impunity watch

Amnesties for Human Rights Violations in Guatemala

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Content

Is it possible that the opposite of oblivion is not memory, but justice?
Yosef HayanYerushalmi

Pardoning political crimes has been one of the traditional mechanisms through which reconciliation amongst enemies is reached. The legal expression of such political act is known as amnesty. This formula, which has been used for decades in Latin America in order to guarantee the transition from military dictatorships to democracy or to end armed conflicts, has been applied in many occasions to benefit persons who have not committed political crimes but, on the contrary, have perpetrated grave violations against human rights. This distortion has generated strong reaction from the human rights international community.

Guatemala has not escaped this debate. From the authorization of the National Reconciliation Law in 1996, to the presentation of the Historical Clarification Commission's Final Report in 1999 and the reaction towards various sentences by the Inter American Court of Human Rights, amongst others, the issue has been considered relevant. This document deals with some issues regarding the topic and has been divided into the following sections: National Reconciliation Law, amnesties and political crimes; crimes excluded from the extinction of criminal accountability according to the National Reconciliation Law; amnesties in international law; the interpretation of article 5 in decree 145-1996; Guatemalan legal precedents regarding amnesties and amnesties in the current Guatemalan juncture.

National Reconciliation Law, amnesties and political crimes

The National Reconciliation Law –authorized in Guatemala on December 27 1996, through decree 145-1996– grants the "total extinction of criminal accountability" which is nothing other but an amnesty, since its objective is to eliminate the illegal character of a crime and its corresponding criminal accountability. The extinction of such criminal accountability is both for political crimes (article 2) and for common crimes related to those political crimes (article 4).

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Oblivion for political crimes has been, precisely, one of the objectives of amnesties.

Historically, it has been understood that political crimes are those that attempt against the political or constitutional organization of a State[1], while common crimes are those ordinary crimes committed against a pre-established legal order:

> *[…] 2.4. It is clear that with a political crime, what is being attacked is the constitutional and legal regime concerning the political organization of society and its forms of government; or it is committed in order to overthrow the authorities in power whose legitimacy is not recognized or whose abuses are ceased, and the actions are, therefore, justified by the superior benefit of society. On the contrary, with a common crime the motives lack such nobility; its perpetration attacks legal rights that every society must protect in order to defend life, rights and peaceful living. Thus, it has been established that a political crime is of less gravity than a common crime, since legal rights attacked through it don´t belong to those instituted by a social group as indispensable for everyday life. Thus, the law gives political crimes a more benign treatment than it gives common crimes and, once the legislator attends to specific circumstances, due to public convenience, prioritizes peace as a constitutional value and authorizes the granting of amnesty or pardon to crimes related to political ones.*[2]

As can be observed, an amnesty is able to cover common crimes related to political crimes, but a common crime, if not linked with a political crime, cannot in any case be subject of an amnesty or a pardon. Traditionally, in criminal law the quintessential political crime[3] is rebellion and the natural political criminal is the rebel. The crime of rebellion is committed by someone who combats legality through the use of arms or weapons[4]. Due to this, common crimes related to political crimes are directly linked to actions involving an armed confrontation, for example the illegal carrying of weapons, the illegal use of uniforms and emblems, the use of communication devises and those performed in combat, as long as they are not acts of terrorism, ferocity or barbarism[5].

A total of 51 crimes labeled as political are mentioned in article 2 of decree 145-96[6] and 29 are qualified as

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1 Juan Pablo Cardona Chávez, "Political crime; an alternative for peace?" in Andreas Forer, Claudia López (editors), Colombia: a new model for transitional justice, GIZ, Embassy of the Federal Republic of Germany, Bogotá, 2012, p. 397 and ss.

2 Constitutional Court of Colombia, Vote reasoning of magistrate Alfredo Beltrán Sierra in the Sentence C-370 of the Constitutional Court dated May 18 2006 (Case file D-6032).

3 Political crime is an expression that has carried important historical developments in other latitudes; for example, in revolutionary France (between 1789 and 1830), Pre-Imperial Germany (between 1789 and 1871) and in the Latin American context, the Colombian case stands out (since the civil wars in the 19th century, up to date). See the first part of the book by Iván Orozco Abad, Fighters, rebels and terrorists, war and law in Colombia, Temis, Institute of Political Studies and International Relations, National University, Bogotá, 1992.

4 For example, in the currently valid Colombian criminal code, articles 467 and 468 establish rebellion and sedition as crimes against the legal and constitutional regime. The crime of rebellion is committed by a person who, through the use of arms, intends to overthrow the national government or to suppress or modify the valid legal or constitutional regime. The crime of sedition is committed by a person who, through the use of arms, intends to transitionally impede the free functioning of the valid legal or constitutional regime.

5 In the former Colombian criminal code, article 127 established that rebel or seditious people would not be subject to punishment for the actions committed during combat, as long as those actions did not constitute acts of ferocity, barbarism or terrorism.

6 Political crimes, according to article 2, are "crimes against the security of the State, against the institutional order and against the public administration, found in articles 359, 360, 367, 368, 375, 381, 385 to 399, 408 to 410, 414 to 416, of the criminal code, as well as those articles found on Title VII of the Weapons and Ammunition Law". These crimes are the following:
Title XI of crimes against the security of the state chapter I of treason: article 359 treason, article 360 attempts against the integrity and independence of the state, article 367 mapping of fortifications, article 368 aggravated mapping of fortifications and revealing of state secrets; chapter II of espionage: article 375 insult against a foreign nation´s symbols. Title XII of crimes against institutional order, chapter I of crimes against the constitution: article 381 violation against the constitution; chapter III of crimes against the internal political order of the state: article 385 rebellion, article 386 proposition and conspiracy, article 387 sedition, article 388 exception of punishment of executors, article 389 public incitation, article 390 actions against the internal security of the nation; chapter IV of crimes against public order: article 391 terrorism, article 392 public intimidation, article 393 aggravated public intimidation, article 394 instigation to commit crimes, article 395 apology of crime, article 396 illicit associations, article 397 illicit reunions and protests; chapter V of crimes against social tranquility: article 398 illegal grouping of armed peoples, article 399 militancy in illegal groups.
Title XIII of crimes against public administration; chapter I of crimes against public administration committed by individuals: article 408 attempt, article 409 resisting, article 410 specific aggravations, article 414 disobedience, article 415 public disorder, article 416 insult against national symbols.
Weapons and ammunition law, decree number 39-89, Title VII, sole chapter: crimes, punishments and sanctions: article 83

common crimes related to those political crimes in article 4 of such decree.[7] Although the purpose of this document is not evaluating if this extensive list of 80 crimes complies with what traditional criminal law considers political and related common crimes[8] nor is it pointing its mistakes, it is important to note that such list does not contain grave human rights violations nor those considered gravest infractions to international humanitarian law.

Amnesties and pardons only exist for political crimes, since they are constructed upon forgiveness and oblivion, precisely in favor of those who intended to overthrow a national government or to either suppress or modify the valid legal or constitutional regime. Amnesty "*symbolizes the fact that individuals who were once considered dangerous have ceased to be so. It becomes unnecessary to keep the political criminal or the fighter, deprived of his or her liberty after either dialogue or military victory have returned the threatened regime its stability*"[9]; which is why he or she are forgiven, being a privileged criminal due to his or her recognition as an equal, in a morally symmetrical relationship with the State[10].

Legal tradition is categorical in stating that human rights violations cannot be included as political crimes and even less so as common crimes related to political crimes. It is worrisome that in many an occasion, amnesty is specifically used in order to evade punishment for those responsible of perpetrating human rights violations and grave infractions to international humanitarian law.

Crimes excluded from the extinction of criminal accountability according to the National Reconciliation Law

Article 8 of decree 145-1996 states: "*the extinction of criminal accountability referred to in this law, will not be applicable to crimes of genocide, torture and forced disappearance, nor to those crimes that do not prescribe or that do not admit the extinction of criminal accountability, according to internal law or international*

illegal importation of weapons, article 84 illegal importation of ammunition for fire arms, article 85 illegal fabrication of firearms, article 86 illegal fabrication of ammunition for firearms, article 87 illegal possession of machinery for maintenance of firearm ammunition, article 88 illegal possession of material for the fabrication of maintenance of firearm ammunition, article 89 illegal exportation of firearms, article 90 illegal exportation of ammunition for firearms, article 91 illegal transportation and/or transfer of firearms, article 92 illegal transportation and/or transfer of firearm ammunition, article 93 illegal ownership of offensive firearms, explosives, chemical, biological or atomic weapons, traps and experimental weapons, article 94 illegal deposit of defensive or sport firearms, article 95 illegal ownership and deposit of offensive firearms, explosives, chemical, biological or atomic weapons, traps and experimental weapons, article 96 illegal ownership of firearm ammunition, article 97 a. illegal carrying of defensive and/or sport firearms, article 97 b. illegal carrying of offensive firearms, article 97 c. illegal carrying of explosives, chemical, biological or atomic weapons, traps and experimental weapons, article 98 illegal ownership of weaponry, article 99 clandestine construction of firearm shooting fields, article 100 use of firearms in clandestine shooting fields, article 101 illegal modification of firearms, article 102 reparation of non-registered firearms, article 103 crime of appropriation of confiscated items.

7 According to article 4 of the decree, common crimes related to political crimes "are those typified in articles 214 to 216, 278, 279, 282 to 285, 287 to 289, 292 to 295, 321, 325 330, 333, 337 to 339, 400 to 402, 404, 406 and 407 of the criminal code". These crimes are:
Title IV of crimes against liberty and security of the individual, chapter IV of coercion and threat: article 214 coercion, article 215 threats, article 216 coercion against political liberty. Title VI of crimes against patrimony; chapter IX of damages: article 278 damage, article 279 aggravated damage.
Title VII of crimes against collective security; chapter I of arson and destruction: article 282 arson, article 283 aggravated arson, article 284 destruction, article 285 unintentional arson and destruction, article 287 fabrication or ownership of explosive material; chapter II of crimes against communication media, transportation and other public services: article 288 danger of railroad disaster, article 289 railroad disaster, article 292 attempt against other means of transportation, article 293 unintentional disaster, article 294 attempt against the security of public services, article 295 interruption of obstruction of communications.
Title VIII of crimes against public trust and national patrimony, chapter II of the forgery of documents: article 321 material forgery, article 325 use of counterfeit documents; chapter III of the forgery of stamps, official paper, mail stamps and other fiscal goods: article 330 forgery of license plates and other vehicle signs; chapter V of common dispositions: article 333 ownership of instruments for forgery.
Title IX of crimes against individual identity, article 337 public use of false name, article 338 illegitimate use of identity document, article 339 illicit use of uniform and emblems. Title XII of crimes against institutional order, chapter V of crimes against social tranquility: article 400 ownership and carrying of firearms, article 401 deposit of firearms or ammunition, article 402 unauthorized deposits, article 404 traffic of explosives, article 406 illegal carrying of arms, article 407 unlawful delivery of weapon.

8 It is arguable, for example, if the crime of terrorism in article 391 or certain crimes against mass media, transportation and other public services, might constitute attacks against certain civilian assets and, therefore, constitute a grave infraction against humanitarian law. Or we can point, also as an example, if conducts which might rather be related to political crimes (those related to weapons and ammunition) are included amongst political crimes.

9 Iván Orozco Abad, Fighters, rebels and terrorists, war and law in Colombia, op, cit., p. 37.

10 Ibid…, p. 46.

treaties ratified by Guatemala". In an express manner, this disposition only excludes three grave human rights violations: genocide, torture and forced disappearance. These three actions were recurrent during the Guatemalan armed conflict[11] and are expressly typified in the criminal code[12]. If one compares those three criminal types with the standards established by international law, the following can be specifically noted:

> *The definitions of the international crime of genocide as established in article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide[13], and the Guatemalan crime established in article 376 are almost identical; the differences between both are the following: first, the international crime contains racial groups as one of the types of groups that are subject to destruction in whole or in part, yet the national crime does not include this; second, the international crime establishes the "forced transferring of children of the group to another group" while the national crime establishes the "compulsive displacement of children or adults of the group to another group", the main difference being the inclusion of adults in the Guatemalan legal rule[14].*

The sentence emitted by Guatemala´s Constitutional Court on July 17 2012, declared article 201 bis of the criminal code (which typifies the crime of torture) as unconstitutional by partial omission due to its omission of the expressions "punishment", "discrimination of any kind", "or for any reason", as the objectives of the crime, as well as the expression "the application upon a person of methods aimed at annulling the victim´s personality or to diminish his or her physical or mental capacity, even when not causing physical pain or psychic angst". The importance of this sentence relies on the adjustment of the criminal type accordingly to international standards, stating that "*constitutional article 46 shows the inclusion of treaties in the constitutional block, the respect to these imposed upon the rest of the legal system, thus demanding the adaptation of the inferior category rules to the mandates contained in such instruments*"[15].

Article 201 ter, concerning forced disappearance, when compared to the definition offered by international instruments[16], clearly contains the elements of deprivation of liberty and concealment and refusal to acknowledge the deprivation of liberty (the criminal type reads "concealing his or her whereabouts, refusing to reveal his or her fate or to acknowledge his or her detention"). It does not include the requirement of "placing such a person outside the protection of the law", also established by international standards[17], limiting it to political motives and including more categories for the active party who commits the action. Furthermore, while the criminal rule states that "*the crime is considered permanent as long as the victim is not liberated*", international standards establish that "*every act of forced disappearance will be considered a permanent crime for as long as its authors continue concealing the fate and whereabouts of the victim and for as long as the facts remain unclear*"[18].

As can be observed, the criminal type that mostly resembles international standards is genocide; it is expected that legislators will adjust the crime of torture

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11 As stated in the Final Report of the Historical Clarification Commission, acts of genocide were carried out against Mayan peoples and tortures and forced disappearances were two of the gravest human rights violations perpetrated by agents of the State, which constitute crimes of war or crimes against humanity.

12 Articles 376, 201 bis and 201 ter, respectively and the expression "or who committed any inhumane act against civilian population" dealt with in article 378 which typifies a conduct named crimes against humanity duties, would include, no doubt, torture and forced disappearance; by the type of expressions it uses, it criminalizes both crimes of war and crimes against humanity. Regarding articles 376 and 378, see a brief by Alejandro Valencia Villa "Genocide and humanity duties in the Guatemalan criminal code: its interpretation in the light of international standards", published in the magazine Opus Magna of the Guatemalan Constitutional Court, volume VII, March 2013.

13 The Convention on the Prevention and Punishment of the Crime of Genocide was ratified by the State of Guatemala through Legislative Decree number 704 dated November 30 1949. Date of ratification: December 13 1949. Date of deposit: January 13 1950. Date of publication: January 6 1950.

14 See Alejandro Valencia Villa, "Genocide and humanity duties in the Guatemalan criminal code: its interpretation in the light of international standards", op., cit.

15 Constitutional Court of Guatemala, Case file 1822-2011, sentence dated July 7 2012, p. 30.

16 The Inter American Convention on Forced Disappearance of Persons was signed by the State of Guatemala on June 24 1994, ratified on July 27 1999 and deposited on February 25 2000; it became valid for Guatemala on March 25 2000. The United Nations International Convention for the Protection of All Persons from Enforced Disappearance was signed by the State of Guatemala on February 6 2007, but has not been ratified yet.

17 The Inter American Convention states: "thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees" (article II); the Rome Statute states with the intention of removing them from the protection of the law for a prolonged period of time" (article 7.2.i) and the United Nations convention establishes: "which place such a person outside the protection of the law" (article 2).

18 Article 17.1 of the Declaration on the Protection of All Persons from Enforced Disappearance.

accordingly and the criminal type of force disappearance contains some defects and differences in relation to them. In any case, it is understood that, based on constitutional article 46, this criminal rules are to be interpreted based on international human rights law. This hermeneutic criteria must transcend treaties ratified by Guatemala; thus, precedents and doctrine from the Universal and Inter American human rights systems must be taken into account, as well as those from international criminal courts and international public law sources, all according to article 38 of the Statute of the International Court of Justice.

Furthermore, article 8 of decree 145-1996 makes a general mention of crimes that do not prescribe or that do not admit such measure according to national law or to treaties ratified by Guatemala. For example, Guatemala is a State Party of the Statute of the International Criminal Court[19], which establishes in its article 29 that genocide, crimes against humanity and war crimes shall not be subject to any statute of limitations, for which such court is competent. In addition, as we´ll analyze later, the interpretation of section 5 in article 6 of the Protocol II of 1977 does not allow amnesties for war crimes; Guatemala is a State Party of it[20]. What is established in these treaties is important due to the preeminence of international law over internal law, which is stated in article 46 of Guatemala´s Constitution: "It´s hereby established the general principle that in human rights matters, treaties and conventions accepted and ratified by Guatemala, are preeminent over internal law".

However, there are more important legal reasons than just "internal law and international treaties ratified by Guatemala" that support the non-extinction of criminal accountability in relation to other crimes than those established by article 8 of decree 145-1996. As will be pointed later, there is an extensive common law practice, as well as practice related to legal precedents and doctrine, both at a national and international level, concerning human rights international law, international humanitarian law and international criminal law, regarding the illegality of amnesties in cases of grave human rights violations or grave infractions against international humanitarian law.

Amnesties in international law

Currently there is a wide consensus in the international community regarding the lack of legitimacy of general amnesties. Persons who commit grave human rights violations or grave infractions against international humanitarian law are not able to benefit from an amnesty or a pardon that prevents their investigation or sanction. Although section 5 of article 6 of Protocol II of 1977 Additional to the Geneva Conventions of 1949 is valid in Guatemala since 1987 dealing with the protections of victims in non international armed conflicts states that "*At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained"*, such amnesty cannot cover those who have committed grave infractions or war crimes if the right to justice is not satisfied, just as has been established by the following common law rule applicable to non international armed conflicts:

"When hostilities have ceased, authorities in power shallmake the effort to concede the widest possible amnesty to those who participated in a noninternationalarmed conflict or to persons deprived of liberty due to reasons related to the armedconflict, except for people who are suspect or have been accused of having committed war crimesor who have been condemned for them"[21].

"… *Amnesty laws adopted within the frame of an internal armed conflict must concern political crimes and related common crimes related to hostilities, thus excluding from such measures all grave infractions to international humanitarian law or systematic and flagrant human rights violations, in any manner in which they constitute crimes against humanity*"[22]

"…*In his report regarding the Rule of Law and transitional justice in societies that are suffering or have suffered conflict, the Secretary-General [of the United Nations] concluded that 'peace agreements approved by the United Nations can never promise amnesties for*

19 The Rome Statute was ratified by the congress of Guatemala on January 26 2012 and on April 2 2012 the ratification instrument was deposited; it will be valid for the State of Guatemala starting July 1 2012.

20 Protocol II was ratified by the State of Guatemala through Congress Decree 21-87 dated April 23 1987. Date of adhesion: September 21 1987. Date of deposit: October 19 1987. Date of publication: September 6 1988.

21 See Jean-Marie Henckaerts, LouiseDoswald-Beck, Common international humanitarian law, volume I, rules, CICR, no city, 2007, p. 691 to 694.

22 M. T. Infante, Treaties in Chilean internal law: the effect of the constitutional reform of 1989 seen from the perspective of jurisprudence, in Héctor Gross Espiell, AmicorumLiber, vol. I, Bruylant, Brusels, 1997, p. 567, cited in Alejandro Ramelli Arteaga, The Colombian Constitution and the International Humanitarian Law, Universidad Externado of Colombia, Bogota, 2000, p. 344.

crimes of genocide, war or against humanity or grave infractions against human rights"[23].

Both the Statutes of the Special Court for Sierra Leone of 2002 and the Special Tribunal for Lebanon of 2006, expressly state this prohibition. Article 10 of the Statute of the Special Court for Sierra Leone, reads: "*An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution".*Articles 2 and 4 refer to crimes against humanity and other serious violations of international humanitarian law. Article 6 of the Statute of the Special Tribunal for Lebanon, adopted in 2007, reads: "*An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution*"[24].

The Updated Set of principles for the protection and promotion of human rights through action to combat impunity25, in its principle 24 regarding restrictions and other measures relating to amnesty, establishes that "*the perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19[26]refers or the perpetrators have been prosecuted before a court with jurisdiction –whetherinternational, internationalized or national– outsidethe State in question*".

The legal precedents of the Inter American system of human rights protection also consider that dispositions regarding amnesties that intend to prevent investigation and sanction for those responsible for grave human rights violations, are inadmissible[27];the Inter American Commission on Human Rights in its report on the demobilization process in Colombia, has stated:

"Some states affected by internal armed conflicts and their consequences have issued amnesty laws when implementing mechanisms for achieving peace and national reconciliation. Nonetheless, the granting of amnesties and pardons should be limited to punishable conduct in the nature of political crimes or common crimes linked to political crimes insofar as, having a direct and close relationship with the political criminal conduct, they do not constitute serious violations under international law. Those responsible for committing such crimes should not benefit unduly from grounds of exclusion from punishment, such as the prescription of the crime and prescription of the punishment, the granting of territorial or diplomatic asylum, the refusal to extradite a person for the commission of crimes punished by international law, or the granting of amnesties or pardons"[28].

The Special Court for Sierra Leone has sustained that even when amnesties cover international law crimes, these are not an obstacle for the exercise of universal jurisdiction either by another State or by the International Criminal Court's international jurisdiction[29]. The Inter American Court of Human Rights has stated that:

…every international organism for the protection of human rights as well as different national high courts in the region that have had the opportunity to speak

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23 United Nations, Commission on Human Rights, Report by Diane Orentlicher, independent expert in charge of updating the Set of Principles to combat impunity, E/CN.4/2005/102, February 18 2005, par. 50. In par. 51 it is established how the decisions of national courts have continued to limit the application of amnesties granted in the past. Also, in the study carried out by this same expert in 2004 reference is made to the incompatibilities of amnesties that favor impunity, see E/CN.4/2004/88, February 27 2004, par. 28 to 32.

24 Cited by Hernando Valencia Villa, "The 1977 Spanish amnesty law in the light of human rights international law", in Santiago Ripol Carulla and Carlos Villán Durán (Dir), Transitional Justice: the case of Spain, Institut Catalá Internacional, Barcelona, 2012, par. 24.

25 Annex to the Report by Diane Orentlicher, independent expert in charge of updating the Set of Principles to combat impunity, presented to the United Nations Commission on Human Rights in 2005, E/CN:4/102/add.1, February 8 2005.

26 "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, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished. Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as parties civiles or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein." (first section).

27 See Inter American Court of Human Rights, case Barrios Altos, sentence dated March 14 2001, par. 41. A decision by the Inter American Court that includes a very detailed recount about the incompatibilities of amnesties related to grave human rights violations and international law is found in sentence dated November 24 2010, Case Gomes Lund and others ("guerrilha do araguaia") vs. Brasil, in particular paragraphs 106 to 160.

28 Inter American Commission on Human Rights, Report on the demobilization process in Colombia, OAS/Ser.L/V/II.120, Doc. 60, December 13 2004, par. 37.

29 Juan Pablo Pérez-León Acevedo, The international accountability of individuals for crimes of war, Ara Editores, Lima, 2008, p. 547.

regarding the range of laws that grant amnesty over grave human rights violations and their incompatibility with the States 'international obligations, have concluded that such amnesties violate the States' international obligation of investigating and sanctioning such violations[30]*.*

Even when there seems to be a common law tendency (also including some judicial practices) that suggests prohibition for cases of grave human rights violations and infractions against international humanitarian law are more directed towards amnesties than pardons[31], the majority of jurisprudence tends to prohibit both[32] and when concerning total pardons (those including all criminal sanctions) these are not admissible according to human rights international law[33].

An amnesty is different to a pardon. Amnesty supposes the forgiveness of a crime, while pardon supposes the forgiveness of a punishment. Amnesty benefits a plural number of people, while pardon benefits one specific person. Amnesty extinguishes civil responsibility derived from a crime, while a pardon does not. Amnesty is granted by a law emitted by the Republic's Congress, while a pardon is granted by an administrative measure taken by the Republic's President. Amnesty extinguishes criminal records, while pardon doesn't necessarily. Amnesty does not require a firm sentence in order to be granted, while pardon does so. One of the most relevant efforts carried out in the last few years in order to make peace issues compatible with transitional justice issues, was offered by The Chicago Principles on Post-Conflict Justice[34], which state the following regarding amnesties:

> ***Amnesty*** *– States shall not grant blanket amnesty to absolve individuals of responsibility for genocide, serious war crimes or crimes against humanity.*
>
> ***Token sentences and similar actions*** *– States shall not issue token sentences or engage in other actions designed to inequitably limit punishment for gross violations of human rights and humanitarian law.*
>
> ***Amnesty as a pre-requisite to the termination of conflict*** *– States should limit the granting of amnesty to circumstances where such measures are necessary for negotiating the end of a conflict, subject to obligations arising under international law.*
>
> ***Linking amnesty with accountability*** *– States that provide amnesty or other mechanisms to reduce individual legal responsibility for past crimes shall do so in consideration of international law. States should ensure that amnesty policies are linked to specific mechanisms of accountability to discourage impunity and support the goals of post-conflict justice. Amnesty is more acceptable when it provides protection to low-ranking perpetrators, child soldiers, those responsible for less serious crimes and those forced to commit violations.*
>
> ***Individual adjudication of claims*** *– States that provide amnesty or other mechanisms of reducing individual legal responsibility for past crimes should favor systems that involve the individual adjudication of claims.*

As can be observed based on these principles, there is no absolute prohibition of amnesties; these are even permitted in order to finalize an armed conflict or to "reduce legal responsibility for crimes committed in the past", as long as they remain subject of international law

30 Sentence dated November 24, Case Gomes Lund and others ("guerrilha do araguaia") vs. Brasil, par. 150. In particular, this decision in paragraphs 127 to 149 cites decisions by the Inter American Court of Human Rights and the Inter American Commission on Human Rights, by the Secretary General of the United Nations, by the United Nations Office of the High Commissioner for Human Rights, by the Special Rapporteur on the issue of impunity, by the Vienna Declaration and Programme of Action on Human Rights of 1993, by the United Nations Working Group on Enforced or Involuntary Disappearances, by the United Nations Human Rights Committee, by the United Nations Committee against Torture, by the International Criminal Tribunal for the former Yugoslavia, by the Special Court for Sierra Leone, by the European Court of Human Rights, by the African Commission on Human and Peoples' Rights, by the Supreme Court of Justice of the Nation of Argentina, by the Supreme Court of Justice of Chile, by the Constitutional Court of Peru, by the Supreme Court of Justice of Uruguay, by the Constitutional Court of Colombia and by the Supreme Court of Justice of Colombia, regarding the incompatibility of amnesties with grave human rights violations.

31 For example, section 5 of article 6 of Protocol II of 1977 Additional to the Geneva Conventions of 1949 and the sentence of the Inter American Court of Human Rights for the case Barrios Altos (Chumbipuma Aguirre and others vs. Peru), dated March 14 2001, only refers to amnesties and not to pardons.

32 Due Process of Law Foundations, Digest of Latin American jurisprudence regarding crimes of international law, Washington, 2009, particularly sections 2 and 3 in Chapter VI about state decisions that obstruct investigation, trial and, in some cases, sanctioning crimes of international law.

33 Luz María Sánchez Duque, Legal perspectives regarding an eventual peace process with guerrilla groups, Planeta Paz, Bogotá, 2011, p. 47.

34 A joint Project of the "International Human Rights Law Institute", the "Chicago Council on Global Affaire", the "Istituto Superiore Internazionale di Scienze Criminali" and the "Association Internationale de Droit Pénal". 2007.

and, in all circumstances, illegitimate when it comes to grave human rights violations. Precisely, permitted amnesties are for political crimes and, as has been pointed, political crimes are not human rights violations; nor are human rights violations considered political crimes, either.

The interpretation of article 5 in decree 145-1996

Furthermore, the total extinction of criminal accountability mentioned in article 5 of the abovementioned decree for "*State authorities, members of the State's institutions or any other force of State established by the law*" who may have committed crimes in order to "*prevent, impede, persecute or repress*" political crimes and common related crimes, cannot include human rights violations either, nor infractions against international humanitarian law.

As has been pointed throughout this document, the extinction of criminal accountability established by this law is no other measure than an amnesty, which cannot be granted in cases of human rights violations. Because of this, human rights violations and infractions against international humanitarian law committed in Guatemala during its armed conflict by members of the military, by the police or other public officers, by military commissioners or by members of the Civilian Self-Defense Patrols[35], cannot be considered political crimes nor related common crimes; thus, they cannot benefit from the extinction of criminal accountability granted by such decree. As said, oblivion cannot come before society has remembered nor can there be forgiveness if not even the public recognition of responsibility on behalf of those who committed atrocities has occurred. [36].

It could never be said that the second phrase of article 5 in decree 145-1996 which states that "*crimes whose criminal accountability is hereby declared extinguished are also conceptualized as of political nature*", covers human rights violations or infractions against international humanitarian law. Precisely, this second phrase contains the exception for "*cases where there is no rational and objective link between the mentioned objectives [political] and the specific actions committed*" [human rights violations]. Just as has been said, there is no "rational and objective" link between political crimes and human rights violations.

Amnesties might only cover crimes of national nature, of minor character or purely political[37]. No agent of the State or particular person who acted on behalf or with aid of the State, who committed grave human rights violations or grave infractions against international humanitarian law –such as crimes against humanity or war crimes– is able to benefit from the National Reconciliation Law.

As long as the victim has not witnessed his or her aggressor face trial, he or she is condemned to extreme loneliness, due to the fact that he or she is not able to share such moral experience with someone else; what the victim expects from this calling, from this new meeting, is not a probable reconciliation or an unlikely forgiveness, but being able to reincorporate him or herself to a common political and moral universe. Only after justice has procured such moral connection to occur, shall the aggressor once again be "a fellow neighbor" to the victim[38].

Guatemalan legal precedents regarding amnesties

What's particularly worrisome in the Guatemalan context is that certain sectors sustain that the total extinction of criminal accountability granted in decree 145-1996, specifically covers grave human rights violations. As American philosopher Stephen Colmes has said, amnesty laws are classic examples of gag-laws created in order to stabilize democracy[39]. On November 4 2011, Guatemalan citizen Julio Roberto Alpírez presented an action of unconstitutionality against article 8 of the abovementioned decree arguing, amongst other things, that genocide, torture and forced disappearance were

35 Both military commissioners and members of the Civilian Self-Defense Patrols were "other force[s] established by the law", according to article 5 of decree 145-1996. On July 9 1938, by a government accord, the Military commissioners were created; the restructuring of such a figure was carried out by the government of Arana through government accord 4-73. The Civilian Self-Defense Patrols (PAC, by its Spanish initials) were legally recognized by the government accord 222-83 dated April 14 1983. See Guatemala Memory of Silence, Report by the Historical Clarification Commission, Volume II Human rights violations and the acts of violence, Guatemala, 1999, paragraphs 1193, 1198, 1209 and 1265.

36 Iván Cepeda Castro and Claudia Girón Ortiz, "Memory and Human Rights in Latin America", in Mourning, Memory, Compensation, Foundation Manuel Cepeda Vargas, Bogotá, 1998, p. 90.

37 Hernando Valencia Villa, "The 1977 Spanish amnesty law in the light of human rights international law", op, cit, p. 22.

38AntoineGarapon "Justice and the moral investment of time", in Francoise Barret-Ducrocq, Why remember?, Granica, Barcelona, 2002, p. 97.

39 S. Holmes, "Gag rules or thepolitics of omission", in Jon Elster and RuneSlagstad (eds.), Constitutionalism and democracy, Maison des SciencesPress, New York, 1988, p. 27, quoted by Hernando Valencia Villa, "The 1977 Spanish amnesty law in the light of human rights international law", op, cit, p. 15.

not typified as crimes in the Guatemalan Criminal Code for a significant part of the armed conflict's 36 years[40]. This actions was dismissed on October 9 2012 by Guatemala's Constitutional Court, under the case file numbered 4371-2011. The AmicusCuriae presented by the Human Rights Office of the Guatemalan Archbishop on January 26 2012 notes that "*those crimes listed in article 8 were punishable under the international law applicable during the armed conflict era*". This Amicus argues that the Convention on the Prevention and Punishment of the Crime of Genocide was valid in Guatemala since 1950, genocide being a crime that has reached the rank of *iuscogens*; that the prohibition of torture was established in common article 3 of the Geneva Conventions of 1949 valid for the State of Guatemala since 1952[41]; and that regarding forced disappearance, due to the fact that it is a continuous crime, prescription counts "*starting the day in which the last action took place*" (number 3 in article 108 of the Guatemalan Criminal Code).

It is also useful to point that the sentence emitted on August 8 2012 by the Criminal Chamber of the Supreme Court of Justice in the case known as the "Dos Erres Massacre", denied the amnesty requested by Carlos Antonio Carías López, citing the sentence emitted by the Inter American Court on November 24 2009 regarding that same case, particularly the jurisprudence of this organism regarding the incompatibility of amnesty in cases of grave human rights violations[42] and that, considering the gravity of the events, the State cannot apply amnesty laws in order to excuse itself from its obligation to "*efficaciously conduct investigation aimed at individualizing, judging and eventually sanctioning those accountable for those crimes committed in the Dos Erres village*"[43]. Concerning this issue, the Criminal Chamber of the Supreme Court of Justice concludes that the events of this case in which 201 people were executed and other human rights violations were committed, "*exclude any political consideration in favor of its authors and raise to the category of grave human rights violations as has already been declared by the Inter American Tribunal*"[44].

The effects of the sentence dated July 17 2012 concerning this document's topic, not only concern how the crime of torture cited in article 8 of decree 145-1996 must be dealt with, but also concern the no-excuses application of the constitutional bloc theory. In this sense, the above cited international corpus that clearly establishes the illegality of amnesties in cases of grave human rights violations must be kept closely in mind, since a considerable portion of it is part of the constitutional bloc. Even more so, this international corpus is part of the "conventionality control" that must be performed by the Constitutional Court; that is, the control of constitutionality of an internal rule is not only carried out based upon the sole Constitution, but also with the "international instruments related to such rule", as was already cited by the Constitutional Court in its sentence dated February 14 2012, case file 3334-2011.

The victims of human rights violations are entitled to an adequate and effective judicial response and, due to this, it is not allowed to apply measures that tend to exclude criminal accountability in cases of this sort, since it would violate the States' international duty for judicial protection granted, amongst others, in article 25 of the American Convention on Human Rights.

As conclusion: amnesties in the current Guatemalan juncture

Even though many truths are left unknown in Guatemala and thousands of victims are still awaiting repair; even with all the mistakes and criticism that can be faulted upon the National Compensation Programme and the Final Report of the Historical Clarification Commission (aspects not meant to be analyzed in this document) it cannot be denied that the peace agreements signed in 1996 do contain a mixture of elements of transitional justice. Besides the extinction of criminal accountability for political crimes established in decree 145-1996, a Truth Commission was created, which delivered its final report on February 1999; an administrative compensation programme for victims of human rights violations has also been functioning.

Precisely because of the weaknesses that can be found on these measures for transitional justice 16 years after the peace agreements were signed, it is necessary to defend and strengthen those rights to justice, truth and

40 Another charge made in the claim, states that "the law hereby referred cannot fulfill its reconciliation objectives because it´s dealing all affected parties through inequality…since some, the military, were agents of the State and the others, the guerillas, were not". Charge seven, p. 4 of the written claim.

41 The Geneva Conventions of August 12 1949 were ratified by the State of Guatemala through Legislative Decree 881 dated April 16 1952. Date of ratification: April 21 1952. Date of deposit: May 14 1952. Date of publication: September 1, 2 and 3 1952.

42 Inter American Court of Human Rights, sentence on the case Las Dos Erres massacre vs. Guatemala dated November 24 2009, par. 129.

43 Ibid…, par. 233.

44 Criminal Chamber of the Supreme Court of Justice of Guatemala, sentence dated August 8 2012, p. 58. Pages 53 to 58 contain all considerations regarding the case.

compensation; under no circumstances should the recognition of those rights be debilitated or diminished. Transitional justice is not regressive. The greatest the offense was in the past, the greatest the victim´s rights are in the present[45]. Therefore, certain sector´s propositions aimed at negotiating a "greater truth" regarding human rights violations in exchange for a new amnesty are neither legal nor legitimate[46]. They are not legal due to all that has been explained in these pages; there is an international *corpus juris* which prohibits amnesties in cases of human rights violations. They are not legitimate, since the moment for negotiations has already passed and at this point those agreements must be complied with and all international commitments acquired by the State of Guatemala must be honored. When justice is reduced to the particular criteria of the repressor, the law becomes a limitless witch-hunt[47].

In order to move forward with respecting and guaranteeing human rights for Guatemalans, the victim´s rights must be fulfilled; this requires a correct application and interpretation of the National Reconciliation Law according to both the Constitution and to international instruments. The tension between amnesties and human rights must be resolved in favor of the latter if we are to believe in the ethics of democracy in order to fulfill the rights to justice, truth and compensation.

[45] TzvetanTodorov, Memory of evil, temptation of good, inquiry regarding the 20th Century, Península, Barcelona, 2002, p. 170.

[46] See ImpunityWatch, Historic truth in Guatemala, a step aside, Guatemalan team, ImpunityWatch, 2012, p. 20, 23 and 46.

[47] Tomás Valladolid Bueno, "The rights of the victims", in José M. Mardones and Reyes Mate (editors), Ethics regarding victims, Anthropos, Barcelona, 2003, p. 158.