

**INTER-AMERICAN COURT OF
HUMAN RIGHTS**

**AMICUS CURIAE BRIEF IN
THE CASES OF “*LA
CANTUTA*” AND “*BARRIOS
ALTOS*” *vs. PERU*
(MONITORING COMPLIANCE
WITH JUDGMENTS)**

**AMNESTY
INTERNATIONAL**



***Amicus curiae* brief on the granting of pardons to persons convicted of serious human rights violations or crimes under international law**

I. Introduction

Amnesty International has the honour of submitting this brief for the consideration of the Inter-American Court of Human Rights as an *amicus curiae* in the case regarding the *joint monitoring of compliance with judgments for the cases of Barrios Altos and La Cantuta*, both against Peru.

2. The purpose of this brief, prompted by the recent pardon granted by the President of Peru Pedro Pablo Kuczynski to former head of state Alberto Fujimori, is to present to this honourable Court different standards of international and comparative law in relation to the issuing of pardons, as well as how they relate to crimes under international law¹ and serious human rights violations.

To that end, the brief firstly addresses the obligation of States to investigate and punish serious human rights violations and crimes under international law in accordance with the rules of treaty law and the jurisprudence of various international human rights mechanisms. Secondly, the organization presents several examples, from both the Americas and other regions, where States have in recent years restricted the application of a reprieve or pardon, particularly in relation to crimes under international law and other serious human rights violations. This brief then draws a distinction between the issuing of a reprieve or pardon and the possibility of early release, including on humanitarian grounds. Finally, by way of conclusion, the organization respectfully calls on this honourable Court to use the current compliance monitoring hearing to deepen its analysis of the concept of the reprieve or pardon and clarify how it is distinct from early release, including on humanitarian grounds, which must not under any circumstances lead to quashing of the conviction.

II. The obligation under treaty law to investigate and punish serious human rights violations and crimes under international law

There is no question that in recent decades there has been a growing tendency to bring people suspected of criminal responsibility for human rights violations and crimes under international law before national and international judicial bodies. Although this is still the exception rather than the rule for such crimes, the establishment of international and internationalized or hybrid courts, and the current proceedings before the International Criminal Court, together with important rulings in various countries that have imposed penalties for such conduct, reflect a process that seems to be taking root, albeit slowly.

However, the obligation to investigate and prosecute the commission of crimes under international law is a longstanding one. There are a number of international conventions that refer to this obligation.

The **Convention on the Prevention and Punishment of the Crime of Genocide** confirms that

¹ For Amnesty International, crimes of international law are any crimes or offences that entail criminal responsibility under international law. Genocide, crimes against humanity, war crimes, torture, enforced disappearance of persons and extrajudicial executions are examples of this category of crimes.

genocide, whether committed in times of peace or times of war, is a crime of international law that the States parties undertake to prevent and punish. It stipulates that:

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.²

Meanwhile, the **First Geneva Convention of 12 August 1949** states that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following article.³

The 2016 Commentary of the International Committee of the Red Cross on this article explains that, “to be effective, penal sanctions must be sufficiently dissuasive: they should stop ongoing violations of humanitarian law and prevent their repetition or the occurrence of new violations”⁴.

The **Supplementary Convention on the Abolition of Slavery** of 1956 establishes that:

The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States parties to this Convention and persons convicted thereof shall be liable to very severe penalties.⁵

The **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** stipulates that the States parties must ensure that all acts of torture are offences under their criminal law. It adds that:

Each State party shall make these offences punishable by appropriate penalties which take into account their grave nature.⁶

As is widely known, the **Rome Statute of the International Criminal Court**, which prosecutes the crime of aggression, genocide, crimes against humanity and war crimes, establishes the

² Convention on the Prevention and Punishment of the Crime of Genocide (approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948), 78 UNTS 277, article V. Entry into force: 12 January 1951.

³ Geneva Convention of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (approved on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the protection of war victims, held in Geneva from 12 April to 12 August 1949), article 49. Entry into force: 21 October 1950.

⁴ Commentary of 2016, para. 2842.

⁵ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, article 3(1), 226 UNTS 3. Entry into force: 30 April 1957.

⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984), article 4(2), 1464 UNTS 85. Entry into force: 26 June 1987.

complementary nature of this court, stating that the States parties have a duty to exercise their own national criminal jurisdictions in the first instance.

In any event, its Preamble states that “the most serious crimes of concern to the international community as a whole must not go unpunished” and also affirms that the States have “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.⁷

Moreover, the **Convention on the Enforced Disappearance of Persons** establishes that:

Each State party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.⁸

At the regional level, the **Inter-American Convention to Prevent and Punish Torture** stipulates that:

The States parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.⁹

The **Inter-American Convention on Forced Disappearance of Persons** also states that:

The States parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity.¹⁰

III. Other international standards regarding the obligation to investigate and punish serious human rights violations and crimes under international law

The **Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity** (1973) establish the prohibition on taking measures that might affect the sentence imposed, specifying that:

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.¹¹

Similarly, the **Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary**

⁷ Rome Statute of the International Criminal Court (approved in Rome on 17 July 1998), 2187 UNTS 3. Entered into force on 1 July 2002.

⁸ Article 7(1). International Convention for the Protection of All Persons from Enforced Disappearance, article 12(2), adopted by the General Assembly on 20 December 2006. Opened for signature on 6 January 2007.

⁹ Inter-American Convention to Prevent and Punish Torture (adopted in Cartagena de Indias, Colombia, on 9 December 1985), article 6(2), Treaties Series, OAS, No.67. Entry into force: 28 February 1987.

¹⁰ Inter-American Convention on Forced Disappearance of Persons (adopted in Belém do Pará, Brazil, on 9 June 1994), article III. Entry into force: 28 March 1996.

¹¹ Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (General Assembly resolution 3074 (XXVIII) of 3 December 1973), para. 8.

and Summary Execution state that governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences.¹²

In the same vein, the **Declaration on the Protection of All Persons from Enforced Disappearance** stipulates that “[a]ll acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness”.¹³

The **Basic Principles and Guidelines on the Right to Reparation for Victims** stipulate that:

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.¹⁴

In view of the foregoing, it can be reasonably concluded that international law imposes on States not only the obligation to investigate human rights violations and crimes under international law, but also the obligation to punish the people found responsible for such unlawful conduct, in accordance with the gravity or seriousness of the crime, in order to avoid impunity and prevent similar acts in future.

The Special Rapporteur for crimes against humanity of the UN's International Law Commission, professor Sean Murphy, stated, in concrete terms, that these different formulations mean that “language calling for the penalty to reflect the gravity of the offence serves to emphasize that ‘the penalties established should be akin to those normally established by Parties for serious, rather than minor, crimes’”.¹⁵

IV. The prohibition of pardons in the jurisprudence of international human rights mechanisms

Although international jurisprudence relating to the scope of the reprieve or pardon is not extensive (unlike the legislative advances that have explicitly clarified the prohibition of amnesties), new rules are emerging to limit the circumstances and scope of reprieves or pardons.

In this sense, this honourable Court has had the opportunity in the past to rule on the scope of the pardon under the provisions of the American Convention on Human Rights. Indeed, in the case of *Gutiérrez Soler vs. Colombia*, the court stated:

It is likewise needed for competent ordinary criminal courts to investigate and punish the law enforcement staff members that take part in cases of human rights violations.

¹² Economic and Social Council resolution 1989/65 of 24 May 1989.

¹³ UN Doc. A/Res/47/133, 12 February 1993.

¹⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Res. 60/147, approved by the General Assembly of 16 December 2005, Principle 4.

¹⁵ Second report on crimes against humanity presented by Sean D Murphy, Special Rapporteur, UN Doc. A/CN.4/690, 21 January 2016, para. 83.

On the other hand, the State shall refrain from resorting to amnesty, pardon, statute of limitations and from enacting provisions to exclude liability, as well as measures aimed at preventing criminal prosecution or at voiding the effects of a conviction.¹⁶

The **United Nations Human Rights Committee** has also issued opinions on the scope of the pardon. In its examination of the report submitted by **Argentina** pursuant to article 40 of the International Covenant on Civil and Political Rights, the Committee noted as follows:

The Committee expresses concern that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces. Respect for human rights may be weakened by impunity for perpetrators of human rights violations.¹⁷

Likewise, in its Concluding Observations on **Algeria**, the Committee made the following recommendation, indicating that the State should:

Ensure that no pardon, commutation or remission of sentence or termination of public proceedings is granted in respect of any person, whether a State official or member of an armed group, who has committed or commits serious human rights violations such as massacres, torture, rapes and disappearances, that a thorough and exhaustive inquiry is conducted by the competent judicial authorities into other violations and that the courts are able to examine the crimes of which these persons are allegedly guilty before any decision on a pardon, commutation or remission of sentence or termination of public proceedings is taken.¹⁸

In the *Kepa Urra Guridi vs. Spain* case, the **Committee against Torture** expressed its opinion in relation to the pardon granted to persons convicted of torture in the following terms:

With regard to the alleged violation of article 4, the Committee recalls its previous jurisprudence to the effect that one of the purposes of the Convention is to avoid allowing persons who have committed acts of torture to escape unpunished. The Committee also recalls that article 4 sets out a duty for States parties to impose appropriate penalties against those held responsible for committing acts of torture, taking into account the grave nature of those acts. The Committee considers that, in the circumstances of the present case, the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment.¹⁹

In its Concluding Observations on the initial report of **Lebanon**, the Committee noted that:

The State party should repeal the amnesty laws of 1991 and 2005. It should also ensure that its laws preclude any possibility of granting amnesty to any person convicted

¹⁶ Inter-American Court of Human Rights, case of *Gutiérrez Soler vs. Colombia*, judgment of 12 September 2005, para. 97.

¹⁷ Human Rights Committee report A/50/40, 3 October 1995, para. 153.

¹⁸ UN Doc. CCPR/C/DZA/CO/3, 12 December 2007, subparagraph 7(c).

¹⁹ *Mr Kepa Urra Guridi vs. Spain*, Communication No. 212/2002, UN Doc. CAT/C/34/D/212/2002 (2005), para. 6(7).

of the crime of torture or any kind of pardon that violates the Convention.²⁰

In a similar vein, in its Concluding Observations on the fourth periodic report of **Armenia**, the Committee pointed out that:

The State party should also ensure that pardon, amnesty and any other similar measures leading to impunity for acts of torture are prohibited both in law and in practice.²¹

Similarly, in its Concluding Observations on **Cape Verde**, the Committee stated that:

Recalling its general comments No. 2 (2008) on the implementation of article 2 by States parties and No. 3 (2012) on the implementation of article 14 by States parties, the Committee reiterates that amnesty provisions or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability of the prohibition of torture and contribute to a climate of impunity. Accordingly, the Committee urges the State party to amend the Criminal Code to indicate that, where torture offences are concerned, granting of amnesty or pardon shall be inadmissible.²²

Moreover, in the Concluding Observations on **Morocco**, the Committee noted that:

The Committee is concerned by some of the existing legal provisions on torture, particularly those providing for the possibility of granting an amnesty or pardon to perpetrators of acts of torture.²³

Meanwhile, the **Committee on Enforced Disappearances**, in its Concluding Observations on **Bosnia and Herzegovina**, expressed its concern about:

... legislative proposals that would allow pardon for persons convicted of the crimes of genocide, war crimes and crimes against humanity after serving three-fifths of the sentence.²⁴

V. Prohibition of the reprieve or pardon in comparative law

In recent years, various States have restricted the granting of reprieves or pardons for crimes under international law or serious human rights violations, both through legislation and in the case law of their courts. Amnesty International draws the attention of this honourable Court to several examples of standards prohibiting pardons for persons responsible for such acts, trusting that they will be useful for this Court's analysis of the present case.

Act 27,156 (2015) of **Argentina**, "Prohibition of pardons, amnesties and commutation of sentences for crimes against humanity", establishes that:

Sentences or criminal proceedings regarding the crimes of genocide, crimes against humanity and war crimes referred to in articles 6, 7 and 8 of the Rome Statute of the

²⁰ UN Doc. CAT/C/LBN/CO/1, 30 May 2017, para. 47.

²¹ UN Doc. CAT/C/ARM/CO/4, 26 January 2017, para. 8.

²² UN Doc. CAT/C/CPV/CO/1, 26 January 2017, para. 13.

²³ UN Doc. CAT/C/MAR/CO/4, 21 December 2011, para. 6.

²⁴ UN Doc. CED/C/BIH/CO/1, 3 November 2016, para. 25.

International Criminal Court and in the international human rights treaties with constitutional status cannot be the subject of an amnesty, pardon or commutation, under penalty of the act that ordered it being declared absolutely and irremediably invalid.²⁵

Meanwhile, the 2016 Peace Agreement between the conflicting parties in **Colombia** states that:

Crimes against humanity, genocide, serious war crimes – that is, any violation of international humanitarian law committed as part of a systematic attack – hostage taking or other serious deprivations of liberty, torture, extrajudicial executions, enforced disappearances, rape and other forms of sexual violence, child abduction, forced displacement and the recruitment of minors will all be ineligible for an amnesty or pardon, in every case as established in the Rome Statute.²⁶

The Criminal Code of **Costa Rica**, after stipulating that “amnesties for political or related crimes may only be granted by the Legislative Assembly”, goes on to add that “pardons, applicable to ordinary crimes, involve the total or partial remission of the sentence imposed by a final judgment, or its commutation to another more lenient sentence, and does not include any accessory penalties”, which seems to suggest that neither measure would be applicable to crimes under international law or serious human rights violations.²⁷

The Comprehensive Organic Criminal Code of **Ecuador** establishes that:

The National Assembly may grant amnesties for political offences and pardons on humanitarian grounds, in accordance with the Constitution and the law.

They may not be granted for crimes committed against the public administration or for genocide, torture, enforced disappearances, kidnapping or murder for political or conscientious reasons.²⁸

In **Mexico**, two recently passed laws prohibit the granting of pardons, as well as amnesties and other measures with similar effects, for people found guilty of torture or enforced disappearances. The General Law on Torture states that:

No person prosecuted or sentenced for the crime of torture shall be eligible for immunities, pardons, amnesties, or arrangements having similar effects.²⁹

The General Law on Enforced Displacements, meanwhile, establishes as follows:

The application of amnesties, pardons or similar measures of impunity that prevent the investigation, prosecution or punishment and any other measure to establish the truth

²⁵ Act 27,156, article 1, of 31 July 2015 (Official Gazette).

²⁶ Final Agreement, 24 November 2016, “Final agreement to end the conflict and build a stable and lasting peace”, article 40.

²⁷ Criminal Code, articles 89 and 90, respectively.

²⁸ Comprehensive Organic Criminal Code, 2014, article 73.

²⁹ General Law to Prevent, Investigate and Punish Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 26 June 2017 (Official Journal of the Federation), article 17.

and obtain full reparation for the offences covered by this Law is prohibited.³⁰

Concerning pardons, **Panama's** 2007 Criminal Code stipulates that:

The pardon is an individual ground for annulment of the sentence, which may be granted by the President of the Republic with the respective government ministry. It is only applicable to political crimes and annuls the sentence.

The amnesty is an act of clemency for which any person linked to a political crime may be eligible; it may only be granted by the legislative body and it cancels the prosecution and the sentence.

Neither pardons nor amnesties may be applied to crimes against humanity or the crime of enforced disappearance of persons.³¹

In **Paraguay**, the recently adopted Act 5,877 (2017), which implements the provisions of the Rome Statute of the International Criminal Court into domestic law, defining genocide, crimes against humanity and war crimes, states that:

The crimes and punishments defined in this Law may not be annulled by a pardon, commutation, amnesty or any other act of clemency that prevents the prosecution of suspects or effective enforcement of the sentences imposed.³²

The new Criminal Code of the **Dominican Republic** of 2015, establishes that:

No statute of limitations is applicable to genocide, enforced disappearance of persons, other serious crimes against humanity, serious war crimes, or the sentences imposed as a consequence thereof.

Persons convicted of such offences may not be granted a pardon or amnesty, or any similar form of clemency that prevents the prosecution of suspects or the effective serving of the sentence by convicted persons.³³

Act 18,026 (2006) of **Uruguay**, which adapted the Rome Statute to the country's legislation, stipulates that:

The crimes and punishments defined in Sections I to III of Part II of this law may not be annulled by a pardon, amnesty, reprieve or any other form of clemency, sovereign or similar, that prevents the prosecution of suspects or the effective serving of the sentence by convicted persons.³⁴

Finally, the **Venezuelan** Constitution states that:

³⁰ General Law on Enforced Disappearance of Persons, Disappearance Committed by Individuals and the National Missing Persons Search System, of 17 November 2017 (Official Journal of the Federation), article 15.

³¹ Criminal Code of Panama, article 116.

³² Act 5,877 of 29 September 2017 (Official Gazette), article 10 (Inadmissibility of amnesties and similar measures).

³³ Act No. 550-14 establishing the Criminal Code of the Dominican Republic, article 95.

³⁴ Act 18,026 of 4 October 2006 (Official Gazette), article 8 (Inadmissibility of amnesties and similar measures).

The State will be obliged to investigate and legally punish crimes against human rights committed by its authorities.

There is no statute of limitations for actions to punish crimes against humanity, serious human rights violations and war crimes. Human rights violations and crimes against humanity will be investigated and tried by the ordinary courts. Such crimes are not eligible for legal benefits that could result in impunity, including pardons and amnesties.³⁵

In a similar vein, States from regions beyond the Americas have enacted legislation prohibiting pardons for various crimes under international law, including crimes against humanity.

In this regard, Act 052/2009 of **Burkina Faso**, which transposes the provisions of the Rome Statute into domestic law, establishes that:

There is no statute of limitations for the offences and penalties provided for in this law. They are not eligible for either amnesty or pardon.³⁶

The Criminal Code of **Burundi**, meanwhile, states that:

Pardons may not annul sentences delivered for genocide, crimes against humanity or war crimes.³⁷

Likewise, the Criminal Code of the **Central African Republic** of 2010, after defining genocide, crimes against humanity and war crimes, establishes that:

Public action relating to the crimes provided for in Sections I, II and II of this chapter as well as civil action and the sentences imposed are not subject to a statute of limitations.

The aforementioned crimes are not eligible for amnesty or pardon.³⁸

Act 011-022 of 13 December 2011 of **Comoros**, which incorporates the Rome Statute into local law, states that:

There is no statute of limitations for the offences and penalties provided for by this law. They are not eligible for either amnesty or pardon.³⁹

The criminal legislation of the **Democratic Republic of the Congo** adopts a similar stance to the other examples mentioned:

No statute of limitations applies to the crimes and penalties provided for in Section IX on crimes against the peace and security of mankind. They are not eligible for amnesty

³⁵ Constitution of the Bolivarian Republic of Venezuela, article 29.

³⁶ Act 052/2009 determining the jurisdiction and procedures for application of the Rome Statute of the International Criminal Court by the courts of Burkina Faso, article 14.

³⁷ Criminal Code of Burundi, Act No. 1/05 of 22 April 2009 amending the Criminal Code, article 170. Similarly, article 171 stipulates that: "The amnesty is an act whereby the legislative authority forbids the institution or continuation of criminal proceedings and erases any convictions previously handed down. Genocide, crimes against humanity and war crimes shall be excluded from any amnesty law".

³⁸ Act No. 10,001 of 6 January 2010 establishing the Criminal Code of the Central African Republic, article 162.

³⁹ Act 011-022 of 13 December 2011 implementing the Statute of Rome, article 14.

or pardon.⁴⁰

In the **Philippines**, Act 10,353 (2012) on enforced or involuntary disappearances, provides as follows:

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.⁴¹

La Supreme Court of Justice of **Argentina** has also had occasion to analyse the scope of the application of the pardon. In the *Mazzeo* case, it upheld the invalidity of pardons issued to persons under judicial investigation, as well as pardons that might benefit persons already convicted of crimes against humanity. In this regard, the highest court of Argentina maintained that:

Thus, as the case in question concerns the investigation of these kinds of crimes, irrespective of the extent of the pardon, it is unenforceable for these types of proceedings as, the granting of pardons to defendants involved in the commission of crimes against humanity would constitute a contravention of the State's international duty to investigate, establish responsibility and punish. Likewise, pardons for convicted persons also contravene the State's duty to apply appropriate penalties commensurate with the seriousness of such crimes.⁴²

Similarly, in the case of *More than 5,000 citizens vs. the Congress of the Republic*, in 2011, the Constitutional Court of **Peru** ruled that the pardon is not applicable to persons who have been convicted of crimes against humanity or of sexually abusing minors. The Court said that:

In fact, there are certain criminal offences that violate human dignity so profoundly that, in principle, the possibility of adopting measures that prevent their effective punishment is prohibited. Indeed, the Inter-American Court has indicated that "amnesty provisions, provisions regarding limitation periods and the establishment of measures designed to eliminate responsibility are inadmissible as they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, summary, extrajudicial or arbitrary execution and enforced disappearance, all of which are prohibited because they violate non-derogable rights recognized by international human rights law (see *Barrios Altos vs. Peru*, judgment of 14 March 2001, paragraph 41). The Constitutional Court interpreted that as precluding the possibility of adopting such measures for an act that constitutes a crime against humanity.

The Constitutional Court then went on to ask and answer the question:

⁴⁰ Act No. 15/022 of 31 December 2015 amending and supplementing the Decree of 30 January 1940 establishing the Criminal Code, 29 February 2016 (Official Gazette), article 34 bis.

⁴¹ Philippines, Republic Act No.10, 353, Act defining and penalizing enforced or involuntary disappearance, 23 July 2012, Sec. 23.

⁴² CSJN, '*Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad*'; M.2334.XLII '*Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad*' and M.2335.XLII '*Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad*', 13 July 2007, para. 31. See also '*Videla, Jorge Rafael y Massera, Emilio Eduardo s/ recurso de casación*', 31 August 2010, para. 12.

Are crimes against humanity the only crimes that, from an abstract perspective, cannot be pardoned or commuted? The legislature does not consider that to be the case as, pursuant to article 2 of Act No. 28,704, it considers that such forms of clemency are not applicable to persons convicted of sexually abusing minors, either.⁴³

VI. Distinction between the reprieve or pardon and the sentence reduction, including on humanitarian grounds

Amnesty International considers that there is a crucial distinction between the concept of the reprieve or pardon and early release, including on humanitarian grounds, and international law establishes different rules and standards for each situation.

Although neither treaty nor customary international law has clearly addressed the question of the reprieve or pardon granted after a sentence has been imposed, that is, once the investigation, proceedings and sentencing have taken place by means of a fair trial, insofar as a pardon annuls the conviction and sentence, it would be incompatible with international human rights law and international criminal law.

Therefore, Amnesty International is of the view that a State cannot fulfil its legal obligation to try and punish all persons reasonably suspected of criminal responsibility for crimes under international law and other serious human rights violations, including crimes against humanity, and then simply cancel the legal effect of the conviction by means of a reprieve or pardon.

However, a reprieve or pardon (irrespective of the terminology used) that has the legal effect of quashing a conviction for a crime of international law must be distinguished from a humanitarian measure (irrespective of the terminology used) intended to respect the dignity of persons who have been found guilty of such crimes, such as early release on humanitarian grounds, where such measures maintain the conviction even though the sentence may be waived.

Some States provide in their domestic legislation for the possibility of allowing early release on humanitarian grounds when the detained person has been diagnosed with a terminal illness, i.e. when there is reasonable medical likelihood that the health condition will continue to deteriorate, resulting in death. In such situations, in order to respect the dignity of the individual, States have allowed early release on humanitarian grounds to enable the person to die in dignity. However, such early release should not have the effect of erasing or quashing the conviction; it should merely end implementation of the sentence.

Early release on humanitarian grounds is not, in itself, at odds with international human rights law or international criminal law. Although the Rome Statute of the International Criminal Court stipulates that persons convicted of crimes under its jurisdiction should not be released before having served the sentence imposed, it does establish the possibility of the Court itself considering early release under certain circumstances, provided that the individual has served at least two thirds of the sentence imposed.⁴⁴ In accordance with article 110(4), the Court –

⁴³ Constitutional Court, full session, Case No. 0012-2010-PI/TC, 11 November 2011, paras. 46 and 47.

⁴⁴ Rome Statute of the International Criminal Court (approved in Rome on 17 July 1998), 2187 UNTS 3. Entered into force on 1 July 2002, article 110(1).

and not a public body within the State where the convicted person is serving the sentence – may reduce the sentence if the convicted person has cooperated with the Court or if there are other factors that justify his or her early release, even though such early release shall in no way alter the conviction itself. The Rules of Procedure and Evidence set out the criteria that must be considered by the Court when deciding whether to grant early release to a prisoner, namely:

- a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime;
- b) The prospect of the resocialization and successful resettlement of the sentenced person;
- c) Whether the early release of the sentenced person would give rise to significant social instability;
- d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release;
- e) Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.⁴⁵

Consequently, international law would not prohibited a genuine decision by a State to allow the early release of a person convicted of crimes under international law on humanitarian grounds, based on the person's worsening physical or mental health or advanced aged. However, international law and the practice of States seem to draw a distinction between a reprieve or pardon on the one hand, and the decision to grant early release, including on humanitarian grounds, on the other.

Thus, if a person convicted of crimes under international law or another serious violation or abuse of human rights is granted a reprieve or pardon that annuls the sentence, that would violate the State's international duty to investigate, try and punish with due diligence crimes under international law and other serious human rights violations or abuses. Furthermore, if a reprieve or pardon is granted to a person who is criminally responsible for crimes under international law or other serious human rights violations or abuses shortly after they have been convicted, or after a period of time that is not proportional to the seriousness of the crime, the decision would be in breach of the same obligations of due diligence.

VII. Conclusion

In view of the foregoing, it can be inferred that international law imposes on States a clear obligation to independently and impartially investigate human rights violations and crimes under international law. International law also requires States to ensure that persons found responsible for such offences or crimes are punished in accordance with the gravity or seriousness of the crime, in order to avoid impunity and prevent similar acts from being committed in the future.

Various States in our region and in other parts of the world have taken steps to restrict the application of the reprieve or pardon for crimes under international law or serious human rights violations, both through legislation and in the case law of their courts. Indeed, this has

⁴⁵ Rule 223.

occurred in nearly all countries that have witnessed in their territories serious human rights violations or crimes under international law.

The jurisprudence of this honourable Inter-American Court and various UN committees has also opposed the granting of a reprieve or pardon if it would prevent the effective serving of the sentences imposed on persons found guilty of serious human rights violations or crimes under international law.

Taking into account all of the above, Amnesty International respectfully calls on this honourable Court to use the current compliance monitoring hearing in the cases of *La Cantuta* and *Barrios Altos versus Peru* to deepen its analysis of the concept of the reprieve or pardon and clarify its distinction from early release, including on humanitarian grounds, which must not under any circumstances lead to quashing of the conviction or constitute a measure that perpetuates impunity.

Amnesty International is concerned about the recent granting by the Peruvian authorities of a pardon to former president Alberto Fujimori, although the State has yet to release evidence of a terminal illness that would warrant his early release. Furthermore, the circumstances under which this decision was taken did not make it possible to be certain of its scope and whether the measure taken will also give rise to quashing of the conviction.

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