



AMNESTY INTERNATIONAL CONDITIONAL SUPPORT TO THE DRAFT ARTICLES ON CRIMES AGAINST HUMANITY ADOPTED BY THE INTERNATIONAL LAW COMMISSION IN FIRST READING

Introduction

Since 2014 Amnesty International has been closely following the International Law Commission (ILC) as it develops its Draft Articles on Crimes against Humanity. To that end, the organization has published three papers commenting on the draft Convention on crimes against humanity¹ with the goal of ensuring that the draft articles best represent a progressive reading of international law. In addition, the organization sent, along with a number of other non-governmental organizations (NGOs), two letters to the ILC Special Rapporteur on crimes against humanity raising some concerns in 2016 and 2017.²

Draft Articles on Crimes against Humanity

The Draft Articles on Crimes against Humanity³ were provisionally adopted by the ILC in first reading this year and has been transmitted, through the Secretary-General, 'to Governments, international organizations and others for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018'.⁴ It includes 15 draft articles, a draft preamble, an annex and commentaries to them.

Amnesty International position on a draft convention on crimes against humanity⁵

When the ILC announced in 2014 the drafting of articles for the purposes of an international convention on crimes against humanity, Amnesty International welcomed that decision. The organization stated that such a treaty should be drafted bearing in mind the standards contained in the Rome Statute of the International Criminal Court and other progressive

¹ Amnesty International, 'International Law Commission: Initial recommendations for a convention on crimes against humanity' (AI Index: IOR 40/1227/2015), April 2015; Amnesty International, 'International Law Commission: Second report on crimes against humanity: positive aspects and concerns Initial recommendations for a convention on crimes against humanity' (AI Index: IOR 40/3606/2016), May 2016; Amnesty International, 'International Law Commission: Commentary to the third report on crimes against humanity' (AI Index: IOR 40/5817/2017), April 2017.

² Joint letter to the International Law Commission Special Rapporteur on Crimes against Humanity, 23 February 2016 (AI Index: IOR 53/3512/2016) and Joint letter to the Special Rapporteur of the International Law Commission on Crimes against Humanity, 27 January 2017 (AI Index: IOR 53/5579/2017).

³ Report on the work of the sixty-ninth session (2017) (1 May-2 June and 3 July-4 August 2017), A/72/10, 'Text of the draft articles on crimes against humanity adopted by the Commission on first reading', p.10, available at: <http://legal.un.org/docs/?path=..ilc/reports/2017/english/chp4.pdf&lang=EFSRAC>

⁴ UN Doc. A/72/10, Chapter IV, Crimes against Humanity, para.43.

⁵ In 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', ILC, First report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, A/CN.4/680, 17 Feb. 2015, para.2.



iterations of obligations under international law as a baseline for the progressive development of international criminal law, aimed at ending the perpetration of crimes against humanity and ensuring accountability. In such a way, the future Convention may not only consolidate customary rules, such as the states' obligation to investigate and prosecute crimes against humanity at national level, but also expand the potential to help end impunity (for example, through the *aut dedere aut judicare* obligation regarding crimes of sexual violence, persecution or deportation amounting to crimes against humanity, among others).

Some provisions that should be supported by states

Amnesty International welcomes several provisions proposed by the ILC. Among them, the clauses on the *jus cogens* character of the prohibition of crimes against humanity (Preamble, para.3); the explicit reference to Article 7 of the Rome Statute (Preamble, para.6); and that recalling the rights of victims, witnesses and others (Preamble, para.9), must be highlighted. Furthermore, provisions on *aut dedere aut judicare* (draft Article 10), on superior orders (draft Article 6(4)), and the non-applicability of statutes of limitation (draft Article 6(6)), among others, are also a positive contribution for a strong Convention on Crimes against Humanity. Likewise, and despite the fact that wording should be enhanced, Amnesty International welcomes the clause on *non-refoulement* (draft Article 5); the detailed approach to the issue of mutual legal assistance (draft Article 14); and the provision requiring each state party to provide procedures enabling victims to obtain reparation for crimes against humanity committed abroad (draft article 12(3)).

Some general concerns

The organization is of the view that the Draft Articles, as it is today, may and must be considerably improved by the ILC in 2019. For example, the Draft Articles lack fundamental provisions, such as a ban on amnesties, military courts and reservations. The organization also believes that the Draft Articles should not be silent as to its territorial scope, stating that is binding upon each party in respect of its entire territory.

If those provisions were included, they could decisively contribute to a much stronger Convention and, therefore, to a more useful legal tool for states determined to put an end to impunity.

All these concerns, plus some suggestions regarding to several Draft Articles will be the subject of an extensive analysis the organization plans to issue in 2018.

The lack of a specific provision prohibiting amnesties

The lack of a provision prohibiting amnesties for those suspected of criminal responsibility for crimes against humanity is a deeply concerning failure on the part of the ILC. Such a ban would be in full accordance with the ILC mandate of the codification of international law.⁶ As set out below, the jurisprudence of international, regional and national courts, as well as

⁶ Article 1(1), Statute of the International Law Commission, adopted by the GA 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.



recent national legislation (which reflects a widespread *opinio juris*), customary international law prohibits amnesties for crimes against humanity, as well as for genocide and war crimes.

The commentary to Draft Article 10 seems to, in rather unfortunately unclear language, suggest that an amnesty enacted at national level would be impermissible as a violation of the obligations of a state party under the Convention to criminalize crimes against humanity, and specifically its *aut dedere aut judicare* obligation and the obligation to provide a remedy to victims. However, no reason is given by the ILC not to include a provision expressly prohibiting amnesties. Since the purpose of the potential Convention is 'to put an end to impunity for the perpetrators of these crimes', as stated in the Preamble, an express prohibition of amnesties would be a logical corollary of the whole instrument.

In any case, the organization considers that a prohibition of amnesties for crimes under international law under customary international law is a necessary legal consequence of the peremptory character (*jus cogens*) of the prohibition of certain conduct, including crimes against humanity.

The International Tribunal for the Former Yugoslavia,⁷ the European Court of Human Rights,⁸ the Inter American Court of Human Rights,⁹ the Special Court for Sierra Leone,¹⁰ the African Commission on Human and Peoples' Rights,¹¹ and national courts of Argentina,¹² Brazil,¹³ Chile,¹⁴ El Salvador,¹⁵ Ethiopia,¹⁶ and Peru,¹⁷ among others states where crimes against

⁷ ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1, Trial Chamber, Judgment, 10 Dec. 1998, paras.155-6.

⁸ ECHR, *Ould Dah v. France*, Decision of 17 March 2009.

⁹ Inter American Court of Human Rights, case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Judgment of November 24, 2010 (Preliminary Objections, Merits, Reparations, and Costs), para.137.

¹⁰ 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.

¹¹ African Commission on Human and Peoples' Rights, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Decision of 15 May 2006, para.201.

¹² 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*").

¹³ 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").

¹⁴ Suprema Corte, Sala penal, *Molco case*, Rol N° 559-2004, 13 Dec. 2006; and Corte de Apelaciones de Valparaiso, ROL:96-10, MJJ24129, 4 June 2010.

¹⁵ Sala de lo Constitucional de la Corte Suprema de Justicia, *44-2013/145-2013, Inconstitucionalidad*, 13 July 2016.

¹⁶ Central High Court, Addis Abeba, *Col. Mengistu Haile Mariam et al. case*, May 23rd, 1995 ('It is, however, a well established custom and belief that war crimes and crimes against humanity are not subject to amnesty and aren't barred by limitation').

¹⁷ Corte Superior de Justicia de Lima (Primera Sala Penal Especial), *Julio Rolando Salazar Monroe et al.*, 03-2003-1° SPE/CSJLI,



humanity have been committed in the past, have shared the view that amnesties for those suspected of criminal responsibility for crimes against humanity are impermissible under (customary) international law.

Since the adoption of the Rome Statute of the International Criminal Court a number of states have passed laws or amended national constitutions prohibiting amnesties for crimes under international law, including crimes against humanity. See for example Argentina,¹⁸ Burkina Faso,¹⁹ Burundi,²⁰ Central African Republic,²¹ Colombia,²² Comoros,²³ Côte d'Ivoire,²⁴

8 April 2008, para.216.

¹⁸ *Ley 27.156*, 31 July 2015, article 1 ('Las penas o procesos penales sobre los delitos de genocidio, de lesa humanidad y crímenes de guerra contemplados en los artículos 6º, 7º y 8º del Estatuto de Roma de la Corte Penal Internacional y en los tratados internacionales de derechos humanos con jerarquía constitucional, no pueden ser objeto de amnistía, indulto o conmutación de pena, bajo sanción de nulidad absoluta e insanable del acto que lo disponga').

¹⁹ *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').

²⁰ *Loi n°1/05 du 22 avril 2009, Code Pénal du Burundi*, Art.171 ('Le génocide, le crime contre l'humanité et le crime de guerre ne peuvent faire objet d'aucune loi d'amnistie').

²¹ *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 ('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 de guerre ou toute autre crime relevant de la compétence de la Cour Pénale Internationale').

²² *Acuerdo de Paz*, 24 Nov. 2016, art.40 ('No serán objeto de amnistía ni indulto ni de beneficios equivalentes los delitos de lesa humanidad, el genocidio, los graves crímenes de guerra -esto es, toda infracción del Derecho Internacional Humanitario cometida de forma sistemática -, la toma de rehenes u otra privación grave de la libertad, la tortura, las ejecuciones extrajudiciales, la desaparición forzada, el acceso carnal violento y otras formas de violencia sexual, la sustracción de menores, el desplazamiento forzado, además del reclutamiento de menores, todo ello conforme a lo establecido en el Estatuto de Roma').

²³ *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');

²⁴ *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').



Democratic Republic of Congo,²⁵ Ecuador,²⁶ Panama,²⁷ Paraguay,²⁸ Uruguay,²⁹ and Venezuela.³⁰ Equally important are the Philippines' Republic Act No.10353 of 23 July 2012,³¹ and Mexico's Law of 26 June 2017,³² which prohibit amnesty for enforced disappearances and torture, respectively.

ICRC's view on amnesties for war crimes and crimes against humanity

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 crimes³³

The Commentary to the rule reads as follows:

²⁵ *Loi n°014/006 du 11 février 2014 portant amnistie pour faits insurrectionnels, faits de guerre et infractions politiques*, Art.4 ('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').

²⁶ *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').

²⁷ *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').

²⁸ *Ley No.5877 que implementa el Estatuto de Roma que crea la Corte Penal Internacional*, Official Gazette, 29 September 2017, Art.10 ('Los hechos punibles y penas tipificadas en la presente Ley, no podrán declararse extinguidos por indulto, conmutación, amnistía o por cualquier otro instituto de clemencia que impida el juzgamiento de los sospechosos o el cumplimiento efectivo de las condenas impuestas').

²⁹ *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').

³⁰ *Constitución de la República Bolivariana de Venezuela*, 2009, 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').

³¹ Sec.23 ('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');

³² *Ley general para prevenir, investigar y sancionar la tortura y otros tratos o penas crueles, inhumanos o degradantes*, 21 June 2017, Art.17 ('Artículo 17.- Ninguna persona procesada o sentenciada por el delito de tortura podrá beneficiarse de inmunidades, indultos, amnistías, figuras análogas o con similares efectos').

³³ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 159, p.611.



[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 allows war criminals or other persons guilty of crimes against humanity to escape severe punishment. The ICRC agrees with this interpretation³⁴

Other sources

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

[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 punishment³⁵

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 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 humanity³⁶

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 committed³⁷

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

³⁴ J.M. Henckaerts and L. Doswald-Beck, p.612.

³⁵ Article II(5).

³⁶ Adopted by General Assembly resolution 3074 (XXVIII) of 3 December 1973, paras.1 and 8.

³⁷ Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, para.18.



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 court³⁸

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 sanction³⁹

Conclusion

Amnesty International considers that a provision containing an explicit prohibition of amnesties for all those suspected of criminal responsibility for crimes against humanity, grounded in a widespread international practice and on the *opinio juris* of states, should be incorporated into the Draft Articles.

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³⁸ 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").

³⁹ Adopted by General Assembly resolution 47/133 of 18 December 1992, art.18.