

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. []

**BETWEEN:**

**BALTASAR GARZÓN**

*Applicant*

**and**

**SPAIN**

*Respondent*

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**EXPERT OPINION ON INTERNATIONAL STANDARDS RELATING TO  
THE DUTY TO INVESTIGATE, AND THE IMPERMISSIBILITY OF  
AMNESTY OF PRESCRIPTION, IN RELATION TO CRIMES AGAINST  
HUMANITY**

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**Expert Opinion on International Standards Relating to the Duty to Investigate, and the Impermissibility of Amnesty or Prescription, in relation to Crimes Against Humanity**

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## I. INTRODUCTION

1. This expert opinion is submitted on behalf of INTERIGHTS in support of the application by Baltasar Garzón to the European Court of Human Rights. The comments and opinions that follow are those of the undersigned.

2. This opinion seeks to place the investigations undertaken by Judge Baltasar Garzón into incidents of enforced disappearance during the Spanish Civil War (“the Civil War”) and subsequently during the Francoist regime in Spain (“the Junta Period”) in the context of the wider body of international law and practice relating to the investigation and prosecution of such acts. In particular, the comments address the applicability of statutes of limitation and amnesties to these acts as a matter of international law.

3. The following analysis sets out relevant international and comparative national law and practice regarding the limited applicability of amnesties and rules of prescription. It is concluded that, although there is scope for controversy and reasonable disagreement as to the characterization of the acts in question under international law at the time of their commission, and as to the legal implications of this characterization, Judge Garzón’s decision to initiate criminal investigations into the above-mentioned acts cannot be said to represent an irrational interpretation of existing or developing rules of international law. In fact, the investigation launched by Judge Garzón is consistent with the trend, both in international law and in national legal systems, not to permit the application of amnesties or statutes of limitation to conduct amounting to a crime against humanity since such laws are inconsistent with a state’s obligation to investigate and prosecute such conduct. Indeed, the investigation in question provided an important means of furthering compliance with the obligation to investigate.

4. More generally, the prosecution of a judge for undertaking a criminal investigation, rather than merely addressing an impugned decision through the normal judicial process, must be regarded as an extreme power, reserved for truly exceptional cases. In view of the substantial body of law and practice favouring the investigation and prosecution of crimes against humanity, regardless of an amnesty or statute of limitation, the prosecution of Judge Garzón for instigating an investigation in these circumstances appears to be an inappropriate and unnecessary use of prosecutorial power.

## II. BRIEF FACTUAL BACKGROUND

5. During the period in question Judge Garzón served as a *Juez de Instrucción* (examining magistrate) on Spain’s *Audiencia Nacional*. Within the Spanish legal system a *Juez de Instrucción* controls and directs criminal investigations, where necessary working alongside the police and public prosecutors. Reports of crimes within the jurisdiction of the *Juez de Instrucción* are sent to his or her office and the *Juez de Instrucción* may decide whether to proceed with a judicial investigation or to dismiss the case. The *Audiencia Nacional* has jurisdiction over crimes including organized crime, terrorism, drug trafficking, serious financial

crime and those crimes under international law over which Spanish courts have jurisdiction.

6. On 16 October 2008 Judge Garzón ordered the opening of an investigation into the enforced disappearance of a large number of individuals during the Spanish Civil War (c. 1936-1939) and subsequently during the Francoist Junta Period (c. 1939-1973). In particular, the investigation concerned what is alleged to have been a systematic pattern of abduction, confinement, disappearance (and, in many cases, the consequent torture and/or killing of individuals) orchestrated by the Franco government between 17 July 1936 and December 1951.<sup>1</sup> This conduct was investigated in respect of the crime under Spanish national law of “*detención ilegal, sin dar razón del paradero de la víctima*” (“unlawful detention, without providing information concerning the whereabouts of the victim”).<sup>2</sup> However, Judge Garzón also characterized the acts under investigation as occurring “in the context of crimes against humanity”.<sup>3</sup>

7. The particular focus of the investigation was the alleged widespread and systematic practice of the abduction, imprisonment and disappearance of Republican governmental and military personnel, political activists and their children. With regard to the latter, it is alleged that during the Civil War and in the years that followed, these children were often taken from their families and relocated to others, their former identity records having been expunged. These are the so-called “*Los Niños Perdidos Del Franquismo*”. The total number of disappeared individuals within the scope of the investigation was estimated by Judge Garzón to be in the region of 114,266 individuals.<sup>4</sup> Judge Garzón suspended his investigation on 18 November 2008 (before the indictment for *prevaricación* was issued) in view of the fact that all of those individuals under investigation were deceased.

8. However, following complaints by *Sindicato de Funcionarios Manos Limpias*, a Spanish trade union and *Falange Española de las J.O.N.S.*, a far right group, Judge Garzón was prosecuted for “*prevaricación*”, which is a form of abuse of public office. A charge of “*prevaricación*” requires it to be shown that a judge acted in a manner that was flagrantly irrational, manifestly contrary to the law and any recognized method of legal interpretation. Evidently, the threshold set by this test is high. A decision of the *Tribunal Supremo* of 3 February 2010 rejected an application to stay the prosecution for *prevaricación* and permitted the matter to proceed to trial.

### **III. THE PRACTICE OF ENFORCED DISAPPEARANCES IN SPAIN AS A POSSIBLE CRIME AGAINST HUMANITY**

9. A substantial amount of practice in international law relates to the non-applicability of statutes of limitation and amnesties to crimes against humanity. As a preliminary matter, therefore, it is necessary to consider whether it could be

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<sup>1</sup> Auto, 16 October 2008, Juzgado Central de Instrucción No. 5, pps. 5-6 (paras 4-5).

<sup>2</sup> Auto, 18 November 2008, Sumario 53/2008, p. 5, Juzgado Central de Instrucción No. 5. See further Article 166, Criminal Code (1995), Spain.

<sup>3</sup> Auto, 16 October 2008, Juzgado Central de Instrucción No. 5.

<sup>4</sup> Auto, 16 October 2008, Juzgado Central de Instrucción No. 5, p. 23.

argued that the conduct subject to investigation by Judge Garzón was a crime against humanity at the time of its perpetration.

10. The first aspect of this question concerns the point in time at which individuals could, in principle, be held individually criminally responsible under international law for such crimes. In 1946 the surviving Nazi leadership faced trial at the International Military Tribunal at Nuremberg (“IMT Nuremberg”) pursuant to the London Charter<sup>5</sup> and most were convicted and individually punished for participating in the commission of crimes under international law, including crimes against humanity. According to the judgment of the IMT:

[F]rom the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity. [...] Insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.<sup>6</sup>

The IMT therefore accepted that individuals could be held individually responsible for crimes against humanity under international law at least as of 1939 onwards and a number of defendants convicted at Nuremberg were convicted of crimes against humanity relating to conduct perpetrated from this period.<sup>7</sup> Soon after the judgment of the IMT the principles of law it recognized, including the principle that individuals may be individually punishable for participating in certain crimes under international law, were affirmed by the United Nations General Assembly in Resolution 95(I).<sup>8</sup> Following the International Military Tribunal at Nuremberg many hundreds of individuals were tried before national military commissions in Europe and the Far East, often applying international law, and punished for conduct in violation thereof.

11. For its part, the IMT had jurisdiction over crimes against humanity defined as conduct including “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds”.<sup>9</sup> The International Military Tribunal for the Far East also had jurisdiction over crimes against

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<sup>5</sup> London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, London, 8 August 1945, entry into force 8 August 1945, 8 *U.N.T.S.* 279.

<sup>6</sup> *Trial of the Major War Criminals Before the International Military Tribunal* Vol. I, (Nuremberg International Military Tribunal, 1947), p. 226.

<sup>7</sup> *E.g.* Hermann Göring, Rudolf Hess, Wilhelm Frick, Wilhelm Keitel, Julius Streicher and Walther Funk.

<sup>8</sup> GA Resolution 95 (I), 11 December 1946, A/Res/95(I).

<sup>9</sup> The London Charter only permitted crimes against humanity to be prosecuted “in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated [e.g. war crimes or crimes against peace]”. This, however, was a jurisdictional requirement of the tribunal rather than reflecting a definitional element of crimes against humanity. Other Post-WWII international criminal jurisdictions, for example, permitted perpetrators to be tried pursuant to international law for crimes against humanity without a nexus with other species of crime. *See* Article 2(c), Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity.

humanity defined in identical terms. Similarly, Control Council Law No. 10, which provided the basis for the prosecution of individuals by national military tribunals by the Allied Powers, provided the relevant military tribunals with jurisdiction to prosecute crimes against humanity defined as:

Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.<sup>10</sup>

12. Thus, although the precise point at which individual criminal responsibility became an established element of international law is a question which invites controversy and is a matter over which there is scope for reasonable disagreement, it is at least arguable that persons could be held individually responsible for crimes against humanity under international law from 1939 onward.

13. A further question which arises is whether the acts that were subject to investigation by Judge Garzón (either individually or in combination) may have amounted to a crime against humanity as that concept was understood in 1939. The Judge's investigation pertained to allegations of an orchestrated pattern of abduction, confinement, disappearance (and, in many cases, the consequent torture and/or killing) of many individuals, estimated to number in the region of 114,000,<sup>11</sup> between 17 July 1936 and December 1951.

14. Although forced disappearance is now widely recognized as a crime against humanity,<sup>12</sup> this is a relatively recent development. In the 1930s and 1940s, as indicated by the Statutes of the various post-World War II military tribunals, forced disappearance was not considered to be a crime against humanity in its own right. Nevertheless, it is arguable that a widespread or systematic practice involving the abduction, imprisonment and, ultimately, the disappearance of Republican political activists and their children on grounds of their political allegiances could amount to the crime of persecution.

15. Persecution on political grounds was a crime over which the IMT Nuremberg, the IMT Far East and national military tribunals established under Control Council Law No. 10 all had jurisdiction. Indeed, many of the defendants charged before the IMT Nuremberg were ultimately convicted of persecution on racial and religious grounds including, for example, Martin Bormann,<sup>13</sup> Arthur Seyss-Inquart,<sup>14</sup> Walther Funk,<sup>15</sup> Wilhelm Frick,<sup>16</sup> Julius Streicher<sup>17</sup> and Hermann

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<sup>10</sup> Article 2(c), Control Council Law No. 10.

<sup>11</sup> Auto, 16 October 2008, Juzgado Central de Instrucción No. 5, p. 23.

<sup>12</sup> *See, for instance*, Article 7(i), Rome Statute of the International Criminal Court, Rome 17 July 1998, entry into force 1 July 2002.

<sup>13</sup> *Trial of the Major War Criminals Before the International Military Tribunal Vol. I*, (Nuremberg International Military Tribunal, 1947), p. 339.

<sup>14</sup> *Ibid.* pps. 328-330.

<sup>15</sup> *Ibid.* pps. 305-306.

<sup>16</sup> *Ibid.* p. 301. .

<sup>17</sup> *Ibid.* p. 303.

Göring.<sup>18</sup> Moreover, the IMT Nuremberg found acts including, *inter alia*, deprivation of liberty,<sup>19</sup> acts designed to eliminate Jews from political life,<sup>20</sup> torture, cruelty or ill-treatment<sup>21</sup> and killings<sup>22</sup> to constitute persecution. That systematic or widespread detention, imprisonment, confinement of individuals on political, racial or religious grounds can constitute persecution has also been confirmed by the more recent jurisprudence of the *ad hoc* tribunals.<sup>23</sup> In addition, to the material elements of the crime, the essential mental element is that the acts in question must be animated by a discriminatory intent, whether on political, racial or religious grounds.<sup>24</sup>

16. In this light, it is arguable that, if proven, a policy involving the widespread or systematic abduction, imprisonment and enforced disappearance of Republican activists, officials and their children by the Francoist regime in Spain during the Junta Period may have amounted to a crime against humanity under international law, at least from 1939 onwards.

17. A further issue concerns Judge Garzón's investigations into the alleged practice of enforced disappearances in Spain ca. 1936-1938 and continuing thereafter. In those aspects of its judgment addressing the crime against humanity of persecution (and other crimes against humanity) the IMT Nuremberg often referred to events occurring prior to 1939 in considering whether an individual was individually responsible for the commission of a crime against humanity. For example, finding Wilhelm Frick guilty of the crime against humanity of persecution, the Tribunal observed:

Frick drafted, signed, and administered many laws designed to eliminate Jews from German life and economy. His work formed the basis of the Nuremberg Decrees [enacted into law in 1935, subsequently followed by a number of further regulations] and he was active in enforcing them. [...]<sup>25</sup>

18. Similarly, finding Julius Streicher guilty of persecution the Tribunal observed:

Streicher had charge of the Jewish boycott of 1st April, 1933. He advocated the Nuremberg Decrees of 1935. He was responsible for the demolition on 10th August, 1938, of the Synagogue in Nuremberg.

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<sup>18</sup> *Ibid.* p. 282.

<sup>19</sup> *Ibid.* p. 66

<sup>20</sup> *See, e.g.* Judgment re Frick, *ibid.* p. 300 and Judgment re Funk, *ibid.* p. 305.

<sup>21</sup> *Ibid.* p. 66.

<sup>22</sup> *Ibid.*

<sup>23</sup> *See, e.g. Prosecutor v. Blagoje Simic et al.*, Trial Judgment, 17 October 2003, IT-95-9-T, paras. 61-62 and *Prosecutor v. Tihomir Blaskic*, Trial Judgment, 3 March 2000, IT-95-14-T, paras. 234 and 688 (holding that unlawful detention may constitute persecution and finding that the imprisonment of male Muslim civilians qualified as this crime against humanity).

<sup>24</sup> These requirements are now reflected in the Elements of Crime of the Rome Statute. *See* ICC Elements of Crimes, ICC Assembly of States Parties, entry into force 9 September 2002, ICC-ASP/1/3(part II-B), p. 11.

<sup>25</sup> *Trial of the Major War Criminals Before the International Military Tribunal Vol. I*, (Nuremberg International Military Tribunal, 1947), p. 300.

And on 10th November, 1938, he spoke publicly in support of the Jewish pogrom which was taking place at that time.<sup>26</sup>

The Tribunal went on to enumerate a further series of egregious acts in which Streicher was involved in the period following 1938, concluding that his conduct “clearly constitutes persecution on political and racial grounds”.<sup>27</sup>

19. Thus, even though persecution had not necessarily been clearly established as a crime against humanity under international law in the period 1936-1939, the approach of the IMT Nuremberg indicates that events or a pattern of conduct occurring prior to 1939 (and continuing thereafter), may well be relevant in assessing whether such a pattern of conduct, considered as a whole, amounted to a crime against humanity under international law. Thus, from the perspective of international law, Judge Garzón’s decision to investigate events occurring during the Spanish Civil War c. 1936-1939 cannot be regarded as unreasonable, aberrant or irrational.

#### **IV. THE PERMISSIBILITY OF AMNESTIES UNDER INTERNATIONAL LAW**

20. A substantial and growing body of practice exists at both the international, regional and national levels dealing with the applicability of amnesties to grave human rights violations. Taking into account the jurisprudence of international courts, tribunals and supervisory mechanisms and the position adopted by numerous national legal systems, there is now an extensive and widespread practice precluding amnesties, *inter alia*, for crimes against humanity, torture and other grave human rights violations. Judge Garzón’s decision to investigate patterns of enforced disappearance during the Spanish Civil War and, thereafter, in the Junta Period, in spite of Spain’s 1977 Amnesty Act, is consistent with this much larger body of practice at the international and national levels.

##### **1. The Universal Human Rights Framework**

21. Both the Human Rights Committee, established to monitor the implementation of the International Covenant on Civil and Political Rights (“ICCPR”)<sup>28</sup> and the Committee against Torture established to monitor the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”)<sup>29</sup> have developed a substantial body of practice dealing with amnesties in respect of torture, crimes against humanity and other grave human rights violations. In all of this practice, both bodies have consistently affirmed that amnesties are generally incompatible with obligations incumbent upon States Parties to these instruments.

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<sup>26</sup> *Ibid.* p. 302.

<sup>27</sup> *Ibid.* p. 302.

<sup>28</sup> International Covenant on Civil and Political Rights, New York 16 December 1966, entry into force 23 March 1976, 999 *U.N.T.S.* 171.

<sup>29</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York 10 December 1984, entry into force 26 June 1987, 1465 *U.N.T.S.* 85.

## A. The ICCPR

22. In both General Comments on the ICCPR and in the views expressed in response to communications concerning alleged violations of the Convention, the Human Rights Committee has consistently adopted the position that amnesties in respect of serious human rights violations are incompatible with the obligations imposed by the ICCPR, in particular the obligation to investigate and prosecute such acts.

23. In General Comment 20,<sup>30</sup> which concerns the prohibition of torture, inhuman or degrading treatment or punishment, the Committee observed:

[S]ome States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.<sup>31</sup>

24. Subsequently, in General Comment 31, which concerns the general legal obligations imposed upon States Parties by the Covenant, the Human Rights Committee made the broader observation that,

Where investigations ... reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with a failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6).<sup>32</sup>

Developing this analysis, the Committee noted that “where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties ...”<sup>33</sup>

25. This is a position which the Human Rights Committee has also affirmed in its Concluding Observations in respect of state reports. Of particular significance, for present purposes, is the Committee’s 2008 Concluding Observations on Spain which state:

While taking note of the recent decision of the National High Court to consider the question of the disappeared, the Committee is concerned at the continuing applicability of the 1977 amnesty law. It recalls that

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<sup>30</sup> CCPR General Comment 20, HRI/GEN/1/Rev.1, p. 30.

<sup>31</sup> *Ibid.* para. 15.

<sup>32</sup> CCPR General Comment 31, 29 March 2004, CCPR/C/21/Rev.1/Add. 13, para. 18.

<sup>33</sup> *Ibid.*

crimes against humanity are not subject to a statute of limitations and draws the State Party's attention to its general comment No. 20 (1992), on article 7, according to which amnesties for serious violations of human rights are incompatible with the Covenant, and its general comment No. 31 (2004), on the nature of the general legal obligation imposed on States parties to the Covenant.<sup>34</sup>

In light of these observations the Committee recommended that Spain "should consider repealing the 1977 amnesty law [and] (b) take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity".<sup>35</sup>

26. In numerous other concluding observations, the Committee has, in similar terms, consistently condemned the promulgation of amnesty statutes in countries including Argentina,<sup>36</sup> Bolivia,<sup>37</sup> Cambodia,<sup>38</sup> Chile,<sup>39</sup> Croatia,<sup>40</sup> El Salvador,<sup>41</sup> Haiti,<sup>42</sup> Lebanon<sup>43</sup> and Sudan.<sup>44</sup>

27. As regards individual communications, the Human Rights Committee has dealt with the question of amnesties in the views its has given in response to such communications. For instance, in the *Rodríguez v. Uruguay* communication, which concerned whether amnesty legislation enacted by the State Party in question was in compliance with its obligations under the Covenant, the Committee expressed the view that "amnesties for gross violations of human rights and legislation such as Law No. 15,848, *Ley de Caducidad de la Pretensión Punitiva del Estado*, are incompatible with the obligations of the State Party under the Covenant".<sup>45</sup> The Committee further observed that "the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses".<sup>46</sup>

## **B. The Convention against Torture**

28. Several provisions of the Convention against Torture also have a bearing on the permissibility of amnesty legislation which prevents the prosecution of acts of torture. Article 4(1) obliges States Parties to ensure that "all acts of torture are offences under its criminal law while Article 4(2) requires States Parties to "make these offences punishable by appropriate penalties which take into account their grave nature". In addition, Article 12 stipulates that "[e]ach State Party shall

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<sup>34</sup> Spain (2008), CCPR/C/ESP/CO/5, para. p. 2.

<sup>35</sup> *Ibid.*

<sup>36</sup> Argentina (2000), CCPR/CO/70/ARG, para 9.

<sup>37</sup> Bolivia (1998), CCPR/C/79/Add.73, para. 15.

<sup>38</sup> Cambodia (1999), CCPR/C/79/Add. 108, para. 6.

<sup>39</sup> Chile (1999), CCPR/C/79/Add. 104, para. 7.

<sup>40</sup> Croatia (2001), CCPR/CO/71/HRV, para. 11.

<sup>41</sup> El Salvador (1994), CCPR/C/79/Add. 34, para. 7.

<sup>42</sup> Haiti (1995), CCPR/C/79/Add.49, paras. 230-235.

<sup>43</sup> Lebanon (1998), CCPR/C/79/Add. 78, para. 12.

<sup>44</sup> Sudan (1997), CCPR/C/79/Add. 85, para. 17.

<sup>45</sup> *Rodríguez v. Uruguay*, HRC Communication No. 322 (1988), CCPR/C/51/D/322/1988, para. 12.4.

<sup>46</sup> *Ibid.*

ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction”. Article 13 stipulates that “[e]ach State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities”.

29. Mirroring the practice of the Human Rights Committee, the Committee against Torture has noted its concern at the application of amnesty legislation to torture in Concluding Observations in respect of Azerbaijan,<sup>47</sup> Bahrain,<sup>48</sup> Benin,<sup>49</sup> Chile,<sup>50</sup> Croatia,<sup>51</sup> Kyrgyzstan,<sup>52</sup> Peru,<sup>53</sup> Senegal,<sup>54</sup> and Venezuela,<sup>55</sup> among others. In making such observations, in practice the Committee often observes that amnesty laws are incompatible with the relevant State Party’s obligations under the Convention.<sup>56</sup>

30. Of particular relevance for present purposes are the CAT’s Concluding Observations on Spain’s 2009 State Report where the CAT specifically addressed the 1977 Amnesty Act. The Committee observed that,

While it takes note of the State party’s comment that the Convention against Torture entered into force on 26 June 1987, whereas the Amnesty Act of 1977 refers to events that occurred before the adoption of that Act, the Committee wishes to reiterate that, bearing in mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by the principle of legality or the statute of limitation. The Committee has received various interpretations of article 1, paragraph (c), of the Amnesty Act — which stipulates that amnesty shall not apply to acts that “entailed serious harm to the life or inviolability of persons” — to the effect that this article itself would in any case exclude torture from the offences subject to amnesty (arts. 12, 13 and 14).<sup>57</sup>

The Committee concluded its observations on this issue with a clear recommendation that “[t]he State Party should ensure that acts of torture, which also include enforced disappearances, are not offences subject to amnesty”.<sup>58</sup> It further encouraged Spain “to continue to step up its efforts to help the families of victims to find out what happened to the missing persons, to identify them and to have their remains exhumed, if possible”. Finally, the CAT reiterated that “under

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<sup>47</sup> Azerbaijan (1999), paras. 68(e) and 69(c).

<sup>48</sup> Bahrain (2005), CAT/C/CR/34/BHR, para. 6(g).

<sup>49</sup> Benin (2001), A/57/44, para. 34(i).

<sup>50</sup> Chile (2004), CAT/C/CR/32/5, paras. 6(b) and 7(b).

<sup>51</sup> Croatia (1999), A/54/44, para. 66.

<sup>52</sup> Kyrgyzstan (1999), A/54/44, paras. 73(e) and 75(c).

<sup>53</sup> Peru (2006), CAT/C/PER/CO/4, para. 16.

<sup>54</sup> Senegal (1996), A/51/44, para. 112.

<sup>55</sup> Venezuela (2002), CAT/C/CR/29/2, para. 6(c).

<sup>56</sup> E.g. Peru (1999), A/55/44, para. 59(g); Chile (1999) *op cit*; Venezuela (2002) *op. cit.*

<sup>57</sup> Spain (2009), CAT/C/ESP/CO/5, para. 21.

<sup>58</sup> *Ibid.*

article 14 of the Convention, the State party must ensure that the victim of an act of torture obtains redress and has an enforceable right to compensation”.<sup>59</sup>

### C. UN Commission on Human Rights

31. For its part, the UN Commission on Human Rights has addressed the question of amnesties on numerous occasions, for instance, Resolution 2005/81 on Impunity, stated:

Amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes. [The Commission] urges States to take action in accordance with their obligations under international law and welcomes the lifting, waiving, or nullification of amnesties and other immunities [...]<sup>60</sup>

This statement has been reiterated by the Commission on Human Rights (as it then was), on numerous occasions.<sup>61</sup> Likewise, expert reports approved by the U.N. human rights machinery have also supported a limited role for amnesties. For example, in 2005 the Updated Set of Principles to Combat Impunity, prepared on behalf of the UN Commission on Human Rights, stated:

Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:

The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to [investigate and, if warranted, prosecute] or the perpetrators have been prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question; ...”<sup>62</sup>

The approach adopted by the various UN human rights monitoring mechanisms regarding the limited applicability of amnesties is also reflected in the jurisprudence of regional human rights courts and supervisory mechanisms.

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<sup>59</sup> *Ibid.*

<sup>60</sup> Human Rights Resolution 2005/81, 21 April 2005, para. 3 (adopted without a vote).

<sup>61</sup> *E.g.* UN Commission on Human Rights Resolutions: 2004/72, 21 April 2004, para. 3; 2005/44, 19 April 2005, para. 7; 2004/72, 21 April 2004, para 3; 2004/48, 20 April 2004, para 6; and 2002/79, 25 April 2002, para 2, (all adopted without a vote).

<sup>62</sup> Diane Orentlicher, Principle 24: Restrictions and Other Measures Relating to Amnesty, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, 8 February 2005, E/CN.4/2005/102/Add.1.

## 2. Regional Human Rights Systems

### A. The Inter-American System of Human Rights

#### (i) Inter-American Court of Human Rights

32. Like the HRC and CAT, the *jurisprudence constante* of the Inter-American Court of Human Rights has been that amnesties which seek to prevent the prosecution of torture, arbitrary killings or enforced disappearances are incompatible with the obligations contained in the American Convention on Human Rights.<sup>63</sup>

33. Amnesty laws have been found to be incompatible with several obligations contained in the ACHR. Article 1(1) of the American Convention on Human Rights provides that “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms...”, while Article 2 requires States Parties “to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms”. Article 8 of the Convention guarantees a right to a fair hearing (which, in the jurisprudence of the Inter-American Court includes the right of victims to have serious human rights violations investigated and, if necessary, prosecuted). Finally, Article 25 guarantees the right to an effective remedy.

34. In *Barrios Altos v. Peru*, which related to the extrajudicial killing of a group of civilians by members of the Peruvian armed forces, the Court, taking into account the above-mentioned obligations, held:

[A]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.<sup>64</sup>

The Court concluded by holding that:

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>65</sup>

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<sup>63</sup> American Convention on Human Rights, San José, 22 November 1969, entry into force, 19 July 1978.

<sup>64</sup> *Barrios Altos v. Peru*, Merits, 14 March 2001, Inter-Am. Ct. H. R. Series C. No. 75, para. 41 *et seq.*

<sup>65</sup> *Ibid.* para. 44.

In its subsequent interpretative judgment dealing with judgment on the merits in *Barrios Altos*, the Inter-American Court of Human Rights made clear that its findings in that case as to the invalidity of the laws in question was “general in nature”.<sup>66</sup> The Court’s position on amnesty legislation has been reaffirmed in numerous other cases including *Myrna Mack Chang v. Guatemala*,<sup>67</sup> *El Caracazo v. Venezuela*,<sup>68</sup> *Trujillo-Oroza v. Bolivia*,<sup>69</sup> and *Almonacid-Arellano et al v. Chile*<sup>70</sup> and now forms part of its *jurisprudence constante*. Most recently, in December 2010, the Court provided further confirmation of this line of case law, in *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, where the Court found that Brazil’s 1977 amnesty was incompatible with its obligations under the American Convention.<sup>71</sup> Finally, it should be noted that although a significant number of the cases before the Inter-American Court have been concerned with “self-amnesties” (that is to say amnesty laws passed by a regime to prevent the prosecution of the individuals comprising it) the Court has not hesitated to apply the principle laid down in *Barrios Altos v. Peru* in other cases too.<sup>72</sup>

(ii) Inter-American Commission on Human Rights

35. The Inter-American Commission on Human Rights has also had to deal with the question of amnesties on many occasions.<sup>73</sup> The Commission has consistently opined that amnesty laws are incompatible with the rights enshrined in the ACHR in communications including, for example, *Lucio Parada Cea et al. (El Salvador)*<sup>74</sup> and *Samuel Alfonso Catalan Lincoleo (Chile)*.<sup>75</sup> In the *Lucio Parada* communication, the Commission observed that “amnesty laws have deprived large segments of the population of the right to justice in their claims against those who committed excesses and acts of barbarity against them”.<sup>76</sup> It further found that “in approving and enforcing the General Amnesty Law, the Salvadoran State violated the right to judicial guarantees enshrined in Article 8(1) of the Convention [setting out the right to a fair trial], to the detriment of the surviving victims of torture”.<sup>77</sup> The Commission’s approach to this question has been reaffirmed on many occasions.<sup>78</sup>

<sup>66</sup> *Barrios Altos v. Peru*, Interpretation of the Judgment on the Merits. 3 September 2001. Inter-Am. Ct. H. R. Series C No. 83, para. 18.

<sup>67</sup> *Myrna Mack Chang v. Guatemala*, Merits, Reparations and Costs, 25 November 2003, Series C. No. 101, para. 276.

<sup>68</sup> *Caracazo v. Venezuela*, Reparations and Costs, 29 August 2002, Inter-Am. Ct. H. R. Series C No. 95, para. 119.

<sup>69</sup> *Trujillo-Oroza v. Bolivia*, Reparations and Costs, 27 February, 2002, Inter-Am. Ct. H. R. Series C No. 92, para. 106.

<sup>70</sup> *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, Inter-Am. Ct. H. R. Series C No. 154

<sup>71</sup> *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Merits, Reparations and Costs, 24 November 2010, Inter-Am. Ct. H. R., Series C. No. 219.

<sup>72</sup> *19 Tradesmen v. Colombia*, Merits, Reparations and Costs 5 July, 2004, Inter-Am. Ct. H. R. Series C No. 109, para. 261 *et seq.*

<sup>73</sup> Note that the decisions of the Commission, unlike the Court, are recommendatory rather than binding.

<sup>74</sup> *Lucio Parada Cea et al. (El Salvador)*, Case No. 10.408, Report No. 1/1999.

<sup>75</sup> *Samuel Alfonso Catalan Lincoleo (Chile)* Case No. 11.771, Report No. 61/2001.

<sup>76</sup> *Lucio Parada Cea et al. (El Salvador)*, Case No. 10.408, Report No. 1/1999, para. 108.

<sup>77</sup> *Ibid.* para. 123.

<sup>78</sup> See Annual Report of the Inter-American Commission on Human Rights (1996), OEA/Ser.L/V/II.95, Doc.7 rev., of March 14, 1997, Reports No. 36/96 (Chile), para. 78 and

## B. European Convention on Human Rights<sup>79</sup>

36. Although the European Court of Human Rights has been called upon less frequently than its Inter-American counterpart to determine whether amnesty laws comply with the obligations inherent in the ECHR, in the case of *Ould Dah v. France*, a case which concerned the prosecution *in absentia* of a Mauritanian army officer for acts of torture in his home state, the Court held:

*A n'en pas douter, écarter cette législation au profit de décisions ou de lois de circonstance adoptées par l'Etat du lieu des infractions, agissant pour protéger ses propres ressortissants ou, le cas échéant, sous l'influence directe ou indirecte des auteurs de ces infractions, en vue de les disculper, conduirait à paralyser tout exercice de la compétence universelle, et réduirait à néant le but poursuivi par la Convention du 10 décembre 1984. A l'instar du Comité des droits de l'homme des Nations Unies et du TPIY, elle considère que l'amnistie est généralement incompatible avec le devoir qu'ont les États d'enquêter sur de tels actes.*<sup>80</sup>

In addition, the Court has insisted on several occasions on the need for investigation and provision of an effective remedy in respect of serious crimes, including rape, torture and enforced disappearance.<sup>81</sup> This position is at one with the approach adopted, more generally, by the universal and regional mechanisms for the protection of human rights in respect of amnesties.

## 3. Other International Instruments and Practice

37. A further aspect of international practice concerning amnesties arises in the context of instruments concluded in the aftermath of armed conflict or protracted violence which make arrangements regarding the scope of criminal prosecutions which may follow the conflict. Where such agreements provide for amnesties, it is normal for serious human rights violations, war crimes and crimes against humanity to be excluded from the scope of such amnesties.

38. In the aftermath of the conflict in Sierra Leone (c. 1991-2002) a general amnesty clause regarding participation in the civil war was included in the Lomé Peace Agreement. However, in his report on the establishment of the Special Court for Sierra Leone, the United Nations Secretary General made clear that “the

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No. 34/96 (Chile), para. 76; Annual Report of the Inter-American Commission on Human Rights (1992-93), OEA/Ser.L/V/II.83, Doc. 14, March 12, 1993, Reports No. 28/92 (Argentina), para. 41 and No. 29/92 (Uruguay), par. 51; Annual Report of the Inter-American Commission on Human Rights (1997), OEA/Sere.L/V/II.98, Doc. 6 rev., April 13, 1998, para. 71.

<sup>79</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950, entry into force 3 September 1953, 213 *U.N.T.S.* 222.

<sup>80</sup> *Ould Dah v. France*, Admissibility, 17 March 2009, Unreported, Application No. 13113/03, pps. 16-17 (judgment available only in French).

<sup>81</sup> *Musayeva et al. v. Russia*, Merits, 26 July 2007, 47 E.H.R.R. 25; *Aydin v. Turkey*, Merits, 25 September 1997, 25 E.H.R.R. 251; *Assenov et al. v. Bulgaria*, Merits, 28 October 1998, 28 E.H.R.R. 652; *Kurt v. Turkey*, Merits, 25 May 1998, 27 E.H.R.R. 373; *Yasa v. Turkey*, Merits, 2 September 1998, 28 E.H.R.R. 408.

United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law”.<sup>82</sup> In consequence, Article 10 of the 2002 Statute of the Special Court for Sierra Leone<sup>83</sup> states that “[a]n amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute [crimes against humanity, violations of common Article 3 of the 1949 Geneva Conventions and of the 1977 Additional Protocol II, and other serious violations of IHL] shall not be a bar to prosecution”. A similar clause was inserted in the UN-Cambodia Agreement Concerning the Prosecution of Crimes Committed During the Period of the Democratic Kampuchea.<sup>84</sup>

39. More generally, the clear policy of the United Nations is now to refuse to participate in or fund transitional justice arrangements which countenance amnesty in respect of genocide, crimes against humanity or war crimes. This position was recommended by the 2004 Report of the Secretary General of the UN on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.<sup>85</sup> This position is also set out in the 1999 Guidelines for UN Mediators (revised and readopted in 2005).<sup>86</sup>

40. Peace agreements may also make arrangements for the return of refugees without fear of prosecution. Again, where such arrangements are made war crimes and crimes against humanity are commonly excluded from their scope. Following the Georgian Civil War (c. 1992-1994) an international agreement was reached regarding the return of refugees and Internally Displaced Persons. Article 3(c) of the Quadripartite Agreement on Georgian Refugees<sup>87</sup> and IDPs provides:

Displaced persons/refugees shall have the right to return peacefully without risk of arrest, detention, imprisonment or legal criminal proceedings. Such immunity shall not apply to persons where there are serious evidences that they have committed war crimes and crimes against humanity as defined in international instruments and international practice as well as serious non-political crimes committed in the context of the conflict.

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<sup>82</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, para. 22.

<sup>83</sup> Statute of the Special Court for Sierra Leone, annexed to 2002 Agreement on the Special Court for Sierra Leone annexed to Letter dated 6 March from UN Secretary General to the President of the Security Council, 8 March 2002, S/2002/246.

<sup>84</sup> Article 11, UN-Cambodia Agreement Concerning the Prosecution of Crimes Committed During the Period of the Democratic Kampuchea annexed to GA Res. 57/228/B, 22 May 2003.

<sup>85</sup> Report of the Secretary General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 23 August 2004, S/2004/616, p. 21.

<sup>86</sup> Not publicly available.

<sup>87</sup> Quadripartite Agreement on Georgian Refugees between the Abkhaz and Georgian Sides, the Russian Federation and the UNHCR, 4 April 1994, annexed to a letter from the Permanent Representative of Georgia to the UN addressed to the President of the Security Council, S/1994/397, Annex II.

A similar provision is included in Article VI of the Agreement on Refugees and Displaced Persons annexed to the Dayton Accords.<sup>88</sup>

#### **4. National Practice**

##### **A. Central and South America**

41. The States Parties to the American Convention on Human Rights have by and large followed the consistent position of the Inter-American Court in annulling existing amnesty laws or interpreting them so as to exclude serious human rights violations and crimes under international law from their ambit. A sample of the region's recent jurisprudence shows that, with few exceptions, the states of the Americas have declined to pass new amnesty laws and have found existing ones to be contrary to law.

42. The Colombian Constitutional Court, for example, has held that:

Measures such as the Full Stop laws that obstruct access to justice, blanket amnesties for any crime, self-amnesties (meaning the benefits, under criminal law that the legitimate or illegitimate authorities grant to themselves and to their aiders in the crimes committed), or any other method intended to keep victims from obtaining an effective legal remedy to assert their rights have been deemed a breach of the international obligation of States to provide legal remedies for the protection of human rights, which is embodied in [various international] instruments.<sup>89</sup>

43. Argentina, for its part, has annulled its amnesty laws, as void from the outset, both in the legislature and through judicial decision. Argentina held trials in 1985 with regard to egregious human rights violations perpetrated during the period of the military junta. Subsequently, however, laws were passed which limited prosecutions, in effect, providing an amnesty. The amnesty law was finally annulled in 2005. The Argentine Supreme Court held that the law in question was incompatible with the Constitution because, *inter alia*, it was found to violate the country's obligations under customary and conventional international law.<sup>90</sup> Moreover, this finding was reached notwithstanding the fact that the legislation in question was not a self-amnesty but had been granted by a subsequent, democratically elected regime.

44. In October 2009, the Uruguayan Supreme Court found that Articles 1, 3 and 4 of that state's amnesty law was unconstitutional because it violated the separation of powers and violated Uruguay's human rights commitments.<sup>91</sup> In particular, the Court cited the role of international law in Uruguay's legal system and precedents from neighbouring Argentina as well as the Inter-American

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<sup>88</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, 35 ILM 75 (1996).

<sup>89</sup> Revisión constitucional del Estatuto de Roma de la Corte Penal Internacional, 30 July 2002, Corte Constitucional de Colombia, § 2.3, sentencia C-578/02.

<sup>90</sup> *Simón, Julio Hictory otros s/ privaciin ilegítima de la libertad*, 14 June 2005, Case S. 1767. XXXVIII.

<sup>91</sup> *Sabalsagaray Curutchet, Blanca Stela*, 19 October 2009, Supreme Court of Uruguay, Case No. 365.

Commission and Court in reaching its decision. A year later, the Court made clear that this position with regard to the non-applicability of amnesties applied to all cases of grave human rights violations perpetrated by members of the security forces.<sup>92</sup>

45. In Perú, the Constitutional Court addressed the issue of amnesties in the case of Santiago Rivas, one of the heads of the Colina Group, a clandestine intelligence body that operated during the government of Alberto Fujimori. The Court held that under the Constitution amnesty laws may not be enacted in contravention of the international obligations derived from the international human rights treaties and conventions ratified by the Peruvian State.<sup>93</sup> The Court further held that that the amnesty laws at issue in the case were unconstitutional when it is proved that the legislature used its authority to enact amnesty laws in order to cover up the commission of crimes against humanity or when such power is used to “guarantee” impunity for gross human rights violations.<sup>94</sup>

46. Chile’s amnesty law, promulgated to cover crimes committed by state agents between 1973 and 1978, remains formally in place. It has not, however, been applied by the courts for several years and hundreds of military and police officers have been indicted and are being tried for crimes committed during the era of military rule. In fact, this process arguably began with the decision by a number of Chilean judges to investigate Pinochet-era atrocities despite the enactment of the Chilean amnesty law. Most notable among these was, perhaps, Judge Carlos Cerda of the Santiago Appeals Court, who issued indictments against General Gustavo Leigh and many other high-ranking military officials for grave crimes despite their being absolved by the Supreme Court on the basis of Chile’s amnesty law. Judge Cerda’s decision to continue with his investigation despite the Supreme Court’s decision resulted in the latter deciding to suspend him for two months without pay.

47. Subsequently, however, other Chilean courts held, for example, that Chile’s international obligations criminalize war crimes and require their prosecution regardless of amnesty laws.<sup>95</sup> In addition, Chilean courts have reopened investigations that had been closed (*sobreseídos*) upon application of the amnesty law on grounds that it was only after full investigation, trial and conviction that they could decide whether or not the amnesty applied at all. In disappearance cases, the courts have adopted a different line of reasoning. They have held that in cases of continuing crimes like disappearance an amnesty cannot be applied because it is not clear whether the victim was killed within the period covered by the amnesty. Since the victim could theoretically have been alive when the amnesty expired, it cannot apply unless the date of death is firmly established.

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<sup>92</sup> *Organization of Human Rights, Ruling on Constitutionality of Arts. 1, 3, 4 of Law. No. 15,848*, 1 November 2010, Supreme Court of Uruguay, Case file 2-21986/2006, Sentence No. 1525.

<sup>93</sup> *Santiago Martín Rivas*, 29 November 2005, Constitutional Court of Perú, Exp. 4587-2004.

<sup>94</sup> *Ibid.*

<sup>95</sup> *See, e.g. Videla*, 26 September 1994, Third Criminal Chamber, Appeal Court of Santiago, Chile.

48. In Central America, the Guatemalan National Reconciliation Law provides for amnesty for political crimes, but explicitly excludes genocide, disappearances and other crimes under international law from its ambit of application.<sup>96</sup>

49. The Salvadoran legislature passed a blanket amnesty law in 1999 and the law was upheld by the Supreme Court in 2000. However, even then, the Court left room for a case-by-case consideration of instances in which the amnesty might not apply, namely those in which fundamental rights are at issue. The Court held that, under the Salvadorian Constitution, international human rights law imposes limitations on the power of the executive to pass amnesty laws. According to the Court:

This means that the Legislative Assembly may grant amnesty for political crimes or for common crimes related to them ... as long as that amnesty does not get in the way of safeguards to preserve and defend—through criminal prosecution—the fundamental rights of the human person.<sup>97</sup>

50. The sole exception to an otherwise consistent regional trend on the non-application of amnesty laws to crimes under international law is Brazil, where the Supreme Court upheld the amnesty law as recently as April 2010.<sup>98</sup> However, in *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil* the Inter-American Court of Human Rights found in December 2010 that the enactment of this law contravened Brazil's international obligations.<sup>99</sup> If Brazil brings its domestic legislation into line with this ruling, the states of Central and South America will have a generally consolidated a regional practice in support of the proposition that amnesties are impermissible in respect of crimes against humanity and certain other grave human rights violations.

## **B. Europe**

51. The practice in Europe relating to amnesties is much less extensive than that in Central and South America. In general, however, with the exception of Spain's 1977 Amnesty Act, it has not been the practice of European states to offer amnesties in respect of egregious conduct occurring within their territory. As part of the general settlement reached in Northern Ireland, for example, the United Kingdom offered accelerated release to paramilitaries convicted of crimes including, for instance, those involving grave sectarian atrocities.<sup>100</sup> Although all prisoners were released within two years, no amnesty was offered. A subsequent proposal to provide amnesty to those who, not having been convicted at the time of the agreement did not benefit from accelerated release, was abandoned after proving highly controversial politically.

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<sup>96</sup> National Reconciliation Law, 18 December 1996, (Guatemala).

<sup>97</sup> Acción de inconstitucionalidad contra los artículos 1 y 4 del Decreto Legislativo No. 486, Sala de lo Constitucional, Corte Suprema de Justicia, 27 Sept. 2000. The Court reiterated this case-by-case approach in 2003. Proceso de Amparo promovido por Juan Antonio Ellacuría Beascochea y otros, Sala de lo Constitucional, Corte Suprema de Justicia, 23 Dec. 2003.

<sup>98</sup> *Acción de Incumplimiento No. 153*, 29 April 2010, Supremo Tribunal Federal.

<sup>99</sup> *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Merits, Reparations and Costs, 24 November 2010, Inter-Am. Ct. H. R., Series C. No. 219.

<sup>100</sup> Good Friday Agreement, p. 30, available at < <http://www.nio.gov.uk/agreement.pdf> > .

52. With regard to the states of the former Yugoslavia, Croatia passed a General Amnesty Law in 1996 providing “general amnesty from criminal prosecution and proceedings to perpetrators of criminal offences committed during the aggression, armed rebellion or armed conflicts in the Republic of Croatia”.<sup>101</sup> The law stipulates, however, that crimes under international law are exempted from its ambit.<sup>102</sup> Similarly, in Bosnia and Herzegovina, its Law on Amnesty provides amnesty to crimes committed in the conflict between 1991 and 1995 but excludes those alleged to have committed crimes against humanity from the benefits of this amnesty.<sup>103</sup>

53. Spain’s own jurisprudence in cases involving crimes committed in other jurisdictions has been consistent with these trends. For example, in a much celebrated decision, the Spanish *Audiencia Nacional* refused to take into account the existence of Chile’s 1978 amnesty law in deciding whether to charge Augusto Pinochet and other high-ranking Chilean officers with torture, genocide and other international crimes.<sup>104</sup> Nor has an amnesty law in El Salvador been an impediment to Spanish trial court investigations into killings in that country.<sup>105</sup>

54. Thus, although the question of amnesties has not often arisen in European jurisdictions, from such practice as exists it can be concluded that the overall trend is in favour of the non-application of amnesty legislation to crimes against humanity and war crimes.

### C. Other National Practice

55. A somewhat scattered and less coherent, body of practice has developed in Asia and Africa regarding the permissible scope of amnesty legislation. The general tenor of this practice is more mixed than that found in Europe or America. Perhaps the most prominent example of amnesty legislation in recent times is to be found in South Africa, where amnesty was offered to individuals who cooperated fully with, and provided full disclosure to, that country’s truth and reconciliation commission. In *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*<sup>106</sup> the South African Constitutional Court considered whether South Africa’s international legal obligations prevented the offering of amnesty in respect of crimes committed in internal armed conflicts, finding that they did not. Amnesty in South Africa was not, however, granted unconditionally. Individuals were required to apply to the Committee on Amnesty committing themselves to provide full disclosure in respect of the crimes they had committed and showing that these crimes were perpetrated for a “political

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<sup>101</sup> General Amnesty Law, Articles 1 and 3 (Croatia).

<sup>102</sup> *Ibid.*

<sup>103</sup> Law on Amnesty 1999, Article 1 (Bosnia and Herzegovina).

<sup>104</sup> Chile, decision del Pleno de la *Audiencia Nacional*, Nov. 5, 1998, available in English in Reed Brody, and Michael Ratner, (eds.), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (The Hague: Kluwer, 2000), p. 89.

<sup>105</sup> Jesuit Massacre Case, 13 January 2009, Decision of the 6<sup>th</sup> Chamber of the *Audiencia Nacional*.

<sup>106</sup> *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*, South African Constitutional Court, 25 July 1996, 1996 (8) BCLR 1015.

purpose” connected with the apartheid era conflict.<sup>107</sup> Many applications were rejected.

56. Other state practice in Africa and Asia, however, tends to support the non-applicability of amnesties to genocide and crimes against humanity. Article 28 of Ethiopia’s constitution stipulates:

The legislature and other organs of the state shall have no power to pardon or give amnesty with regard to inhuman punishment, forcible disappearance, summary executions, acts of genocide. Crimes against humanity shall not be subject to amnesty or pardon by any act of government.

57. In Asia, Article 40 of the Law on the Establishment of the Extraordinary Chambers of the Courts of Cambodia prohibits the provision of an amnesty to crimes within the jurisdiction of the Court. In Tajikistan, the General Amnesty Law 1998, provided amnesty to those who had participated in that country’s war of independence, but excluded from the scope of this amnesty were crimes committed as part of an attack on the civilian population, murder, rape and pillage.<sup>108</sup> Even outside the context of crimes against humanity, Article 6 of the UN-Lebanon Agreement on the Establishment of a Special Tribunal for Lebanon, Lebanon committed not to provide amnesty to persons alleged to have committed the crimes of terrorism falling within the jurisdiction of the Special Tribunal.<sup>109</sup>

## 5. The 1977 Amnesty Act and Judge Garzón’s Investigations

58. In its judgment of February 2010, Spain’s *Tribunal Supremo* appears to place emphasis on the proposition that amnesties were, at the time the 1977 Amnesty Act was passed, permissible under international law.<sup>110</sup> It is true that the legal position of amnesties is not set in stone. A measure which once may have been permissible as a matter of international law may, over the passage of time, become of questionable legality. There is no doubt that international law on the question of the amnesties has developed significantly since the 1970s when the Amnesty Act was passed. Clearly, there now exists significant and widespread practice in international human rights law and in national legal systems concerning the non-applicability of amnesties to grave human rights violations, war crimes or crimes against humanity. Indeed, the ICRC’s study on customary international humanitarian law suggests that a prohibition on applying amnesties to such acts has now become a rule of customary international law.<sup>111</sup> Although there is still a

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<sup>107</sup> See Promotion of National Unity and Reconciliation Act, 1995 (South Africa).

<sup>108</sup> General Amnesty Law 1998, Articles 1, 6, 8(b) and (c), Tajikistan.

<sup>109</sup> Agreement annexed to Security Council Resolution 1757, 30 May 2007.

<sup>110</sup> Auto, Tribunal Supremo, Sala de lo Penal, Causa Especial No: 20048/2009, 3 February 2010, p 42.

<sup>111</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (Cambridge: CUP, 2005), p. 612 *et seq.* The study suggests that this is an exception to the general rule in favour of the granting of amnesties following internal armed conflicts, as set out in Article 6(5) of Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 8 June 1977, entry into force 7 December 1978, 1125 *U.N.T.S.* 606.

degree of uncertainty about whether such a rule has crystallized,<sup>112</sup> Judge Garzón's decision to investigate systematic patterns of enforced disappearance in spite of Spain's 1977 Amnesty Act cannot be said to represent an irrational interpretation of existing or developing rules of international law. Indeed, the decision is in keeping with the substantial body of practice at the international and national levels identified above.

## V. THE IMPRESCRIPTIBILITY OF WAR CRIMES AND CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW

59. As with amnesties, there is a very substantial body of international practice relating to the non-applicability of statutes of limitation to war crimes and crimes against humanity. Likewise, it has been suggested that this practice has developed to the point where a rule of customary international law prohibits the application of statutes of limitation at the national level to war crimes and crimes against humanity.<sup>113</sup> Although there is room for controversy as to whether practice in this area has so far led to the crystallization of a rule of customary international law,<sup>114</sup> it is clear that the great bulk of practice, at both the international and national levels, favours the non-applicability of statutes of limitation to crimes against humanity, torture and (albeit to a lesser extent) war crimes in general.

60. Viewed in the context of this body of practice, in spite of the expiration of the general statutory limitation period under Spanish law, Judge Garzón's investigation into allegations of crimes against humanity (encompassing acts including arbitrary killings, enforced disappearances and torture) cannot be characterized as exceptional, aberrant or as an irrational interpretation of international law.

### 1. Universal Human Rights Supervisory Mechanisms

#### A. The ICCPR

61. General Comment 31 states that “[w]here public officials or State agents have committed violations of the Covenant rights referred to in this paragraph [torture, cruel, inhuman and degrading treatment, summary and arbitrary killing and enforced disappearance] the States Parties concerned may not relieve perpetrators from personal responsibility”.<sup>115</sup> Moreover, the Comment observes that “[o]ther impediments to the establishment of legal responsibility should also be removed, such as ... unreasonably short periods of statutory limitation in cases where such limitations are applicable”.<sup>116</sup>

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<sup>112</sup> See, for instance, John Dugard, “Dealing with the Crimes of a Past Regime, Is Amnesty Still an Option?”, 12 *Leiden Journal of International Law* 1001 (1999); Diane Orentlicher, “Settling Accounts Revisited: Reconciling Global Norms with Local Agency”, 1 *International Journal of Transitional Justice* 10 (2007).

<sup>113</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (Cambridge: CUP, 2005), p. 614 *et seq.*

<sup>114</sup> See e.g. *The Prosecutor v. Morris Kallon and Brima Buzzy Kamara, Special Court for Sierra Leone, Appeals Chamber, 13 March 2004, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, para. 82.

<sup>115</sup> CCPR General Comment 31, 29 March 2004, CCPR/C/21/Rev.1/Add. 13, para. 18.

<sup>116</sup> *Ibid.*

62. In its Concluding Observations on State Reports the HRC has often noted with concern the application of statutory limitation periods to the investigation and prosecution of serious human rights abuses. For instance, in its 2003 Concluding Observations on El Salvador the Committee expressed “concern at the fact that the investigations into the killing of Mgr. Oscar Romero, the Archbishop of San Salvador and similar cases have been under the statute of limitations, even though the supposed perpetrators have been identified, without checking whether the decision is compatible with the State party’s obligations under international law”.<sup>117</sup> In light of this the Committee recommended that El Salvador should “review its rules on the statute of limitations and bring them fully into line with its obligations under the Covenant so that human rights violations can be investigated and punished”.<sup>118</sup>

63. The Committee has expressed similar concerns and recommendations in other Concluding Observations, for instance, in respect of Ecuador<sup>119</sup> and Uruguay.<sup>120</sup> Most pertinent for present purposes is the Committee’s recent Concluding Observations on Spain where the Committee “noted the recent decision of the National High Court to consider the question of the disappeared”,<sup>121</sup> and recalled “that crimes against humanity are not subject to a statute of limitations...”<sup>122</sup>

## **B. The Convention against Torture**

64. In its Concluding Observations the Committee against Torture has repeatedly expressed concern about the prescription of torture in domestic legislation. For example, in its recent Concluding Observations on the Republic of Korea the Committee expressed its concern that “that the application of a statute of limitations on torture offences, in both criminal and civil law, may result in the lack of investigation, prosecution, and punishment of acts of torture, as well as in the lack of compensation and other remedies provided to victims of torture”.<sup>123</sup> In light of this, the Committee “urg[ed] the adoption of the bill to exclude or suspend the application of a statute of limitations to crimes against humanity (including torture crimes), which is currently pending before the National Assembly”.<sup>124</sup> In fact, the consistent practice of the Committee has been to express concern about the application of statutes of limitation to torture (though not conduct merely involving inhuman and degrading treatment) and to recommend the abrogation of such legislation. It has done so in Concluding Observations in respect of Chile,<sup>125</sup> France,<sup>126</sup> Morocco,<sup>127</sup> Slovenia<sup>128</sup> and Turkey<sup>129</sup> among others.

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<sup>117</sup> El Salvador (2003), CCPR A/58/40, para. 84(7).

<sup>118</sup> *Ibid.*

<sup>119</sup> Ecuador (1998), A/53/40, para. 280.

<sup>120</sup> Uruguay (1998), A/53/40, para. 247.

<sup>121</sup> Spain (2009), CAT/C/ESP/CO/5, para. 21.

<sup>122</sup> *Ibid.*

<sup>123</sup> Republic of Korea (2006), CAT/C/KOR/CO/2, para. 8.

<sup>124</sup> *Ibid.*

<sup>125</sup> Chile (2004), CAT/C/CR/32/5, para. 7(f).

<sup>126</sup> France (2005), CAT/C/FRA/CO/3, para. 5.

<sup>127</sup> Morocco (2003), CAT/C/CR/31/2, para. 5 (f).

<sup>128</sup> Slovenia (2000), A/55/44 para. 116(b).

<sup>129</sup> Turkey (1991), A/46/46, para. 123 (c).

65. Of particular significance for present purposes are the Committee's recent Concluding Observations on Spain. The Committee observed that "[w]hile it takes note of the State party's comment that the Convention against Torture entered into force on 26 June 1987, whereas the Amnesty Act of 1977 refers to events that occurred before the adoption of that Act...bearing in mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by the principle of legality or the statute of limitation".<sup>130</sup>

66. The CAT's position with regard to the non-applicability of statutes of limitation to torture is also reflected in the jurisprudence of the ICTY. In *Prosecutor v. Furundzija*<sup>131</sup> the ICTY Trial Chamber noted torture's *jus cogens* character. A consequence of this, according to the Trial Chamber, includes "*the fact that torture may not be covered by a statute of limitations* [...]"<sup>132</sup>

## 2. International Instruments Dealing with the Application of Statutes of Limitation to Crimes under International Law

67. Two international conventions deal specifically with the question of the prescription of crimes under international law: the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity ("Convention on the Non-Applicability of Statutes of Limitation")<sup>133</sup> and the Council of Europe Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes ("European Convention on the Non-Applicability of Statutes of Limitation").<sup>134</sup> A number of other treaties and international instruments also deal with the application of statutes of limitation to crimes under international law.

### (i) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity

68. According to its preamble, the Convention on the Non-Applicability of Statutes of Limitation "Recogniz[es] that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity". To this end, Article I of the Convention states that no statutory limitation period shall apply to "war crimes as they are defined in the Charter of the International Military Tribunal Nürnberg ... particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims" nor shall statutory limitations apply to "crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg".

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<sup>130</sup> Spain (2009), CAT/C/ESP/CO/5, para. 21.

<sup>131</sup> *Prosecutor v. Furundzija*, ICTY Trial Chamber, 10 December 1998, para. 157, IT-95-17/1-T.

<sup>132</sup> *Ibid.*

<sup>133</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, New York, 26 November 1968, entry into force 11 November 1970, 754 *UNTS* 73 (54 States Parties).

<sup>134</sup> Council of Europe Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes Strasbourg, 25 January 1974, entry into force, 27 June 2003 (6 States Parties).

69. The language of the preamble, in particular the observation that it is “timely to affirm in international law, through this Convention” the principle of non-applicability provides some support for the view that the principle of non-applicability was regarded as an already established principle of international law. The statements of a number of those states involved in negotiations prior to the adoption of the Convention provide further support for this interpretation. Bulgaria, for instance, stated that “[t]he Committee’s task was therefore very simple and essentially a technical one: it had to adopt a Convention which was of the nature of a declaration and brought together principles that already existed in international law”.<sup>135</sup> Czechoslovakia stated:

The principle of non-applicability of statutory limitation was universally recognized as constituting one of the fundamental principles of international law. The non-applicability of statutory limitations to war crimes and crimes against humanity followed directly from international law... [C]onsequently, the application to such crimes of the rules of domestic law concerning statutory limitation would constitute a flagrant violation of the principles of international law”.<sup>136</sup>

Similar statements were also made by France,<sup>137</sup> Israel,<sup>138</sup> Poland<sup>139</sup> and Ukraine.<sup>140</sup>

70. It should be acknowledged, though, that this view was not universally accepted and a number of states made clear that the principle did not, in their view, form part of customary international law.<sup>141</sup> In this context it may be noted that neither the 1968 Convention, nor the 1974 Council of Europe Convention has been widely ratified. Nevertheless, it is apparent that there has for some time existed a measure of support for the view that statutes of limitation cannot now be applied to crimes against humanity or war crimes as a matter of international law.

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<sup>135</sup> Bulgaria, Statement Before the Third Committee of the UN General Assembly A/C.3/SR.1518, 17 November 1967, para. 5.

<sup>136</sup> Czechoslovakia Statement Before the Third Committee of the UN General Assembly, A/C.3/SR.1514, paras. 38-39.

<sup>137</sup> France, Statement Before the Third Committee of the UN General Assembly, A/C.3/SR.1515, 15 November 1967, para 19.

<sup>138</sup> Israel, Statement Before the Third Committee of the UN General Assembly, A/C.3/SR.1547, 12 December 1967, para. 1.

<sup>139</sup> Poland, Statement Before the Third Committee of the UN General Assembly, A/C.3/SR.1514, 14 November 1967, para 18, describing the principle of non-applicability of statutes of limitation to war crimes and crimes against humanity as “one of the basic principles of international law”.

<sup>140</sup> Ukraine, Statement Before the Third Committee of the UN General Assembly, A/C.3/SR.1517, 16 November 1967, para 5.

<sup>141</sup> See Brazil, Statement Before the Third Committee of the UN General Assembly, A/C.3/SR.1547, 12 December 1967, para 28; Norway, Statement Before the Third Committee of the UN General Assembly, A/C.3/SR.1902, 9 December 1971 para. 80; Greece, Statement Before the Third Committee of the UN General Assembly, A/C.3/SR.1515, 15 November 1967, paras. 15 and 19 (but, at para. 12, accepting that the Convention, as drafted, was intended to affirm an existing principle of international law rather than establish a new one).

(ii) Other International Instruments

71. In the years since the entry into force of the Convention on the Non-Applicability of Statutes of Limitation other international instruments and declarations have provided further support for the imprescriptibility of certain crimes under international law. At the European level, the Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes also deals with the application, obliging States Parties to ensure that such crimes are not prescribed within their domestic legal system. More recently, Article 29 of the Rome Statute expressly provides that “[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”. The Basic Principles on the Right to a Remedy and Reparation also state that “[w]here so provided for in an applicable treaty or contained in other international legal obligations statutes of limitation shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law”.<sup>142</sup>

### 3. Regional Human Rights Systems

#### A. The Inter-American System of Human Rights

(i) The Inter-American Court of Human Rights

72. The question of the applicability of statutory limitation periods to serious human rights violations and crimes under international law is an issue which the Inter-American Court of Human Rights has dealt with on a number of occasions. In *Almonacid v. Chile*, a case which concerned a 1973 disappearance as part of a campaign of violence which the Court characterized as a crime against humanity, the Court held:

The State may not invoke the statute of limitations ... to decline its duty to investigate and punish those responsible. Indeed, as a crime against humanity, the offense committed against Mr. Almonacid-Arellano is neither susceptible of amnesty nor extinguishable.<sup>143</sup>

The Court went on to opine that even though Chile had not ratified the Convention on the Non-Applicability of Statutory Limitations “the Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of general international law which is not created by said Convention, but is acknowledged by it. Hence, the Chilean State must comply with this imperative rule”.<sup>144</sup> The Court’s position is not, however, limited to human rights violations which may be characterized as crimes against humanity. In *Baldeón-García v. Perú* the Court held that “amnesty laws, the statute of limitations and rules on limitations of liability aimed at hindering the investigation and punishment of

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<sup>142</sup> 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 [“Basic Principles on the Right to Reparation”], adopted in General Assembly Resolution 60/147, 21 March 2006, para. 6.

<sup>143</sup> *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, Inter-Am. Ct. H. R. Series C No. 154, paras. 151-152.

<sup>144</sup> *Ibid.* para. 153.

those responsible for serious human rights violations are inadmissible since they affect irrevocable rights protected under International Human Rights Law”.<sup>145</sup> This position with regard to the non-applicability of statutes of limitation has been repeated on numerous occasions, forming part of the Court’s *jurisprudence constante*.<sup>146</sup>

(ii) The Inter-American Commission on Human Rights

73. Precisely the same approach has consistently been adopted by the Inter-American Commission on Human Rights. For example, in *Antonio Braga (Brazil)*, criticizing the application of the statute of limitations to allegations of torture the Commission observed that “[u]nder international law, the obligation to try and, if convicted, to punish the perpetrators of certain international crimes ... follows from the obligation [to ensure respect for the Convention set out] in Article 1(1)”.<sup>147</sup> Recalling the finding of the Inter-American Court of Human Rights in *Barrios Altos* the Commission stated “all...provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they prevent the investigation and punishment of those responsible for serious human rights violations”.<sup>148</sup> This approach has also been adopted in other communications.<sup>149</sup>

**B. The European Convention on Human Rights**

74. For its part, the European Court of Human Rights has consistently adopted the position that statutory limitations cannot be applied to crimes against humanity. This matter was addressed by the Court in *Kolk and Kislyiy v. Estonia*, a case which concerned the conviction by Estonian courts of two individuals of the crime against humanity of forced deportation relating to their participation in the removal of Estonian nationals to remote parts of the Soviet Union in 1949. In its decision finding the perpetrators’ applications inadmissible the Court stated its view that “no statutory limitation applies to crimes against humanity, irrespective of the date on which they were committed”.<sup>150</sup> This proposition has been repeated by the Court in a number of other cases.<sup>151</sup> This approach has not, however, merely been limited to conduct amounting to crimes against humanity. In *X. v. Federal Republic of Germany* the European Commission on Human Rights stated:

The exceptional character of criminal proceedings involving war

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<sup>145</sup> *Baldeón-García v. Perú*, Merits, Reparations and Costs, 6 April 2006, Inter-Am. Ct. H. R. Series C No. 147, para. 201.

<sup>146</sup> *Blanco-Romero et al v. Venezuela*, Merits, Reparations and Costs, Inter-Am. Ct. H. R., 28 November 2005. Series C No. 138, para. 98; *Gómez-Palomino v. Peru*, Merits, Reparations and Costs, 22 November 2005, Inter-Am. Ct. H. R. Series C No. 136, para. 140; *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, 15 September 2005, Inter-Am. Ct. H. R. Series C No. 134, para. 304.

<sup>147</sup> *Antonio Braga v. Brazil*, Case 12.019, Report No. 35/08, para. 108.

<sup>148</sup> *Ibid.* para. 109.

<sup>149</sup> *E.g. Samuel Alfonso Catalan Lincoleo (Chile)* Case No. 11.771, Report No. 61/2001.

<sup>150</sup> *Kolk and Kislyiy v. Estonia*, Admissibility, 17 January 2006, Unreported, Application No. 23052/04.

<sup>151</sup> *Papon v. France*, Admissibility, (No. 2), 15 November 2001, Unreported, Application No. 54210/00; *Touvier v. France*, Admissibility, 13 January 2007, Unreported, Application No. 29420/95.

crimes committed during World War II renders, in the Commission's opinion, inapplicable the principles- developed in the case-law of the Commission and the Court of Human Rights in connection with cases involving other criminal offences. In particular the Commission had regard to the fact that the rules of prescription do not apply to war crimes and that the international community requires the competent authorities of the Federal Republic of Germany to investigate and prosecute these crimes despite the difficulties encountered by reason of the long time that has elapsed since the commission of the acts concerned.<sup>152</sup>

The long-established position adopted by both the Court and (formerly) the Commission that crimes against humanity and war crimes are imprescriptible as a matter of international law is certainly in accord with the approach of many other international human rights courts and supervisory mechanisms.

#### **4. National Practice**

##### **A. Central and South America**

75. Although the practice regarding the applicability of amnesties to crimes against humanity emanating from Central and South America is more substantial than that relating to statutes of limitation, both courts and legislatures in the Americas have dealt with the latter issue on a number of occasions.

76. In the *Priebke* case, which concerned an extradition request by Italy in order that the accused could stand trial for his participation in a massacre during the Second World War, the Argentine Supreme Court addressed the applicability of statutes of limitation to crimes against humanity. It rejected the defendant's argument that the expiry of the statutory limitation period meant that the accused could not be extradited to Italy. It observed the defendant was required to stand trial for killing a large number of individuals as part of a wider atrocity which it classified as a crime against humanity. Finding the defendant's argument flawed, the Court held that there is no prescription for such crimes under international law.<sup>153</sup>

77. Similarly, in *Prosecutor v. Videla*,<sup>154</sup> Chile's Appeal Court of Santiago held that acts which amounted to grave breaches of the Geneva Conventions 1949 are imprescriptible and that as a result the provisions of the Chile's Penal Code, which specified the period of criminal prescription, were inapplicable to conduct amounting to grave breaches. More recently, in the *Sandoval* case, the Chilean Supreme Court has had the opportunity to address the applicability of amnesties and statutes of limitation to the crime against humanity of enforced disappearance finding that such legislation is not applicable to this crime.<sup>155</sup>

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<sup>152</sup> *X. v. Federal Republic of Germany*, Admissibility, 6 July 1976, Unreported, Application No. 6946/75.

<sup>153</sup> *Prosecutor v. Priebke*, Supreme Court, Argentina, 2 November 1995.

<sup>154</sup> *Videla*, Judgment, 26 September 1994, Appeal Court of Santiago, 3<sup>rd</sup> Criminal Chamber.

<sup>155</sup> *Juan Contreras Sepulveda y otros (crimen) casación fondo y forma*, 17 November 2004, Supreme Court, 517/2004, Resolución 22267.

The Constitutional Court of Costa Rica held that “[I]t must be recalled that [the matter at hand is] considered a crime against humanity which is to say that it affects not only individual interests but rather those of all of humanity, as a species ... it is the majority view of the Court [...] that the non-applicability of the statute of limitations is not an unreasonable legal response to this category of crimes.”<sup>156</sup>

Similarly, the Mexican Supreme Court has also found that crimes against humanity are not subject to a statute of limitations, as have the highest courts of Bolivia, Paraguay and Uruguay. The Uruguayan Supreme Court has found that the non-applicability of statutes of limitation is a rule of customary international law.<sup>157</sup>

78. Thus, the practice that exists in the Americas supports the proposition that statutes of limitation cannot be applied to crimes against humanity.

## **B. Europe**

79. Courts in the various European jurisdictions have also been faced with questions regarding the legality of applying statutes of limitation to war crimes or crimes against humanity on a number of occasions. Where courts have been squarely faced with this issue, the statutes of limitation have generally been found to be impermissible. In reaching such determinations European courts often make reference to the impermissibility under international law of applying statutes of limitation to crimes against humanity and war crimes, drawing guidance from the latter.

80. In *Prosecutor v. Barbie* the French *Cour de Cassation*, dealing with the applicability of statutes of limitation to crimes against humanity, the court approved the Court of Appeal’s determination that,

the only principle with regard to the statutory limitation of prosecution of crimes against humanity to be deduced from the Charter of the International Military Tribunal is that prosecution of such crimes is not subject to statutory limitation [...] This rule is applicable to crimes against humanity by virtue of the principles of law recognized by the community of nations.<sup>158</sup>

This approach has been followed in a number of subsequent prosecutions in France including *Prosecutor v. Papon*<sup>159</sup> and *Prosecutor v. Touvier*.<sup>160</sup>

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<sup>156</sup> *Constitutional review of the bill to approve the Inter-American Convention on Forced Disappearance of Persons*, Sentencia 00230, Exp. 95-006543-0007-CO, Consulta Judicial Perceptiva, 12 January 1996, Corte Suprema de Justicia.

<sup>157</sup> Case “Condor Plan”, *José Nino Gavazzo Pereira, et al.*, Sentencia 036, Ficha 98-247/2006, Juez Penal 19° Turno, 26 March 2009; *Case of the Leaders of Left Revolutionary Movement, Luis García Meza Tejada*, — *García Meza Tejada, Luis y otros*, 21 April 1993, Corte Suprema de Justicia de la Nación, (Bolivia); Remedy of inconstitutionality submitted by Modesto Napoleón Ortigoza — *Acción de inconstitucionalidad en el juicio: Modesto Napoleón Ortigoza s/ supuesto homicidio del Cadete Alberto Anastacio Benítez*, Acuerdo y Sentencia 585, *Acción de inconstitucionalidad en el juicio*, 31 December 1996, Suprema Corte de Justicia, (Paraguay).

<sup>158</sup> *Prosecutor v. Barbie*, Cour de Cassation, 20 December 1985.

<sup>159</sup> *Prosecutor v. Papon*, Trial Judgment, Assize Court of Gironde, 2 April 1998.

81. A similar approach was adopted by the Italian courts in *Prosecutor v. Hass and Priebke*, where the Military Tribunal of Rome held that since the accused had been charged with conduct amounting to war crimes and crimes against humanity, statutes of limitation were inapplicable both as a matter of Italian law and customary international law.<sup>161</sup> This decision was ultimately upheld, in relevant part, by the Italian *Corte Suprema di Cassazione*.<sup>162</sup>

82. The national legislation of numerous European states also renders inapplicable statutes of limitation to war crimes and crimes against humanity. States with such legislation include Albania,<sup>163</sup> Belgium,<sup>164</sup> Croatia,<sup>165</sup> Germany,<sup>166</sup> Hungary,<sup>167</sup> The Netherlands,<sup>168</sup> Poland,<sup>169</sup> The Russian Federation,<sup>170</sup> Slovenia,<sup>171</sup> and Switzerland.<sup>172</sup> It is evident that, whether through the case law or legislation, a significant body of practice exists within Europe which treats statutes of limitation as inapplicable to war crimes and crimes against humanity. That national courts often reach this conclusion by reference to an interpretation of international law adds weight to the view that this proposition may reflect an existing or developing norm of customary international law.

### C. Other National Practice

83. Practice in Africa and Asia generally tends to support the position that crimes against humanity are imprescriptible. Ethiopia's 1994 constitution provides that "[t]here shall be no period of limitation on persons charged with crimes against humanity as provided by international conventions ratified by Ethiopia and other laws of Ethiopia."<sup>173</sup> Mali's Penal Code provides that "[a]ny of the crimes provided for under the present title [e.g. crimes against humanity, war crimes and genocide] ... are not subject to statutes of limitation".<sup>174</sup> The Criminal Codes of Niger,<sup>175</sup> Tajikistan,<sup>176</sup> Uzbekistan<sup>177</sup> and Yemen<sup>178</sup> contain provisions to similar effect.

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<sup>160</sup> *Prosecutor v. Touvier*, Trial judgment, Assize Court of Yvelines, April 20, 1994.

<sup>161</sup> *Prosecutor v. Hass and Priebke*, Trial Judgment, Military Tribunal of Rome, 1 August 1996.

<sup>162</sup> *Prosecutor v. Hass and Priebke*, Appeal Judgment, Corte Suprema di Cassazione, 16 November 1998.

<sup>163</sup> Military Penal Code, Article 67, (Albania).

<sup>164</sup> Law Concerning the Repression of Grave Breaches of the Geneva Conventions and Their Additional Protocols (as amended 1993), Articles 1 and 8, (Belgium).

<sup>165</sup> Criminal Code 1987, Article 24 (Croatia).

<sup>166</sup> Penal Code 1998, Section 78(2), (Germany).

<sup>167</sup> Criminal Code 1978 (as amended 1998), Article 33(2), (Hungary).

<sup>168</sup> International Crimes Act 2003, Article 13 (The Netherlands).

<sup>169</sup> Penal Code 1997, Article 109 (Poland).

<sup>170</sup> Criminal Code 1996, Article 78(5), (The Russian Federation).

<sup>171</sup> Penal Code 1994, Article 116, (Slovenia).

<sup>172</sup> Military Criminal Code 1927, Article 75 *bis* (Switzerland).

<sup>173</sup> Ethiopia's Constitution, 1994 Article 28(1).

<sup>174</sup> Penal Code, 2001 Article 32 (Mali).

<sup>175</sup> Penal Code, 1962, Article 208.8 (Niger).

<sup>176</sup> Criminal Code, 1998, Articles 75 and 81 (Tajikistan).

<sup>177</sup> Criminal Code, 1994, Articles 64 and 69 (Uzbekistan).

<sup>178</sup> Military Criminal Code, 1998, Article 22 (Yemen).

## **5. The Investigation of Enforced Disappearances and Spain's Statute of Limitations**

84. Evidently, there is a substantial body of jurisprudence and practice relating to the non-applicability of statutes of limitation to torture, crimes against humanity and war crimes at both the national and international levels. Indeed, as has been seen, it is often suggested that this practice has developed into rule of customary international law prohibiting the application of statutes of limitation at the national level to war crimes, crimes against humanity and torture.<sup>179</sup> Although there is room for debate as to whether the practice in this area has yet led to the crystallization of such a rule, there is no doubt that a large body of consistent practice exists, at both the international and national levels, favouring the non-applicability of statutes of limitation to torture, crimes against humanity and war crimes.

## **VI. THE RIGHT TO TRUTH**

85. The International Convention for the Protection of All Persons from Enforced Disappearances<sup>180</sup> has established the right of victims to learn the truth of the circumstances surrounding enforced disappearance. In addition, although there is scope for debate about whether the "right to truth" exists as an autonomous, freestanding right or whether it is merely a function of the obligation to investigate grave human rights violations within various human rights regimes, there is no doubt that in recent years, a wide range of universal and regional human rights courts and supervisory mechanisms have recognized the right of victims to be provided with information concerning the circumstances surrounding serious human rights violations of which they were victim, including enforced disappearance. In the context of this jurisprudence, criminal investigations have been regarded as an important means of fulfilling such obligations.

### **1. International Convention for the Protection of All Persons from Enforced Disappearances**

86. Building upon the United Nations Declaration on the Protection of All Persons from Enforced Disappearance adopted by the UN General Assembly in 1992,<sup>181</sup> in 2001 the UN Economic and Social Council endorsed a decision by the UN Commission on Human Rights to establish an intersessional open-ended working group of the Commission with a mandate to draft a binding instrument for the protection of all persons from enforced disappearance.<sup>182</sup> As a result of this process, the UN General Assembly adopted the International Convention on the

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<sup>179</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (Cambridge: CUP, 2005), p. 614 *et seq* and Antonio Cassese, *International Criminal Law* (Oxford: OUP, 2003), p. 319.

<sup>180</sup> Article 24(2), International Convention for the Protection of All Persons from Enforced Disappearances, New York, 20 December 2006, entry into force 23 December 2010, A/61/488.

<sup>181</sup> Adopted in General Assembly Resolution 47/113, 18 December 1992.

<sup>182</sup> UN Economic and Social Council Decision, 2001/221, 4 June 2001.

Protection of All Persons from Enforced Disappearance, which entered into force on 23 December 2010, with Spain as a State Party.<sup>183</sup>

87. Article 2 of the Convention defines enforced disappearance as,

[...] the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

88. The right to truth is a matter addressed directly by the Convention. The preamble to the Convention affirms “the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end”. The terms of the Convention contain a number of specific obligations with regard to the right to truth. Article 24(2) of the Convention provides:

Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

This is elaborated upon by Article 24(3), which provides that “[e]ach State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains”.

89. Guidance as to the possible scope of the right to the truth under the Convention may be drawn from the work of the UN Working Group on Enforced and Involuntary disappearances. In a General Comment dealing with the scope of the right to truth contained in the Declaration on the Protection of All Persons from Enforced Disappearance, the Working Group observed:

The State’s obligations under the right to the truth are mainly procedural and include: the obligation to investigate until the fate and the whereabouts of the person have been clarified; the obligation to have the results of these investigations communicated to the interested parties ... ; the obligation to provide full access to archives; and the obligation to provide full protection to... judges and other participants in any investigation.<sup>184</sup>

The Working Group further noted:

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<sup>183</sup> Spain ratified the Convention on the 24 September 2009.

<sup>184</sup> General Comment on the Right to the Truth in Relation to Enforced Disappearances, Working Group on Enforced or Involuntary Disappearances, p. 5, 22 July 2010, available at <[http://www2.ohchr.org/english/issues/disappear/docs/GC-right\\_to\\_the\\_truth.pdf](http://www2.ohchr.org/english/issues/disappear/docs/GC-right_to_the_truth.pdf)>.

[I]n certain cases, clarification is difficult or impossible to attain, for instance when the body, for various reasons, cannot be found. A person may have been summarily executed, but the remains cannot be found because the person who buried the body is no longer alive, and nobody else has information on the person's fate. The State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person.<sup>185</sup>

90. The International Convention on the Protection of All Persons from Enforced Disappearance is not the only international instrument of relevance for victims of enforced disappearance seeking to learn the truth of the circumstances surrounding an enforced disappearance or other serious human rights violation. A number of international courts and human rights supervisory mechanisms have, in recent years, developed jurisprudence regarding the investigation and disclosure of the information regarding the circumstances surrounding a serious human rights violation to victims.

## **2. Universal Human Rights Supervisory Mechanisms**

### **A. ICCPR**

91. In General Comment 31, the Human Rights Committee observed that “[a] failure by a State Party to investigate allegations of violations amounting to crimes under international or national law could in and of itself give rise to a separate breach of the Covenant”.<sup>186</sup> Similarly, in General Comment 6, the Human Rights Committee noted that “[s]tates should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life”.<sup>187</sup>

92. The Committee has further addressed the scope of this investigative duty in a number of communications. As to the form that an investigation should take, in *Arhuaco et al. v. Colombia*, the Committee noted that “purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, especially when violation of the right to life is alleged...”.<sup>188</sup> According to the Committee, although “the Covenant does not provide that private individuals have a right to demand that the State criminally prosecute another person ... the State party has a duty to investigate thoroughly alleged violations of human rights, particularly enforced disappearances and violations of the right to life ...”.<sup>189</sup> This approach has been affirmed by the Committee in its views in respect of many other communications.<sup>190</sup> With regard to the results of an investigation, aside from the

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<sup>185</sup> *Ibid.*

<sup>186</sup> CCPR General Comment 31, 29 March 2004, CCPR/C/21/Rev.1/Add. 13, para. 15.

<sup>187</sup> CCPR General Comment 6, 30 April 1982, HRI/GEN/1/Rev.6, p. 125, para. 4.

<sup>188</sup> *Arhuaco v. Colombia et al.*, HRC Communication No. 612/1995, CCPR/C/60/D/612/1995, para. 5.2.

<sup>189</sup> *Ibid.* para. 8.8.

<sup>190</sup> *Bautista de Arellana v. Colombia*, HRC Communication No. 563/1993, CCPR/C/55/D/563/1993, para. 8.2; *Miango Muiyo v. Zaire*, HRC Communication No. 194/1985, CCPR/C/31/D/194/1985; *Mojica v. Dominican Republic*, HRC Communication

prosecution of individuals where appropriate, the Committee has consistently been of the view that the obligation to provide for an effective remedy set out in Article 2(3) of the ICCPR, may require a State Party to disclose a range of information to victims such as the fate of a missing person, the whereabouts of their remains or the circumstances surrounding their disappearance, death or torture.<sup>191</sup>

### 3. Regional Human Rights Systems

#### A. The Inter-American System

##### (i) The Inter-American Court of Human Rights

93. The “right to truth” is now well established in the jurisprudence of the Inter-American Court of Human Rights, after initially receiving a cautious reception from the Court.<sup>192</sup> Although the Court has not made clear whether it regards the “right to truth” as an autonomous right or merely an aspect of other obligations (in particular, the obligation to investigate and prosecute serious human rights violations and the obligation to provide reparation)<sup>193</sup>, there is no doubt that where grave violations occur States Parties to the American Convention must, to the extent possible, provide various forms of information to victims.

94. In *Bámaca-Velásquez v. Guatemala* the Inter-American Court of Human Rights held:

The right that every person has to the truth has been developed in international human rights law [...] [T]he possibility of the victim’s next of kin knowing what happened to the victim ... is a means of reparation, and therefore an expectation regarding which the State must satisfy the next of kin of the victims and society as a whole.<sup>194</sup>

95. Subsequently, in “*Las Dos Erres*” *Massacre v. Guatemala*, the Court has held:

[...] in a democratic society the truth [concerning] grave human rights violations must be known. This is a fair expectation that the State must satisfy, on the one hand, through the obligation to investigate human rights violations, and on the other hand, through the public disclosure of the results of the criminal and investigation processes.<sup>195</sup>

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No. 449/1991, CCPR/C/51/D/449/1991; *Laureano v. Peru*, HRC Communication No. 540/1993, CCPR/C/56/D/540/1993.

<sup>191</sup> See, e.g. *Khalilova v. Tajikistan*, HRC Communication No. 973/01, CCPR/C/83/D/973/2001, para. 9; *Miango v. Democratic Republic of the Congo*, HRC Communication No. 194/85, CCPR/C/31/D/194/1985, para. 11; *Quinteros v. Uruguay*, HRC Communication No. 107/81, CCPR/C/19/D/107/1981, para. 14-16; *Sultanova v. Uzbekistan*, HRC Communication No. 915/00, CCPR/C/86/D/915/2000, para. 9.

<sup>192</sup> *Castillo-Páez v. Peru*, Merits, 3 November 1997, para. 86, Inter-Am. Ct. H. R. Series C No. 34

<sup>193</sup> Cf. *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, 22 February 2002, para. 201, Inter-Am. Ct. H. R. Series C. No. 91.

<sup>194</sup> *Ibid.*, para. 76.

<sup>195</sup> “*Las Dos Erres*” *Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, 24 November 2009, para. 149, Inter-Am. Ct. H. r. Series C No. 211

96. Moreover, specifically with regard to crimes against humanity, the Court has held that the investigation of crimes against humanity “must be focused on the determination of the truth and the investigation ... and conviction of those persons that are responsible ...”<sup>196</sup>

97. As to the character and scope of the investigation required, the Court made clear, in the same case, that truth commissions and other historical investigations, while welcome, are not necessarily sufficient. The Court has held that “the historical truth included in the reports [of truth commissions] is no substitute for the duty of the State to reach the truth through judicial proceedings”.<sup>197</sup>

98. In the jurisprudence of the Inter-American Court of Human Rights the right to truth potentially covers a broad range of information. It may include information concerning the fate of a disappeared person including, if relevant, the time and place of death<sup>198</sup>, or the location of his or her remains.<sup>199</sup> Where such information is not in the possession of a state, the Court often requires that efforts be made to acquire such information.<sup>200</sup>

99. Factual disclosure may also encompass the clarification of the wider circumstances surrounding a violation. In the case of *19 Tradesmen v. Colombia*, the Inter-American Court of Human Rights stated:

Victims of grave human rights violations and their next of kin, if applicable, have the right to know the truth. Consequently, the next of kin of the victims must be informed of everything that happened concerning such violations.<sup>201</sup>

The Court added that “this right to the truth ... is an important measure of reparation”<sup>202</sup> Information concerning the circumstances surrounding a violation could also include factual material relating to issues such as the events which led up to an atrocity, the number of culpable individuals involved, their role in any organization on behalf of which they were acting and so forth.<sup>203</sup>

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<sup>196</sup> *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, Inter-Am. Ct. H. R. Series C No. 154, para. 111.

<sup>197</sup> *Ibid.* para. 150.

<sup>198</sup> *Trujillo-Oroza v. Bolivia*, Reparations and costs, 27 February 2002, para. 114, Inter-Am. Ct. H.R. Series C. No.92.

<sup>199</sup> *Castillo Páez v. Peru*, Reparations and Costs, 27 November 1998, para. 90, Inter-Am. Ct. H. R. Series C. No. 43.

<sup>200</sup> *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, 22 February 2002, para 83, Inter-Am. Ct. H. R. Series C. No. 91; *Ituango Massacres v. Colombia*, Merits, Reparations and Costs, 1 July 2006, para. 399, Inter-Am. Ct. H. R. Series C. No. 148.

<sup>201</sup> *19 Tradesmen v. Colombia*, Merits, Reparations and Costs, 5 July 2004, para. 261, Inter-Am. Ct. H. R. Series C. No. 109. *See also Myrna Mack-Chang v. Guatemala*, Merits, Reparations and Costs, 25 November 2003, para. 274, Series C. No. 101.

<sup>202</sup> *19 Tradesmen v. Colombia*, Merits, Reparations and Costs, para. 261, *ibid.*

<sup>203</sup> *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, 22 February 2002, para. 73, Inter-Am. Ct. H. R. Series C. No. 91.; *Myrna Mack-Chang v. Guatemala*, Merits, Reparations and Costs, 25 November 2003, para. 275, Series C. No. 101; *Trujillo-Oroza v. Bolivia*, Merits, Reparations and Costs, 26 January 2000, para. 100, Series C. No. 64.

100. Finally, the obligations under the American Convention regarding the right to truth exist even in circumstances where individuals cannot be prosecuted. In *Velásquez-Rodríguez v. Honduras* the Inter-American Court of Human Rights held:

The duty to investigate facts [relating to enforced disappearance] continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.<sup>204</sup>

This observation has been repeated by the Court in *Godínez-Cruz v. Honduras*.<sup>205</sup> Thus, even in circumstances where perpetrators are deceased, under the American Convention a state is, nevertheless, under an obligation to investigate the fate of a disappeared person disclosing relevant information to family members, including, if necessary, the whereabouts of the victim's remains.

(ii) The Inter-American Commission on Human Rights

101. The Commission has adopted precisely the same approach on these questions as the Court. In *Lucio Parada Cea et al. (El Salvador)*, for example, the Commission held:

The right to know the truth with respect to the incidents which took place and the serious human rights violations which occurred ... as well as to know the identity of those who participated in them, constitutes an obligation which the State has to the relatives of the victims and to the society, as a consequence of the obligations and duties assumed [under the] American Convention on Human Rights.<sup>206</sup>

The Commission has reiterated precisely this approach in many other cases.<sup>207</sup>

## B. The European Convention on Human Rights

102. Although the ECtHR has not developed a freestanding “right to truth” in respect of serious human rights violations like its Inter-American counterpart, the Court's jurisprudence leaves no doubt that egregious conduct including arbitrary killings, torture, enforced disappearance must be adequately investigated in a manner capable of leading to prosecutions, if appropriate.<sup>208</sup>

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<sup>204</sup> *Velásquez-Rodríguez v. Honduras*, Merits, 29 July 1988, Inter-Am Ct. H. R. Series C No. 4, para. 181.

<sup>205</sup> *Godínez-Cruz v. Honduras*, Merits, 20 January 1989, Inter-American Court of Human Rights Series C No. 5, para. 190.

<sup>206</sup> *Lucio Parada Cea et al. (El Salvador)*, Case No. 10.408, Report No. 1/1999, para 148.

<sup>207</sup> *Samuel Alfonso Catalan Lincoledo (Chile)* Case No. 11.771, Report No. 61/2001, para. 81 *et seq.*

<sup>208</sup> *Kaya v. Turkey*, Merits, 19 February 1998, para. 107-108, 28 *E.H.R.R.* 1; *Taş v. Turkey*, Merits, 14 November 2000, para. 91-93, 33 *E.H.R.R.* 15; *Kurt v. Turkey*, Merits, 25 May 1998, paras. 140-142, 27 *E.H.R.R.* 373.

#### 4. Other International Instruments and Declarations

103. The Basic Principles on the Right to Reparation also include factual disclosure as a form of reparation. The principles state that “satisfaction should include [v]erification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations”.<sup>209</sup> They further indicate that satisfaction should include “[t]he search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities”.<sup>210</sup>

104. The Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity contained in the final report of the United Nations Special Rapporteur on Amnesty, Mr. Louis Joinet (“the Joinet Principles”), also address the right to truth.<sup>211</sup> In his report the Special Rapporteur states that the right to truth “is not simply the right of any individual victim or closely related persons to know what happened ... The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future”.<sup>212</sup>

105. The Human Rights Council, and formerly, the Commission on Human Rights, have also expressed support for the right to truth of victims of enforced disappearance on many occasions.<sup>213</sup>

#### 5. The Right to Truth and Judge Garzón’s Investigations

106. A growing body of international jurisprudence now exists with regard to the right to truth for victims of grave human rights violations. Moreover, the International Convention for the Protection of All Persons from Enforced Disappearances has established a specific right to truth for victims of enforced disappearance. Where applicable, this right requires states to investigate instances of enforced disappearance and, where possible, to provide information to family members and other victims including, in particular, the fate of the disappeared person and the location of his or her remains. With regard to international human rights law more generally, it is true that there is room for controversy as to whether “the right to truth” is an autonomous right or whether it is merely an aspect of other obligations. Nevertheless, as is indicated by the jurisprudence of international courts and supervisory mechanisms, a criminal investigation such as

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<sup>209</sup> Basic Principles on the Right to Reparation, para. 22 (b).

<sup>210</sup> *Ibid* para. 22 (c).

<sup>211</sup> Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, 2 October 1997, E/CN.4/Sub.2/1997/20/Rev.1.

<sup>212</sup> *Ibid.* para. 17.

<sup>213</sup> *See, e.g.* UN Commission on Human Rights, Resolution 2005/66, 20 April 2005; Human Rights Council Resolution 9/11, 18 September 2008 and Resolution 12/12, 1 October 2009. *See also*, UN Office of the High Commissioner for Human Rights, Study on the Right to Truth, 8 February 2006, E/CN.4/2006/91.

that conducted by Judge Garzón, provides an important means by which information can be provided to victims and through which the relevant international obligations can be met.

## VII. CONCLUDING COMMENTS

107. The focus of Judge Garzón's investigation concerned the alleged practice of the abduction, imprisonment and disappearance of Republican governmental and military personnel, political activists and their children during the Spanish Civil War and subsequently during the Junta Period. Given the foregoing analysis, it is arguable that, if proven, a practice involving the widespread or systematic perpetration of such conduct could have amounted to a crime against humanity, at least from 1939 onwards. Moreover, from the perspective of international law, an ongoing course of conduct commencing prior to 1939 could reasonably be taken into consideration in assessing whether a crime against humanity had occurred.

108. With regard to amnesty legislation, a substantial and growing body of practice exists at both the international, regional and national levels dealing with the applicability of such legislation to grave human rights violations. Taking into account the jurisprudence of international courts, tribunals and supervisory mechanisms and the position adopted by numerous national legal systems, there is now a widespread practice in favour of the non-applicability of amnesties, *inter alia*, to crimes against humanity. Judge Garzón's decision to investigate patterns of enforced disappearance in spite of Spain's 1977 Amnesty Act is consistent with this much larger body of practice at the international and national levels.

109. Likewise, although there is room for controversy as to whether a rule of international law regarding the non-applicability of statutes of limitation to crimes against humanity and war crimes has yet crystallized, there is no doubt that a large body of practice exists favouring the non-applicability of statutes of limitation to torture, crimes against humanity and war crimes. Judge Garzón's decision to commence investigations in spite of the expiry of the general criminal statutory limitation period under Spanish law cannot be characterized as exceptional or as an irrational interpretation of legal rules, at least insofar as international law is concerned. Instead, the impugned decision to commence the investigations in question is at one with the approach adopted by many international courts, human rights supervisory mechanisms and jurisprudence developed at the national level.

110. In addition to the significant body of practice which treats amnesties and statutes of limitation as inapplicable to crimes against humanity, a growing body of international practice has, in recent years, developed with regard to the right to truth of victims of grave human rights violations. With regard to enforced disappearances, a specific obligation on the right to truth has been embodied in the International Convention on the Protection of All Persons from Enforced Disappearance. As is evident from the jurisprudence and views of various international courts and supervisory mechanisms, criminal investigations, such as those undertaken by Judge Garzón, provide an important means of fulfilling obligations connected with this right.

111. In sum, although there is scope for controversy and reasonable disagreement as to the characterization of acts under investigation, namely the abduction, imprisonment and disappearance of Republican activists and their children during the period in question, and as to the legal implications of this characterization with regard to amnesties and statutes of limitation, Judge Garzón's decision to initiate criminal investigations into the above-mentioned acts cannot be said to represent an unreasonable or irrational interpretation of existing or developing rules of international law. Instead, his decision to instigate an investigation into such matters, in spite of the 1977 Amnesty Act and the expiration of Spain's statute of limitations, is consistent with a large body of practice at both the international and national levels.

112. More generally, the prosecution of a judge for undertaking a criminal investigation rather than merely addressing an impugned decision through the normal judicial process, is surely an extreme power reserved for truly exceptional cases. In view of the substantial body of law and practice favouring the investigation and prosecution of crimes against humanity, regardless of any amnesty or statute of limitation, the prosecution of Judge Garzón for instigating an investigation in these circumstances appears to be an inappropriate and unnecessary use of prosecutorial power. Indeed, the prosecution of a judge for launching a criminal investigation in these circumstances may have a chilling effect on the investigation and prosecution of similar crimes both in Spain and in other jurisdictions. If so, this would certainly be an unfortunate development given the importance of accountability for such crimes.

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