Separate and Concurring Opinion of Judge Luz del Carmen Ibáñez Carranza on the Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"'

KEY FINDINGS

1. Forms of amnesties or similar measures that prevent the investigation, prosecution, and eventual punishment of international core crimes that amount to grave human rights violations and grave breaches of international humanitarian law are incompatible with international law because they violate concrete treaty and *erga omnes* obligations of States and internationally recognised victims' rights.

2. In contexts of transitional justice processes, certain forms of amnesties such as conditional amnesties may be granted, provided that they do not include gross violations of human rights or grave braches of international humanitarian law, they respect victims' rights to truth, justice and reparations, and they guarantee forms of accountability.

3. In the context of the Rome Statute, amnesties or similar measures that result in impunity for serious violations of human rights or grave breaches of international humanitarian law that constitute crimes under the jurisdiction of the Court appear to be contrary to the object and purpose of the Rome Statute. Nevertheless, each case must be assessed on a case-by-case basis.

4. In the case at stake, Law No 6 appears to be incompatible with well-established international law; was inapplicable to Mr Gaddafi because the crimes he was charged with were excluded from the ambit of the law, it was not applied by a competent judicial authority and the specific requirements for its application were not met; and thus the law had no effect on the admissibility of the case brought against Mr Gaddafi which remains admissible before the Court.

I. INTRODUCTION

5. The Appeals Chamber delivered its judgment in the case of *The Prosecutor v. Saif Al-Islam Gaddafi* on 9 March 2020 (the 'Common Judgment').[1] I concur with the majority in their conclusions on both grounds of appeal leading to their confirmation of the Pre-Trial Chamber's decision to reject Mr Gaddafi's challenge to the admissibility of the case brought against him before the Court. However, I depart from the majority's reasoning and brief discussion on amnesties' compatibility with international law in paragraph 96. I am compelled to address this point in detail as the second ground of appeal directly engages the issue of the compatibility of amnesties with international law. The Common Judgment characterises the Pre-Trial Chamber's discussion of amnesties as *obiter dicta*, thus declining the opportunity to explore this important question.

6. I am writing this opinion to afford the important matter of amnesties the space it deserves, such that this Court's efforts to ensure an end to impunity for atrocious crimes can progress in accordance with international advances in the law. It is imperative to clarify the relationship between mechanisms that effectively collide with States' obligations to investigate, prosecute and punish perpetrators of gross human rights violations that underlie crimes before this Court's jurisdiction, for the sake of legal certainty. The Rome Statute system is not designed to allow measures, including amnesties, that ultimately lead to impunity for perpetrators of the atrocious crimes under the Court's jurisdiction that seriously violate human rights. This would be inconsistent with its object and purpose.

7. Some forms of amnesties may be applied in transitional justice contexts for purposes of reconciliation at the end of hostilities, including peace accords. Nevertheless, blanket amnesties or equivalent measures that result in impunity for core international crimes are incompatible with international law. Tools such as conditional amnesties may be applied in the context of delicate reconciliation efforts during periods of transitional justice in domestic proceedings where the

[1] Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019, ICC-01/11-01/11-695.

nature of the crimes so permits, and when they meaningfully engage with victims' human rights to truth, justice and reparations. Clear norms, principles and standards in international law state this authoritatively.

8. This opinion first considers the Pre-Trial Chamber's reasoning relating to amnesties and whether this issue was *obiter dicta*. It then discusses amnesties and equivalent measures in depth as a second issue, including their compatibility with specialised international law: international human rights law, international humanitarian law, issues of transitional justice and international criminal law. The final section applies this discussion to the present case in order to determine whether Law No. 6 of 2015 ('Law No. 6') could be held compatible with international law, whether Law No. 6 could be applicable to Mr Gaddafi, and what the impact is, if any, of its purported *de facto* application on Mr Gaddafi's challenge to the admissibility of the case before this Court. Finally, section VI will set out the final conclusions.

II. RELEVANT BACKGROUND AND ISSUES AT STAKE

9. I confine this opinion to a focused examination of amnesties for crimes under the jurisdiction of this Court. This issue arises under the second ground of appeal, where Mr Gaddafi argues that '[t]he Pre-Trial Chamber erred in law and fact, and procedurally, by failing to determine that Law No. 6 was applied to [him] and that such application rendered his conviction final' and his case before the Court inadmissible.[2] I will not repeat the parties' and participants' submissions on appeal on this issue as they are helpfully outlined in the Common Judgment.[3]

10. Under the second ground of appeal, counsel for Mr Gaddafi raises several points. In his last set of arguments, he argues that the Pre-Trial Chamber '[e]rred in law in finding that Law No. 6 was incompatible with international law' and, thus, this law rendered his case before the Court inadmissible on the basis of articles

[2] Defence Appeal Brief in support of its appeal against Pre-Trial Chamber I's 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"', 20 May 2019, ICC-01/11-01/11-669 (the 'Appeal Brief'), paras 7, 11.
[3] The parties' submissions on amnesties and international law are addressed in the Common Judgment as follows: Mr Gaddafi paras 71-72; the Prosecutor paras 74, 76; OPCV para. 80; Government of Libya para. 82; *Amici Curiae* paras 83-84.

17(1)(c) and 20(3) of the Rome Statute.[4] It is this issue which this opinion is designed to resolve. I refer to submissions from the parties and participants throughout where they assist in addressing this question.

A. Impugned Decision

11. The Pre-Trial Chamber held that Law No. 6 'does not apply to Mr Gaddafi at a minimum due to the nature of the crime(s) he is domestically charged with […] which are automatically excluded by virtue of said law'.[5] It further expressed its belief that 'there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law'.[6] The Pre-Trial Chamber treated Law No. 6 as a 'general amnesty law', as defined by the Government of Libya.[7]

12. After a review of relevant specialised jurisprudence, the Pre-Trial Chamber concluded that

> granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate.[8]

13. In applying the foregoing considerations to Law No 6, the Pre-Trial Chamber considered that 'assuming its applicability to Mr Gaddafi leads to the conclusion that it is equally incompatible with international law, including internationally recognized human rights'.[9] It held that its application 'would lead to the inevitable negative conclusion of blocking the continuation of the judicial process against Mr Gaddafi once arrested, and the prevention of punishment if found guilty by virtue

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[4] Appeal Brief, paras 36(v), 110(i).
[5] Pre-Trial Chamber I, Decision on the 'Admissibility Challenge by Dr Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute', ICC-01/11-01/11-662, 5 April 2019, (the 'Impugned Decision'), para. 58.
[6] Impugned Decision, para. 61.
[7] Impugned Decision, para. 61.
[8] Impugned Decision, para. 77.
[9] Impugned Decision, para. 78.

of a final judgment on the merits, as well as denying victims their rights where applicable'.[10]

14. In his separate opinion, Judge Perrin de Brichambaut, upon conducting an analysis under article 21 of the Statute,[11] concluded that 'granting amnesties for serious crimes such as murder constituting a crimes against humanity appears to be incompatible with regards to States' obligation under the Convention against Torture, the Geneva Conventions and the Convention on the Punishment and Prevention on Genocide to prosecute or extradite those who have committed serious crimes'.[12] According to Judge Perrin de Brichambaut, 'this interpretation is consistent with States' obligations under international human rights law'.[13] He further stated that the Chamber should take this duty into account when considering 'whether domestic amnesty laws would create an obstacle to proceedings before this Court', and that where there are proceedings before this Court which follow or are concurrent with a State's use of an amnesty law, 'these proceedings do not necessarily give rise to a violation of the *ne bis in idem* principle'.[14] Accordingly, he concluded, 'a State's decision to enact an amnesty law does not automatically affect admissibility before this Court under articles 17(1)(c) and 20(3) of the Statute'.[15]

B. Relevant findings in the Common Judgment

15. The Common Judgment holds that the Pre-Trial Chamber's findings in relation to amnesties and Law No. 6's compatibility with international law were *obiter dicta*.[16] The Common Judgment finds in light of the conclusions reached earlier in the judgment – that the Pre-Trial Chamber did not err in finding a lack of finality of the Tripoli Court Judgment, and that Law No. 6 is not applicable to the crimes for which Mr Gaddafi was convicted – it was not necessary to address the

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[10] Impugned Decision, para. 78.
[11] Separate concurring opinion by Judge Marc Perrin de Brichambaut, 8 May 2019, ICC-01/11-01/11-662-Anx ('Separate Concurring Opinion of Judge Perrin de Brichambaut'), paras 119-136.
[12] Separate concurring opinion by Judge Perrin de Brichambaut, para. 146.
[13] Separate concurring opinion by Judge Perrin de Brichambaut, para. 147.
[14] Separate concurring opinion by Judge Perrin de Brichambaut, para. 148.
[15] Separate concurring opinion by Judge Perrin de Brichambaut, para. 148.
[16] Common Judgment, para. 96.

remaining arguments in the second ground of appeal. Further, and without any further explanation, it added: '[f]or present purposes, it suffices to say only that international law is still in the developmental stage on the question of acceptability of amnesties. The Pre-Trial Chamber appears to have accepted this […]'.[17] In these circumstances, a decision was made to '[not] dwell on the matter further'.[18]

C. Issues arising in the present appeal

16. The Common Judgment noted that the Pre-Trial Chamber's findings on this issue were *obiter dicta*, and it declined to explicitly address the question. It also affirmed that international law is still in the developmental stage on the question of acceptability of amnesties and seems to have misinterpreted the Pre-Trial Chamber's analysis of this crucial matter. On this basis, it decided to limit its analysis to the discrete question of whether Law No. 6 was applicable to the crimes for which Mr Gaddafi was convicted. In my view, there is a need to examine this issue in order to clarify the legality or otherwise of amnesties or similar measures when dealing with the commission of atrocious crimes that seriously violate core human rights, including grave breaches of the Geneva Conventions. This will enable a better understanding and application of the Rome Statute in light of its object and purpose.

17. Considering the foregoing, the following issues must be addressed:

- **First Issue**: Were the Pre-Trial Chamber's findings related to amnesties *obiter dicta*?

- **Second Issue**: Was the Pre-Trial Chamber correct in its conclusion regarding the incompatibility of amnesties with international law?

- **Third Issue**: Was the Pre-Trial Chamber correct in its finding about the incompatibility of Law No 6 with international law, about its inapplicability to Mr Gaddafi, and about the impact, if any, of the alleged

[17] Common Judgment, para. 96, referring to Impugned Decision, para. 61.
[18] Common Judgment, para. 96.

de facto application of the law on Mr Gaddafi's admissibility challenge before this court?

III. FIRST ISSUE: WERE THE PRE-TRIAL CHAMBER'S FINDINGS RELATED TO AMNESTIES *OBITER DICTA*?

18. According to the Black's Law Dictionary, the phrase *obiter dicta* means 'a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential'.[19] These are incidental remarks which are non-essential to the decision.[20] They do not form part of the *ratio decidendi* of the case and therefore create no binding precedent.[21] On the other hand, the *ratio decidendi* contains the rationale of the decision. It is the principle or principles of law on which the court reaches its decision and it is said to be the statement of law applied to the material facts.[22] In light of the entirety of the reasoning in a decision, if one reaches the conclusion that the decision would have been different if a given statement had been omitted, then that statement is a critical part of the decision, and is therefore part of the *ratio decidendi.*

19. In this case, the Pre-Trial Chamber had to decide what impact, if any, Law No. 6 had on the admissibility of the case of Mr Gaddafi. The issue of the compatibility of amnesties with international law was directly relevant to this question. Indeed, if Law No. 6 is incompatible with international law, then it cannot be a valid reason to oppose the declaration of the inadmissibility of the case brought against Mr Gaddafi. The relevance of the issue is self-evident.

20. As recalled in the Judgment, the Pre-Trial Chamber found that Law No. 6 could not apply to Mr Gaddafi for two reasons. First, because the crimes charged fell outside the scope of the law and second, because the law was incompatible with international law.[23] In particular, the Pre-Trial Chamber first found that this law 'does not apply to Mr Gaddafi at a minimum due to the nature of the crime(s) he is domestically charged with […] which are automatically excluded by virtue of said

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[19] Black's Law Dictionary 1177 (9th ed. 2009).
[20] https://www.lexico.com/definition/obiter_dictum.
[21] https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100243515.
[22] https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100405351.
[23] Impugned Decision, paras 56-78.

law',[24] and that it follows that Law No. 6 does not 'render the existing Judgment [against Mr Gaddafi] final', as argued by counsel for Mr Gaddafi.[25]

21. Turning to the second element regarding the nature of the crimes, the Pre-Trial Chamber, after reviewing relevant jurisprudence from the Inter-American Court of Human Rights,[26] European Court of Human Rights, African Court of Human and People's Rights;[27] a select pronouncement from the United Nations Human Rights Committee;[28] and jurisprudence of the *ad hoc* tribunals,[29] held that 'there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law'.[30] It set out in detail, and relied on, the jurisprudence from various international and regional bodies[31] to conclude that 'granting amnesties and pardons for serious acts such as murder constituting crimes against humanity in incompatible with internationally recognized human rights'.[32]

22. These findings formed part of the Pre-Trial Chamber's core reasoning that led to its conclusion that 'Law No. 6 of 2015 does not apply to Mr Gaddafi'[33] because it would have the effect of 'denying victims their rights where applicable'.[34] This led the Pre-Trial Chamber to reject Mr Gaddafi's admissibility challenge.[35] These findings formed part of the *ratio decidendi* of the Pre-Trial Chamber's determination. In these circumstances, I find it difficult to accept the Common Judgment's proposition that 'the Pre-Trial Chamber's findings on Law No. 6's compatibility with international law were *obiter dicta*'.[36]

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[24] Impugned Decision, para. 58.
[25] Impugned Decision, para. 59.
[26] Impugned Decision, paras 62-66.
[27] Impugned Decision, paras 67-68.
[28] Impugned Decision, paras 69-71.
[29] Impugned Decision, para. 72.
[30] Impugned Decision, para. 61.
[31] Impugned Decision, paras 61-76.
[32] Impugned Decision, para. 77.
[33] Impugned Decision, para. 56.
[34] Impugned Decision, para. 78.
[35] Impugned Decision, para. 79.
[36] Common Judgment, para. 96.

23. I further note that counsel for Mr Gaddafi made extensive submissions on this subject under the second ground of appeal of his Appeal Brief,[37] which were addressed by the Prosecutor and the other participants in their respective filings.[38] Also, in its decision on the conduct of the hearing, the Appeals Chamber raised a number of questions to be addressed by parties and participants during the hearing, including in relation to amnesties and their relevance for the purposes of admissibility determinations.[39] Oral submissions on this issue were received during the hearing,[40] which is a further reason warranting, in my view, a pronouncement from this Chamber. The Appeals Chamber was thus required to address the issue.

24. In light of the above considerations, it is clear that the Pre-Trial Chamber's reasoning and determination on the incompatibility of amnesties with international law for serious human rights violations, such as those resulting from the crimes subject to the jurisdiction of this Court, was an essential part of the *ratio decidendi* because the decision would have been different if this reasoning and determination had been omitted. It cannot therefore be maintained, as the Common Judgment does, that the findings of the Pre-Trial Chamber in this regard were *obiter dicta*.

IV. SECOND ISSUE: WAS THE PRE-TRIAL CHAMBER CORRECT IN ITS CONCLUSION REGARDING THE INCOMPATIBILITY OF AMNESTIES WITH INTERNATIONAL LAW?

25. The Common Judgment stated that 'international law is still in the developmental stage on the question of acceptability of amnesties',[41] and elects not to dwell on the matter further. For the reasons that follow, I cannot support this approach as

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[37] Appeal Brief, paras 87-109.
[38] *See for example*, Prosecution Response to Mr Saif Al-Islam Gaddafi's Appeal against the "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'" (ICC-01/11-01/11-669), 11 June 2019, ICC-01/11-01/11-671, paras 74-106; Response on Behalf of Victims to the Defence Appeal Brief on the Decision on the Admissibility of the Case, 11 June 2019, ICC-01/11-01/11-670, paras 67-71.
[39] Decision on the conduct of the hearing before the Appeals Chamber, 1 November 2019, ICC-01/11-01/11-681, p. 5.
[40] *See* for example, Transcript of 11 November 2019, ICC-01/11-01/11-T-007-ENG, p. 112, line 14 to p. 113, line 20; Transcript of 12 November 2019, ICC-01/11-01/11-T-008-ENG, p. 14, line 8 to p. 15, line 22; p. 18, line 2 to p. 23, line 1; p. 23, line 2 to p. 29, line 8; p. 31, lines 1-5; p. 73, line 16 to p. 74, line 23.
[41] Common Judgment, para. 96.

there is well-established law, principles and standards confirming that general amnesties and equivalent measures for grave human rights violations, such as those caused by the commission of crimes under the jurisdiction of the Court, are incompatible with international law. This opinion is limited to those areas of public international law relevant to determining the permissibility of amnesties for international crimes that amount to serious human rights violations: international human rights law, international humanitarian law and international criminal law.

26. This section will first set out the conceptual approaches to amnesties for grave human rights violations, such as those caused by the commission of crimes under the Court's jurisdiction, and the variants of amnesties. It will then discuss the broad legal framework and relevant juridical considerations concerning the issue of amnesties in international law in the areas of international human rights law and international humanitarian law. It will also consider transitional justice contexts and international criminal law, including a discussion on amnesties and their incompatibility with the spirit, object and purpose of the Rome Statute. This section will include principles and relevant jurisprudence and a discussion about the kinds of amnesties typically granted in transitional justice contexts. The ultimate aim is to determine whether the Pre-Trial Chamber was correct in its conclusions regarding the incompatibility of amnesties with international law.

A. Amnesties for international crimes that amount to grave human rights violations

1. Conceptual approaches to amnesties

27. This section sets out conceptual approaches and an operative definition of amnesties for international crimes that amount to grave human rights violations. Numerous conceptual approaches and features of amnesties that prevent the investigation, prosecution and punishment of those atrocities have been espoused by, *inter alia*, academics, the United Nations and relevant courts.

28. From an academic perspective, Mark Freeman conceptualises amnesty as 'an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons

in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law'.[42]

29. According to Norman Weisman, an amnesty 'is an act of sovereign power granting forgiveness for a past offence, usually committed against the State'.[43] Anja Seibert-Fohr has defined amnesty as 'the legal basis for the decision by a government not to punish offenders for particular crimes or offences committed within a fixed period of time or specified situation'.[44]

30. The International Committee of the Red Cross (the 'ICRC') has distinguished between amnesties and pardons, stating that while the ultimate effect of an amnesty is to eliminate 'the consequences of certain punishable offenses, stop […] prosecutions and quash […] convictions', a pardon 'puts an end to the execution of the penalty, though in other respects the effects of the conviction remains in being'.[45] The ICRC further maintained that amnesties are usually created by legislative act, while a pardon is usually granted by an executive act of the head of state.[46] Academics note that amnesties typically take place prior to proceedings or conviction, while pardons take place following conviction and punishment.[47] In this regard, this Opinion notes that, if the effect of a pardon or similar measure is impunity for international crimes that constitute serious human rights violations, then they would be, together with amnesties and for reasons explained in detail below, incompatible with international law.

31. In its Rule-of-Law Tools for Post-Conflict States relating to amnesties, the United Nations Office of the High Commissioner for Human Rights stated that 'amnesty [refers] to legal measures that have the effect of: (a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed

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[42] M. Freeman, 'Necessary Evils: Amnesties and the Search for Justice' (2009), p. 13.
[43] N. Weisman, 'A history and discussion of amnesty' in *4 Columbia Human Rights Law Review 520* (1972), p. 529.
[44] A. Seibert-Fohr, 'Amnesties' in *Max Planck Encyclopedia of Public International Law* (2010), p. 2.
[45] International Committee of the Red Cross 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1969 (1987), para. 4617.
[46] International Committee of the Red Cross 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1969 (1987), para. 4617.
[47] F. Ntoubandi, 'Amnesty for Crimes Against Humanity Under International Law' (2007), p. 10.

before the amnesty's adoption; or (b) Retroactively nullifying legal liability previously established'.[48]

32. In a different document, the United Nations Office of the High Commissioner for Human Rights has noted that 'amnesties for serious violations of human rights and humanitarian law—war crimes, crimes against humanity and genocide—are generally considered illegal under international law, regardless of whether they are given in exchange for a confession or apology'.[49] It has also held that '[s]uch an amnesty would violate the accepted Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution', referring to the Secretary-General's report on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).[50]

33. The latter report states that 'United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights'.[51] It further maintains that '[c]arefully crafted amnesties can help in the return and reintegration of both groups and should be encouraged, although, as noted above, these can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights'.[52]

34. From a jurisprudential perspective, the IACtHR held in the landmark *Barrios Altos* case that amnesties are 'measures designed to eliminate responsibility' and 'are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary

[48] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Amnesties (2009), p. 5.
[49] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Truth Commissions, (2006), p. 12.
[50] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Truth Commissions, (2006), p. 12, footnote 9.
[51] UN Security Council, Report of the Secretary General on The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, S/2004/616, p. 5.
[52] UN Security Council, Report of the Secretary General on The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, S/2004/616, p. 11.

execution and forced disappearance, all of them prohibited because they violate non-derogable rights'.[53]

35. In a decision on the question of the legality of the amnesty granted by the Lomé Peace Agreement,[54] the Appeals Chamber of the Special Court for Sierra Leone held that 'the amnesty granted by Sierra Leone cannot cover crimes under international law that are the subject of universal jurisdiction'.[55] It further stated that 'a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*'.[56].

36. In light of the above conceptual approaches, it is possible to infer the following operative definition: amnesties are measures or mechanisms whereby a State condones or forgets political, minor and domestic offences. Offences that can be the object of an amnesty are those that typically violate the interests of the State. The State can excuse these offences given their non-substantial character in the sense that they do not seriously violate core human rights. However, it is not open to a State to dispose of international crimes that resulted in the serious violation of human rights. Human rights predate the existence of the State and therefore cannot be the object of an exercise of political power by a State.

2. Variants of Amnesties

37. Although different approaches have been taken as to the categorisation of amnesties,[57] this opinion will address the most commonly known variants of amnesties such as self-amnesties, blanket, general and conditional. This classification is not strict given that the scope of amnesties includes more variants

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[53] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 41.
[54] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone-R.U.F./S.L., 7 July 1999, article IX.
[55] *Prosecutor v. Kallon*, case no. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 71.
[56] *Prosecutor v. Kallon*, case no. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 71.
[57] For further discussion of academic typologies, see, for example, J. Roberti di Sarsina, 'Transitional Justice and a State's Response to Mass Atrocity' (2019), p. 123.

and there may even be sometimes mixed forms. It is set out merely for pedagogical purposes within the specific scope and aim of this Opinion. In determining whether an amnesty for international crimes that amount to serious human rights violations is compatible with international law, it is its effect rather than its nomenclature that matters. If the effect of the measure is impunity for perpetrators of international crimes, then such measure would be incompatible with international law.

38. The United Nations Office of the High Commissioner for Human Rights has explained that 'the phrase "blanket amnesties" is rarely defined and does not appear to be used consistently'.[58] It noted however that 'a working definition can be derived from the way this phrase has been used: blanket amnesties exempt broad categories of serious human rights offenders from prosecution and/or civil liability without the beneficiaries' having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis'.[59]

39. General amnesties are granted to large groups of individuals who are being prosecuted or have been convicted without making any distinction as to specific beneficiaries.[60] In the context of peace agreements, these are granted to facilitate, among other purposes, demobilisation, disarmament, return and reintegration following the cease of hostilities, and in addition the release and exchange of prisoners.

40. Self-amnesties are those in which a regime grants measures to exempt itself from investigation, prosecution and punishment, in order to protect principals and members of the regime from any future criminal proceedings.[61]

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[58] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Amnesties (2009), p. 8.
[59] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Amnesties (2009), p. 8.
[60] *See generally* R. Parker, 'Fighting the Sirens' Song: The Problem of Amnesty in Historical and Contemporary Perspective' in *42 Acta Judica Hungarica 69* (2001).
[61] International Centre for Transitional Justice, Navigating Amnesty and Reconciliation in Nepal's Truth and Reconciliation Commission Bill, November 2011. One example of such an amnesty occurred in Ghana, where the Rawlings administration included a self-amnesty in the 1992 Constitution which

41. In terms of conditional or conditioned amnesties, they have been defined as a particular type of amnesty that 'meet the calls for truth, peace and justice' and 'while satisfying the accountability requirements are designed to facilitate a peaceful transition and reconciliation'.[62] In this regard, the United Nations Office of the High Commissioner for Human Rights has indicated that conditional amnesties 'exempt an individual from prosecution if he or she applies for amnesty and satisfies several conditions, such as full disclosure of the facts about the violations committed'.[63] Conditional or conditioned amnesties will be further elaborated upon below when discussing amnesties in transitional justice contexts.

42. As noted above, rather than the specific nomenclature of an amnesty, the determining aspect in assessing its compatibility or otherwise with international law is its effect. If this measure results in impunity for perpetrators of international crimes amounting to serious human rights violations or grave breaches of international humanitarian law, then such amnesty measure would be incompatible with international law as explained below.

B. Legal Framework and Relevant Juridical Considerations

43. As it will be shown below, there are numerous provisions, principles, standards and jurisprudence in international law, emerging from international human rights law, international humanitarian law and international criminal law, indicating that amnesties for international core crimes which amount to gross human rights violations are not permitted as they negate essential rights to the victims of such atrocities. This section sets out the law, principles and jurisprudence, which are ultimately reflected in the principles and values established in the Rome Statute, establishing that amnesties for international crimes are impermissible.

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barred any legal measures from being taken against members of either the provisional National Defence Council (PNDC) or the Armed Forces Revolutionary Council (AFRC), both military regimes headed by Rawlings himself (Nahla Valji, *Ghana's National Reconciliation Commission: A Comparative Assessment*, International Centre for Transitional Justice (2006)).

[62] Anastasia Kushleyko, 'Accountability v. "Smart Amnesty" in the Transitional Post-conflict Quest for Peace. A South African Case Study' in Current Issues in Transitional Justice, Springer Series in Transitional Justice 4 (2015).

[63] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Amnesties (2009), p. 43.

1. International Human Rights Law, Principles and Standards

(a) Treaties

44. Under international human rights law, victims enjoy several fundamental human rights. States must observe these rights and once violated, they are under an international obligation to investigate, prosecute and, if applicable, punish the perpetrators. If those obligations are not fulfilled, States are susceptible to international legal liability.

45. The ICCPR establishes core human rights that can never be derogated – even in times of public emergency that threatens the life of the nation.[64] Those core human rights to which article 4 of the ICCPR refers are: the right to life connected to the right to personal, physical and mental integrity and dignity;[65] the prohibition of torture, cruel, inhuman and degrading treatment;[66] the prohibition on being held in slavery or in servitude;[67] being imprisoned merely on the ground of inability to fulfil a contractual obligation;[68] the right not to be held guilty for a criminal offence that did not constitute a criminal offence at the time of its commission;[69] the right to be recognised as a person before the law that entails full protection by the law;[70] and the right to freedom of thought, conscience and religion.[71]

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[64] International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, article 4.
[65] International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, article 6.
[66] International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, article 7.
[67] International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, article 8.
[68] International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, article 11.
[69] International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, article 15.
[70] International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, article 16.
[71] International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, article 18.

46. At the regional level, the American Convention on Human Rights,[72] the European Convention on Human Rights[73] and the African Charter on Human and Peoples' Rights[74] mirror the core human rights established in article 4 of the ICCPP.[75]

47. The core human rights protected in these treaties, especially the right to life and its connected rights to personal, physical and mental integrity and dignity and the protection of the law at all times, are peremptory norms that the international community recognises as *ius cogens*, meaning also that the prohibition to commit international crimes which violate the core human rights is also a *ius cogens* norm.[76] Article 53 of the 1969 Vienna Convention on the Law of Treaties defines a *ius cogens* provision as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[77] Therefore, this triggers an *erga omnes* obligation.

48. From the international human rights law perspective, once their basic human rights have been violated by the commission of international crimes, according to article 2(3)(a) of the ICCPR, victims enjoy the right to an effective remedy, meaning the right to access tribunals and the right to reparations. This right is also reflected in regional human rights treaties.[78] In addition, according to the current

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[72] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, article 4 (1).
[73] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos. 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998, *respectively*, article 2 (1).
[74] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[75] *See for e.g.* Right to Life (articles 4(1) of the American Convention on Human Rights; article 2(1) of the European Convention on Human Rights; article 4 of the African Charter on Human and Peoples' Rights); Right to humane treatment, including the prohibition of being subject to torture and having one's moral integrity respected (article 5 of the American Convention on Human Rights; article 3 of the European Convention on Human Rights; article 5 of the African Charter on Human and Peoples' Rights); Right to have honour respected and dignity recognised (article 11 of the American Convention on Human Rights; article 8 of the European Convention on Human Rights; article 5 of the African Charter on Human and Peoples' Rights).
[76] Mark Tushnet et al, 'International Human Rights and Humanitarian Law' (2006), pp. 34-35.
[77] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
[78] *See e.g.* American Convention on Human Rights, art. 25; European Convention on Human Rights, art. 13.

human right *corpus juris*, this right to effective remedy entails the right to know the truth, the right to justice and the right to integral reparations.[79]

49. Article 2 of the ICCPR establishes that each State 'undertakes to respect and to ensure to all individuals' the rights it recognises. Article 1 of the American Convention on Human Rights and of the European Convention on Human Rights impose the same obligation to ensure and secure the rights and freedoms recognised therein. Similarly, the African Charter on Human and Peoples' Rights stipulates that '[t]he Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall *undertake to adopt legislative or other measures to give effect to them*' (emphasis added). This duty 'to ensure' and 'give effect' can only mean that States are under an obligation to take specific steps to redress the wrong committed by the violation of the right.[80] This obligation includes effective investigation, prosecution and, if applicable, punishment of those responsible for the violation.

50. The concrete positive obligations to investigate, prosecute and, if applicable, punish serious human rights violations is reinforced in numerous treaties in the field of international criminal law, including article I of the Genocide Convention, which requires Contracting Parties to 'prevent and punish' genocide whether in peace or war;[81] article 7 of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which requires States to prosecute or extradite persons alleged to have committed torture;[82] and article 6 of the International Convention for the Protection of All Persons from Enforced

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[79] C. Bassiouni, 'International Recognition of Victims' Rights' in *6 Human Rights Law Review 203* (2006), p. 260; P. de Greiff, UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, para. 20 (the Special Rapporteur lists treaties which establish these rights, including the ICCPR, ICESCR, Convention against Torture, Genocide Convention, International Convention on the Suppression and Punishment of the Crime of Apartheid, Convention on the Rights of the Child, and Racial Discrimination Convention).
[80] *See* Juan E. Méndez, 'Accountability for Past Abuses' in *19:2 Human Rights Quarterly 255* (1997), p. 259.
[81] Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution 260 A (III), adopted 9 December 1948, 78 UNTS 277.
[82] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/39/51 (1984), entered into force 26 June 1987.

Disappearance, which requires State parties to hold perpetrators criminally responsible.[83] In addition, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[84] imposes the obligation on States signatories 'to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of [war crimes and crimes against humanity] and that, where they exist, such limitations shall be abolished'.[85] These treaties are further examined below when analysing international criminal law.

51. It is clear from the provisions contained in these treaties that crimes under the jurisdiction of the Court violate rights that are peremptory norms recognised as *ius cogens* by the international community. The commission of international crimes infringes the prohibition against violating some or all of these rights which is also a *ius cogens* norm. There is thus well-established hard law requiring the effective investigation, prosecution and punishment of those responsible for grave human rights violations. In addition, the obligation to investigate, prosecute and punish perpetrators of mass atrocities amounts to an obligation *erga omnes*.[86] Measures, such as amnesties, the effect of which is to effectively prevent the investigation, prosecution and punishment of those atrocities would thus be incompatible with international human rights law.

(b) Principles and standards

52. In terms of existing principles and standards in the field of international human rights law, there are several principles proscribing impunity for atrocious international crimes that amount to serious human rights violations and

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[83] International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, UN Doc. A/RES/61/177; IHRR 582 (2007). Its article 11(1) further stipulates that State parties should either extradite, surrender or prosecute persons alleged to have committed an offence under its remit.

[84] Adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968. Entered into force on 11 November 1970, in accordance with article VIII.

[85] Article IV of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, A/RES/2391(XXIII).

[86] The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr (the '*Al-Bashir* Judgment'), para. 123.

consecrating the rights of victims of serious human rights violations to truth, justice and reparations, which would effectively be annulled by the adoption of measures such as amnesties.

53. The above principles imply obligations on States to investigate, prosecute and, if applicable, punish perpetrators and result in concrete rights for the victims. The principles set out below form part of a broad spectrum of principles and standards repeatedly set out by the UN.[87]

54. The 2005 United Nations' Updated Principles to Combat Impunity clearly relate to amnesties and provide detail on victims' right to justice. Impunity means 'the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims'.[88] These principles are designed to apply to 'serious crimes under international law,' which the UN Commission on Human Rights defines as

> grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery.[89]

55. Principle 19 asserts that 'States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators […] by ensuring that those responsible for serious crimes under international law are

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[87] *See* UN Human Rights Office of the High Commissioner, *International instruments relating to the promotion of truth, justice, reparation and guarantees of non-recurrence*, setting out a list of all relevant instruments, including, treaties, resolutions and reports.
[88] UN Commission on Human Rights Updated Principles to Combat Impunity, 8 February 2005, UN Doc. E/CN.4/2005/102/Add.1, p. 6.
[89] UN Commission on Human Rights Updated Principles to Combat Impunity, 8 February 2005, UN Doc. E/CN.4/2005/102/Add.1, p. 6.

prosecuted, tried and duly punished'.[90] It is clear that amnesties for serious crimes under international law are not permitted, as articulated in these principles.

56. Principle 22 holds that 'States should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty […] that fosters or contributes to impunity'.[91]

57. Principle 24 refers to restrictions and other measures relating to amnesty, which must be kept within the following bounds:

> a. The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations [under Principle 19 - the duty to investigate, prosecute and punish] or the perpetrators have been prosecuted before a court with jurisdiction – whether international, internationalized or national – outside the State in question;
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> b. Amnesties and other measures of clemency shall be without effect with respect to the victims' right to reparation… and shall not prejudice the right to know.[92]

58. In 2006, drawing from prior international agreements, the UN adopted the 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. The Principles state that '[v]ictims should be treated with humanity and respect for their dignity and human rights' and include three remedies for gross violations of international human rights law: 'equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; [and] access to relevant information concerning violations and reparation mechanisms'.[93]

59. Principle 4 is particularly relevant insofar as it provides that:

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[90] UN Commission on Human Rights Updated Principles to Combat Impunity, 8 February 2005, UN Doc. E/CN.4/2005/102/Add.1, p. 12.
[91] UN Commission on Human Rights Updated Principles to Combat Impunity, 8 February 2005, UN Doc. E/CN.4/2005/102/Add.1, p. 13.
[92] UN Commission on Human Rights Updated Principles to Combat Impunity, 8 February 2005, UN Doc. E/CN.4/2005/102/Add.1, p. 14.
[93] Articles VI and VII, United Nations, General Assembly, *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 - Resolution 147*, 21 March 2006, A/RES/60/147; 13IHRR 907 (2006) ("Basic Principles").

> [i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish him or her.[94]

60. The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has highlighted that '[b]oth international human rights law and humanitarian law […] impose obligations [that] include a duty (a) to investigate, prosecute and punish those accused of serious rights violations; (b) to reveal to victims and society at large all known facts and circumstances of past abuses; (c) to provide victims with restitution, compensation and rehabilitation; and (d) to ensure repetition of such violations is prevented'.[95]

61. The UN Security Council has recalled that the political bodies of the United Nations as well as human rights bodies have affirmed the responsibility of States to 'end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of humanitarian law'.[96]

62. Similarly, as noted above, in his report on the establishment of the Special Court for Sierra Leone, the Secretary-General of the United Nations indicated that '[w]hile recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the 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'.[97]

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[94] Basic Principles, Article III.
[95] P. Greiff, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, 21 August 2017, A/HRC/36/50, para. 20. The Special Rapporteur also goes on to list some of the treaties establishing these rights, which include the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination.
[96] UN Doc. S/PRST, 2002/41, p.1.
[97] Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, para. 22.

63. The unopposed declarations of UN representatives made in the exercise of their official functions are reflective of the UN standards in relation to these important matters. These principles and standards further support the understanding that amnesties for international crimes that result in serious human rights violations are incompatible with international law insofar as they violate fundamental rights of the victims.

(c) Interpretation of the UN Human Rights Committee

64. The UN Human Rights Committee ('UN HRC') has taken the view that preventing punishment for serious human rights violators 'undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity […] and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights' in violation of article 2 of the ICCPR.[98] Article 14 of the ICCPR – the right to fair trial – has been found to be violated by amnesties as they exclude victims' abilities to claim compensation through civil litigation.[99] The UN HRC also maintains that war crimes, crimes against humanity, torture and other gross human rights violations require outright prosecution.[100] In its recent Concluding Observations concerning Spain, Great Britain and Northern Ireland, and South Africa, the UN HRC stipulated the need for States to *at least* fully investigate serious human rights violations in order to fulfil the aims of the ICCPR.[101]

65. The above findings and interpretations by the UN HRC show a clear understanding that any amnesties or similar measure would lead to impunity and therefore violate primarily articles 2 and 14 of the ICCPR, rendering them incompatible with international law.

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[98] Human Rights Committee, Concluding Observations of the Human Rights Committee: Peru 1996, UN Doc. CCPR/C/79/Add.67, para. 9.
[99] J. Roberti di Sarsina, 'Transitional Justice and a State's Response to Mass Atrocity' (2019), p. 135.
[100] *See, for example,* HRC, Concluding Observations of the Human Rights Committee: Colombia, 2004, UN Doc. CCPR/CO/80/COL, para. 8; HRC, Concluding Observations of the Human Rights Committee: Argentina, 2000, UN Doc. CCPR/CO/70/ARG, para. 5.
[101] HRC, Concluding Observations of the Human Rights Committee: Spain, 2015, UN Doc. CCPR/C/ESP/CO/6, para. 21; HRC, Concluding Observations on the Human Rights Committee: Great Britain and Northern Ireland, 2015, UN Doc. CCPR/C/GBR/CO/7, para. 8; HRC, Concluding Observations of the Human Rights Committee: South Africa, 2016, UN Doc. CCPR/C/ZAF/CO/1, paras 12-13.

(d) Jurisprudence

66. Existing jurisprudence in international human rights law has further has underscored the obligations of States to investigate, prosecute and punish serious human rights violations occurring, for instance, as a result of the commission of international crimes. This jurisprudence is clear in affirming that amnesties for grave human rights violations are incompatible with those obligations and, as such, incompatible with international law.

(i) *Inter-American context*

67. In the American context, the Inter-American bodies have developed leading jurisprudence on the subject of amnesties and similar measures following a series of amnesties that were passed in recent decades at the domestic level and subsequently examined by the guardians of the American Convention on Human Rights. This case law warrants attention in depth, particularly following the submissions of the parties in this area in the present appeal.

68. The Inter-American Commission on Human Rights is forcefully against the use of amnesties in instances of gross violations of human rights, stipulating that 'the obligation to investigate and prosecute crimes against humanity is a norm of *jus cogens'*.[102] The Commission notes that its doctrine regarding amnesties has crystallised such that '[t]hese decisions which coincide with the standards of other international bodies on human rights regarding amnesties, have declared in a uniform manner that both the amnesty laws as well as other comparable legislative measures that impede or finalize the investigation and judgment of agents of [a] State […] violate multiple provisions of said instruments'.[103]

69. The Inter-American Court of Human Rights (the 'IACtHR') has stated in the clearest terms that amnesties and similar measures are in contradiction with the international obligation to investigate, prosecute, and where criminal responsibility is determined, to punish perpetrators of human rights violations. In *Gelman v Uruguay*, it was held that 'amnesties or similar forms have been one of

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[102] Case 11.552 (Brazil), March 26 2009, para. 186.
[103] Case 10.820 (Peru), Report (13 April 2000), para. 68; Case 10.908 (Peru), Report (13 April 2000) para. 76.

the obstacles alleged by some States in the investigation, and where applicable, punishment of those responsible for serious human rights violations'.[104] In this case, the Court confirmed that amnesties are not compatible with the American Convention even if approved by democratic referenda that approve their use.[105]

70. In relation to pardons specifically, the IACtHR has found that States must 'refrain from resorting to amnesty, pardon, statute of limitations, and from enacting provisions to exclude liability, as well as measures, aimed at preventing criminal prosecution or at voiding the effects of a conviction'.[106] The Court has highlighted the general duty of States to refrain from resorting to actions 'that intend […] to suppress the effects of the conviction'[107] and make an 'undue granting of benefits in the execution of the penalty'.[108]

71. In the *Massacres of El Mozote* case, the IACtHR disapproved amnesty laws in general, stating, *inter alia*, that '[a]mnesties or similar mechanisms have been one of the obstacles cited by States in order not to comply with their obligation to investigate, prosecute and punish, as appropriate, those responsible for grave human rights violations'.[109] The IACtHR noted the 'inadmissibility of "amnesty provisions, provisions on prescription, and the establishment of exclusions of responsibility that seek to prevent the investigation and punishment of those responsible for grave human rights violations"'.[110] It concluded that 'the Law of General Amnesty for the Consolidation of Peace […] resulted in the installation and perpetuation of a situation of impunity owing the absence of investigation, pursuit, capture, prosecution and punishment of those responsible for the facts, thus failing to comply with Articles 1(1) and 2 of the Convention'.[111]

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[104] Judgment (24 February 2011), para. 195.
[105] Judgment (24 February 2011).
[106] *Gutierrez Soler v. Colombia*, Judgment (12 September 2005), para. 97.
[107] *Merchants v. Colombia*, Judgment (Merits, Reparations and Costs), 5 July 2004, para. 263.
[108] *Barrios Altos v. Peru*, Decision on Monitoring Compliance with the Judgment, 7 September 2012, paras 45-54.
[109] Case of the *Massacres of El Mozote and Nearby Places v. El Salvador* (Merits, reparations and costs), Judgment of 25 October 2012, para. 283.
[110] Case of the *Massacres of El Mozote and Nearby Places v. El Salvador* (Merits, reparations and costs), Judgment of 25 October 2012, para. 283.
[111] Case of the *Massacres of El Mozote and Nearby Places v. El Salvador* (Merits, reparations and costs), Judgment of 25 October 2012, para. 296.

72. In the *Gomes Lund* case, the IACtHR reasserted its ruling on the non-compatibility of amnesties with international law in cases of serious human rights violations.[112] The IACHR identified the clear link between crimes against humanity and serious human rights violations in the *Almonacid Arellano et al.* case stating that '[a]ccording to the international law *corpus juris*, a crime against humanity is in itself a serious violation of human rights and affects mankind as a whole'.[113] It reiterated that 'the adoption and enforcement of laws that grant amnesty for crimes against humanity' prevent States from complying with their obligations to investigate and punish those accused for such crimes.[114]

73. In the *Barrios Altos* case, the IACtHR stated that amnesties are 'measures designed to eliminate responsibility' and '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'.[115] In the present appeal, this case has been cited and incorrectly interpreted by counsel for Mr Gaddafi.

74. Counsel for Mr Gaddafi submits that the IACtHR introduced factors to consider in determining a pardon's legality, including the extent of the sentence that had been served, the prisoner's conduct in the establishment of the truth, and the potential effect of early release on society and victims.[116] Counsel for Mr Gaddafi avers that the introduction of factors suggests that pardons *may* be legal if they meet the factors outlined.[117] In his view, the case of *Barrios Altos* 'shows again that a partial amnesty or reduced sentence is not, without more, contrary to international human rights law'.[118] This reading is incorrect.

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[112] *Gomes Lund et al. ("Guerrilha Do Araguaia") v. Brazil* (Preliminary Objections, Merits, Reparations, and Costs), Judgment of 24 November 2010, para. 148.
[113] *Case of Almonacid-Arellano et al v. Chile* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 26 September 2006, para. 105.
[114] *Case of Almonacid-Arellano et al v. Chile* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 26 September 2006, paras 108.
[115] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 41.
[116] Appeal Brief, para. 100.
[117] Appeal Brief, para. 100.
[118] Appeal Brief, para. 100.

75. At the outset, it is important to emphasise that the case to which counsel for Mr Gaddafi refers concerns a decision rendered by the IACtHR in the context of supervising the execution of its 2001 Judgment, in which it found that the amnesties granted by the Peruvian authorities were contrary to the rights enshrined in the American Convention. It was in the context of the implementation phase of its judgment on the illegality of amnesties related to the crimes committed that the Court considered the legality or otherwise of the granting of a humanitarian pardon to former President Fujimori. Nevertheless, in light of counsel for Mr Gaddafi's argument, this opinion analyses the matter.

76. The facts of *Barrios Altos* case involved the indiscriminate killing, in 1991, of 15 people in a neighbourhood of Lima, Peru, by the 'death squadron' known as the 'Colina Group' integrated by members of the Peruvian army.[119] During the formal investigation that had begun in 1995, the Peruvian Congress passed amnesty Law No. 26479 which entered into force on 15 June 1995, exonerating members of the army, police force and civilians who had violated human rights between 1980 to 1995 from responsibility.[120] The effect of that law 'was to determine that the judicial investigations were definitively quashed and thus prevent the perpetrators of the massacre from being found criminally responsible'.[121] That law resulted in the release of security forces held for both the *Barrios Altos* and *La Cantuta* cases.[122]

77. Shortly after, a second amnesty law was adopted by Congress, Law No. 26492, which 'was directed at interfering with legal actions in the *Barrios Altos* case'.[123] This law expanded the earlier amnesty law, in effect granting a 'general amnesty to all military, police or civilian officials who might be the subject of indictments for human rights violations committed between 1980 and 1995, even though they had not been charged'.[124]

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[119] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 2.
[120] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 2.
[121] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 2.
[122] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 2.
[123] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 2.
[124] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 2.

78. The Court considered that 'the amnesty laws adopted by Peru prevented the victims' next of kin and the surviving victims in this case from being heard by a judge' thus violating 'the right to judicial protection' in article 25 of the American Convention.[125] Further, the amnesty laws violated article 1(1) of the American Convention in that they 'prevented the investigation, capture, prosecution and conviction of those responsible', and thus 'obstructed clarification of the facts' of the case.[126]

79. The IACtHR finally emphasised that 'State Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse'; self-amnesty laws 'lead to the defenselessness of victims and perpetuate impunity' making them 'manifestly incompatible with the aims and spirit of the [American] Convention'.[127]

80. In sum, the Court ruled 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, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.[128]

81. The *La Cantuta* judgment of 2006 echoed the *Barrios Altos* decision, ruling that 'during the time in which the amnesty laws were applied in the instant case […] the State breached its obligation to adjust its domestic law to the Convention pursuant to Article 2 thereof […] to the detriment of the victims' relatives' and that the amnesty laws passed by Peru 'have not been capable of having effects, nor will it have them in the future'.[129]

82. These judgments conclusively rule out *all measures* that *in effect* deprive victims of judicial protection given that they contribute to impunity. These cases gave rise

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[125] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 42.
[126] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 42.
[127] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 43.
[128] *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, para. 44.
[129] *La Cantuta v. Peru*, Merits, Reparations and Costs, IACtHR (ser. C) No. 162, 29 November 2006, para. 189.

to the doctrine of incompatibility of laws promoting impunity with the rights of victims and the duties of States set out in the American Convention.

83. Furthermore, in the monitoring and compliance stage of the judgment concerning amnesties, in 2018 the IACtHR considered the humanitarian pardon that had been granted to former President Fujimori after his conviction and sentence of imprisonment imposed by the Peruvian judiciary as a result of the outcome of the *Barrios Altos* and *La Cantuta* cases.[130] The petitioners in this case had asked the Court to determine whether the granting of a humanitarian pardon to Alberto Fujimori, who was serving the 25-year imprisonment sentence imposed by the Peruvian judiciary for his involvement in crimes against humanity related to the *Barrios Altos* and *La Cantuta* cases, was compatible with the fulfilment of the obligation to investigate, prosecute and punish.[131]

84. On 24 December 2017, former President Fujimori, at that time serving his imprisonment sentence, had been granted an allegedly humanitarian pardon for all his accounted crimes and *derecho de gracia* (presidential clemency) for pending criminal proceedings (*Pativilca* case) by the then Peruvian President Pedro Pablo Kuczynski.[132] Under Peruvian legislation and subject to the observance of the prescribed proceeding, presidents can authorise a humanitarian pardon to release an individual from any criminal conviction and grant presidential clemency for health considerations.[133]

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[130] In 2009, the former President of Peru Alberto Fujimori had been convicted and sentenced to 25 years in prison for his role as indirect perpetrator ('*autoría mediate por dominio de organización*') in, *inter alia*, crimes against humanity related to the *Barrios Altos* and *La Cantuta* cases (*Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, paras 20-21).

[131] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, paras 3, 18, 20-21.

[132] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, para. 23.

[133] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, paras 24-27.

85. In determining the matter, the IACtHR noted, *inter alia*, that the state's duty to investigate, try and convict those responsible for human rights violations includes the sentencing stage, and that said function is a constitutive part of the victims' right to access to justice.[134] The Court recalled that sentence reductions must not constitute a form of impunity[135] and that States must abstain from recurring to structures that pretend to cancel the effects of a sentence and illegitimately grant benefits in the execution of a sentence.[136]

86. The Court further observed that sentences imposed for the *types* of crimes falling under the jurisdiction of international criminal tribunals could not be pardoned or reduced by States' discretionary decisions.[137] It noted that in this case concerning grave human rights violations, a presidential pardon results in a greater affectation of the victims' rights to access to justice in relation to the execution of the sentence imposed.[138]

87. The Court maintained that it should be possible to request a judicial review of the pardon granted to Fujimori to assess its impact on the rights of victims and noted that the constitutional jurisdiction of Peru could carry out such review.[139] The Court indicated that the review should address serious shortcomings related to the

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[134] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, para. 30.
[135] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, para. 31.
[136] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, para. 38.
[137] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, para. 42.
[137] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, para. 42.
[138] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, para. 56.
[138] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, para. 56.
[139] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, paras 57, 64.

legal requirements stipulated in the Peruvian law to grant a humanitarian pardon.[140]

88. On the basis of the above, the IACtHR declared that Peru did not fully comply with its obligation to investigate, prosecute and punish the grave human rights violations determined in the *Barrios Altos* and *La Cantuta* cases.[141] It further ordered the State and the representatives of victims to submit, by 29 October 2018, information concerning the steps taken by the constitutional jurisdiction in reviewing the humanitarian pardon granted to Fujimori in relation to the fulfilment of the obligation to investigate, prosecute and sanction grave human rights violations determined in the *Barrios Altos* and *La Cantuta* cases.[142]

89. As a result of this decision by the IACtHR, the Supreme Court of Peru decided to review Fujimori's pardon. In October 2018, the Supreme Court ruled that the pardon lacked legal effect,[143] and President Alberto Fujimori returned to prison.

90. It follows from the above, that the *Barrios Altos* case twice affirmed that measures which result in the obstruction of the effective observance of victims' human rights under the American Convention thereby promoting impunity are incompatible therewith.[144] It did it first in 2001 in the context of examining the amnesty laws passed by the Peruvian government and it re-stated the same principles in 2018 when considering the presidential humanitarian pardon granted to Fujimori. It is thus sufficiently clear that the *ratio decidendi* of these decisions

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[140] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, para. 69.
[141] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018, operative point 1.
[142] *Case Barrios Altos and Case La Cantuta vs. Perú*, Supervision of Execution of Judgment, Obligation to investigate, prosecute and, if appropriate, punish (*Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar)*, 30 May 2018,operative point 4.
[143] Supreme Court of Peru, Special Criminal Chamber, Exp. No. 00006-2001-4-5001-SU-PE-01, Control de Convencionalidad Alberto Fujimori o Kenya Fujimori, 13 February 2019.
[144] J Contesse, 'Case of Barrios Altos and La Cantuta v Peru', International Decisions (ed. HG Cohen), *American Journal of International Law* Vol. 113:3, p. 568. Following the pardon's invalidation, Fujimori returned to prison on 23 January 2019 following medical treatment. On 13 February 2019, the Supreme Court finally denied Fujimori's appeal against the revocation of his pardon.

does not support counsel for Mr Gaddafi's submissions. To the contrary, these decisions of the IACtHR are fundamentally against any suggestion that amnesties or similar measures for serious human rights violations may be permissible under international law.

91. The principles set out in *Barrios Altos* have been adopted by other Latin American jurisdictions. In the context of Argentina, it has been estimated that during the seven years of military ruling between 1976 and 1983 between ten thousand and thirty thousand people were abducted, transferred to clandestine detention centres, tortured and subjected to numerous inhumane conditions and humiliations before being murdered and/or disappeared.[145]

92. Pressure set upon democratic authorities by the still strong and influential military forces resulted in the issuance of two controversial laws known as the *Ley de Obediencia Debida* ('Due Obedience Law')[146] and the *Ley de Punto Final* ('Full Stop Law').[147] The first one established an irrefutable presumption that military officers up to a certain rank in the hierarchy within the chain of command, were following orders by superiors when carrying out criminal offences. Because of this assumption, those in the hierarchical rank provided by the law were not punishable for offences committed during the dictatorship. The Full Stop Law provided a prohibition to prosecute members of the military and security forces for crimes perpetrated between 24 March 1976 and 26 September 1983 in operations performed allegedly aiming at combating terrorism. These laws were complemented by the pardons issued by former president Carlos Menem. These pardons benefited high officers of the military structure that had been excluded from the foregoing Due Obedience and Full Stop laws.

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[145] In addition, an estimated five hundred children of the victims of forced disappearance and children born to detained women were taken away from them and given to other families. (Filippini Leonardo (2012), *Criminal Prosecution in the Search of Justice*, in J. Taiana, Making Justice, Further Discussions on the Prosecution of Crimes Against Humanity in Argentina, pp. 11-29. Buenos Aires: Centre for Legal and Social Studies and International Center for Transitional Justice).
[146] Law No. 23.521 enacted on 4 June 1987 and published in the Official Bulletin on 6 June 1987.
[147] Law No. 23.492 enacted on 24 December 1986 and published in the Official Bulletin on 29 December 1986.

93. In 2001, a federal judge declared the Full Stop and Due Obedience laws null and void on the grounds that they were incompatible with international duties assumed by the State.[148] In 2003, under the presidency of Nestor Kirchner, the Congress passed Law 25.779 repealing the aforementioned laws.[149] The judgment declaring the laws null and void was upheld in 2005 by the Supreme Court in the famous "Simon" case.[150] Finally, in 2007 the Supreme Court upheld a lower court decision confirming the unconstitutionality of the pardons issued by Carlos Menem.[151]

94. As a result, numerous cases were brought before the Argentine courts as amnesty laws unravelled following victims' claims to truth. The *Simón* decision meant that perpetrators who wished to rely on the rule against retroactivity or finality were prevented from doing so on the grounds that these principles could not be invoked to obstruct truth in the fight against impunity after the amnesty laws were found to have no legal effect. The Argentine State created a new unit under resolution 14/07 to assist with the number of prosecutions that were initiated after the amnesties were ruled unlawful.[152]

95. Although the implementation of the IACtHR *Almonacid* judgment[153] was more indirect, the jurisprudence of the Court on amnesties had considerable effects in Chile. In this regard, it is important to note that the 1978 amnesty decree is not applied in practice since the Chilean Supreme Court has ruled consistently that the amnesty decreed by the military government was inapplicable to war crimes or crimes against humanity and that these crimes were not subject to the statute of limitations.[154] The Supreme Court referred, *inter alia*, to the IACtHR's *Almonacid*

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[148] Decision issued by Federal Court No.4 with jurisdiction in Buenos Aires city on 6 March 2001 in the case "Simon, Julio Hector y otros s/illegal deprivation of liberty, etc (Poblete)".
[149] Law 25.779 enacted on 21 August 2003 and published in the Official Bulletin on 2 September 2003.
[150] Decision issued by the Argentinean Supreme Court on 14 June 2005 in the case No. 17.768 "Simon, Julio Hector y otros s/illegal deprivation of liberty, etc (Poblete)".
[151] Decision issued by the Argentinean Supreme Court on 13 July 2007 in the case No. M. 2333 "Mazzeo, Julio Lilo y otros s/Cassation and unconstitutionality appeal".
[152] Centro de Información Judicial, www.cij.gov.ar/lesa-humanidad.html
[153] *Case of Almonacid-Arellano et al v. Chile* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 26 September 2006.
[154] *See e.g.* Supreme Court of Chile, Criminal Chamber, Molco Case, No. 559-2004, 13 December 2006.

decision (as well as to *Barrios Altos*) when ruling that domestic legal norms could not be used as obstacles for the prosecution of perpetrators of gross human rights violations.[155]

96. In Uruguay, as a result of the judgment rendered by the IACtHR in the *Gelman* case,[156] on 30 June 2011, former president José Mujica issued Presidential Resolution CM/323 that effectively reversed 80 administrative acts through which judicial investigations related to grave human rights violations committed during the dictatorship in that country had been terminated. On 1 November 2011, Law No 18.831 was passed. This law re-established criminal action in relation to crimes committed during the military dictatorship up to 1985. In addition, on numerous occasions the Supreme Court declared the unconstitutionality of Law No 15.848 (*Ley de Caducidad*) as it considered that such law violated the Uruguayan Constitution and international law provisions that are binding upon Uruguay.[157]

(ii) European context

97. The European Court of Human Rights (the 'ECtHR') had the opportunity to address the issue of amnesties and similar measures for grave human rights violations on several occasions. The Court has emphasised the importance of the procedural duty to investigate and prosecute under Article 3, framing the issue by way of focusing on the victim's rights.

98. In the *Yeter v. Turkey* case, the ECtHR stated that 'when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible'.[158] Similarly, in the case of *Enukidze and Girgvliani v. Georgia*, the

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[155] Supreme Court of Chile, Criminal Chamber, Molco Case, No. 559-2004, 13 December 2006, paras 19-20.
[156] *Case of Gelman v. Uruguay*, Judgment (24 February 2011).
[157] Uruguayan Supreme Court, case *Nibia Sabalsagaray*, 19 October 2009; Uruguayan Supreme Court, case *Organizaciones de Derechos Humanos denuncian*, 1 November 2010; Uruguayan Supreme Court, case *Fusilados de Soca*, 10 February 2011.
[158] ECtHR, *Yeter v. Turkey*, application No. 33750/03, Judgment, 13 January 2009, para. 70. *See also Abdülsament Yaman v. Turkey*, application No. 32446/96, Judgment, 2 November 2004, para. 55; *Eskí v. Turkey*, application No. 8354/04, Judgment, 5 June 2012, para. 34; *Taylan v. Turkey*, application No. 32051/09, Judgment, 3 July 2012, para. 45.

ECtHR affirmed that 'when an agent of the State, in particular a law-enforcement officer, is convicted of a crime that violates Article 2 of the Convention, the granting of an amnesty or pardon can scarcely serve the purpose of an adequate punishment'.[159]

99. In the Grand Chamber case of *Jeronovi čs v. Latvia*, the Court reiterated that 'in cases of wilful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim'.[160]

100. Furthermore, the ECtHR has considered *de facto* impunity on several occasions, where in effect accountability is prevented by a failure of States to fulfil their procedural obligations. In *Nasr et Ghali c. Italy*, a case of enforced disappearance, the Court found a violation of article 3 and held that the principle of "state secrecy", though legitimate, was applied to ensure that those responsible did not have to answer for their actions, thus perpetuating their impunity given both the investigation and trial did not lead to punishment of those responsible.[161]

101. In *Azzolina and Others v. Italy*, the case concerned incidents that took place after the G8 Summit in Genoa in 2001, during which the applicants had been subject to violence by law-enforcement officers while in detention. The applicants alleged that they had been tortured, and argued the domestic courts had been ineffective given the statute of limitations that applied to all acts.[162] The ECtHR held in these cases that Italy had violated article 3 in relation to torture following the 2001 G8 Summit in Genoa, and had further violated its procedural obligations to investigate and prosecute the substantive violation through multiple measures including the operation of a statute of limitations and stays of execution.[163] This underlines the ECtHR's support for comprehensive investigation that runs counter to amnesties.

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[159] ECtHR, *Enukidze and Girgvliani v. Georgia*, application No. 25091/07, Judgment, 26 April 2011, para. 274.
[160] ECtHR, *Jeronovi čs v. Latvia*, application No. 44898/10, Judgment, 5 July 2016, para. 105.
[161] ECtHR, *Nasr et Ghali c. Italy*, application No. 44883/09, Judgment, 6 August 2009, p.5.
[162] ECtHR, *Azzolina and Others v Italy*, Judgment, 26 October 2017, application Nos. 28923/09 and 67599/10.
[163] ECHR, Azzolina and Others v. Italy, Judgment, 26 October 2017, application Nos. 28923/09 and 67599/10.

102. In *Tarbuk v Croatia*, the ECtHR considered the 1996 General Amnesty Act in Croatia in relation to the right to fair trial. The ECtHR ruled that legitimate State interests must be balanced against individuals' right to life, but in any event the State has obligations to investigate article 2 violations. Amnesty laws could be permitted as tools of domestic criminal jurisdiction, but only where adequate alternative accountability measures arise.[164]

103. Considering article 3 ECHR violations in recent cases, the ECtHR found that, where ill treatment or torture exists, legal measures (be they amnesties, pardons or statutes of limitations) that effectively end criminal prosecutions 'should not be permissible' in that they contravene State obligations to investigate and prosecute these acts in accordance with the ECHR.[165]

(iii) Concluding observations on Relevant Jurisprudence

104. It is thus clear from the above analysis that, according to relevant and authoritative jurisprudence, amnesties or similar measures for gross human rights violations are incompatible with the fundamental and inalienable rights to truth, justice and reparations.

(e) Conclusion on International Human Rights Law

105. In light of the above, it is possible to conclude that in the field of international human rights law, there is well-established law composed of treaty law and *ius cogens* norms, principles, standards and jurisprudence, establishing States' obligations to investigate, prosecute and punish grave violations of human rights. These obligations are specifically reinforced in articles 26, 27 and 53 of the 1969 Vienna Convention on the Law of Treaties which stipulate by virtue of the principle of *pacta sunt servanda* the binding force of treaties, the impermissibility of invoking provisions of internal law as a justification for a failure to perform a treaty and the *erga omnes* nature of norms accepted and recognised by the international community from which no derogation is permitted. Amnesties or

[164] ECtHR, *Tarbuk v. Croatia*, Judgment, 11 December 2012, application No. 31360/10, para. 50.
[165] ECtHR, *Abdulsamet Yaman v. Turkey*, Judgment, 2 November 2004, application No. 32446/96, para. 55; ECtHR, *Yeter v. Turkey*, Judgment, 13 January 2009, application No. 33750/03, para. 70; ECtHR, *Eski v. Turkey*, Judgment, 5 June 2012, application No. 8354/04, para. 34.

similar measures for international core crimes prevent the fulfilment of these obligations. Failure to observe these reinforced obligations may trigger international liability of the State and further violates the rights of victims to truth, justice and reparations. Therefore, amnesties or similar measures for international core crimes are contrary to international human rights law.

2. International Humanitarian Law

106. In the context of international humanitarian law, the Geneva Conventions and Protocol I create duties for all States to search for, prosecute and punish or extradite perpetrators concerned with 'grave breaches' of the Conventions.[166] As noted above, the obligations to investigate, prosecute and, if applicable, punish grave breaches of international humanitarian law are reinforced in articles 26, 27 and 53 of the 1969 Vienna Convention on the Law of Treaties. In its Rule-of-Law Tools for Post-Conflict States relating to amnesties, the United Nations Office of the High Commissioner for Human Rights explains that war crimes are 'serious violations of international humanitarian law, whether committed during international or non-international armed conflicts' and 'are inconsistent with States' obligations under the widely ratified Geneva Conventions of 1949 and their 1977 Protocols, and may also violate customary international law'.[167] In that document, the High Commissioner further held that

> Although grave breaches can be committed only during international armed conflicts, serious violations of the rules of humanitarian law that apply to non-international armed conflicts are also war crimes. Rules of humanitarian law governing non-international armed conflicts are set forth in common article 3 of the four Geneva Conventions of 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II). Some are also recognized under

[166] Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

[167] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Amnesties (2009), p. 14.

customary international law as serious violations of the 'laws and customs of war'.[168]

107. Article 6(5) of the 1977 Additional Protocol II to the Geneva Convention provides 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'. As it is clear from the wording and the drafting history of this provision, its aim is to encourage 'a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities'.[169] The objective is not to grant amnesties for those having violated international humanitarian law.[170]

108. This provision can only be understood as referring to amnesties for offences other than grave human rights violations such as those occurring as a result of the commission of war crimes. It has been indeed maintained that the purpose of the drafters of this provision was not to provide impunity for war crimes.[171] This provision merely seeks 'to encourage amnesties for combat activities otherwise subject to prosecution as violations of the criminal laws of the State in which they take place'.[172]

109. The former UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Juan E. Méndez states that the amnesty provided for in article 6(5) of the 1977 Additional Protocol II to the Geneva Convention 'refers to the offences of rebellion or sedition and to comparably minor infractions of the laws of war on the governmental side'.[173] He adds that this provision 'is not meant to encourage impunity for attacks on civilians nor for

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[168] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Amnesties (2009), p. 15.
[169] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Amnesties (2009), p. 16.
[170] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Amnesties (2009), p. 16.
[171] Douglas Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities' in *59 Law and Contemporary Problems 197* (1997), p. 218.
[172] Douglas Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities' in *59 Law and Contemporary Problems 197* (1997), p. 218.
[173] Juan E. Méndez, 'Accountability for Past Abuses' in *19:2 Human Rights Quarterly 255* (1997), p. 273.

serious crimes against life and the integrity of the person or adversary. For "grave breaches" of the laws of war, on the contrary there is a clear obligation to punish'.[174]

110. According to Michael Scharf, 'the obligation to prosecute Grave Breaches is "absolute", meaning, inter alia, that States Parties can under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches of the Conventions'.[175]

111. The above interpretation of article 6(5) of the 1977 Additional Protocol II to the Geneva Convention has been confirmed by the ICRC. In 1995, the ICRC sent to the Prosecutor of the International Tribunal for the Former Yugoslavia its interpretation, which was subsequently reiterated in 1997:

> Article 6(5) of Protocol II is the only and very limited equivalent in the law of non-international armed conflict of what is known in the law of international armed conflict as 'combatant immunity', i.e., the fact that a combatant may not be punished for acts of hostility, including killing enemy combatants, *as long as he respected international humanitarian law*, and that he has to be repatriated at the end of active hostilities. In non-international armed conflicts, no such principle exists, and those who fight may be punished, under national legislation, for the mere fact of having fought, even if they respected international humanitarian law. The '*travaux preparatoires*' of [article] 6(5) indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. *It does not aim at an amnesty for those having violated international humanitarian law*.[176]

112. This interpretation is indeed the most consistent with the broad spectrum of international provisions governing amnesties. Amnesties for violations of international humanitarian law would be incompatible with the rule obliging States to investigate and prosecute persons suspected of having committed war crimes in non-international armed conflicts.

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[174] Juan E. Méndez, 'Accountability for Past Abuses' in *19:2 Human Rights Quarterly 255* (1997), p. 273.
[175] Michael Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' in *32 Cornell International Law Journal 507* (1999), p.516.
[176] Letter from Dr. Toni Pfanner, Head of the Legal Division, ICRC Headquarters, Geneva to Douglass Cassel (Douglas Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities' in *59 Law and Contemporary Problems 197* (1997), p. 218).

113. It is noted that these amnesties specifically exclude from their scope persons who are suspected of having committed war crimes or other crimes under international law.[177] The ICRC also refers to several jurisprudential cases supporting this interpretation,[178] resolutions of the UN Security Council,[179] a resolution on impunity adopted without a vote in 2002 by the UN Commission on Human Rights,[180] several reports of the UN Secretary-General;[181] and international case-law[182] to support the proposition that war crimes cannot be the object of an amnesty.

114. Considering the above, it is clear that international humanitarian law does not contradict and/or represent an exception to the restrictions on amnesties emanating primarily from International Human Rights Law. To the contrary, it confirms that grave breaches of international humanitarian law that amount to war crimes cannot be the object of amnesties.

3. Amnesties in transitional justice contexts

115. In transitional justice contexts, some forms of amnesties, or better said carefully crafted amnesties, may be permissible in order to achieve peace and reconciliation after a period of large-scale violence. It is important to first understand what the concept of transitional justice entails. The United Nations has

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[177] *See*, IHL database on customary international humanitarian law referring to the Quadripartite Agreement on Georgian Refugees and Internally Displaced Persons (*ibid.*, § 653), the Agreement on Refugees and Displaced Persons annexed to the Dayton Accords (*ibid.*, § 654), Statute of the Special Court for Sierra Leone (*ibid.*, § 655) and Agreement between Parties to the conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners (*ibid.*, § 656); see also the legislation of Algeria (*ibid.*, § 673) (exempting terrorist or subversive acts), Argentina (*ibid.*, § 676) (exempting crimes against humanity), Bosnia and Herzegovina (Federation) (*ibid.*, § 679), Colombia (*ibid.*, § 683), Croatia (*ibid.*, § 684), El Salvador (*ibid.*, § 685) (exempting assassinations of Mgr Romero and Herbert Anaya, kidnapping for personal gain or drug trafficking), Ethiopia (*ibid.*, § 687) (exempting crimes against humanity), Guatemala (*ibid.*, § 688), Russian Federation (*ibid.*, § 691), Tajikistan (*ibid.*, § 695) and Uruguay (*ibid.*, § 697) and the draft legislation of Argentina (*ibid.*, § 677) and Burundi (*ibid.*, § 646); see also the practice of Bosnia and Herzegovina (*ibid.*, § 707), the former Yugoslav Republic of Macedonia (*ibid.*, § 709) and Philippines (*ibid.*, § 715).

[178] *See*, IHL database on customary international humanitarian law referring to the *Videla case* of the Appeal Court of Santiago (Chile); the *Mengistu and Others case* of Special Prosecutor's Office (Ethiopia); the *Cavallo case*, Federal Judge (Argentina).

[179] UN Security Council, Res. 1120 and Res. 1315 concerning Croatia and Sierra Leone.

[180] UN Commission on Human Rights, Res. 2002/79.

[181] See, e.g., UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone (*ibid.*, § 738) and Report on the protection of civilians in armed conflict.

[182] ICTY, *Furundžija case*, Judgment, 1998.

defined transitional justice as encompassing 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[183] It has also been defined as 'the set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[184]

116. According to the UN Secretary General's 2004 Report on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, the full range of methods 'may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof'.[185] The International Centre for Transitional Justice, an NGO involved in transitional justice initiatives in over 30 countries, defines the major approaches as: prosecution, truth-telling, reparation, institutional reform, promoting reconciliation and social reconstruction, memorialisation and taking into account gendered patterns of abuse.[186]

117. It has been noted that '[t]he contemporary understanding of transitional justice has broadened to encompass more than just prosecutions, reparations, preventing impunity, and building rule of law'.[187] Indeed, the goals of transitional justice include 'truth telling, restoring the dignity and preserving the memory of victims, building peace, creating respect for human rights and democracy, and […] reconciliation'.[188] It must be highlighted that the 2010 'United Nations Approach

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[183] United Nations Secretary General, 'Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', 23 August 2004, UN Doc S/2004/616, para. 8.
[184] N. Roht-Arriaza, 'The new landscape of transitional justice', in N Roht-Arriaza & J Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century* (2006), p. 2.
[185] United Nations Secretary-General, Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004), para. 8.
[186] *See* The International Centre for Transitional Justice's website, https://www.ictj.org/about/transitional-justice.
[187] Elizabeth A. Cole, 'Transitional Justice and the Reform of History Education' in *1 The International Journal of Transitional Justice 115* (2007).
[188] Elizabeth A. Cole, 'Transitional Justice and the Reform of History Education' in *1 The International Journal of Transitional Justice 115* (2007).

to Transitional Justice' identifies the importance of addressing the root causes of conflict, which may include violations of economic, social and cultural rights, in order for societies to have the best chance of lasting transition.[189]

118. In order to enjoy legitimacy, transitional justice tools, such as conditional amnesties must have democratic approval. As noted by one scholar, '[d]emocratic approval can be expressed in various ways including though negotiated settlements involving representatives of all the parties to the conflict of transition process and international observers'.[190] Legitimacy would be enhanced if any conditional amnesty law 'was approved by democratically elected politicians and there was widespread public consultation'.[191] Referring to consultations, former UN Independent Expert on Combating Impunity, Diane F. Orentlicher, affirmed that ''[b]road consultations also help ensure that policies for combating impunity are themselves rooted in processes than ensure public accountability'.[192]

119. In transitional justice contexts, victims play a crucial role. Indeed, they 'must be given a central role in which they can describe their suffering, have their pain acknowledged and receive reparations for the harm they have endured'.[193] Transitional justice systems seek to afford a speedy acknowledgment of victims and grant them appropriate and effective reparations. In the words of former UN Independent Expert on Combating Impunity, the participation of victims 'helps ensure that policies for combating impunity effectively respond to victims' actual needs and, in itself, "can help reconstitute the full civic membership of those who were denied the protection of the law in the past"'.[194]

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[189] Guidance Note of the Secretary General, United Nations Approach to Transitional Justice, 10 March 2010.
[190] Louise Mallinder, 'Can Amnesties and International Justice be Reconciled?' in *1 The International Journal of Transitional Justice 208* (2007), p. 226.
[191] Louise Mallinder, 'Can Amnesties and International Justice be Reconciled?' in *1 The International Journal of Transitional Justice 208* (2007), p. 226.
[192] UN Commission on Human Rights, *Report of the independent expert to update the Set of Principles to combat impunity*, 18 February 2005, E/CN.4/2005/102, para. 7.
[193] Louise Mallinder, 'Can Amnesties and International Justice be Reconciled?' in *1 The International Journal of Transitional Justice 208* (2007).
[194] UN Commission on Human Rights, *Report of the independent expert to update the Set of Principles to combat impunity*, 18 February 2005, E/CN.4/2005/102, para. 7.

120. It is important to clarify that transitional justice and criminal justice do not necessarily exclude each other. Transitional justice measures may indeed include, as noted above, criminal prosecutions. It has been correctly observed that transitional justice is a project 'by virtue of the fairly settled consensus—a consensus that has largely moved past the initial debates of 'peace versus justice' and 'truth versus justice'—that there can be no lasting peace without some kind of accounting and that truth and justice are complementary approaches to dealing with the past'.[195] There are several examples of countries where transitional justice has adopted several forms, combining in many instances criminal prosecutions with other measures such as truth commissions.[196]

121. It is in transitional justice contexts where exceptionally some forms of amnesties can be resorted to in order to achieve reconciliation. In addition, forms of amnesties are used at the end of armed conflict for diverse purposes, including *inter alia*, demobilisation, disarmament, return and reintegration following the cease of hostilities, and the release and exchange of prisoners. Although granting such amnesties may be possible, as noted by the United Nations High Commissioner for Human Rights, they must be consistent with international

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[195] Rosemary Nagi, 'Transitional Justice as Global Project: critical reflections' in *29:2 Third World Quarterly 275* (2008).

[196] Sierra Leone and East Timor each represent significant developments in global practice because they pair trials with truth commissions. Moreover, the Special Court for Sierra Leone and the Special Panel for Serious Crimes in East Timor (1999 – 2005) are hybrid courts. Sierra Leone's Truth and Reconciliation Commission (2000 – 05) and East Timor's Commission for Reception, Truth and Reconciliation (2001 – 05) both demonstrate tentative advances in the ability of truth commissions to provide extensive accounts of gender-based violence, social injustice and external influence (Rosemary Nagi, 'Transitional Justice as Global Project: critical reflections' in *29:2 Third World Quarterly 275* (2008).). In the recent context of Colombia, the 2016 Peace Deal created the Special Jurisdiction for Peace as an extraordinary jurisdiction designed to address and demobilise a long-standing civil conflict through particularised processes subject to judicial review. The ICC engaged with Colombia through positive complementarity, with the ICC Prosecutor acknowledging and approving the Peace Deal's respect for victims and pursuit of accountability (*see, for example,* 'Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army', 1 September 2016). It should be noted that Colombia's peace deal expressly excludes amnesties and pardons regarding war crimes and crimes against humanity (Colombian Final Peace Agreement, 24 November 2016, Items 25, 40). Item 60 of the Final Peace Agreement details the 'Agreement regarding Victims of the Conflict', outlining a three tier sanction regime for perpetrators conditional on their 'exhaustive, complete and detailed recognition' of truth and their responsibility.

standards and best practices and cannot include gross violations of human rights and serious violations of humanitarian law.[197]

122. For reasons explained in detail above, amnesties granted in transitional justice contexts can never include international crimes that amount to serious violations of human rights and are thus limited to political, minor, or domestic offences that violated the interests of a State. Those amnesties 'must be aimed at genuinely promoting peace and reconciliation, rather than simply providing impunity for certain groups of individuals';[198] and must observe the rights of victims to truth, justice and reparations, including by ensuring forms of accountability. According to international human rights principles and standards, these are the minimum requirements for granting amnesties in transitional justice contexts. Further conditions may be decided by the State granting the amnesty. However, those amnesties must be carefully crafted. In keeping with Principle 24(a) of the 2005 United Nations' Updated Principles to Combat Impunity, '[t]he perpetrators of serious crimes under international law may not benefit from such measures'.[199]

123. Although it is likely that States in transition have multiple priorities ranging from economic to social reconstruction, these objectives cannot override victims' need for accountability and redress for the violations suffered. As the Office of the United Nations High Commissioner for Human Rights noted, '[t]he fact that many people will not be investigated, much less prosecuted, should not mean that they should escape any form of accountability'.[200] There is a clear requirement that the potential difficulty in prosecuting criminality fully should not obstruct meaningful accountability efforts with victims at the centre. Promising to pursue 'overly broad and vague principles' such as national stability and reconciliation without concrete models that account for harm caused can have 'adverse implications for the long-term stability for the successor [post-transition leadership] because it keeps alive

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[197] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Amnesties (2009), p. 35.
[198] Louise Mallinder, 'Can Amnesties and International Justice be Reconciled?' in *1 The International Journal of Transitional Justice 208* (2007).
[199] UN Commission on Human Rights Updated Principles to Combat Impunity, 8 February 2005, UN Doc. E/CN.4/2005/102/Add.1.
[200] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States.

injustice and discretion, fosters recidivism, and crushes the rights of victims and their relatives who as a result remain defenceless'.[201]

124. Forms of amnesties such as conditional amnesties for offences other than international crimes that result in serious human rights violations are a tool used in transitional justice contexts. However, for reasons explained in full above, no measure granted in transitional justice contexts can result in impunity for grave human rights violations or grave breaches of international humanitarian law or override the rights of victims to truth, justice and reparations. This would be contrary to international human rights law, international humanitarian law and international criminal law.

4. International Criminal Law and the Rome Statute

(a) Treaties on International Criminal Law

125. As expressed above, there are specialised treaties in the field of international criminal law that explicitly reinforce the obligation to investigate, prosecute and, if applicable, punish perpetrators of international crimes amounting to serious human rights violations. These treaties form a solid *corpus iuris* proscribing conduct that, if committed, must be investigated, prosecuted and punished. Criminal accountability is a central tenet within: article I of the Genocide Convention, requiring Contracting Parties to 'prevent and punish' genocide whether in peace or war;[202] article 7 of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, requiring States to prosecute or extradite persons alleged to have committed torture;[203] and article 6 of the International Convention for the Protection of All Persons from Enforced Disappearance, which requires State parties to hold perpetrators criminally responsible.[204]

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[201] J. Roberti di Sarsina, 'Transitional Justice and a State's Response to Mass Atrocity' (2019), p. 124.
[202] Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution 260 A (III), adopted 9 December 1948, 78 UNTS 277.
[203] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/39/51 (1984), entered into force 26 June 1987.
[204] International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, UN Doc. A/RES/61/177; IHRR 582 (2007). Its article 11(1) further stipulates that

126. Furthermore, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[205] stipulates that '[n]o statutory limitation shall apply to [war crimes and crimes against humanity], irrespective of the date of their commission'.[206] It further imposes the obligation on States signatories 'to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of [war crimes and crimes against humanity] and that, where they exist, such limitations shall be abolished'.[207]

127. In addition to imposing concrete and clear obligations to investigate, prosecute and punish perpetrators of atrocious international crimes, these treaties have the added value of defining those crimes resulting in serious human rights violations in relation to which these obligations apply. Furthermore, these treaties impose more specific duties in terms of the investigation, prosecution and eventual punishment such as the obligation to cooperate in the extradition of suspected persons (e.g. article VII of the Genocide Convention) and the obligation to cooperate in connection with criminal proceedings brought in respect of any of the offences enunciated in the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (see article 9).

128. It follows from the above that the international obligations to investigate, prosecute and punish international crimes are explicitly reinforced in numerous multilateral treaties including notably the Rome Statute, which specifically require that individuals be prosecuted for crimes that constitute grave violations of human rights and further impose more specific obligations in this regard.

State parties should either extradite, surrender or prosecute persons alleged to have committed an offence under its remit.

[205] Adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968. Entered into force on 11 November 1970, in accordance with article VIII.

[206] Article I of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, A/RES/2391(XXIII).

[207] Article IV of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, A/RES/2391(XXIII).

(b) Rome Statute

129. In the field of international criminal law, the Rome Statute is the first treaty that consolidates permanently the international *ius puniendi* for core crimes. Its object and purpose is to put an end to impunity for the perpetrators of atrocities that shock the conscience of humanity and in this way prevent the further commission of the most serious international crimes under the jurisdiction of the Court: genocide, crimes against humanity, war crimes and the crime of aggression in all forms. The Kampala Declaration adopted at the Review Conference of the International Criminal Court on 1 June 2010 affirms its conviction 'that there can be no lasting peace without justice and that peace and justice are thus complementary requirements'.[208]

130. In light of these values, the Rome Statute logically does not address the matter of amnesties. This is simply because providing for amnesties in relation to the crimes subject to the jurisdiction of the Court would be inconsistent with international law and the object and purpose of the Statute. This is despite the attempt of some delegations, particularly South Africa, during the negotiations of the Statute, to provide for this mechanism within the Rome Statute system.[209]

131. It is unsurprising that the Rome Statute does not contemplate amnesties. In this regard, it is important to recall that the consequence of an amnesty or similar mechanisms is the loss of the opportunity to investigate, prosecute and punish certain serious human rights violations or grave breaches of international humanitarian law such as those caused by the commission of crimes under the jurisdiction of this Court. The Preamble of the Rome Statute recalls that the grave crimes under its jurisdiction 'threaten the peace, security and well-being of the world' and '[a]ffirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution

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[208] Assembly of States Parties, Declaration RC/Decl. 1, adopted at the 4th plenary meeting, on 1 June 2010, by consensus.

[209] As Robinson outlines (Darryl Robinson was involved in the coordination of the negotiations and drafting of Article 17), delegates during the negotiation phases believed an explicit recognition of truth commissions should be included within the text (like the South African delegation), supported by those who 'had misgivings about laying down an iron rule for all time, mandating prosecutions as the only acceptable response in all situations' (D. Robinson, 'Serving the interests of Justice' in *14 EJIL 481* (2003), p. 483).

must be ensured'. It further highlights the determination 'to put an end to impunity for the perpetrators of these crimes' and '[r]ecall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. It further emphasises that the Court 'shall be complementary to national criminal jurisdictions'.

132. It is thus clear that any mechanism aimed at preventing the criminal investigation, prosecution and punishment of those responsible for international core crimes is at odds with the object and purpose of the Rome Statute 'to put an end to impunity for the perpetrators of these crimes'.

133. Furthermore, as established by the United Nations, amnesties for international crimes are generally considered illegal under international law.[210] The Rome Statute would therefore be contrary to international law if it were to provide for the possibility of granting amnesties for the crimes under its subject-matter jurisdiction.

134. Under the legal framework of the Rome Statute, the preamble declares that States have assumed specific international obligations to effectively investigate, prosecute and punish the perpetrators of international crimes. It is thus not possible for those States to grant amnesties for international crimes under the Court's jurisdiction given that this would contravene the international obligations assumed when they ratified the Rome Statute.

135. The only mechanism provided in the Rome Statute once a conviction has been entered and the sentence imposed is the possibility of reducing the sentence of a convicted person as stipulated in article 110.[211] As per article 110 and rule 223,[212]

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[210] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Truth Commissions, (2006), p. 12.

[211] '1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court. 2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person. 3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time. 4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present: (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions; (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in

the review of the sentence imposed on a convicted person can only be carried out by the Court, and more specifically the Appeals Chamber. The review is only possible when the person has served two thirds of the sentence, or 25 years in the case of life imprisonment and subject to stringent conditions such as the early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions. The imposition of conditions for the review avoids that sentence reductions that may result in impunity and affect victims' rights.

136. As explained above, the obligation of States to respect the human rights of victims recognised in numerous universal or quasi universal instruments requires them to investigate, prosecute and punish those suspected of violating international core human rights or those that committed grave breaches of the Geneva Conventions. The Rome Statute is the clearest reaffirmation of the well-established law, principles and standards emanating primarily from international human rights law and international humanitarian law as set out in the preceding sections.

(c) Conclusion on International Criminal Law

137. The Rome Statute, together with other treaties such as the Convention against Torture, the Geneva Conventions, the Convention on the Punishment and Prevention on Genocide, the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance and the

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locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence. 5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.'

[212] 'In reviewing the question of reduction of sentence pursuant to article 110, paragraphs 3 and 5, the three judges of the Appeals Chamber shall take into account the criteria listed in article 110, paragraph 4 (a) and (b), and the following criteria: (a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime; (b) The prospect of the resocialization and successful resettlement of the sentenced person; (c) Whether the early release of the sentenced person would give rise to significant social instability; (d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release; (e) Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age'.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity reaffirm the international obligations vested upon States to investigate, prosecute, and, if applicable, punish, international core crimes. Furthermore, these obligations are reinforced in articles 26, 27 and 53 of the 1969 Vienna Convention on the Law of Treaties which stipulate the binding force of treaties, the impermissibility of invoking provisions of internal law as a justification for a failure to perform a treaty and the *erga omnes* nature of norms accepted and recognised by international from which no derogation is permitted.

138. Amnesties for atrocious international crimes would effectively bar States from investigating, prosecuting and punishing those responsible for such atrocities. Those States would be susceptible of incurring international legal liability before the international community as a whole for their breaches of these obligations. Such amnesties are therefore incompatible with international criminal law treaties, and particularly with the object and purpose of the Rome Statute. They are therefore incompatible with international criminal law for crimes under the Court's subject-matter jurisdiction.

C. Conclusion

139. Amnesties or measures of equivalent effect for international crimes that always constitute grave human rights violations are contrary to well-established international law, principles and standards, as they violate concrete State obligations to investigate, prosecute and punish these crimes. Such obligations stem primarily from international human rights law insofar as they are indispensable to ensure the enjoyment of inalienable human rights which are the corollary of human dignity. States enacting or applying laws or measures that renege on their obligations to investigate, prosecute and punish will be acting against internationally recognized human rights.

140. Contrary to the suggestion of some, international humanitarian law reaffirms that amnesties for grave breaches of the Geneva Conventions are incompatible with international law.

141. Crimes falling within the Rome Statute are the most serious crimes of concern to the international community and always amount to grave human rights

violations. In keeping with the Preamble and well-established international law, these crimes must not go unpunished and must be the subject of effective prosecution. These principles consecrate those originating in international human rights law and are thus in keeping with the fundamental and inalienable human rights of the victims of those atrocities.

142. Amnesties in transitional justice contexts for offences other than serious human rights violations may be appropriate where they are developed alongside victims' rights and implemented for the purpose of reconciliation post-hostilities. These amnesties must still guarantee forms of accountability.

143. In addition, failure to comply with the treaty and *ius cogens* obligations to investigate, prosecute, and, if applicable, punish international core crimes violates articles 26, 27 and 53 of the 1969 Vienna Convention on the Law of Treaties which stipulate the binding force of treaties, the impermissibility of invoking provisions of internal law as a justification for a failure to perform a treaty and the *erga omnes* nature of norms accepted and recognised by international from which no derogation is permitted.

144. Considering all of the above, it is clear that the Pre-Trial Chamber was correct in finding that 'granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate'.[213]

[213] Impugned Decision, para. 77.

V. THIRD ISSUE: WAS THE PRE-TRIAL CHAMBER CORRECT IN ITS FINDING ABOUT THE INCOMPATIBILITY OF LAW NO. 6 WITH INTERNATIONAL LAW, ABOUT ITS INAPPLICABILITY; AND WHAT WAS THE IMPACT, IF ANY, OF THE ALLEGED DE FACTO APPLICATION OF THE LAW ON MR GADDAFI'S ADMISSIBILITY CHALLENGE BEFORE THIS COURT?

A. Law No. 6 of 2015

1. Compatibility of Law No. 6 with International Law

145. In terms of the compatibility or otherwise of Law No. 6 with international law, this opinion notes that this law, which was adopted on 7 September 2015[214] appears to be a general amnesty law. This is because, first it is described as such in its text:

> [w]ith due regard to the provisions of articles 2 and 3 of the present Law, all Libyans who committed crimes during the period from 15 February 2011 until the promulgation of the Present Law shall be covered by a *general amnesty*. Criminal proceedings related to such crimes shall be terminated, and sentences handed down shall be revoked. Such crimes shall have no subsequent penal effects and shall be struck from the criminal record of those covered by the amnesty, provided that the conditions stipulated herein are met. [Emphasis added.][215]

146. Second, and more importantly, a plain reading of the law shows that it is designed for all Libyans who committed offences during the period of 15 February 2011 until the date of its issuance. The law is thus not limited to any specific group of persons but rather includes all Libyans. In this regard, Law No. 6 does not exclude from its application perpetrators of serious crimes under international law. This shortcoming in the law renders it contrary to Principle 24(a) of the 2005 United Nations' Updated Principles to Combat Impunity.

147. Furthermore, Law No. 6 does not exclude from its ambit atrocious international crimes that amount to gross human rights violations. While it is correct that article 3 sets out the crimes which are exempted from the amnesty,

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[214] Law No. 6, ICC-01/11-01/11-650-AnxIII-tENG.
[215] Law No. 6, ICC-01/11-01/11-650-AnxIII-tENG, p. 2.

which include 'identity-based murder, abduction, forced disappearance and torture',[216] these crimes do not necessarily amount to atrocious international crimes. This is because those crimes must meet certain additional legal elements such as contextual elements to qualify as international crimes.

148. This Opinion observes that Law No. 6 provides for some requirements to be met by applicants. According to article 2 of the law, the requisites are as follows: a written pledge in which the person undertakes to repent and not to reoffend, return of property or money obtained through crimes, reconciliation with victims and the surrender of weapons used.[217] However, none of these requisites require full disclosure of the facts about the violations committed, full reparations for victims[218] and do not ensure forms of accountability.

149. Therefore, in the absence of such conditions, and contrary to counsel for Mr Gaddafi's portrayal of the law,[219] the requisites provided for in the law do not appear sufficient to render it a conditional amnesty. Indeed, the lack of any reference to the rights of victims to know the truth and receive full reparations renders Law No. 6 incompatible with Principle 24(b) of the 2005 United Nations' Updated Principles to Combat Impunity. Accordingly, in addition to concerns about the source of the law as well as whether it enjoyed democratic approval through, for instance, widespread public consultations, it is undisputed that Law No. 6 does not comply with the requirements set out in Principle 24 of the 2005 United Nations' Updated Principles to Combat Impunity.

150. As explained above, granting amnesties for serious crimes such as murder and persecution as crimes against humanity is incompatible with States' obligations under, *inter alia*, the Convention against Torture, the Geneva Conventions and the Convention on the Prevention and Punishment of the Crime of Genocide to

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[216] Law No. 6, ICC-01/11-01/11-650-AnxIII-tENG, p. 3.
[217] Law No. 6, ICC-01/11-01/11-650-AnxIII-tENG, p. 3.
[218] For a detailed discussion on the content of full reparations, *see* SEPARATE OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA (Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'), 16 September 2019, ICC-01/04-01/06-3466-AnxII.
[219] *See, for example,* Defence Appeal Brief, para. 87.

prosecute or extradite those who have committed serious crimes.[220] Libya, as signatory to these treaties, is bound by these obligations. In addition, it is recalled that the Appeals Chamber held in its judgment in the *Al-Bashir* appeal, that there exists an obligation *erga omnes* 'to prevent, investigate and punish crimes that shock the conscience of humanity, including in particular those under the jurisdiction of the Court […]'.[221]

151. In this regard, it is recalled that before this Court Mr Gaddafi is charged with crimes of 'murder as a crime against humanity' in violation of article 7(1)(a), and 'persecution as a crime against humanity' in violation of article 7(1)(h).[222] These crimes amount to grave violations of human rights. Therefore, the crimes with which Mr Gaddafi is charged trigger the obligation of States to investigate, prosecute and, if appropriate, punish them.

152. Also, for reasons explained at length above, amnesties for serious international crimes that amount to grave human rights violations are incompatible with international law. Counsel for Mr Gaddafi's assertions that Law No. 6 was passed as part of a national reconciliation effort 'for the purposes of peace'[223] have no bearing on the question of compatibility or otherwise of amnesties for grave human rights violations such as those resulting from the crimes he is charged with. Libya has ratified the major international human rights conventions, including the ICCPR, the UN Universal Declaration of Human Rights, and the African Charter on Human and Peoples' Rights.

153. Given the nature of the crimes with which Mr Gaddafi is charged, which amount to serious human rights violations, and the consequent treaty and *erga omnes* obligations vested upon States, in this case Libya, to investigate, prosecute

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[220] Separate concurring opinion by Judge Perrin de Brichambaut, para. 146.
[221] *Al-Bashir* Judgment, para. 123. The Appeals Chamber further added that 'it is this *erga omnes* character that makes the obligation of States Parties to cooperate with the Court so fundamental. These considerations are reflected in the possibility, pursuant to article 87(7) of the Statute, of referring non-compliance with these obligations to the Assembly of States Parties and, in case the situation to which the cooperation request relates was referred to the Court by the UN Security Council, to the UN Security Council. *Al-Bashir* Judgment. *See* further Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 198-218.
[222] Warrant of Arrest for Saif Al-Islam Gaddafi, 27 June 2011, ICC-01/11-01/11-3, p. 6.
[223] Transcript of 11 November 2019, ICC-01/11-01/11-T-007-ENG, p. 59, line 3.

and, if appropriate punish those violations, the adoption of Law No 6 was incompatible with international law.

154. In light of the above considerations, the Pre-Trial Chamber was correct in concluding that Law No 6 was incompatible with international law because its application 'would lead to the inevitable negative conclusion of blocking the continuation of the judicial process against Mr Gaddafi once arrested, and the prevention of punishment if found guilty by virtue of a final judgment on the merits, as well as denying victims their rights where applicable'.[224]

2. Applicability of Law No. 6 to Mr Gaddafi

155. Without prejudice to what has been stated above in relation to the incompatibility of Law No. 6 with international law, even hypothetically assuming its compatibility, the law remains inapplicable to Mr Gaddafi for three fundamental reasons as set out below.

156. Firstly, as noted above, article 3 of Law No. 6 excluded from its ambit the following crimes: '[t]he crimes of terrorism […]; [d]rug importing and trafficking; [s]exual and indecent assault; [i]dentity-based murder, abduction, forced disappearance and torture; *Huddud [certain Sharia]* offences, so long as justice has been seized of such crimes; [a]ll crimes of corruption'.[225] Therefore, it is clear that the crimes Mr Gaddafi was charged with in Libya, namely murders and corruption, are excluded from the application of Law No. 6.

157. Secondly, article 6 of Law No. 6 states that '[t]he competent judicial authority shall issue a reasoned decision to stay the criminal proceedings once it has ascertained that the conditions for amnesty are met'.[226] It is clear from the record in this case that there was no such 'reasoned decision' by a 'competent judicial authority' as prescribed in article 6.[227] In the appeal proceedings, Libya's

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[224] Impugned Decision, para. 78.
[225] Law No. 6, ICC-01/11-01/11-650-AnxIII-tENG, p. 3.
[226] Law No. 6, ICC-01/11-01/11-650-AnxIII-tENG, p. 4.
[227] *See* for example, Libya's oral submissions, Transcript of 12 November 2019, ICC-01/11-01/11-T-008-ENG, p. 9, lines 15-22; Prosecutor's oral submissions, Transcript of 12 November 2019, ICC-01/11-01/11-T-008-ENG, p. 55, line 16 to p. 57, line 3; p. 59, lines 9-21; Lawyers for Justice in Libya

representatives submitted, during the hearing, that Mr Gaddafi was released by his detainer in Zintan without any order from a judicial authority,[228] as required by article 6 of the said law.

158. In light of the foregoing, I do not find accurate the assertion in the Common Judgment that '[t]here is also no clarity, from the information and submissions before the Appeals Chamber, as to the basis on which Mr Gaddafi was released from prison; in particular there seems to be no evidence of a reasoned decision from 'the competent judicial authority' pursuant to article 6 of Law No. 6, which also appears to be required by the terms of the law'.[229] The information was available on the record and the inevitable conclusion is that no evidence has been presented of a reasoned decision by the competent judicial authorities pursuant to article 6 of Law No. 6. This fundamental requirement of the law was not complied with, rendering the law inapplicable to Mr Gaddafi.

159. Considering the above, counsel for Mr Gaddafi's arguments regarding the *de facto* application of the law[230] are without merit. Law No. 6 does not provide for the possibility of any alleged *de facto* application. The application must always be in conformity with the terms of the law which in this case requires the existence of a reasoned decision by the competent judicial authority. Therefore, as explained below, the purported *de facto* application of Law No. 6 lacked both legal basis and legitimacy and did not have any legal effects on the legal status of Mr Gaddafi.

160. Thirdly, article 2 of Law No. 6 sets out specific requirements for its application which include, among others, '[a] written pledge […] in which the person undertakes to repent and not to reoffend' and that the person 'shall reconcile with the victim, his or her legal guardian, or legal survivor, as appropriate'.[231] However, no information or evidence has been presented showing that Mr Gaddafi made any pledge to repent and not to re-offend, nor as to any

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and Redress's oral submissions, Transcript of 12 November 2019, ICC-01/11-01/11-T-008-ENG, p. 14, lines 14-19, p. 15, lines 12-22.

[228] Libya's oral submissions, Transcript of 12 November 2019, ICC-01/11-01/11-T-008-ENG, p. 10, lines 7-10.

[229] Common Judgment, para. 93 (footnotes omitted).

[230] *See e.g.* Appeal Brief, paras 36 (ii), 43-64.

[231] Law No. 6, ICC-01/11-01/11-650-AnxIII-tENG, p. 3.

effort on Mr Gaddafi's part to reconcile with the victims. In fact, the Appeals Chamber received clear submissions indicating that Mr Gaddafi did not do any of this.[232] As one of the *amici* stated 'this failure to comply with the requirements of Law No. 6 is particularly serious in that it denies the victims of these crimes the rights which Law No. 6 expressly granted to them'.[233]

161. Considering the above, even assuming that the crimes with which Mr Gaddafi was charged would not be excluded from Law No. 6 and its application had been carried out by the competent judicial authority, Law No. 6 would remain inapplicable given Mr Gaddafi's failure to meet the requirements set out therein.

162. In light of all the above, it is clear that, in addition to being incompatible with international law, Law No. 6 was not applicable to Mr Gaddafi. The Pre-Trial Chamber did not err in so finding and thus I agree with the Common Judgment that Law No. 6 was not applicable to Mr Gaddafi.[234]

3. Impact of Law No. 6, if any, on the admissibility of Mr Gaddafi's case before the Court

163. Considering that Law No. 6 was incompatible with international law and that it was, in addition, inapplicable to Mr Gaddafi for the specific reasons set out above, the purported *de facto* application of Law No. 6 to Mr Gaddafi lacks any legal basis, legitimacy and legal effect. Mr Gaddafi's legal status before this Court did not change as a result of the purported *de facto* application of Law No. 6 which is alleged to have been the basis for his release.[235] It had no effect on the Tripoli's Court decision or on the admissibility of the case brought against him before this Court. Mr Gaddafi's warrant of arrest for crimes against humanity of

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[232] *See* for example, Libya's oral submissions, Transcript of 12 November 2019, ICC-01/11-01/11-T-008-ENG, p. 7, lines 10-14; p. 9, lines 7-14; Prosecutor's oral submissions, Transcript of 12 November 2019, ICC-01/11-01/11-T-008-ENG, p. 63, lines 13-15; Lawyers for Justice in Libya and Redress, Transcript of 12 November 2019, ICC-01/11-01/11-T-008-ENG, p. 14, line 24 to p. 15, line 8. Libyan Cities and Tribes Supreme Council's oral submissions Transcript of 12 November 2019, ICC-01/11-01/11-T-008-ENG, p. 38, lines 7-8, 11-15.
[233] *See* Lawyers for Justice in Libya and Redress, Transcript of 12 November 2019, ICC-01/11-01/11-T-008-ENG, p. 15, lines 6-8.
[234] Impugned Decision, paras 93-94.
[235] *See e.g.* Appeal Brief, para. 90.

murder and persecution remains outstanding, Mr Gaddafi remains at large and the case brought against him remains admissible.

164. The purported *de facto* application of the amnesty law had no legal consequences in terms of articles 17 and 20 of the Statute. Therefore, the Pre-Trial Chamber was correct in finding that the case against Mr Gaddafi remains admissible and I thus agree in this regard with the outcome of the Common Judgment.

B. Conclusion

165. For the reasons set out above, Law No. 6 is incompatible with international law and the Pre-Trial Chamber was thus correct in so finding. In addition, even assuming the compatibility of the law with international law, it was not applicable to Mr Gaddafi because the crimes with which he was charged in Libya were excluded, it was not applied by the competent judicial authority and the specific requirements set out in the law were not met. The alleged *de facto* application of Law No. 6 to Mr Gaddafi had no legal basis, legitimacy and no effect on his legal status and on the admissibility of Mr Gaddafi's case before the Court. His admissibility challenge was correctly rejected and the case remains admissible before the Court.

VI. FINAL CONCLUSIONS

166. In relation to the First Issue, the following conclusion is reached:

a. The Pre-Trial Chamber's determination on amnesties' incompatibility with international law was part of the *ratio decidendi* that Law No. 6 was not valid in its application. As such, it was not *obiter dicta*, but rather a core strand of the Impugned Decision and therefore necessitated a proper analysis by the Appeals Chamber.

167. In relation to the Second Issue, the following conclusions are reached:

a. According to well-established international human rights law, amnesties or similar measures are not permissible in relation to international core crimes that result in grave human rights violations

because such measures infringe upon concrete treaty and *erga omnes* international obligations of States to investigate, prosecute and punish those atrocities. These obligations vested upon States are required to ensure the enjoyment of fundamental and inalienable human rights.

b. International humanitarian law establishes the obligation of States to investigate, prosecute, and, if applicable, punish grave breaches of the Geneva Conventions and confirms and reinforces the impermissibility of granting amnesties for grave human rights violations resulting from violations of international humanitarian law.

c. During transitional justice processes, including peace accords, certain kinds of amnesties may be granted if they are not concerned with grave human rights violations, guarantee forms of accountability, and respect the rights of victims to truth, justice and reparations.

d. Specialised treaties in international criminal law reinforce the obligation of States to investigate, prosecute and punish perpetrators of international core crimes that amount to serious human rights violations and further impose specific obligations to cooperate in this regard. Crimes falling within the Rome Statute framework amount to grave human rights violations. Amnesties for crimes under the Court's subject-matter jurisdiction are therefore incompatible with international criminal law treaties, and particularly with the object and purpose of the Rome Statute.

e. There is thus well-established international law reflecting that amnesties that result in impunity for international core crimes that amount to gross violations of human rights are not permissible. Nevertheless, in the context of the Rome Statute, each case must be assessed on a case-by-case basis.

f. The Pre-Trial Chamber did not err in law and was thus was correct in finding that 'granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights.'[236]

168. In relation to the third issue, the following conclusions are reached:

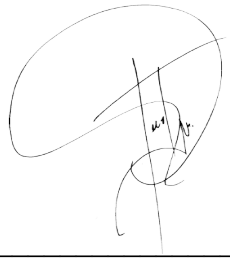
a. Law No 6 appears to be incompatible with international law because it does not exclude international crimes amounting to serious human rights violations from its ambit, does not observe the requirements of Principle 24 of the 2005 United Nations' Updated Principles to Combat Impunity and infringes concrete treaty and *erga omnes* obligation of States to investigate, prosecute and, if applicable, punish perpetrators of international crimes resulting in serious human rights violations.

b. Law No. 6 was also inapplicable to Mr Gaddafi because the crimes he was charged with were excluded from the ambit of the law, it was not applied by a competent judicial authority and the specific requirements for its application were not met.

c. The purported *de facto* application of Law No. 6 to Mr Gaddafi lacks legal basis, legitimacy and had no impact on the legal status of Mr Gaddafi and the admissibility the case brought against him before the Court.

[236] Impugned Decision, para. 77.

d. The Pre-Trial Chamber did not err in finding that, given the incompatibility of Law No. 6 with international law and its inapplicability to Mr Gaddafi, the case brought against him remained admissible. This Opinion therefore concurs with the outcome of the Common Judgment that confirmed the Impugned Decision.



Judge Luz del Carmen Ibáñez Carranza

Dated this 21st day of April 2020

At The Hague, The Netherlands