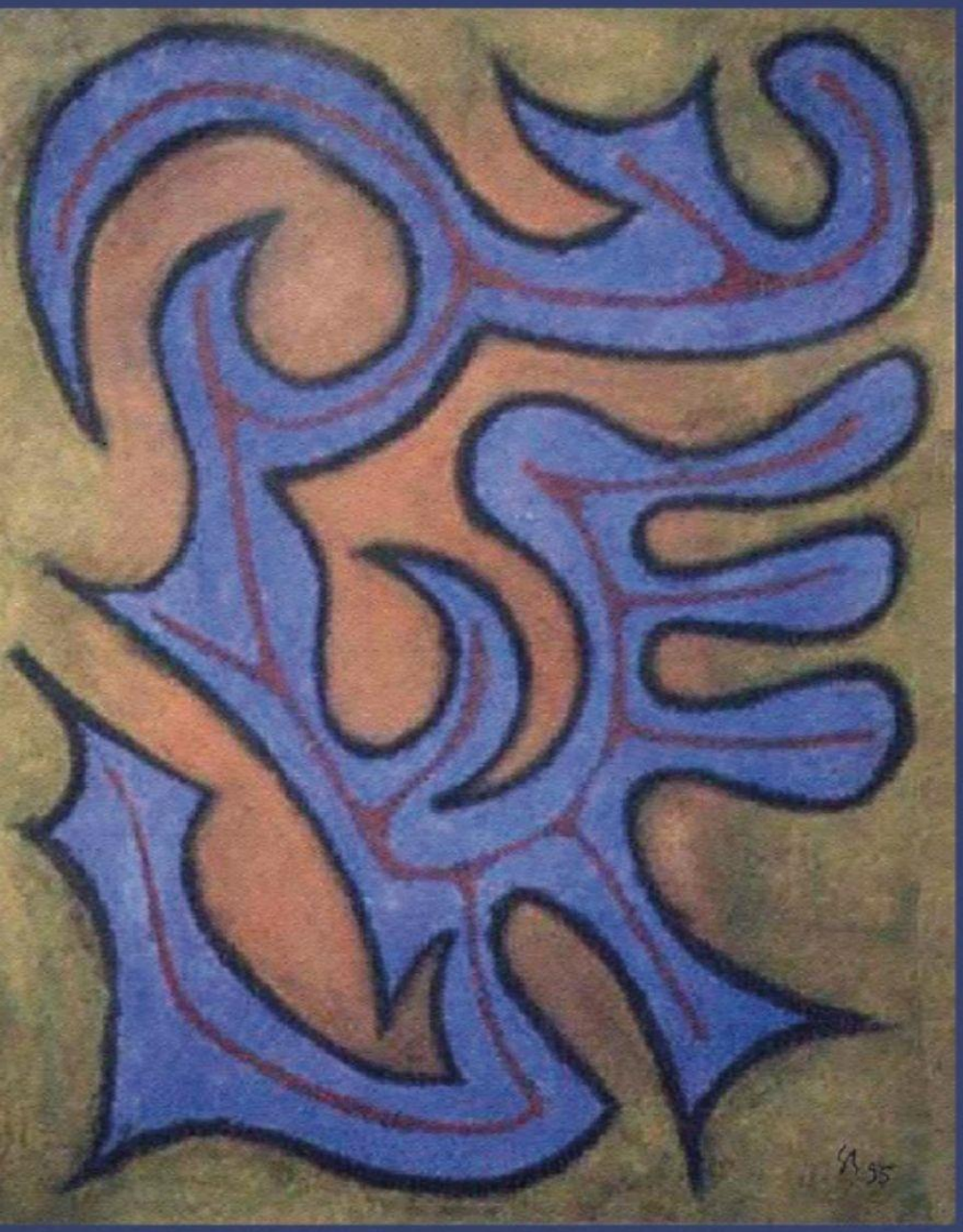

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CONSELHO EDITORIAL

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DOSSIÊ

DIÁLOGOS ENTRE UNIÃO EUROPEIA E AMÉRICA LATINA: desafios e perspectivas para a sociedade internacional do século XXI

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THE EXISTENCE OF LIMITS TO THE GRANTING OF AMNESTIES FOR SERIOUS HUMAN RIGHTS VIOLATIONS: THE AMERICAN CONTRIBUTION TO THE FORMATION AND CONSECRATION OF CUSTOMARY INTERNATIONAL NORMS

Valentin Bou Franch
Universidad de València

ABSTRACT

In this paper I analyse both the practice of American States and that of the Inter-American Commission and Court of Human Rights, which have contributed to the worldwide formation and consecration of the international customary existence of limits to the granting of amnesties in cases of serious human rights violations. These customary limits to the granting of amnesties in these extreme cases are twofold. First, the obligation to investigate and prosecute those allegedly responsible for international crimes or serious human rights violations. Second, the prohibition on granting amnesties to persons who have committed international crimes or serious human rights violations.

Keywords: American practice. Amnesties. Serious human rights violations.

A EXISTÊNCIA DE LIMITES PARA A CONCESSÃO DE ANISTIAS POR VIOLAÇÕES GRAVES DOS DIREITOS HUMANOS: A CONTRIBUIÇÃO AMERICANA PARA A FORMAÇÃO E CONSAGRAÇÃO DAS NORMAS INTERNACIONAIS CONSUETUDINÁRIAS

RESUMO

Neste documento, analiso tanto a prática dos Estados americanos quanto a da Comissão e da Corte Interamericana de Direitos Humanos, que contribuíram para a formação e consagração mundial da existência costumeira internacional de limites à concessão de anistias em casos de violações graves dos direitos humanos. Estes limites habituais para a concessão de anistias nestes casos extremos são duplos. Primeiro, a obrigação de investigar e processar os supostos responsáveis por crimes internacionais ou violações graves dos direitos humanos. Segundo a proibição de conceder anistias a pessoas que tenham cometido crimes internacionais ou violações graves dos direitos humanos.

Palavras-chave: Prática americana. Amnistias. Violações graves dos direitos humanos.

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INTRODUCTION

Although the granting of amnesties dates back to Greek civilisation, in the last two centuries their use has increased markedly for peculiar political purposes. With the aim of bringing forward the end of an internal armed conflict or civil war that has dragged on for years, alongside or alternatively with the intention of consolidating peace at the end of the conflict, the granting of amnesties to the perpetrators of serious violations of Human Rights and the rules of International Humanitarian Law has become one of the most recurrent mechanisms of the so-called transitional justice.

With the creation of international criminal tribunals and the consequent development of International Criminal Law, the use of amnesties to achieve impunity for perpetrators of serious violations of Human Rights and International Humanitarian Law began to be seriously criticised on legal, ethical, and political grounds in the 1990s. There are even important studies that show that the use and effectiveness of amnesties in internal armed conflicts around the world since 1970 have had no demonstrable impact on the achievement of peace and security, adding that the most that has been achieved with the granting of amnesties is the demobilisation of some individual combatants and, very exceptionally, of an entire armed group (e.g. REITER, 2014, p. 133-147).

Many States, when ending a non-international armed conflict and beginning a transition to peace, face few options when it comes to holding individuals criminally accountable for atrocities committed in the immediate past. Some States, such as Mozambique, chose to grant unconditional amnesty. Other States, such as South Africa, established a Truth and Reconciliation Commission while granting a limited amnesty; while others, such as Rwanda, prosecuted those most responsible for genocide, war crimes and crimes against humanity.

This study aims, based on the analysis of International Law and the jurisprudence of international criminal courts, to analyse the validity and scope of granting amnesties in the name of the so-called transitional justice, that is, to determine whether amnesties can be granted at the end of an armed conflict of a non-international nature in accordance with contemporary International Law and, if so, the scope that these amnesties should have. To this end, in this paper I will mainly analyse both the practice of American States and that of the Inter-American Commission and Court of Human Rights, which have contributed to the consolidation of international customary law at the global level on the existence of limits to the granting of amnesties in cases of serious human rights violations. In my view, these customary limits to the granting of amnesties in these extreme cases are twofold. First, the obligation to investigate and prosecute those allegedly responsible for international crimes or serious human rights violations. Second, the prohibition on granting amnesties to persons who have committed international crimes or serious human rights violations.

1. THE 1977 ADDITIONAL PROTOCOL II TO THE GENEVA CONVENTIONS OF 1949

The international legal framework in this respect is represented by the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), as well as by the customary norms of International Humanitarian Law.

Article 6.5 of the Additional Protocol II states that: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained".

A literal interpretation of this rule easily leads to the conclusion that this provision does not permit, let alone mandate, the granting of blanket amnesties, sometimes referred to as general amnesties, at the end of armed hostilities. It is quite clear that the expression "shall endeavour to grant" is different from "shall grant", just as "the broadest possible amnesty" is a different expression from "total amnesty" or "general amnesty". This provision is drafted with the understanding that there must be some limits to the granting of amnesties, i.e. that not all conduct carried out during an internal armed conflict is eligible for pardon or amnesty.

This interpretation is corroborated by the International Committee of the Red Cross (ICRC) itself. In its Commentary to this provision, the ICRC noted that: "the object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided" (SANDOZ, SWINARSKI, ZIMMERMANN, 1998, Commentary 4618). The expression "encouraging a gesture of reconciliation" is distinct from having to grant a mandatory amnesty to those most responsible for serious violations of Human Rights and International Humanitarian Law at the end of a non-international armed conflict.

There is an important doctrinal sector that considers that "total" or "general" amnesties are prohibited in contemporary International Law, either by virtue of international customary norms, or by the *jus cogens* nature of the rules establishing international crimes. For instance, Werle (2009, p. 77) affirmed that: "general amnesties for crimes under International Law are impermissible under customary International Law". For Van der Wyngaertand Ongena (2002, p. 727): "there is a customary International Law prohibition against amnesty for crimes that come under the jurisdiction of the Court, making such amnesties null and void and not binding upon the International Criminal Court (ICC)". Dal Maso Jardim(2012, p. 572)held that:"si la répression des certain crimes internationaux est une norme impérative et qu'elle est à la nature d'une obligation *erga omnes*, cette règle est valable pour la Sierra Leone et, dès lors, sa loi d'amnistie devrait égalant être annule e quant

à ces crimes". Relva (2018, p. 860) considered that: "International Law has evolved over the last decades - in particular since the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda in the early 1990s, and later the adoption of the ICC Statute - to consider amnesties for crimes against humanity, as well as for genocide and war crimes, not to be compatible with International law"; etc.

However, it seems to me appropriate to highlight the great role the ICRC has played in pronouncing systematically and with great precision on the granting of amnesties when it has analysed the customary norms of International Humanitarian Law. This problem has mainly been addressed by the ICRC in its examination of two customary norms which form part of International Humanitarian Law and which I analyse under the following headings.

2. THE OBLIGATION TO INVESTIGATE AND PROSECUTE THOSE ALLEGEDLY RESPONSIBLE FOR INTERNATIONAL CRIMES OR SERIOUS HUMAN RIGHTS VIOLATIONS

The ICRC first mentioned amnesties in the Commentary to the customary norm, numbered as rule 158, which reads as follows:

> States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects (HENCKAERTS, DOSWALD-BECK, 2007, p. 687).

Commenting on this customary norm, the ICRC recalled that the four Geneva Conventions of 12 August 1949 require States to search for persons alleged to have committed, or to have ordered to be committed, serious breaches and to prosecute or extradite those alleged to be responsible (Art. 49 of the First Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Art. 50 of the Second Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Art. 129 of the Third Convention relative to the Treatment of Prisoners of War; and Art. 146 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War). The obligation to investigate and prosecute persons alleged to have committed crimes under international law is also contained in several international treaties of universal scope which apply to acts committed in both international and non-international armed conflicts. Examples include Art. VI of the Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948); Art. 28 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954); Art.

7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984); etc.

The customary norm that settles down that States must investigate war crimes and prosecute alleged perpetrators is expressed in numerous military manuals with respect to grave breaches of the Geneva Conventions and their Additional Protocols, but also more broadly with respect to war crimes in general. In addition to those referring to the grave breaches' regime, the military manuals of Argentina, Brazil, Canada, Colombia, the Dominican Republic, Ecuador, Mexico, Peru, the United States, and other American States, are relevant. Most States comply in practice with the obligation to investigate war crimes and prosecute those allegedly responsible establishing universal jurisdiction for this type of crimes in their national legislation. Indeed, in practice, a large number of investigations and trials of alleged war criminals have been carried out at the national level. Examples include the judicial practice of Canada (e.g., Superior Court, Criminal Division, Province of Quebec, *Munyaneza* case, Judgment, 22 May 2009, paras. 8, 58-60 and 65-66); Chile (e.g., Supreme Court, *Pedro Poblete Córdoba*case, Case No. 469-98, Judgment, 9 September 1998,para. 9);Colombia (Constitutional Court, Constitutional Case No. *C-004/03*, Judgment of 20 January 2003, para. 27); United States of America (Supreme Court, *Quirin* case, Judgment of 31 July 1942; Supreme Court, *Yamashita* case, Judgment of 4 December 1947)[1]; etc.

However, the ICRC acknowledged that it is not possible to determine whether this practice has arisen from an obligation or merely from a right. Nevertheless, the ICRC stated that the obligation to investigate and prosecute alleged perpetrators of international crimes is explicit in other examples of State practice, such as some *ad hoc* international agreements, e.g. Art. III of the Comprehensive Agreement on Human Rights between the Government of the Republic of Guatemala and the Guatemalan National Revolutionary Unity. (Mexico City, 29 March 1994).

The establishment, since the last decade of the last century, of various international or internationalised criminal tribunals has contributed to the consolidation of this international customary norm. States can also respect their obligation to investigate the commission of international crimes and, where appropriate, prosecute those allegedly responsible through the establishment of international or internationalised criminal tribunals. The United Nations (UN) Security Council established the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea

[1] The relevant provisions of these manuals and judgements are available in English in the ICRC database, at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule158.

were established by the conclusion of an international treaty between the UN on the one hand, and Sierra Leone and Cambodia on the other hand, respectively. The ICC is the first international criminal court established through the conclusion of an international treaty, the Rome Statute of 17 July 1998, which has jurisdiction to try all international crimes, without being linked to a specific conflict situation. All these international or internationalised criminal tribunals have already demonstrated, or continue to do so, that they are appropriate legal measures to combat impunity for those most responsible for committing international crimes, where national jurisdiction has not been able to reach. (BOU FRANCH, 2005; CASTILLO DAUDÍ; SALINAS ALCEGA, 2007).

There is in fact international jurisprudence that supports the idea that international crimes cannot be subject to amnesty. The first pronouncement in this regard was, made by the ICTY in the *Furundzija case* in 1998 with regard to torture as both a war crime and a crime against humanity. On this occasion, the ICTY affirmed that the prohibition of torture has the character of a peremptory norm of international law (*ius cogens*) (ICTY. Prosecutor v. *Anto Furundzija*, Judgmentof 10 December 1998, para. 154), and in drawing the consequences of this affirmation, made it very clear that a possible national law amnestying acts of torture, besides being null and void, could never have the effect of preventing the investigation and prosecution, where appropriate, of those responsible for this international crime. In fact, the effects of a national amnesty rule contradicting an international norm of *jus cogens* are as follows:

> If such a situation were to a rise the national, measures, violating the general principle and any relevant treaty provision, would produce the legal effects discusse da bove and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi be for e a competent international; or national judicial body with a view to ask in gitto hold the national measure to be internationally un law ful; or the victim could bring a civil suit for damage in a foreign court; which would there for e be a sked in teralia to dis regard the legal value of the national author is in gact. What I seven more important is that er petrat ors of torture actin gupon or benefiting from those national measures may never the less be held criminally responsible for torture, whe the rina foreign State, or in their own State under a subsequent regime. In short, inspire of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply witht hat principle. As the International Military Tribunal at Nuremberg put it: “individuals have international duties which transcend the national obligations of obedience imposed by the individual State”. Furthermore, at the individual level, that is, that of criminally ability, it would seem that one of the consequences of the jus cogens character best owed by the international community up on the prohibition of torture is that e very State is entitled to investigate, pro secure, and punish or extradite individuals accuse do torture, who are presenting territory under its jurisdiction. (*Ibid.* paras. 155 and 156).

What the ICTY theorised in the above *obiter dicta was* first applied in practice by the SCSL. On 20 September 2000, the UN and Sierra Leone agreed to adopt the SCSL Statute, Article 10 of

which provided that an amnesty granted to a person over whom the SCSL has jurisdiction in respect of international crimes referred to in this Statute shall not constitute a bar to prosecution.

During the various trials before the SCSL, several defendants soon appealed against their respective prosecutions, claiming that they had already been amnestied by the "Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front" (Lomé, 7 jan. 1999), thus challenging the SCSL's jurisdiction to try them. The SCSL responded as follows:

> Whatever effects the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 [of the SCSL Statute, i.e. international crimes] in the national courts of Sierra Leone,it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other States have by reason of the nature of the crimes. It is also ineffective in depriving an international court, such as the SCSL, of jurisdiction (SCSL. Appeals Chamber, Decision of 13 March 2004, para 88. WILLIAMS, 2005, p. 271-309).

The SCSL also took into account the statement of the International Court of Justice (ICJ), the principal judicial organ of the UN, that certain international tribunals have jurisdiction over crimes under International Law (ICJ. Reports, 14 feb. 2002, p. 61).

The preamble to the ICC Statute also underlines that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". Article 1 affirms that the ICC is "complementary to national criminal jurisdictions". Moreover, Article 17, v.1 (a) specifies that the ICC's jurisdiction is subsidiary to national criminal jurisdictions, in that the ICC must decide on the inadmissibility of a case, when that "case is being investigated or prosecuted by a State having jurisdiction over it, unless that State is unwilling or unable genuinely to carry out the investigation or prosecution". Of course, the ICC Statute does not consider the granting of a national amnesty for crimes within its jurisdiction as a ground for inadmissibility of a case. On the contrary, according to Art. 17(2)(a), the ICC must declare a case admissible when "the national decision was made for the purpose of shielding the person concerned of criminal responsibility for crimes within the jurisdiction of the Court"(ARSANJANI, 1999, p. 65-68; STAHN, 2005, p. 695-720; etc.).

It should be recalled that, after opening the situation in Uganda in July 2004, on 13 October 2005 ICC Pre-Trial Chamber II issued the arrest warrants against five senior commanders (*Joseph Kony*, *Vincent Otti*, *Raska Lukwiya*, *Okot Odhiambo* and *Dominic Ongwen*) of the "*Lord's Resistance Army"*(LRA) (ICC. ICC-CPI-20051014-110). While these Arrest Warrants were still outstanding, the Government of Uganda entered into negotiations with the LRA rebels. As a result, Ugandan President *Yoweri Museveni*, ignoring the ICC Arrest Warrants, announced in July 2006 a "total" amnesty for LRA fighters, on condition that the rebels renounce terrorism and accept peace. Following this amnesty offer, the Government of Uganda and the LRA adopted a cessation of

hostilities agreement, which entered into force on 29 August 2006 (SSENYONJO, 2005, p. 405-434; *ibid*., 2007, p. 361-389; and MALLINDER, 2009). ICC Pre-Trial Chamber II, unsurprisingly, ignored the amnesties granted and confirmed both the admissibility of this case and the five arrest warrants previously issued (ICC. ICC-02/04-01/05, confirmed by the Appeals Chamber in ICC. ICC-02/04-01/15-181). All accused remained at large for a decade until, in January 2015, suspect *Dominic Ongwen* voluntarily surrendered to the ICC (ICC. ICC-02/04-01/05-419). On 23 March 2016, Pre-Trial Chamber II confirmed the 70 indictments brought by the Prosecutor against *Dominic Ongwen*, in his capacity as former commander of the LRA *Sinia* Brigade and sent him to trial (ICC. ICC-02/04-01/15-422-Red). His trial commenced before ICC Trial Chamber IX on 6 December 2016. It should be noted that Pre-Trial Chamber II only ordered the end of the trial proceedings against *Raska Lukwiya* and *Okot Odhiamno*, on 11 ju. 2007 and 10 sept. 2015 respectively, after receiving forensic confirmation of their deaths (ICC. ICC-02/04-01/05-248; and ICC. ICC-02/04-01/05-431). The ICC is therefore also sending a clear message that the enactment or granting of national amnesties in respect of crimes within its jurisdiction does not affect the exercise of its investigative and prosecutorial powers.

In addition, the UN Security Council has, on several occasions, reaffirmed the obligations both to investigate war crimes and, where appropriate, to prosecute suspects in connection with attacks on peacekeepers and international crimes committed in the non-international armed conflicts in Afghanistan, Bosnia and Herzegovina, Burundi, Croatia, Kosovo, Democratic Republic of Congo, Rwanda, etc. For example, the Security Council stated:

> Reaffirming the importance of compliance with International Humanitarian Law and reaffirming further that persons who commit or authorize serious violations of International Humanitarian Law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law. (UN. Security Council, Resolution 1315 (2000).

In 1946, during its first session, the UN General Assembly recommended that all States, including non-members of the UN, arrest those allegedly responsible for committing or ordering the commission of war crimes in World War II and send them to the countries where the crimes were committed for trial (UN. General Assembly, Resolution 3 (I)). Since then, the UN General Assembly has, on several occasions, reiterated the obligation of States to take all necessary measures to ensure that war crimes and crimes against humanity are investigated and, where appropriate, punished (UN. General Assembly, Resolutions 2583 (XXIV), para. 1; 2712 (XXV), paras. 2 and 5; 2840 (XXVI), para. 1; 3074 (XXVIII), para. 1; 49/50, para. 11; etc.). With regard to cases of sexual violence in situations of armed conflict, the UN General Assembly has also adopted several consensus resolutions

calling on States to strengthen mechanisms to investigate and punish those responsible for sexual violence and bring them to justice (UN. General Assembly, Resolutions 51/77; and 52/107, among others).

In a Resolution on impunity, adopted by consensus in 2002, the UN Commission on Human Rights also recognised that those suspected of war crimes and serious Human Rights violations, for whom amnesties would not be appropriate, should be tried or extradited (UN. Commission on Human Rights, Resolution 2002/79, para. 1). In 2004, the UN Commission on Human Rights insisted that "amnesties should not be granted to those who commit violations of Human Rights and International Humanitarian Law that constitute crimes", adding that it welcomed "the lifting, waiving, or nullification of amnesties and other immunities"(*ibid.*, 2004/72, para. 3). In 2005, the UN Commission on Human Rights further elaborated on these ideas, adding that it "recognizes as well as the Secretary-General's conclusion that United Nations-endorsed peace agreements can never promise amnesties for genocide, crimes against humanity, war crimes, or gross violations of Human Rights"(*ibid.*, 2005/81, para. 3).

A similar practice has also been followed by the UN Human Rights Council, which has consistently affirmed the need to investigate and prosecute those allegedly responsible for serious violations of Human Rights and International Humanitarian Law in the context of various internal armed conflicts. In particular, the UN Human Rights Council on24 September 2008 stressed"the importance of combating impunity in order to prevent violations of International Human Rights Law and International Humanitarian Law perpetrated against civilians in armed conflicts, and urges States, in accordance with their international obligations, to bring perpetrators of such crimes to justice" (UN. Human Rights Council, Resolution 9/9, para. 4). Reiterating this affirmation, in 1 October 2009 the UN Human Rights Council also noted "the conclusion of the Secretary-General that peace agreements endorsed by the United Nations can never promise amnesties for genocide, crimes against humanity, war crimes and gross violations of Human Rights" and, welcomed "the fact that a growing number of peace agreements contain provisions for transitional justice processes, such as truth-seeking, prosecution initiatives, reparations programmes and institutional reform, and do not provide for blanket amnesties"(*ibid.*, 12/11, paras. 7, 8 and 11).

In relation to crimes committed in non-international armed conflicts, the ICRC has underlined that it is true that several countries have granted amnesties for the commission of war crimes. However, it rightly pointed out that such amnesties have often been considered illegal by national or regional courts and have been criticised by the international community. The ICRC also considered that there is sufficient international practice to establish an obligation under customary

International Law to investigate war crimes allegedly committed in non-international armed conflicts and to prosecute suspects, if appropriate (HENCKAERTS, DOSWALD-BECK, 2007, p. 689).

3. THE RECOMMENDATION TO GRANT A BROAD AMNESTY UPON CESSATION OF HOSTILITIES IN A NON-INTERNATIONAL ARMED CONFLICT

State practice also establishes this rule as a customary norm of International Humanitarian Law applicable in non-international armed conflicts. In fact, the ICRC has identified it as customary rule of International Humanitarian Law number 159, and has formulated it as follows:

> At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes (*Ibid.*, p. 691).

As I noted at the beginning of this paper, the obligation of the authorities in power to strive to grant the broadest possible amnesty after the cessation of hostilities in a non-international armed conflict is established in Additional Protocol II, and it should be noted that its Art. 6.5 was adopted by consensus. This Additional Protocol II has generally been widely accepted by the American States, although there are some curious exceptions, such as the United States, which, although it signed it on 12 December 1977, has not yet ratified it.

Since its adoption, many States have proclaimed or granted amnesties to persons who have participated in non-international armed conflicts, either through a specific international treaty, through various national normative instruments or other unilateral acts. In general, the practice of proclaiming or granting amnesties through national normative instruments has prevailed in the Americas. In this regard, I can mention, among others, Articles 1 and 5 of the Argentine Amnesty Law of 1973, as well as Articles 1 and 2 of the Argentine Law repealing the Self-Amnesty Law of 1983; Article 1 of the Chilean Decree-Law on General Amnesty of 1978; Articles 1 to 7 of the Uruguay's Amnesty Law of 1985; Article 1 of Uruguay's Amnesty Law of 1986; Articles 1 and 3 of El Salvador's Law on Amnesty to Achieve National Reconciliation of 1987; Peru's Law on Terrorism of 1987; Article 1 of Colombia's 1991 Amnesty Decree; Articles 1, 2 and 4 of El Salvador's 1993 General Amnesty Law for Consolidation of Peace; Articles 2 and 4 of Guatemala's National Reconciliation Law of 1996; Peru's Amnesty Law for Retired Officers of the Armed Forces of 1996 and Peru's Law on Amnesty for Military and Civil Personnel of 1996; arts. 1 and 2 of Venezuela's General Amnesty Law of 2000; Articles1 and 2 of Venezuela's Special Amnesty Law of 2007 (*ibid.*).

Both the Resolutions adopted by the UN Security Council and the UN General Assembly on this matter promote the granting of amnesties or the approval of amnesties granted as broadly as

possible. This means that the public authorities of a State are under no obligation whatsoever to grant an amnesty at the end of hostilities in the context of a non-international armed conflict but are required to consider carefully and endeavour to grant them.

4. THE PROHIBITION OF GRANTING AMNESTIES TO PERSONS WHO HAVE COMMITTED INTERNATIONAL CRIMES OR SERIOUS HUMAN RIGHTS VIOLATIONS

The hortatory character of this second customary norm of International Humanitarian Law has an important exception or limit. When Article 6(5) of Additional Protocol II was adopted, the Union of Soviet Socialist Republics stated, in its explanation of vote, that this provision "could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever"(CDDH/I/SR.64, p. 319, para. 85). The ICRC has stated that it also agrees with this interpretation. In a statement made on 19 June 1995, the ICRC stated that, taking into account the preparatory work and its context, Art. 6.5 of Additional Protocol II could not be invoked in favour of impunity for war criminals, "since this provision only applied to prosecution for the sole participation in hostilities" (HENCKAERTS,DOSWALD-BECK, 2005, p. 4043, para. 759). In a letter of April 1997, the Director of the ICRC Legal Division informed the University of California Law Department and the ICTY Prosecutor that:

> The "*travaux préparatoires*" of Article 6(5) [of the 1977 Additional Protocol II] indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities. It does not aim at an amnesty for those having violated International Humanitarian Law… Anyway, States did not accept any rule in Protocol II obliging them to criminalize its violations… Conversely, one cannot either affirm that International Humanitarian Law absolutely excludes any amnesty including persons having committed violations of International Humanitarian Law, as long as the principle that those having committed grave breaches have to be either prosecuted or extradited is not voided of its substance *(Ibid*., para. 760).

Such amnesties would also be incompatible with the customary norm of International Humanitarian Law, discussed above, which obliges States to investigate and, where appropriate, prosecute those suspected of committing international crimes or serious Human Rights violations.

Most of the amnesties proclaimed or granted expressly exclude from their scope of application those suspected of having committed or ordered the commission of war crimes or other crimes specifically delimited in International Law, as well as serious Human Rights violations. By way of example, among the amnesties granted by specific international treaties, Article 6 of the Global and Inclusive Agreement on Transition in the Democratic Republic of Congo of 16 December 2002 already stated that in order "to achieve national reconciliation, amnesty shall be granted for acts

of war, political offences and opinion offences, with the exception of war crimes, crimes of genocide and crimes against humanity". The same applies to the vast majority of amnesties proclaimed or granted by national law. Examples of national legislation include, among many others: Article 1 of the Colombian Amnesty Decree of 1991, which excludes atrocities and murder committed in non-combat situations or taking advantage of the defencelessness of the victim; Article 104 (18) of the Constitution of the City of Buenos Aires (Argentina) of 1996, which exempts crimes against humanity; Article 8 of Uruguay's 2006 Law on Cooperation with the International Criminal Court, which excludes genocide, crimes against humanity and war crimes; Article 4 of Venezuela's 2007 Special Amnesty Law, which excludes crimes against humanity, gross violations of human rights and war crimes; etc. (*ibid*.).

This is also confirmed by the jurisprudence of national courts. In the *Videla case, in* its Judgment of 26 September 1994, the Court of Appeal of Santiago (Chile), held that the crimes it was considering constituted grave breaches of the Geneva Conventions which did not admit of amnesties and added that the granting of amnesties is not the appropriate way to extinguish the criminal responsibility of those who violate Human Rights and the Laws of war. In the *Cavallo case*, the Federal Judge of Argentina, in a Decision of 2 May 2001, confirmed that amnesties are not permissible in respect of gross violations of Human Rights and crimes against humanity. In this Decision, the Argentine Federal Judge annulled two 1987 laws that had amnestied hundreds of military officers for Human Rights violations committed during the 1976 to 1983 dictatorship. The Judge declared that these amnesty laws did not respect the Argentine State's obligations under International Law to investigate and punish Human Rights violations and crimes against humanity. In the Judgment of the Colombian Constitutional Court of 18 May 2006, in *case no. C-370/06*, the plenary of this high court considered that amnesties are not possible in respect of crimes against humanity and serious violations of International Humanitarian Law and Human Rights. On 2 March 2007, the Judgment of the Constitutional Court of Peru affirmed, in the case of *Santiago Enrique Martín Rivas*, that amnesties are not possible when they contravene international obligations arising from human rights treaties and in cases of crimes against humanity, etc. (*ibid.*).

At the UN level, the UN Security Council, in resolutions concerning Croatia, Sierra Leone and Guinea Bissau, confirmed that amnesties cannot be granted for war crimes. In relation to acts of gender-based violence committed against women and girls during armed conflicts, the UN Security Council has also generally affirmed that amnesties are not possible (UN.S/PRST/2007/05, p. 2-3).

The UNGeneral Assembly has insisted in several of its Resolutions on the need not to grant amnesties to those who commit crimes against children, in particular acts of genocide, crimes against humanity and war crimes (UN. General Assembly, Resolutions 58/157, para. 8; 59/261, para. 25;

60/231, para. 16; 61/146, para. 18; 62/141, para. 55; etc.). In a Resolution on impunity, adopted without a vote in 2002, the UN Commission on Human Rights noted that amnesties should not be granted to those who commit serious crimes resulting from violations of International Humanitarian Law and Human Rights Law (UN. Commission on Human Rights, Resolution 2002/79, para. 2. This idea was reiterated in UN. Commission on Human Rights, Resolutions 2003/72, para. 2; 2003/86, para. 6; 2004/48, para. 6; 2004/72, para. 3; 2005/44, para. 7; 2005/81, para. 3; etc.), as well as by the UN Secretary-General in several reports (UN. S/2000/915, paras. 22-24; and UN. S/2001/331, para. 10).

International Human Rights monitoring or enforcement bodies have also stated that amnesties are incompatible with the duty of States to investigate crimes under International Law and non-derogable Human Rights violations. The UN Human Rights Committee, for example, made the following statement in 1992 in its General Comment on Article 7 of the International Covenant on Civil and Political Rights, concerning the prohibition of torture or other cruel, inhuman, or degrading treatment or punishment:

> The Committee has noted that some 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 (UN. Human Rights Committee, General Comment n. 20, para 15).

Subsequently, in 2004, the same UN Human Rights Committee affirmed that amnesties are not applicable to those who commit offences "recognised 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)"(*Ibid.*, General Comment n. 31, para 18).

The same attitude has been maintained by the American regional human rights monitoring bodies in the framework of the Organization of American States (OAS). In its Report of 24 September 1992, in *case 10.287 (El Salvador)*, the Inter-American Commission on Human Rights (IACmHR) held that the application of the 1987 Salvadoran Amnesty Law to achieve national reconciliation constituted a clear violation of the Salvadoran Government's obligation to investigate and punish the human rights violations of the victims in the 1983 *Las Hojas Massacre* case and to provide adequate compensation for the damages resulting from these rights violations (OAS.IACmHR, *Report No. 26/92, Case 10.287*). In its Report of 27 January 1999, in *Case 10.488 (El Salvador), Ignacio Ellacuría, SJ et al*, the IACmHR also held that the application of the 1993 Salvadoran Law of General Amnesty for the Consolidation of Peace constituted a violation of the judicial guarantees and the right

to effective judicial protection of the victims contemplated in Arts. 8.1 and 25 of the American Convention on Human Rights, as well as art. 3 common to the four Geneva Conventions and art. 4 of Additional Protocol II, recommending that the Government of El Salvador annul the 1993 Law with *ex tunc* effect (OAS.IACmHR, Report No. 136/99, *Case 10.488*, paras. 122 and 129, Chapt. XI, para. 2 and Chapt. XII, para. 1).

In its Judgment of 14 March 2001, concerning the *case* of *Barrios Altos v. Peru*, which dealt with the legality of Peruvian amnesty laws, the Inter-American Court of Human Rights (IACtHR) held that:

> All amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law"(OAS. IACtHR, *Case of Barrios Altos v. Peru*. Judgment of 14 March 2001, para. 41).

The IACtHR added 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(*Ibid*., para. 44).

Since then, the IACtHR has maintained the same judicial doctrine against amnesties for crimes against humanity. The IACtHR has consolidated this judicial doctrine in its Judgments in the cases of *La Cantuta v. Peru* (OAS. IACtHR, Judgment of 29 November 2006, para. 225); *Almonacid Arellano et al. v. Chile*, (OAS. IACtHR, Judgment of 26 September 2006, para. 129); *Dos Erres v. Guatemala*, (OAS. IACtHR, Judgment of 24 November 2009, para. 129); *Gomes Lund ("Guerrilha do Araguaia") v. Brazil*, (OAS.IACtHR, Judgment of 24 November 2010, para. 180); *Gelman v. Uruguay*, (OAS. IACtHR, Judgment of 24 February 2011,para. 225); *Tarazona Arrieta et al. v. Peru*, of 15 October 2014 (OAS. IACtHR, Judgment of 15 October 2014, para. 155); etc. (ESTEVE MOLTÓ, 2016a, p. 105-123; and *ibid*., 2016b, p. 405-427).

International criminal tribunals have also considered that the character of norms prohibiting international crimes as peremptory norms of International Law (*ius cogens*) has the consequence of depriving national measures (national laws or peace agreements between a Government and a revolutionary movement) that proclaim or grant amnesties for these crimes of legal relevance. As stated by ICTY:

> The fact that torture is prohibited by a peremptory norm of international law has other effects (...) At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition

> against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law((ICTY. Prosecutor v. *Anto Furundzija*,Judgment of 10 December 1998, para 155).

We have already noted above that the SCSL also affirmed that, due to the character of international crimes as peremptory norms of International Law (*ius cogens*), universal jurisdiction exists for their prosecution. From this, it deduced that a State cannot deprive another State of its universal jurisdiction to prosecute the commission of international crimes by the domestic granting of an amnesty, nor constitute a procedural impediment to the exercise of criminal jurisdiction by an international court.

CONCLUSIONS

Article 6.5 of the 1977 Additional Protocol II to the Geneva Conventions of 1949 was undoubtedly the first important step towards restricting or limiting amnesties granted or proclaimed in the name of transitional justice at the end of hostilities in an armed conflict of a non-international nature.

Whether it is because of the legal consequences that derive from the character of peremptory International Law (norms of *jus cogens*) that the prohibitions on serious Human Rights violations or on committing or ordering the commission of international crimes currently have, or because of the character of customary norms of general International Law that these prohibitions have acquired, the conclusion is that the granting or proclamation of "total" or "general" amnesties in the name of the so-called transitional justice is not in accordance with contemporary International Law. The fact is that the consistent practice of States and international organisations, as well as the reiterated jurisprudence of regional and international commissions and tribunals, demonstrates the existence of two insurmountable limits to the proclamation or granting of amnesties at the end of hostilities in a non-international armed conflict. First, the proclamation or granting of amnesties at the end of a non-international armed conflict must in no case prevent the investigation and, where appropriate, prosecution of those allegedly responsible for committing or ordering the commission of international crimes or serious Human Rights violations. Secondly, the proclamation or granting of such amnesties should also in no case imply exoneration from criminal responsibility of individuals who have committed or ordered the commission of such atrocities.

This paper has demonstrated how the practice of the American States, as well as that of the supervisory bodies of the Inter-American Convention on Human Rights, have contributed very actively to the consolidation and enshrinement of these two customary limits to State sovereignty.

At the present time, it is important not to forget this double limit to the sovereignty of States when proclaiming or granting amnesties or pardons in the name of transitional justice. The International Law Commission is currently working on a draft international convention on the prevention and punishment of crimes against humanity. It is hoped that the outcome of this codification effort will reflect the two customary international norms discussed above, which are conceived as absolute limits on the ability of States to proclaim or grant amnesties for those who commit or order the commission of such crimes.

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