the law be amended so as to restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature<sup>79</sup>

The HRC also recommend to Croatia to:

Ensure that the Amnesty Law is not applied in cases of serious human rights violations or violations that amount to crimes against humanity or war crimes<sup>80</sup>

Regarding Colombia the CAT stated:

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<sup>77</sup> See: International Commission of Jurists, *Military jurisdiction and international law* (Geneva 2004) and Comisión Colombiana de Juristas, *Tribunales Militares y graves violaciones de derechos humanos* (Bogotá 2011).

<sup>78</sup> Inter-American Convention on Forced Disappearance of Persons, Art.IX. The Convention was adopted at Belem do Pará, Brazil, on 9 June 1994. Entry into force: 28 March 1996.

<sup>79</sup> Concluding Observations of the HRC, Chile, CCPR/C/79/Add.104 (1999), para.9(2).

<sup>80</sup> Concluding Observations of the HRC, Croatia, CCPR/C/HRV/CO/2, 4 Nov. 2009, para.10.

The Committee reiterates its concern that the military justice system continues to assume jurisdiction in cases of gross human rights violations, including extrajudicial executions carried out by the security forces, thereby undermining the impartiality of those investigations<sup>81</sup>

In its Report on a Mission to Equatorial Guinea the UN Working Group on Arbitrary Detention said:

the jurisdiction of military courts should be limited exclusively to military offences committed by armed forces personnel and they should have no jurisdiction to try civilians<sup>82</sup>

#### 4.2. DECLARATIONS AND OTHER INSTRUMENTS

The 1992 UN Declaration on the Protection of all Persons from Enforced Disappearance provides that persons suspected of criminal responsibility for 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<sup>83</sup>

The Updated Set of principles for the protection and promotion of human rights through action to combat impunity is of a similar view. Thus,

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<sup>84</sup>

#### 4.3. MILITARY COURTS IN REGIONAL AND NATIONAL TRIBUNALS

The Inter-American Court of Human Rights in the *Mapiripán Massacre v. Colombia* case, said:

[t]he criminal military jurisdiction is to be restricted and exceptional in scope and intended to protect special juridical interests linked to the duties assigned to the armed forces by law. Therefore, civilians are not to be judged in this jurisdiction, and only military personnel are to be tried for crimes or misdemeanors which, by their very

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<sup>81</sup> CAT/C/COL/CO/4, 4 May 2010, para.16.

<sup>82</sup> A/HRC/7/4/Add.3, 18 February 2008, para.100(f)

<sup>83</sup> Adopted by General Assembly resolution 47/133 of 18 December 1992, para.16(2).

<sup>84</sup> E/CN.4/2005/102/Add.1, 8 Feb. 2005, Principle 29, Restrictions on the jurisdiction of military courts.

nature, harm the juridical interest of the military<sup>85</sup>

Likewise, in the *Rosendo Radilla v. Mexico* case, the regional Court stated, regarding enforced disappearances, that:

[T]he commission of acts such as the forced disappearances of persons against civilians by the members of the military can never be considered as a legitimate and acceptable means for compliance with the military mission. It is clear that those behaviors are openly contrary to the duties of respect and protection of human rights and, therefore, are excluded from the competence of the military jurisdiction<sup>86</sup>

The Full Panel of the Constitutional Court of Colombia found on the scope of military courts:

[T]he tie between the criminal act and the service-related activity is broken when the crime is unusually grave, as in the case of crimes against humanity. Under these circumstances, the case must be allocated to regular courts, given the total contradiction between the crime and the constitutional mandates of the security forces.<sup>87</sup>

#### 4.4. NATIONAL LEGISLATION

Over the last decades, several constitutions have restricted the competence of the military jurisdiction to offenses of military nature, to the exclusion of ordinary crimes and crimes under international law. The Constitutions of Bolivia,<sup>88</sup> Cabo Verde,<sup>89</sup> Ecuador,<sup>90</sup> El

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<sup>85</sup> IACtHR, *Durand and Ugarte v. Peru* case, Judgment of Aug. 16, 2000, para.117; see also case of the *Mapiripán Massacre v. Colombia*, Judgment of Sept. 15, 2005, para.202.

<sup>86</sup> IACtHR, *Radilla-Pacheco v. Mexico*, Judgment of Nov. 23, 2009, para.277.

<sup>87</sup> Judgment C-358 of August 5, 1997 (quotation at "*Mapiripán Massacre*" v. *Colombia* case Judgment, para.205).

<sup>88</sup> *Nueva Constitución Política del Estado Plurinacional de Bolivia*, Art.180(3) ("La jurisdicción ordinaria no reconocerá fueros, privilegios ni tribunales de excepción. La jurisdicción militar juzgará los delitos de naturaleza militar regulados por la ley").

<sup>89</sup> *Constituição da República de Cabo Verde*, 2010, Art.210(1) ("Ao Tribunal Militar de Instância compete o julgamento de crimes que, em razão da matéria, sejam definidos por lei como essencialmente militares, com recurso para o Supremo Tribunal de Justiça, nos termos da lei").

<sup>90</sup> *Constitución de la República del Ecuador*, 2008, Art.160 ("Los miembros de las Fuerzas Armadas y de la Policía Nacional serán juzgados por los órganos de la Función Judicial; en el caso de delitos cometidos dentro de su misión específica, serán juzgados por salas especializadas en materia militar y policial, pertenecientes a la misma Función Judicial. Las infracciones disciplinarias serán juzgadas por los órganos competentes establecidos en la ley").

Salvador,<sup>91</sup> and Paraguay,<sup>92</sup> are among the examples.

The law implementing the Rome Statute into Uruguay law provides that genocide, crimes against humanity, war crimes, torture, enforced disappearance and extrajudicial are not subject to the competence of military courts.<sup>93</sup> Likewise, military courts were abolished in Argentina in 2008, so genocide, crimes against humanity and war crimes, as any other crime under national law is, therefore, under the competence of ordinary civilian courts.<sup>94</sup>

In response to a recent governmental initiative in Colombia to expand the scope of military courts, 12 UN Special Rapporteurs expressed concerns that the Bill in question "would unjustifiably extend the jurisdiction of military and police courts to offences that should clearly fall under the jurisdiction of ordinary courts". They also said:

[w]e believe that the adoption of the proposed reform would represent a significant step back in Colombia's efforts to comply with its international human rights and humanitarian law obligations. This is especially serious in the context of the significant efforts made by the Colombian State to address and prevent repetition of the notorious human rights violations committed in the past, in particular the extrajudicial killings carried out between 2002 and 2008 by some members of the armed forces<sup>95</sup>

In conclusion, Amnesty International recommends that the Convention on crimes against humanity provide that persons suspected of criminal responsibility for crimes against humanity shall be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of military jurisdictions.

## 5. RESERVATIONS

### **Recommendation: The Convention should prohibit any reservations**

The ILC has rightly observed that: "[t]here is well-established practice in this area: there are more reservations to human rights treaties and codification treaties than to any other type of

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<sup>91</sup> *Constitución de la República*, 1983 (as amended), Art.216(3) ("Gozan del fuero militar los miembros de la Fuerza Armada en servicio activo por delitos y faltas puramente militares").

<sup>92</sup> *Constitución Nacional*, 1992, Art.174 ("Los tribunales militares solo juzgarán delitos o faltas de carácter militar, calificados como tales por la ley, y cometidos por militares en servicio activo. Sus fallos podrán ser recurridos ante la justicia ordinaria").

<sup>93</sup> *Ley 18.026*, Art.11 ("Los crímenes y delitos tipificados en la presente ley no podrán considerarse como cometidos en el ejercicio de funciones militares, no serán considerados delitos militares y quedará excluida la jurisdicción militar para su juzgamiento").

<sup>94</sup> *Ley 26.394* (2008).

<sup>95</sup> Open letter by Special Procedures mandate-holders of the United Nations Human Rights Council to the Government and the Congress of the Republic of Colombia, 29 Sept. 2014.

treaty".<sup>96</sup>

Amnesty International recommends that the Convention on crimes against humanity should expressly prohibit any reservations, as in Article 120 of the Rome Statute, which states:

No reservations may be made to this Statute

In line with what Amnesty International said during the Rome Statute drafting process, a ban on reservations would be appropriate for on crimes against humanity to ensure that all states parties assume the same obligations and that these obligations are readily known to all states and to the general public.<sup>97</sup> As a leading scholarly authority and former ILC member explained with reference to the Rome Statute: "The exclusion of reservations preserves the integrity of the text, which is infringed only by the transitional provision of article 124."<sup>98</sup> In a similar sense a non-governmental organizations also stated: "Permitting reservations [to the Rome Statute] would undermine the force and moral authority behind the treaty and weaken the nature of the obligations embodied in it".<sup>99</sup>

Like the Rome Statute, some human rights treaties also expressly prohibit reservations, including the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment,<sup>100</sup> the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;<sup>101</sup> and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty,<sup>102</sup> among others.

The Inter-American Court of Human Rights in its *Opinion on the Effect of Reservations on the Entry into Force of the American Convention on Human Rights* has also clarified and limited the scope of the Vienna Convention on the Law of Treaties with respect to human rights instruments:

The Court must emphasize, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both

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<sup>96</sup> Guide to Practice on Reservations to Treaties, Sixty-third session (26 April-3 June and 4 July-12 Aug. 2011) (A/66/10/Add.1), p.373.

<sup>97</sup> Amnesty International, *The International Criminal Court: Making the right choices - Part IV, Establishing and financing the court and final clauses* (IOR 40/004/1998), III(b).

<sup>98</sup> G. Hafner, Article 120, *Commentary on the Rome Statute: Observers' Notes, Article by Article*, O. Triffterer, ed., (Baden-Baden: Nomos Verlagsgesellschaft 1999) 1251.

<sup>99</sup> Human Rights Watch, *Commentary for the March-April Preparatory Committee Meeting* (1998).

<sup>100</sup> Article 21 (E.T.S. 126, entered into force Feb. 1, 1989).

<sup>101</sup> Article 9 (adopted 30 April 1956, entered into force 30 April 1957).

<sup>102</sup> Article 2 (adopted on 8 June 1990, OAS, T.S. No. 73).

against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction<sup>103</sup>

Since reservations are prohibited under the Rome Statute, and the Convention on crimes against humanity is complementary to it, Amnesty International considers that it may not be logical to permit them under the new treaty. Not prohibiting reservations to a convention on crimes against humanity could open the door to states making reservations which could defeat the object and purpose of the treaty and, in addition, could create a situation in which states parties to the Rome Statute - 123 to date - may be allowed to circumvent the strict regime contained in the Rome Statute and, therefore, indirectly defeat the object and purpose of the Rome Statute, too. As the ILC Special Rapporteur has rightly stated in his recent report: "[a] Convention on crimes against humanity should avoid any conflicts with the Rome Statute".<sup>104</sup>

## IV. RECOMMENDATIONS

Amnesty International considers that the ILC, while drafting the Convention on crimes against humanity, should codify existing rules of customary international law in the field of international criminal law, as well as emerging norms that contribute towards the effective prosecution of those suspected of criminal responsibility for crimes against humanity. As the Special Rapporteur has rightly stated: "[i]n several ways the adoption of a convention could promote desirable objectives not addressed in the Rome Statute".

To that end, the organization makes the following initial recommendations:

### 1. UNIVERSAL JURISDICTION

The Convention should require states parties to try persons for crimes against humanity committed outside their territories which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.

### 2. *AUT DEDERE AUT JUDICARE* (EXTRADITE OR PROSECUTE)

The Convention should provide that states parties shall exercise jurisdiction whenever a person suspected of criminal responsibility for crimes against humanity is found in any territory subject to their jurisdiction, unless the person is extradited to another state or surrendered to an international criminal court.

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<sup>103</sup> IACtHR, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, 24 Sep. 1982, para.29.

<sup>104</sup> ILC, First Report on crimes against humanity, para.21.

### 3. AMNESTIES AND SIMILAR MEASURES OF IMPUNITY

The Convention should provide that amnesties and any similar measure of impunity that prevent the emergence of truth, a final judicial determination of guilt or innocence, and full reparation to victims and their families, are prohibited.

### 4. MILITARY COURTS

The Convention should provide that persons suspected of criminal responsibility for crimes against humanity shall be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of military jurisdictions.

### 5. RESERVATIONS

The Convention on crimes against humanity should provide that no reservation may be made to the treaty.

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