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## Giving Amnesties a Second Chance

Charles P. Trumbull IV

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# Giving Amnesties a Second Chance

By  
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I.  
INTRODUCTION

In the past hundred years the world has witnessed atrocities on a scale never before contemplated. Nazi Germany committed acts so heinous that the international community had to develop a new expression to describe them: crimes against humanity. Joseph Stalin killed millions of Soviet citizens. Pol Pot attempted to exterminate the Buddhists in Cambodia. Slobodan Milosevic tried to eliminate the Bosnian Serbs, and the Hutu population in Rwanda killed 800,000 Tutsis and moderate Hutus before finally losing power to the Rwandan Patriotic Front. These conflicts, and over 250 others, have resulted in an estimated 75-170 million deaths.<sup>1</sup>

Until recently, the international community had little hope of bringing to justice these perpetrators of human rights atrocities, at least not for those crimes committed entirely within a state's borders.<sup>2</sup> State leaders acted with impunity, wielding the shield of state sovereignty. The international community begrudgingly approved of domestically enacted amnesties as a legitimate mechanism for ending internal conflicts and promoting democratic transitions.

Two important developments in international law, however, have caused many to question the legality of amnesties. First, the international community has recently established that it will hold at least some violators of international law accountable for their actions. In the 1990s, the United Nations (UN) created two international war crime tribunals to try perpetrators of crimes committed in the former Yugoslavia and Rwanda. Subsequently, the UN set up special courts in Sierra Leone and East Timor. In 1998, delegates from 120 countries approved the Rome Statute, establishing the first international criminal court designed specifically to prosecute crimes under international law.<sup>3</sup> In accord with these developments, many world leaders, international lawyers, and human rights activists now believe it is not acceptable to allow perpetrators of atrocious crimes to go unpunished. Prosecution and punishment, they argue, is essential to eliminate the notion of impunity and to deter current and future leaders from committing similar crimes.<sup>4</sup>

1. M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 409 (2000).

2. See, e.g., Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197, 198 (1996) (noting that in recent decades perpetrators of crimes against humanity have acted with impunity).

3. On July 17, 1998, delegates to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome voted 120-7, with 21 abstentions, to approve the statute. *Rome Statute of the International Criminal Court*, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 2187 U.N.T.S. 90, UN Doc. A/CONF.183/9 (1998) [hereinafter *Rome Statute*]. The official website of the International Criminal Court is available at <http://www.icc-cpi.int/home.html&l=en>.

4. See discussion *infra* Part III.A.

Second, international scholars and government officials in most countries now agree that individuals possess certain fundamental rights such as the rights to be free from torture, slavery, and genocide, the violation of which is considered a *jus cogens* crime.<sup>5</sup> Offering amnesty to persons who violate these fundamental human rights is inconsistent with the idea that these rights are nonderogable.<sup>6</sup>

Despite the recent recognition of fundamental human rights and the accompanying demand to bring violators of these rights to justice, governments in war-torn countries struggle to determine the best way to deal with perpetrators of crimes within their own borders. Leaders in Peru, El Salvador, Argentina, Chile, Haiti, Sierra Leone, South Africa, Colombia, Afghanistan, and Algeria, among others, have passed broad amnesty laws that protect persons who have committed serious violations of international law from domestic prosecution. The decision to grant amnesty often results from a combination of several considerations. Some countries are ill-equipped to prosecute these criminals, especially when the violations occurred on a large scale or a number of years ago.<sup>7</sup> Leaders may see an amnesty as necessary to halt the human rights abuses, believing guerrilla groups or entrenched dictators may naturally be reluctant to cease hostilities or relinquish power if they know that they will face prosecution thereafter.<sup>8</sup> Leaders may also fear that large scale prosecutions would undermine the process of reconciliation,<sup>9</sup> and that the government can better serve the country's immediate needs by focusing on restoring order, rebuilding infrastructure, and implementing democratic reforms.

Thus, the legality of amnesties for perpetrators of serious crimes under international law is in a state of transition and considerable uncertainty. On one hand, various academics, judges, and government officials argue that customary international law prohibits amnesties and requires states to seek justice for serious human rights violations.<sup>10</sup> Further, they argue that all persons, not just the individuals in the country in which the crimes occurred, have an interest in seeking retribution and deterring future human rights violations. Thus, they assert that domestic amnesties do not prevent international tribunals or national courts

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5. Restatement (Third) of the Foreign Relations Law of the United States, Section 102(2) (1987).

6. See, e.g., Ronald Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 175 (2002). Slye states that the problem with amnesties is "their increased use and acceptance in a world which has universally embraced the idea of fundamental human rights from which no derogation is permitted." *Id.*

7. See *id.* at 184-86.

8. See William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145, 164 (2004).

9. See Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293 (2005).

10. See, e.g., Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2585-93 (1991); Kenneth Roth, *International Injustice: The Tragedy of Sierra Leone*, WALL ST. J. (Europe), Aug. 2, 2000 (executive director of Human Rights Watch criticizing the amnesty in Sierra Leone).

in third countries from asserting jurisdiction over these criminals. On the other hand, the fact that governments continue to offer amnesties suggests that customary international law does not, at least yet, prohibit such legislation.<sup>11</sup> A number of states have objected to moves by the international community to interfere with domestic, and often democratic, solutions to what states perceive as domestic problems.

Despite the uncertainty over the *de jure* legality of amnesties, most scholars agree that the international community can *de facto* legitimize an amnesty. The UN has participated in amnesty negotiations and approved of such deals after they were concluded.<sup>12</sup> Likewise, the International Criminal Court (ICC) prosecutor has discretion to not prosecute certain criminals where “a prosecution is not in the interest of justice.”<sup>13</sup>

The need for the international community to reach consensus on the validity of amnesties has become more acute in light of the controversial amnesties recently adopted by several countries.<sup>14</sup> In 2005, Algeria and Colombia both enacted amnesties intended to bring years of civil war to an end. In Algeria, the Charter for Peace and National Reconciliation will provide amnesty to all militants not accused of public bombings, mass murder, and rape.<sup>15</sup> The Charter also provides monetary reparations to the victims of the fifteen-year civil war. In Colombia, the Justice and Peace Law grants amnesty to paramilitaries and leftist guerrillas who turn themselves in, and provides limited sentences of 5-7 years for those who committed serious crimes under international law.<sup>16</sup> After pushing the legislation through Colombia’s Congress, President Alvaro Uribe recently visited with world leaders in hope of securing international approval of the deal. Human rights organizations, however, have criticized the law for perpetuating an atmosphere of impunity in Colombia, and have called upon the ICC to ignore the amnesty and prosecute the leaders of the guerrilla and paramilitary groups.<sup>17</sup>

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11. See, e.g., Slye *supra* note 6, at 201; Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT’L L.J. 1, 36 (1998) [hereinafter Scharf, *Swapping Amnesty for Peace*]; Newman, *supra* note 9, at 311.

12. See discussion *infra* Part II.A(2)(b).

13. *Rome Statute*, *supra* note 3, at Section 53 (2)(c).

14. For example, Algeria, a country recovering from a civil war that left 100,000 people dead, recently passed a law that provides amnesty for most of the Islamist rebels, and absolves the military and security forces for crimes committed while combating the insurgents. The law provides monetary compensation for family members of the victims, but does not establish mechanisms for verifying the identity of the perpetrators, the location of the bodies of the disappeared, or any public acknowledgement of guilt. Michael Slackman, *But Bygones Can’t Be Bygones If the Pain is Raw*, N.Y. TIMES, Oct. 5, 2005, at A4.

15. The Charter for Peace and National Reconciliation is discussed in depth *infra* notes 238-243 and accompanying text. An English translation of the Charter is available at [http://www.algerianembassy.org.uk/charter\\_for\\_peace\\_and\\_national\\_r.htm](http://www.algerianembassy.org.uk/charter_for_peace_and_national_r.htm).

16. Ley de la Justicia y Paz, Ley No. 975 (Justice and Peace Law) (July 25, 2005).

17. The Federacion Internacional de Derechos Humanos (FIDH) has criticized the Justice and Peace Law as granting impunity to perpetrators of crimes against humanity. Alirio Uribe Munoz, the FIDH’s vice president commented to the BBC: “An ICC investigation is the only hope that there will be justice against those who commit crimes against humanity.” *Colombia War Crimes Probe*

This Article develops a balanced proposal for determining whether to recognize a domestic amnesty, such as the Justice and Peace Law in Colombia, for perpetrators of serious crimes under international law. To advocate for such a test, however, this Article first establishes that certain domestic amnesties are permissible under international law. Thus, Part II discusses the international legal background necessary to analyze amnesties for perpetrators of serious crimes. Section A argues that although certain treaty obligations may require states to prosecute certain types of crimes, there is no general duty to prosecute most serious crimes (including *jus cogens* crimes) under customary international law. Section B discusses the tension between the theories of universal jurisdiction and state sovereignty. I conclude that while domestic amnesties have no binding effect on a third party's ability to prosecute under the theory of universal jurisdiction, there may be political reasons for respecting such amnesties.

Part III analyzes the competing interests at play in deciding whether to defer to domestic amnesties. I conclude that the benefits of recognizing amnesties may outweigh the costs, at least in certain circumstances. Part IV proposes a balancing test for determining whether to recognize an amnesty, which the UN (and other states) could justifiably support. Part V applies this balancing test to the recently enacted amnesty laws in Algeria and Colombia. I conclude that the international community should be hesitant to support Algeria's Charter for Peace and National Reconciliation, but should support Colombia's Justice and Peace Law.

## II. FROM CRIMES TO AMNESTIES

Any attempt to determine the validity of amnesties raises two distinct questions. First, do all amnesties violate international law? If states have a duty to prosecute "serious crimes under international law,"<sup>18</sup> then the grant of amnesty might prevent the state from performing this international legal obligation. Second, assuming that amnesties are permissible under international law, can international tribunals or third party states nevertheless prosecute criminals who have been granted amnesty? This Part answers these questions in turn.

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*Urged*, BBC NEWS, June 29, 2005 at <http://news.bbc.co.uk/2/hi/americas/4633955.stm> [hereinafter *War Crimes Probe Urged*].

18. Following the Princeton Principles, this Article uses the phrase "serious crimes under international law" to refer to those crimes that may give rise to universal jurisdiction. PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, Principle 1(2) (2002). These crimes include: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture. *Id.* at Principle 2(1). I use the phrase "serious crimes under international law," which is arguably broader than *jus cogens* violations, because many argue that the duty to prosecute extends to crimes that may not be considered *jus cogens* violations.

### A. Duty to Prosecute

An international duty to prosecute serious crimes under international law could arise from one of the two sources of international law: treaty and custom. A state may accept such a duty by becoming a party to a treaty that explicitly requires signatory states to prosecute certain types of crimes. Alternatively, an existing customary norm of international law may create an obligation to prosecute certain crimes, even where a state has never explicitly agreed to such an obligation.

#### 1. Treaty Obligations

There is no treaty that requires states to prosecute all serious crimes under international law. Three widely-ratified treaties, however, impose duties on signatory parties to prosecute specified crimes: the 1949 Geneva Conventions, the Convention Against Torture, and the Genocide Convention. Almost every country in the world is a party to the Geneva Conventions, which codified international rules regarding the treatment of prisoners of war and civilians during international armed conflict.<sup>19</sup> The Geneva Conventions enumerate acts described as “grave breaches,”<sup>20</sup> and impose a duty on signatories to prosecute perpetrators of such breaches.<sup>21</sup> The official Commentary to the Conventions confirms that the obligation to prosecute these breaches is absolute,<sup>22</sup> implying that any amnesty or obstacle to prosecution would create a material breach of a state’s obligations under the treaty. The grave breach provision of the Conventions, however, only applies to international armed conflict, significantly limiting the scenarios to which they would impose a duty to prosecute.<sup>23</sup> The vast majority of human rights violations are committed by rebel groups seeking to overthrow the incumbent government, or by an entrenched authoritarian regime seeking to

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19. The Geneva Conventions consist of the four treaties signed in 1949 and the two Additional Protocols of 1977. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

20. Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147.

21. Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146.

22. *See* Commentary to Geneva Convention I, Art. 51, available at <http://www.icrc.org/ihl.nsf/COM/365-570062?OpenDocument>.

23. *See* Scharf, *Swapping Amnesty for Peace*, *supra* note 11, at 20.

quash members of opposing political parties. These violations occur within the boundaries of a single state and, under the Conventions, do not entail grave breaches for which there is a duty to prosecute.

The Genocide Convention, entered into force on January 12, 1951, imposes an affirmative duty on party states to criminalize genocide and to prosecute or extradite parties who commit this heinous crime. Under this Convention, a person is guilty of genocide if s/he commits one of the following acts with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:" (1) killing members of the group; (2) causing serious bodily harm or mental harm to members of the group; (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (4) imposing measures intended to prevent births within the group; (5) forcibly transferring children of the group to another group.<sup>24</sup>

Most serious human rights abuses do not fall under the Genocide Convention definition because the perpetrators lack the specific intent to commit genocide, or because the acts are not directed at members of one of the four groups explicitly identified in the Convention. Thus, a duty to prosecute under the Genocide Convention would only arise in specific and limited circumstances, such as Bosnia, Rwanda, and perhaps Darfur.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), entered into force in 1987, also imposes an obligation on parties to criminalize and prosecute acts of torture.<sup>25</sup> The treaty defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person [for certain purposes] when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."<sup>26</sup> Under this treaty, states must also assert jurisdiction where the accused is found within the state's territory; the state may then either extradite the offender to the state in which the crime was committed or prosecute the offender under its domestic laws.<sup>27</sup>

Two important factors limit the effectiveness of the CAT in requiring states to prosecute atrocious acts that we commonly consider to be torture. First, the Convention limits the definition of torture to acts committed by or with the consent of a public official, narrowing the scope of states' duty to prosecute under this treaty. Many acts which fit a colloquial definition of torture are committed by actors fighting against the state. Second, only 74 countries have ratified the CAT; many of those regimes most likely to commit torture have declined to sign it.<sup>28</sup>

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24. Convention on the Crime of Genocide, art. 3. Dec. 9, 1948 78 U.N.T.S. 277.

25. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art.4, 5, 6, (1985) 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51, reprinted in 23 I.L.M. 1027 [hereinafter Torture Convention]. See also ANDREAS O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 184 (2002).

26. Torture Convention, *supra* note 25, art. 1

27. *Id.* at art. 5, 6.

28. Iran, Iraq, and Haiti, for example, have all declined to sign the Convention. See Office of

State parties to these three treaties have an affirmative duty to prosecute specific crimes that are considered serious violations of international law.<sup>29</sup> A large number of human rights atrocities, however, are not covered by treaties—specifically, crimes against humanity and war crimes committed within the context of a domestic conflict. Further, not all states, especially those most prone to human rights violations, are parties to these three treaties. Thus, any obligation to prosecute all remaining serious offenses must arise from customary international law.<sup>30</sup>

## 2. Custom

Customary international law results from a general and consistent practice of states acting under a sense of legal obligation, or *opinio juris*.<sup>31</sup> To determine whether a practice is general and consistent one may look at treaties, UN resolutions, national legislation, individual state action, and academic writings.<sup>32</sup> To determine whether states are acting under a sense of legal obligation one can look at governmental edicts and domestic judicial opinions.<sup>33</sup> A law of customary international law may arise within a short period of time, but the state practice must be widespread and consistent.<sup>34</sup> Specifically, any customary international law should reflect the practice of those states that are involved in the relevant activity.<sup>35</sup>

Judicial opinions from international tribunals and third party states may also indicate the emergence of a customary international law. Since such jurisprudence does not necessarily reflect general and consistent state practice or by itself represent *opinio juris*, judicial opinions are analyzed separately. Nevertheless, their influence should not be understated, as they may pressure states to conform their practice to judicial rulings.

This Section will look at state practice over the past twenty years to deter-

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the High Commissioner for Human Rights, Status of Ratification of the Convention Against Torture, (May 8, 2006), available at <http://www.ohchr.org/english/countries/ratification/9.htm>.

29. See Orentlicher, *supra* note 10, at 2562 (noting state parties' duty to prosecute crimes under the Genocide Convention and Convention Against Torture).

30. There are a few other regional treaties that prohibit acts of torture. The American Convention on Human Rights, for example, states that "no person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." American Convention on Human Rights, Nov. 22, 1969, Art. 5, 1144 U.N.T.S. 144. The Convention, however, does not place an affirmative obligation on signatory states to prosecute violations. Rather, the Convention states that state parties must "undertake to develop the possibilities of judicial remedy" and "ensure that the competent authorities shall enforce such remedies when granted." *Id.* Art. 25. Thus, a state would not necessarily violate its obligations under the Convention by granting amnesty so long as a judicial remedy was possible at the time when the violation occurred.

31. Restatement (Third) of the Foreign Relations Law of the United States, Section 102(2) (1987).

32. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS PROCESS AND ACTORS 74 (2002).

33. *Id.* at 75.

34. Restatement, *supra* note 31, § 102(2) cmt (b).

35. DUNOFF, *supra* note 32.

mine whether it supports various academics' claim that amnesties are illegal under customary international law. It concludes that there is little evidence to suggest that any customary international law has developed that would impose an obligation on all states to prosecute perpetrators of serious crimes under international law, especially crimes against humanity. Although some countries and various international tribunals have declared that amnesties violate customary international law, the large number of amnesties granted in the last twenty years—and the participation of third party countries in brokering these deals—indicates that the state practice does not support this claim.

*i. Treaties*

As discussed, no multilateral treaty imposes an obligation on states to prosecute all serious crimes under international law. To the contrary, several domestic courts have interpreted one important multilateral treaty to imply that states are not required to prosecute serious crimes under international law, at least in some circumstances. Protocol II Additional (APII) to the Geneva Conventions establishes that “at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained.”<sup>36</sup> The International Red Cross subsequently commented that this provision applies only to persons punished for the “mere fact of having participated in hostilities,” not to those persons who have committed crimes under international law.<sup>37</sup>

The South African Constitutional Court broke with the Red Cross on this point, finding that even those persons responsible for masterminding internationally recognized crimes can be granted amnesty under APII. In upholding the country's amnesty laws, the Constitutional Court noted that the 1949 Geneva Conventions were not applicable to South Africa's domestic conflict. It then stated that Protocol II, which deals with non-international conflicts, encourages states to grant amnesties in order to promote peace and reconciliation.<sup>38</sup> Although some scholars have argued that the South African Constitutional Court misinterpreted Additional Protocol II,<sup>39</sup> this interpretation by a neutral and respected court represents the position held by a number of other countries.<sup>40</sup>

The Rome Statute also evidences the lack of consensus regarding the legal-

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36. Protocol II Additional to the 1949 Geneva Conventions on the Laws of War of 1977, Art. 6(5).

37. See Slye, *supra* note 6, at 178 (quoting letter to Margaret Popkin from Toni Pfanner, Head of Legal Division, International Committee for Red Cross).

38. John Dugard, *Reconciliation and Justice: The South African Experience*, 8 *TRANSNAT'L & CONTEMP. PROBS.* 277, 305 (1998) (citing *Azanian Peoples Organization v. President of the Republic of South Africa*, (4) SALR 671 (CC)).

39. See, e.g., *id.* at 305 n.139; Cassel, *supra* note 2, at 212.

40. When El Salvador's Supreme Court considered the validity of its amnesty laws, the court determined that it was incompetent to rule on the amnesty, but likewise referred to this article of Protocol II. See O'SHEA *supra* note 25, at 62.

ity of amnesties, as the Statute is vague as to whether the ICC has jurisdiction over persons granted amnesties under domestic law. Domestic amnesties may prevent ICC prosecution in two ways. First, the Security Council may defer the prosecution for twelve months if it determines, pursuant to its Chapter VII powers, that an amnesty (or temporary amnesty) is necessary to maintain or restore international peace and security.<sup>41</sup> After twelve months, the Security Council may renew its deferral if it continues to be in the interest of international peace and security.<sup>42</sup> Second, the ICC prosecutor may decide not to prosecute a certain crime if the prosecution is “not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”<sup>43</sup> These two provisions reflect a compromise between those parties who urged complete accountability, and those who desired a more flexible approach to promote stability, peace, and reconciliation after periods of internal strife.<sup>44</sup> Recognizing the widespread disagreement as to the validity of domestic amnesties under international law, Philippe Kirsch, the chairman of the drafting committee, stated that the final version of the Rome Statute was creatively ambiguous.<sup>45</sup>

#### ii. United Nations Action

The United Nations has often taken the position that domestic amnesties for perpetrators of serious crimes under international law are not legitimate under international law. The UN has criticized amnesties on several occasions in the last decade.

- In 2000, during the creation of the Special Court for Sierra Leone (SCSL), UN Secretary General Kofi Annan reported: “While 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.”<sup>46</sup>

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41. See *Rome Statute*, *supra* note 3, Art. 16 (stating that the Security Council can request the ICC not to prosecute by adopting a resolution). See also Newman, *supra* note 9, at 316.

42. *Id.*

43. *Id.* Art. 53.

44. Beatrice le Fraper du Hellen, a member of the French negotiating team, stated, “I thought [Article 53] is [sic] a very important provision because it allows the Prosecutor to take into account the existence of a post crisis situation; that is to say, like the South African situation today, the Guatemala, El Salvador situations a few years ago . . . There were [sic] the Truth Commission in Guatemala, there is the Truth Commission in South Africa. And we have tried to give the Court the possibility to take into account the existence of such attempts at finding a solution.” (quoted in Newman, *supra* note 9, at 319 n. 118).

45. Michael Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 367 (2006) [hereinafter Scharf, *eXile Files*].

46. Report of the Secretary General on the establishment of a Special Court for Sierra Leone, S/2000/915 (Oct. 4, 2000), para. 22, (cited in Schabas, *supra* note 8, at 156-57). At the signing of the Lome Peace Agreement, which included a blanket amnesty provision for leaders of the RUF, the UN

- A resolution adopted in 2002 by the UN Commission on Human Rights stated that “crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law and . . . perpetrators of such crimes should be prosecuted or extradited by States.” The resolution added that “amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes.”<sup>47</sup>
- In the Secretary General’s August 2004 Report to the Security Council on the Rule of Law and Transitional Justice, Kofi Annan urged that Security Council resolutions and mandates should “reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, [and] ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court.”<sup>48</sup>

It is misleading, however, to claim—as the UN did in the first of these last three quotations<sup>49</sup>—that the United Nations has “consistently” rejected amnesties for serious crimes under international law. On the contrary, the UN has openly encouraged countries to grant amnesties on several occasions.

- In 1994, the UN supported the South African amnesty. After peace talks between the African National Congress (ANC) and the ruling National Party (NP) stalled, the UN recommended granting amnesty in order to resume the move toward an interim democratic government.<sup>50</sup> Under the proposed amnesty plan, members of the apartheid government security forces and apartheid activists would receive blanket immunity. In exchange, the government would free the remaining political prisoners.<sup>51</sup> Although apartheid is considered a crime against humanity, the UN never suggested prosecuting those most responsible for decades of government sponsored discrimination and oppression.
- In 1993, the UN helped negotiate a blanket amnesty agreement in order to resolve the internal conflict in Haiti. After a military junta forced democratically-elected President Jean-Bertrand Aristide into exile in 1991, the UN appointed Dante Caputo to serve as a mediator between the military government and President Aristide. In 1993, Caputo and U.S. President Bill Clinton negotiated a deal

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Special Representative of the Secretary General for Sierra Leone appended a disclaimer to his signature. The disclaimer stated that the amnesty provision would have no effect against prosecutions for crimes under international law, including genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. Article 10 of the 2002 Statute for the Special Court for Sierra Leone provides: “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.” Schabas, *supra* note 8, at 156.

47. UN Commission on Human Rights, Res. 2002/79, 25 April 2002. The word “should” indicates that the prohibition on amnesties for violations of human rights is hortatory. Importantly, the resolution does not say that such countries must prosecute or that they may not grant such amnesties.

48. The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, S.C. Res. 616, UN SCOR, 59th Sess., at 21, UN Doc. S/2004/616 (2004). In the Security Council’s debate on whether to approve the Secretary General’s Report only two members of the Security Council spoke in favor of the Secretary General’s recommendation. The President’s statement that was eventually approved by the Security Council made no reference to amnesties.

49. See *supra* note 46 and accompanying text.

50. Lynn Berat, *South Africa: Negotiating Change? in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 271-72 (Naomi Roht-Arriaza ed., 1995).

51. *Id.*

with the leaders of the military junta that would provide for the reinstatement of President Aristide in exchange for amnesty for the members of the military junta. The Security Council approved the deal and “commend[ed] the efforts by . . . Mr. Dante Caputo to establish a political dialogue with the Haitian parties with a view to resolving the crisis in Haiti.”<sup>52</sup> The UN and the United States saw an amnesty as the best and least costly way to persuade the military to relinquish power, and therefore end the human rights abuses that threatened to send thousands of Haitians fleeing to American shores.

The United Nations has also implicitly approved several other amnesty deals. In these instances, the UN did not help negotiate the terms of the amnesty or encourage the parties to agree to the deal, but did take action to *de facto* legitimize the amnesty.

- In 1993, the UN Secretary General tacitly approved of the blanket amnesty in El Salvador.<sup>53</sup>
- In 1996, at the conclusion of the amnesty deal in Guatemala, the UN Mission to Guatemala issued a public statement concluding that the proper scope of an amnesty deal lay “exclusively with the Guatemalan people.”<sup>54</sup>
- In 1996, the UN did not object to a peace agreement in Sierra Leone that contained an amnesty clause for the rebels involved in the insurgency against the government.<sup>55</sup>
- Most recently, in 2003, a UN envoy helped negotiate the exile arrangement for Charles Taylor in Nigeria.<sup>56</sup>

Despite recent calls for accountability, the UN does not consistently disapprove of amnesties. Instead, it appears to favor accountability over peace only when the political costs are low. The UN’s inconsistent positions in Haiti and Sierra Leone illustrate this point. The UN Security Council saw the situation in Haiti as the problem of the United States, and therefore deferred to the United States in formulating a solution to the ongoing violence. The United States be-

52. UN SCOR, 48<sup>th</sup> Sess. 3238<sup>th</sup> mtg., 20 UN Doc. S/INF/49 (1993). S.C. Res. 861, UN SCOR 48<sup>th</sup> Sess. 3271<sup>st</sup> mtg., UN Doc. S/RES/861 (1993). In subsequent resolutions, the UN continued to show its support for the amnesty provision.

53. See Cassel, *supra* note 2, at 225 (noting that the Secretary General stated that the “[amnesty] would have been better if [it] had been taken after a broad degree of national consensus had been created in favor of it”).

54. See *id.* at 223 (citing Declaracion Publica del Director de MINUGUA, Dec. 20, 1996).

55. Unfortunately, the agreement did not have its desired effect, and fighting resumed. In 1999, the government of Sierra Leone and the Revolutionary United Front (RUF) signed another peace agreement, the Lome Peace Agreement, which granted Foday Sankoh and the members of the RUF complete amnesty. The Security Council passed a resolution welcoming the Lome Agreement, but the UN Special Representative attached a disclaimer to the Agreement stating that the amnesty provision would not apply to violations of serious international crimes. S.C. Res. 1260, UN SCOR 53<sup>rd</sup> Sess., 4035<sup>th</sup> mtg., UN Doc S/RES/1260 (1999) (cited in Schabas, *supra* note 8, 149-50). Professor Schabas argues that the Resolution signified the Council’s acceptance of the Lome Agreement, and the reference to the Secretary General’s comments on amnesty was “little more than a perfunctory nod that criticized amnesty ‘for the record’ but went no further.” Schabas, *supra* note 8, at 149-50. The Sierra Leone Truth Commission pointed out the UN’s inconsistent stance towards the amnesty laws in Sierra Leone. “It is not clear why unconditional amnesty was accepted by the United Nations in November 1996, only to be condemned as unacceptable in July 1999. This inconsistency in United Nations practice seems to underscore the complexity of the problem.” *Id.* at 164.

56. Scharf, *exile Files*, *supra* note 45, at 341.

lieved that the benefits (avoiding mass exodus from Haiti to the U.S.) resulting from quick cessation of the hostilities would override any long term benefits that might derive from holding the military junta accountable.<sup>57</sup> Similarly, a number of countries had an interest in preventing widespread violence from breaking out in South Africa, and the UN thus determined that the trade of justice for peace there was appropriate. No single country, however, had a strong national interest in resolving the fighting in Sierra Leone. Therefore, the UN favored the benefits of accountability, and stated that it would not recognize any amnesty for rebels who had committed serious crimes under international law.

### iii. State Practice

State practice, especially the practice of states most affected by serious crimes under international law, is the strongest indication that there is no customary international law imposing a duty to prosecute perpetrators of such crimes. Two types of state action illustrate this point. First, states have repeatedly granted amnesty from domestic prosecution to perpetrators of serious crimes under international law. Second, a number of states have participated in negotiating amnesties, suggesting that even states that are not affected by the crimes do not recognize any law that prohibits affected states from granting amnesty.

Governments from every region of the world have decided to grant amnesties to persons who committed serious crimes under international law. In the past twenty years, Argentina,<sup>58</sup> Chile,<sup>59</sup> Uruguay,<sup>60</sup> El Salvador,<sup>61</sup> Guate-

57. See Douglas Farah, *Haiti's Army Accepts Plan for Talks: UN to Dispatch Human Rights Team*, WASH. POST, Jan. 18, 1993, at A14 (stating that “[a] political settlement of the crisis, including the restoration of Aristide, is viewed as essential by the incoming Clinton administration to halt the threat of a mass exodus of boat people to Florida as they seek better economic conditions and an escape from political repression”).

58. In 1986-87 the Argentine government passed two laws intending to bring criminal prosecutions of crimes committed during the “Dirty War” to a conclusion. The Full Stop Law imposed a sixty-day deadline for filing formal charges and issuing summonses for crimes “related to the establishment of political action.” The Due Obedience Law created a presumption that military officers who committed crimes during the Dirty War were following orders, and thus not liable to punishment. See O’SHEA, *supra* note 25, at 56-57.

59. Before leaving power in 1989, General Pinochet issued a blanket amnesty for himself and “all persons who, as principals or accessories, have committed criminal offences during the period of state of siege.” *Id.* at 59. Although the democratically elected president, Patricio Aylwin, was unable to muster the political will to revoke the amnesty, he created the Commission on Truth and Reconciliation, which helped inform society about the prior regime’s actions, and recommended actions that the government could take to prevent similar events from occurring in the future.

60. In 1994, a democratically elected government took power in Uruguay, thus ending a decade of brutal military dictatorship. The new government, led by President Julio Sanguinetti, initially granted a limited amnesty that covered only “political, common and related military crimes” committed after January 1, 1962, but exempted murders and state officers who committed acts of kidnapping, murder or inhumane treatment. Criminal prosecutions were thwarted, however, because the former military regime still held strong influence in society, and threatened to create further civil strife if its members were prosecuted. In 1986, the government passed the *Ley de Caducidad* [Law of Caducity] which prevented the prosecution of state agents who committed crimes for political motives or pursuant to orders. See O’SHEA, *supra* note 25, at 63-64.

mala,<sup>62</sup> Peru,<sup>63</sup> Zimbabwe,<sup>64</sup> South Africa,<sup>65</sup> Haiti,<sup>66</sup> Sierra Leone,<sup>67</sup> Colombia,<sup>68</sup> Afghanistan,<sup>69</sup> and Algeria<sup>70</sup> have granted amnesty to persons who had

61. The Law of General Amnesty for the Consolidation of Peace of 1993 granted a “broad, absolute and unconditional amnesty” to those persons who committed “political crimes, crimes with political ramifications, or common crimes committed by no less than twenty people” before January 1, 1992. *Id.* at 61-62 (citing *La Ley de Reconciliación Nacional* [The Law of National Reconciliation], Legislative Decree #147 Official Journal #14, Volume 314). The government also created a Commission on Truth for El Salvador which investigated acts of serious violence committed after 1980. This Commission reported its findings to the public and to the United Nations, but its report did not affect the amnesty process. The El Salvador amnesty had broad international support and was approved by the United Nations. *Id.*

62. In 1996, Guatemala passed legislation that granted amnesty to persons who committed political crimes against the state, the institutional order, and public administration. The amnesty also covered common crimes “perpetrated with the aim of preventing, impeding, pursuing political and related common crimes.” National Reconciliation Law (1996), Articles 2 and 4. The amnesty expressly excluded the crimes of genocide, torture, and forced disappearances because of treaty obligations to prosecute perpetrators of such crimes. Article 8 of the legislation limits the scope of the amnesty by stating that amnesty does not extend to those crimes “for which the extinction of exemption or penal responsibility is not permitted. . . .” *Id.* at Art. 8. The legislation does not, however, exclude other serious violations of international law to which the government does not have a treaty obligation to prosecute. Thus, the government indicates its intent to honor its international obligations, but apparently does not acknowledge any customary international law that would limit the scope of its amnesty.

63. In June 1995, Peru’s Congress enacted Amnesty Law No. 26479, which exonerated both state actors and civilians for any human rights abuses committed between 1980 and 1995. See Inter-American Court of Human Rights: *Barrios Altos Case* para. 2, *reprinted in* 41 I.L.M. 93 (2002).

64. During its reign of power, the white minority Rhodesian government committed a number of human rights abuses against the majority black population, including massacres, extrajudicial executions, torture, forced disappearances, and racial discrimination. In 1979, after years of battling the counterinsurgency, the Rhodesian government conceded democratic rule to the predominantly black population. In September 1979, the Zimbabwean political parties met in London to negotiate the transfer of power. Robert Mugabe, head of the Zimbabwe African National Union (ZANU), took power and agreed to not investigate or prosecute perpetrators of past abuses against the Zimbabwe people. In explaining the reasoning behind the de facto amnesty, President Mugabe stated, “As far as I have realized the position, we were trying to kill each other; that’s what the war was about. What I am concerned with now is that my public statements should be believed when I say that I have drawn a line through the past.” Mugabe’s government was also guilty of committing massive human rights abuses against political dissidents. In 1988, the government granted amnesty to 75 members of its security forces who had been charged and or convicted of committing violations of human rights. See Richard Carver, *Zimbabwe, Drawing A Line Through the Past*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* (Naomi Roht-Arrazia ed., 2005).

65. This amnesty is discussed in other sections of this Article. For a good description and analysis of the South African amnesty, see Dugard, *supra* note 38.

66. Provisions of this amnesty are discussed in the Article. For a more in depth discussion of the amnesty, see Scharf, *Swapping Amnesty for Peace*, *supra* note 11.

67. In 1999 the government of Sierra Leone and the Revolutionary United Front (RUF), led by Foday Sankoh, signed the Lome Peace Agreement. Under this agreement, the government granted “absolute and free pardon” to Foday Sankoh and the combatants and collaborators of the RUF rebel group. The RUF repeatedly violated the terms of the Lome Agreement and the government subsequently requested UN assistance to end the fighting and to create an internationally sanctioned criminal court. See Daniel Macaluso, Note, *Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lome Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone*, 27 *BROOK. J. INT’L L.* 347, 350 (2001).

68. The details of this amnesty legislation are discussed in depth *infra* Part V.

69. In May 2005, the head of Afghanistan’s peace and reconciliation commission, Sebahatullah Mojadeddi, offered amnesty to all combatants currently fighting against the American and Afghani forces, provided that they lay down their weapons, accept the new Constitution and

committed serious crimes under international law.

State practice also varies with respect to the scope of amnesties. A number of countries have excluded specific grave violations of human rights from the amnesty protection. Guatemala excluded torture, genocide, and forced disappearances.<sup>71</sup> Croatia exempts the most flagrant violations of international law.<sup>72</sup> Colombia imposes light sentences on perpetrators of crimes against humanity.<sup>73</sup> Algeria excluded rape, mass murder, and public bombings from its amnesty.<sup>74</sup> Haiti, South Africa, El Salvador, Sierra Leone and Peru, on the other hand, have extended amnesty to all politically motivated crimes, regardless of their atrocity.<sup>75</sup> Thus, it is difficult to suggest that customary international law obligates states to prosecute even the most heinous crimes.

The participation of third party countries in negotiating amnesties suggests that these states do not believe that amnesties violate customary international law.<sup>76</sup> There are numerous examples of international participation in domestic amnesties over the past twenty years. In 1993, the United States encouraged President Aristide and General Raoul Cedras, leader of the military junta, to negotiate an amnesty deal at Governors Island, arguing that amnesty was the only effective means to bring about peace in Haiti.<sup>77</sup> After negotiations broke down and the Security Council authorized a military invasion, President Clinton sent a special delegation to work out a last-minute deal. Under this deal, the U.S. facilitated asylum for the Haitian military's top leaders, granted their relatives safe passage to the U.S., and agreed to rent three of Cedras's estates in Haiti.<sup>78</sup>

Third party states also supported the 1996 amnesty in Guatemala. Mexico,

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obey the government. Although Mr. Mojadeddi has announced that the amnesty will apply to all rebels, the United States has stated that the amnesty would not include those suspected of harboring Al-Qaeda terrorists or any person who committed certain crimes against humanity. Carlotta Gall, *Top Suspects in Afghanistan are Included in Amnesty*, N.Y. TIMES, May 9, 2005, at A7.

70. The Charter for Peace and National Reconciliation was passed on September 29, 2005, by national referendum. The amnesty is intended to end the conflict which started after the military intervened to end the democratic elections in 1991, in which the Islamic Salvation Front initially held a commanding lead. Since 1991, over 100,000 people have been killed. The amnesty applies to both security forces and Islamic insurgents, but excludes all persons who committed collective massacres, rapes, or public bombings. The amnesty provides compensation to the families of the victims, but does not attempt to bring the identities of the combatants or the details of their crimes to light. See *The Proposed Charter for Peace and National Reconciliation of August 15, 2005*, Human Rights Watch, at <http://hrw.org/background/mena/algeria0905/3.htm> [hereinafter *Algerian Human Rights Watch*].

71. See *supra* note 52 (citing sources).

72. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW II, 4023-24 (Jean Marie Henckaerts & Louise Doswald-Beck eds., 2005).

73. See *infra* note 284 and accompanying text.

74. See *Algerian Human Rights Watch*, *supra* note 70.

75. See *supra* notes 61, 63-66.

76. The most obvious example of this type of state action is the widespread approval of the South African amnesty law. Professor Leila Sadat notes, however, that the "situation might have been different had South Africa, instead of adopting a course involving conditional amnesties, adopted a policy of blanket amnesties." Leila Sadat, *National Amnesties and Truth Commissions*, in UNIVERSAL JURISDICTION 204 (Stephen Macedo ed., 2004).

77. Scharf, *Swapping Amnesty for Peace*, *supra* note 11, at 8-10.

78. *Id.* at 8.

Norway, Spain, the United States, Venezuela, and Colombia facilitated the peace process and the eventual amnesty.<sup>79</sup> The UN Mission to Guatemala likewise did not object to the legality of the amnesty. The Mission stated that the difficult task of determining the appropriate scope of the amnesty belonged “exclusively to the Guatemalan people.”<sup>80</sup>

More recently, the United States helped negotiate an exile for peace deal with Charles Taylor, the former President of Liberia.<sup>81</sup> Under this deal, Charles Taylor agreed to relinquish power in exchange for asylum in Nigeria. Although Taylor had been indicted by the Special Court for Sierra Leone for crimes against humanity and war crimes, the United States, Nigeria, and other countries found that the exile deal was necessary in order to avert the inevitable clash between Taylor’s forces and the rebels.<sup>82</sup>

The international community has also lent its support to a number of recently enacted amnesties throughout the world. In 2005, many world leaders expressed support for the Justice and Peace legislation in Colombia,<sup>83</sup> and the European Union has sent officials to Colombia to observe the amnesty process. In this same year, the United States indicated that it would recognize the amnesty in Algeria, even though the amnesty grants immunity to perpetrators of certain serious crimes under international law. U.S. State Department Spokesman Sean McCormack stated, “While, in our view, it would have been important to have a full public airing of views on the vital issues of reconciliation, we will respect the decision of the Algerian people as it is reflected in the balloting on this referendum. . . .”<sup>84</sup> The French government has also endorsed the Algerian amnesty, stating that it “welcome[s] this exercise in democracy which Algerians participated in, in both their country and abroad.”<sup>85</sup> No country has officially objected to the Algerian amnesty on the grounds that it violates customary international law.

The fact that states grant amnesties to perpetrators of serious crimes under international law – and other states participate in these peace negotiations – suggests that many states believe the exchange of justice for peace is an acceptable tradeoff. This state practice remains the strongest indication that there is no customary international law prohibiting amnesties for perpetrators of all serious

79. See Amnesty International, *Guatemala: Land of Injustice?* available at <http://news.amnesty.org/index/ENGAMR340082006>.

80. See Cassel, *supra* note 2, at 223–24 n. 174 (citing *Declaracion Publica del Director de MINUGUA*, Dec. 20, 1996, para. 5).

81. Scharf, *eXile Files*, *supra* note 45, at 341.

82. Scharf, *Swapping Amnesty for Peace*, *supra* note 11, at 5.

83. Nicolas Burns, Under Secretary of State for Political Affairs, remarked, “I believe it is in the United States’ interest to join with our Colombian partners in that effort [of balancing peace and justice]. But, the Colombian government must implement this law aggressively and with strength of purpose . . . .” Press Release, U.S. State Department, *U.S. Applauds Uribe Administration’s Efforts in Colombia* (August 3, 2005), available at <http://usinfo.state.gov/wh/Arcive/2005/Aug/04-913558.html> [hereinafter *U.S. Applauds Uribe*].

84. *Algerians Approve Amnesty*, AL-JAZEERA, Sep. 30, 2005, at <http://english.aljazeera.net/NR/exeres/89AA2EB6-446C-4E01-A48F-C35E6FA84AC1.htm>.

85. Press Release, Ministry of Foreign Affairs Spokesperson, (Paris, Sept. 30, 2005).

crimes under international law.

#### *iv. Soft Law*

Soft law sources, like many scholarly writings, generally urge states to prosecute perpetrators of serious human rights abuses, but do not unequivocally say that such a duty exists. The drafting of the Princeton Principles illustrates the general disagreement, even among scholars, as to the legal status of amnesties for perpetrators of serious crimes under international law. In 2001, a group of scholars and jurists from around the world met in Princeton, New Jersey, attempting to develop a series of internationally accepted principles for universal jurisdiction.<sup>86</sup> After extensive debate, the participants were unable to establish a *per se* rule regarding the legality of domestic amnesties under international law. Principle Seven establishes that “[a]mnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law.”<sup>87</sup> This principle suggests two important things about states’ obligations. First, the use of the word “generally” leaves open the possibility that some amnesties, even amnesties that are extended to *jus cogens* crimes, may be legitimate. Second, this principle implies that states do not have a legal obligation to prosecute and punish criminals under international law; they only have an obligation to provide some form of accountability.

One participant in the Princeton Project recounted the debate surrounding this principle. He stated that “some participants were very strongly against the inclusion of any principle that recognized an amnesty for ‘serious crimes under international law.’”<sup>88</sup> Other participants argued that certain types of amnesties, especially those “coupled with accountability mechanisms other than criminal prosecution” were acceptable.<sup>89</sup> The participants attempted to outline the general criteria for an acceptable amnesty but were unable to reach a consensus.

#### *v. Judicial Opinions*

International courts and tribunals generally disfavor amnesties, and some have ruled that states have violated their international legal obligations by issuing amnesties. Nevertheless, even international courts have not been able to identify any customary international law with respect to amnesties. This subsection briefly examines three opinions from the Inter-American Court of Human Rights, the International Crime Tribunal for the former Yugoslavia (ICTY), and the Special Court for Sierra Leone (SCSL). Although these opinions disap-

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86. STEPHEN MACEDO, UNIVERSAL JURISDICTION 18 (2004). Principle One defines “universal jurisdiction” as criminal jurisdiction “based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.” *Id.* at 21.

87. *Id.* at 22.

88. *Id.* at 32-33.

89. *Id.* at 33.

prove of amnesties, they do not establish that amnesties are per se illegal.

In *Velasquez Rodriguez v. Honduras*, the Inter-American Court of Human Rights ruled that the high number of forced disappearances in Honduras was a violation of Honduras's duty under Article 1(1) of the American Convention on Human Rights to ensure the free exercise of human rights.<sup>90</sup> Although the court did not mention the recently enacted amnesty legislation, it stated that Honduras had a legal duty to "take reasonable steps . . . to carry out a serious investigation of violations . . . to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."<sup>91</sup> Despite this language, the court did not order Honduras to prosecute the persons covered by the amnesty. Instead, the court ordered the government to pay reparations to the victims' families. The court avoided the more complicated issue of the legal effect of the amnesty and held only that Honduras could not, through amnesty or otherwise, eliminate the victims' right to seek reparations.<sup>92</sup>

In 2000, the Inter-American Court of Human Rights considered whether Peru had violated the American Convention on Human Rights by enacting Amnesty Law No. 26479, which "exonerated members of the army, police force, and civilians who had violated human rights" from 1980 to 1995.<sup>93</sup> The Commission alleged that the government of Peru violated the Convention when in November 1991, six state officials burst into a private party, ordered everyone present to lie on the floor, and indiscriminately shot and killed fifteen people. After judicial proceedings were initiated in Peru, the government passed the amnesty law which ended the proceedings. The Inter-American Court stated,

[T]he establishment of measures designed to eliminate responsibility are inadmissible because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.<sup>94</sup>

It concluded: "Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect . . ." <sup>95</sup>

Peru's amnesty law, like that of Honduras, was extremely broad, deterring investigations into the alleged crimes and foreclosing all remedies for the victims. Thus it is unclear whether the court would have reached a similar conclusion if Peru had provided for some form of accountability or redress for the victims. As two commentators noted, the court "implicitly leaves the door open to

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90. Inter-American Court of Human Rights: *Velasquez Rodriguez Case* para. 41, *reprinted in* 28 I.L.M. 294 (1989).

91. *Id.* at para. 174.

92. *Id.*

93. Inter-American Court of Human Rights: *Barrios Altos Case* para. 2, *reprinted in* 41 I.L.M. 93 (2002).

94. *Id.* at para. 41.

95. *Id.* at para. 44.

amnesties designed to further purposes other than impunity, such as reconciliation or political transition from a repressive regime to one that promises respect for human rights in the future.”<sup>96</sup>

In *Prosecutor v. Furundzija*, the ICTY had the opportunity to comment on the legality of amnesties, but decided not to stipulate the existence of a per se rule against amnesties for serious crimes under international law. Instead the ICTY stated in dicta that “[a]mnesties are generally incompatible with the duty of states to investigate [torture].”<sup>97</sup> Once again, this statement implies that some amnesties may be permissible. Furthermore, the use of the word “investigate” rather than “prosecute” suggests that only amnesties that seek to suppress the truth are incompatible with international law.

Most recently, the Special Court for Sierra Leone faced the question of whether the amnesty granted to the Sierra Leone rebels under the Lome Accords prevented the SCSL from prosecuting them under international law. The court first noted that there is “no general obligation for States to refrain from amnesty laws on these [*jus cogens*] crimes.”<sup>98</sup> States therefore do not “breach a customary international rule” in granting such amnesties.<sup>99</sup> Even though the court concluded that Sierra Leone did not violate international law by granting the amnesty, it decided that the Lome Accords did not prevent the SCSL from exercising jurisdiction over the criminals.

These international court decisions may suggest an emerging international norm that demands accountability. They do not, however, establish that all amnesties for serious human rights abuses are illegal under international law, or that states have an international obligation to prosecute violations of international law.<sup>100</sup> Indeed, international courts have shown a willingness to allow states to decide how to hold perpetrators accountable, and how to provide appropriate redress for the victims.

#### *vi. No Impunity: Blanket Amnesties Violate International Obligation*

State practice disproves the argument made by some activists and legal scholars that amnesties for serious violations of international law are per se ille-

96. Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT’L L. REV. 651, 657 (2003). The Peruvian Supreme Court did invalidate the amnesty laws and the government undertook a number of measures – including the establishment of a truth and reconciliation commission, monetary reparations for the victims, and a formal apology to comply with the Inter-American Court ruling. It did not, however, prosecute the persons involved in the massacre. Peru’s actions, which were reviewed and affirmed by the Inter-American Court, suggest that states do not have a duty to *prosecute* violations of international law. *Id.* at 658-59.

97. *Prosecutor v. Anto Furundzija*, Judgment, Case No., IT-95-17/1-T, para. 155.

98. *Prosecutor v. Kallon & Kambara*, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72 para. 7 (quoted in Leila Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1018 (2006)).

99. *Id.*

100. *Id.*; see also Newman, *supra* note 9, at 298 (asserting that “there is an insufficient basis to conclude that there is any generalized duty to prosecute” perpetrators of crimes against humanity).

gal.<sup>101</sup> This is not to say that all amnesties are legal. Recent state practice indicates that *blanket* amnesties may be illegal. States must provide some form of accountability, even if such accountability does not involve state prosecution, punishment, and incarceration.<sup>102</sup> The precise demands of this obligation, however, remain unclear.<sup>103</sup> State practice is too inconsistent to identify the exact obligation. Professor Ronald Slye sums up the current requirements of international law most accurately, stating that it “requires some response to such atrocities.”<sup>104</sup> This response may include creating truth commissions that expose the criminals’ wrongdoing,<sup>105</sup> requiring the criminals to compensate the victims for their injuries,<sup>106</sup> or imposing non-criminal penalties on the persons covered by the amnesty.

Recent state practice supports the claim that international law requires some form of accountability. With the exceptions of the blanket amnesties enacted by Chile and Peru, both of which have subsequently been struck down,

101. See, e.g., William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT’L L.J. 467, 478-79 (2001) (arguing that “[b]asic norms of customary and treaty law would bar any legislation which sought to grant amnest[ies]” for crimes against humanity). See also Newman, *supra* note 9, at 311 (stating that “[a]ny claim that there is a customary [international] legal prohibition of amnesties must be inventive if it is to maintain that there is the necessary state practice and *opinio juris*, as current state practice obviously includes the granting of amnesties”).

102. Slye, *supra* note 6, at 201. One commentator clarifies that accountability does not necessarily entail retribution. Instead, she suggests that accountability “requires a combination of measures aimed at discovering the truth about past human rights violations, instituting a new and reformed system of justice and obtaining some form of redress for victims of human rights violations.” Maryam Kamali, *Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 COLUM. J. TRANSNAT’L L. 89, 93 (2001).

103. Richard Carver states that accountability must encompass three elements: telling the truth, establishing measures to prevent further atrocities, and providing monetary redress. Carver, *supra* note 64, at 264-65.

104. Slye, *supra* note 6, at 191.

105. Many countries have created some form of fact finding body or mechanism to accompany these amnesties. The South Africa amnesty legislation, for example, required persons seeking amnesty to disclose their crimes and petition the courts for amnesty. See Dugard, *supra* note 38, at 294. The recent Colombia amnesty legislation provides a similar truth finding mechanism: all persons seeking amnesty must disclose their crimes, turn over illegally acquired assets, and lay down their weapons. Algeria’s recent amnesty legislation, on the other hand, does not provide any mechanism to bring the identities of the perpetrators to light. Although the powers and objectives of truth commissions will inevitably vary with the political realities of the country in which they were created, John Dugard has outlined several minimum requirements that these commissions must meet in order to be acceptable alternatives to prosecution: (1) truth commissions should be democratically enacted, (2) members of the commission should represent the different political/ethnic groups, (3) the commission should be independent from the other branches of government, (4) it should be financially autonomous, (5) the commission should have the ability to conduct broad and thorough investigations, (6) hearings should be held in public, (7) perpetrators should be named and have the opportunity to challenge their accusers, (8) the commission should be able to recommend reparations to victims, (9) the commission should make recommendations on ways to prevent future abuses, and (10) the commission should be able to deny amnesty to any person who does not cooperate with the commission’s investigation. Dugard, *supra* note 38, at 289.

106. Haiti, South Africa, Guatemala, Colombia, and Algeria created funds to help compensate victims. See O’SHEA, *supra* note 25, at 277 (asserting that “there is a general obligation on the state to ensure that victims receive reparation for wrongs done to them deriving from the obligation to ensure rights in conjunction with the rights to fair trial and effective remedy”).

states have combined some mix of justice, truth, and reparations in their amnesty laws. The amnesty in Uruguay, for example, allowed perpetrators of crimes to be held liable in civil courts.<sup>107</sup> The South Africa amnesty legislation required persons seeking amnesty to disclose their crimes and petition the courts for amnesty.<sup>108</sup> Under the Haitian amnesty, the leaders of the military junta had to live in exile.<sup>109</sup> The recent Colombia amnesty legislation requires that all persons seeking amnesty disclose their crimes, turn over illegally acquired assets, and lay down their weapons.

There is also evidence of *opinio juris*—i.e., that state officials believe that they are under a legal obligation to hold criminals accountable, in some way, for their actions. The South African government, for example, rejected the National Party's proposals for a blanket amnesty. The government declared its intent to abide by international law in drafting the amnesty legislation, thus indicating that a blanket amnesty could violate its international obligations.<sup>110</sup> In 1999, the Argentine government acknowledged that all persons have a non-derogable right to truth, and declared that the government "accepts and guarantees the right to the truth, which involves the exhaustion of all means to obtain information on the whereabouts of disappeared persons . . ." <sup>111</sup> Several Argentine courts have also declared the blanket amnesty laws to be inconsistent with international law.<sup>112</sup> In 2003, the Argentine government repealed the Due Obedience and the Full Stop laws.

President Uribe has also made some comments indicating his belief that Colombia has a legal obligation to provide some form of accountability for the perpetrators of serious crimes in Colombia. In a speech in Madrid, Spain, Uribe exhorted his listeners: "Compare [the Colombia amnesty legislation] with what is going on in other countries in the world, where there are genocides, only pardon has been given. Compare it to many security laws in Colombia, where the main concern was peace and reconciliation. The new law in Colombia introduces a very important element of justice and a requirement, very demanding, of reparation for victims."<sup>113</sup> Echoing several scholars' articulation of the emerging customary international law, Uribe added that "[f]or the first time Colombia introduces three new elements in a law for peace, these three elements are justice, reparation for the victims and the right of the people to know the truth."<sup>114</sup>

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107. *Id.* at 64.

108. See Dugard, *supra* note 38, at 294.

109. See Scharf, *eXile Files*, *supra* note 45 and accompanying text.

110. See Lynn Berat, *South Africa: Negotiating Change? in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 280 (Naomi Roht-Arriaza ed., 1995).

111. NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT* 103 (2005).

112. Simon, Julio, *Del Cerro, Juan Antonio sustracción de menores de 10 años*, No. 8686/2000, *Juzgado Nacional en lo Criminal y Correccional Federal No. 4*, Dr. Gabriel Cavallo, March 6, 2001, available at [www.derechos.org/nizkor/arg/ley/juezcavallo03mar.html](http://www.derechos.org/nizkor/arg/ley/juezcavallo03mar.html).

113. Press Release, Office of the President, Colombia, President Uribe Asks to Compare Justice and Peace Law with Other Processes in The World (July 11, 2005) at <http://www.presidencia.gov.co/Ingles/news/2005/jul/03112005.htm>.

114. Statement of President Uribe About the Peace and Justice Law, London, July 14 at

This emerging custom of permitting amnesties while demanding some degree of accountability may strike the optimal balance between the competing interests of justice and peace. Requiring some degree of accountability will help prevent the notion of impunity from developing, while at the same time provide states the flexibility to negotiate peace agreements. The costs and benefits of amnesties will be considered further in Part III.

### B. Extraterritorial Validity

Having demonstrated the absence of an international custom prohibiting amnesties, this Section turns to the question of whether a domestic amnesty may completely immunize a person from criminal prosecution.

It is widely accepted that a domestic amnesty only bars prosecution within the state enacting the amnesty.<sup>115</sup> Domestic amnesties do not prevent other states or international tribunals from exercising jurisdiction.<sup>116</sup> Prosecution against a person accused of committing serious crimes under international law could proceed in three different forums, despite a domestic amnesty immunizing that person from prosecution in his own nation. The ICC could assert jurisdiction over the crime,<sup>117</sup> the Security Council could create a special ad-hoc tribunal, and another country could prosecute the person in its domestic courts. While the prosecutorial authority of the Security Council and the ICC is derived from treaties, and therefore from state consent, third party countries may lawfully prosecute a person who commits serious crimes under international law<sup>118</sup> under the theory of universal jurisdiction.<sup>119</sup>

The theory of universal jurisdiction rests on the notion that certain crimes “affect the fundamental interests of the international community as a whole.”<sup>120</sup>

<http://www.presidencia.gov.co/Ingles/news/2005/jul/01142005.htm>

115. See, e.g., Sadat, *supra* note 98, at 1030 (noting that national amnesties “have no play before international courts”).

116. Courts located in third party countries may prosecute perpetrators of serious crimes under international law so long as they observe international due process norms. See MACEDO, *supra* note 86, at 21 (quoting Princeton Principles 1(4)).

117. Commentators debate whether the ICC may assert jurisdiction over a person who is covered by a domestic amnesty. Article 17 states that the ICC shall consider a case inadmissible if the “case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.” See *Rome Statute*, *supra* note 3, Art.17(1)(b). The most plausible interpretation—given that amnesties generally do not have extraterritorial effect—is that the ICC may assert jurisdiction, notwithstanding the amnesty.

118. Individuals have certain legal obligations that transcend obligations to the state. When an individual violates these international legal obligations, she is subject to prosecution by any domestic or international court that exercises internationally accepted norms of due process. Thus, international law has a “vertical relationship” to domestic law. See Sadat, *supra* note 98, at 975.

119. The Princeton Principles declare that “[u]niversal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law . . . provided that the person is present before such judicial body.” at <http://www1.umn.edu/humanrts/instree/princeton.html>.

120. MACEDO, *supra* note 86, at 18. See also Sadat *supra* note 98, at 975 (noting that “universal jurisdiction is predicated largely on the notion that some crimes are so heinous that they of-

Crimes against humanity, for instance, as implied by the terminology, aggrieve not only the persons who were tortured or killed, but all humans, regardless of their nationality.<sup>121</sup> Persons throughout the world have the right to prevent such crimes and seek retribution against the perpetrators. Therefore, when courts exercise universal jurisdiction, “they act to vindicate not merely their own interests and values but the basic interests and values common to the international community.”<sup>122</sup>

Recent domestic and international court decisions have reaffirmed the primacy of international law over domestic, and have established that domestic amnesties do not prevent other courts from prosecuting violations of international law. In 1998, the Spanish National Court held that the amnesty laws in Chile and Argentina did not bar prosecution in Spain.<sup>123</sup> Spanish courts could exercise jurisdiction over persons accused of committing genocide, torture, and terrorism under a domestic law that provided for universal jurisdiction over certain crimes. The court limited its holding, however, by noting that it would defer to a court in the state in which the crimes occurred if that court decided to exercise jurisdiction over the alleged crimes.<sup>124</sup>

The Special Court for Sierra Leone also said that amnesties have no transnational effect. The court stated that “where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction.”<sup>125</sup> The court found that the Sierra Leone amnesty law did not violate international law, but also that it did not deprive the international community of the right to prosecute those persons who had committed serious crimes under international law. Since international law trumps domestic law, at least with respect to *jus cogens*, an amnesty may not extinguish liability under international law, even if it may provide immunity under domestic law.<sup>126</sup>

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fend the interest of all humanity, and, indeed, imperil civilization itself”).

121. See David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 86 (2004).

122. MACDEO, *supra* note 86, at 18.

123. Maria del Carmen Marquez Carrasco & Joaquin Alcaide Fernandez, *In re Pinochet*, 93 AM. J. INT’L L. 690, 691 (1999). More than 300 Spanish nationals were killed during the military rule in Argentina and Chile. See *id.*

124. *Id.*

125. Prosecutor v. Kallon & Kamara, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, Case Nos. SCSL-2004016-AR72(e) para. 67 (March 13, 2004).

126. A number of countries have passed legislation incorporating the theory of universal jurisdiction in their domestic law, thus explicitly authorizing courts to assert jurisdiction over certain criminals. The domestic courts, however, have imposed limits on this grant of jurisdiction, and the exercise of pure universal jurisdiction by state courts is relatively rare. Many domestic courts require “universality plus” or some sort of nexus between the state exercising jurisdiction and the accused. Thus, pure universal jurisdiction is most commonly, and least controversially, invoked by international tribunals. See Anne Marie-Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts in UNIVERSAL JURISDICTION* 171-73 (2004).

Although scholars and the several courts that have confronted the question agree that domestic amnesties do not bar prosecution in other forums, in reality there have been few attempts to prosecute persons covered by domestic amnesties. This is due largely to pragmatic reasons. Prior to 1998, the ICC did not exist, and the cost of creating ad-hoc tribunals was substantial. Efforts to prosecute individuals in third party countries were futile so long as the person covered by the amnesty remained in his home country. Moreover, national courts may have been reluctant to prosecute individuals covered by domestic amnesties for reasons of international comity.<sup>127</sup>

With the establishment of the ICC and the recent push towards accountability there is greater pressure on state leaders, the UN, and the ICC prosecutor to bring perpetrators of serious crimes under international law to justice. While preventing future human rights abuses is an important goal, there may still be good reasons to respect domestic amnesties and refrain from prosecuting those covered by the amnesty.

### III.

#### WHEN SHOULD THE UN RECOGNIZE DOMESTIC AMNESTIES?

This Article has established that (1) amnesties that include some form of accountability do not violate international law, and (2) domestic amnesties do not prevent other countries or international tribunals from exercising universal jurisdiction over the persons covered by the amnesty. The important question remains: When should the international community recognize a domestic amnesty? The remainder of this Article examines this question, focusing on the interests of the international community, rather than any individual state.<sup>128</sup> For the sake of simplicity, I direct this Article's recommendations at the United Nations because the international community often expresses its views on amnesties through the various decisionmaking bodies within the UN.

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127. In the Guatemalan Genocide Case, for example, the Spanish Audencia Nacional retreated from its earlier aggressive stance on universal jurisdiction. It reasoned: "To determine when to intervene subsidiarily for the prosecution of certain acts, basing such decision on either real or apparent inactivity on the part of the courts of another sovereign State implies judgment by one sovereign State on the judicial capacity of similar judicial bodies in another sovereign State." Guatemalan Genocide Case, *reprinted in* 42 I.L.M. 686, 696 (2003).

128. Individual third-party countries often pursue their short-term interests and may choose to recognize or ignore amnesties based on political considerations that are inconsistent with the international community's interests. Newman, *supra* note 9, at 344. *See also* Sadat, *supra* note 98 (noting that international negotiators may be eager to bring about settlements that assure their own country's interests will be protected in the political transition). The United States' decision to broker the amnesty deal in Haiti, for example, was driven by two concerns. First, the U.S. was concerned that civil unrest in Haiti would cause an exodus of Haitian immigrants to the United States. Second, the Clinton Administration had committed troops to the UN-sanctioned invasion of Haiti, but knew that U.S. casualties would be politically costly. Thus, on the eve of the invasion, President Jimmy Carter and General Colin Powell convinced General Cedras to accept the amnesty deal and ensured that Cedras's troops would not fire at incoming U.S. soldiers. *See* Bassiouni, *supra* note 1, at 416.

*A. Arguments in Favor of Prosecution*

Scholars and human rights advocates offer three principal reasons to prosecute perpetrators of serious crimes under international law, regardless of the existence of a domestic amnesty: prosecutions are necessary to (1) deter future violations of human rights, (2) honor the victims' right to seek justice, and (3) restore the rule of law.

First, a number of scholars have argued that prosecutions are necessary to deter future violations of international humanitarian law.<sup>129</sup> Amnesties, they argue, may send a signal to rogue regimes that they have nothing to lose by committing heinous crimes to further their political agenda. In fact, the general acceptance of amnesties may encourage such regimes to commit more heinous acts; the more heinous the crimes, the greater the regime's bargaining chip in the event that it starts to lose power.

Scholars point to anecdotal evidence to support the claim that amnesties create a notion of impunity. On the eve of the German invasion of Poland, Adolf Hitler notoriously responded to concerns about international reaction to planned acts of genocide by asking: "Who now remembers the Armenians?"<sup>130</sup> More recently, Richard Goldstone, the former Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, concluded that the international community's failure to prosecute dictators who had committed heinous crimes encouraged the Serbs to carry out their ethnic cleansing campaign with little fear of retribution.<sup>131</sup> This notion of impunity presents a cost to the entire international community, not just to the state in which the particular crimes occurred.

Scholars also argue that prosecution is necessary to deter future crimes, not just in the state where the crimes have already occurred, but throughout the rest of the world.<sup>132</sup> The international community has an interest in maintaining the credibility of international law in order to prevent atrocities in future conflicts within or between other states.<sup>133</sup> Professor David Luban presents a more theoretical analysis of this interest, arguing that it results from our character as "political animals."<sup>134</sup> Humans, he argues, are naturally social creatures, who must live in groups in order to survive. Since group living is a necessity, we all must prevent from realization the threat that we will "become the object of a murder or persecution solely on the basis of a group" that we must live within by our very nature.<sup>135</sup> Crimes against humanity are precisely those crimes that involve the killing of members based on group membership.

129. See, e.g., Bassiouni, *supra* note 1; Orentlicher, *supra* note 10, at 2542 (stating that the failure to prosecute serious crimes teaches regimes that they can commit crimes with impunity).

130. Hitler was referring to the Turkish massacre of 250,000 Armenians as part of its general persecution against that ethnic group. *Id.* at 414.

131. Scharf, *eXile Files*, *supra* note 45, at 349.

132. See, e.g., *id.* at 347 (suggesting that prosecuting perpetrators of serious crimes under international law may be necessary to discourage future human rights abuses).

133. O'SHEA, *supra* note 25, at 85.

134. Luban, *supra* note 121, at 90.

135. *Id.* at 138. Professor Luban describes this as "politics gone cancerous".

The second argument in favor of prosecution is that amnesties deprive victims of the right to seek justice. A number of international legal scholars and international courts assert that all persons have certain fundamental rights, including the right to justice, the right to judicial protection, and the right to a fair remedy.<sup>136</sup> Criminal trials are necessary to honor these fundamental rights as well as to “give significance to the [victims’] suffering.”<sup>137</sup> In addition to upholding these rights, prosecutions may help to restore the victims’ dignity, serve as a truth finding mechanism, and provide the necessary evidence to permit victims to recover damages in civil courts.

Beyond the rights of the actual victims and their families, this argument asserts, amnesties deprive the rest of humanity of the opportunity to seek justice. In both our domestic and international legal systems, we accept the notion that crimes do not only affect the aggrieved person, but the entire community. In the same way that a district attorney prosecutes a rapist regardless of the victim’s wishes because his crime transgresses the norms of the community, the international community has an interest in prosecuting crimes that offend the norms of all mankind regardless of the specific victims’ wishes. Amnesties prevent humanity from seeking this retribution.

Third, some scholars assert that amnesties may undermine the transition to democracy and the establishment of the rule of law.<sup>138</sup> If criminals from the prior regime are not brought to justice, the prevailing notion of impunity may undermine the establishment of democratic institutions. Likewise, if citizens perceive that criminals are not held accountable for their actions, they are more likely to disregard the law themselves, further undermining the establishment of the rule of law.<sup>139</sup> Lawlessness leads to more lawlessness, encourages disrespect for legal institutions, and increases the probability of vigilante justice.<sup>140</sup> Finally, amnesties may fuel fears that the prior regime may return to power, further undermining attempts to reconcile the country. Prosecuting criminals may assuage the community’s fears and provide a sense of stability and security for the new democratic regime.

### *B. Responding to These Arguments*

#### *1. Prosecutions May Neither Deter Nor Incapacitate Criminals*

Due to the limited number of prosecutions there is no reliable way to prove

136. Slye, *supra* note 6, at 191.

137. Scharf, *Swapping Amnesty for Peace*, *supra* note 11, at 14.

138. For more on this argument, see Orentlicher, *supra* note 10, at 2542.

139. See Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2486 (1997) (describing the propensity of individuals to conform their behavior to the behavior and expectations of others, and noting that social influence “fuels the decision to commit crimes”).

140. See Sadat, *supra* note 98, at 983. In Haiti, for example, General Henri Max Mayard—a general from the military regime who received amnesty—was assassinated as he drove his car through Port-au-Prince. Scharf, *Swapping Amnesty for Peace*, *supra* note 11, at 14.

or disprove the assertion that prosecuting perpetrators of human rights atrocities will deter the commission of similar crimes in the future.<sup>141</sup> There are several reasons, however, to believe that criminal sentences may not deter people from committing these atrocities.

The deterrence theory rests on three assumptions: (1) criminals are aware of the laws and the possible punishments; (2) criminals weigh the costs and the benefits of their actions before committing a crime; and (3) the risk of incarceration outweighs the benefit of committing the crime.<sup>142</sup> Although we may assume that persons who commit human rights atrocities are aware that their actions are illegal, the second and third assumptions are more problematic.

Studies in criminal behavior suggest that many criminals do not consider the costs of their actions before committing certain crimes. For example, most murders are crimes of passion, committed while the perpetrator is not thinking or behaving rationally.<sup>143</sup> Since murderers generally do not consider the costs of committing these acts, prison sentences do not have a clear deterrent effect on these crimes.<sup>144</sup> Similar to murderers, perpetrators of grave human rights abuses (especially lower ranking members of rebel groups) are often caught up in massive violence, chaos, and incendiary propaganda when carrying out these crimes.<sup>145</sup> As one scholar recently stated, "It beggars belief to suggest that the average crazed nationalist purifier or abused child soldier will be deterred by the prospect of facing trial."<sup>146</sup>

Even assuming that perpetrators of serious crimes under international law are rational actors—a safer assumption for the leaders and instigators of these crimes than for the persons who merely carry out orders—the third assumption of the deterrence theory may not prove accurate. Under a deterrence theory, criminal sanctions will deter a person from committing a crime if the Risk of

141. Instead, international scholars base this claim on the perceived deterrent effect of prison sentences in the domestic criminal system. If prison sentences deter criminal behavior in the domestic system, they reason, sentences will likewise deter violations of international humanitarian law. Recent scholarship, however, casts doubt on whether prison sentences deter criminal behavior. See Christopher Slobogin, *Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 141 (2005) (noting that "most criminals are not the rational actors favored by economic models"); Savid A. Anderson, *The Deterrence Hypothesis and Picking the Pockets at the Pickpocket's Hanging*, 4 AM. LAW & ECON. REV. 295 (2002).

142. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953 (2003).

143. See Ruth D. Petersen & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 157-58 (James R. Acket et al. eds., 1998).

144. Steven Levitt, *Why Do Increased Arrest Rates Appear to Reduce Crime: Deterrence, Incapacitation, or Measurement Error?* 36 ECON. INQ. 353, 368 (1998); see also Robinson & Darley, *supra* note 142, at 956 (noting that prison sentences are more likely to deter white-collar criminals).

145. Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 590 (2005) ("[D]eterrence is based on the essentially unproven assumption of perpetrator rationality in the chaos of massive violence, incendiary propaganda, and upended social order.").

146. *Id.* at n.271.

Prosecution x Cost of Sentence > Benefit of Committing Crime.<sup>147</sup> There are several reasons to believe that perpetrators of atrocious crimes may rationally decide that the benefit of committing the crime outweighs the risk of prosecution.

First, these actors often believe that their actions are morally justifiable, or even morally compelled, thereby increasing the benefit of pursuing the course of action.<sup>148</sup> Perpetrators of these atrocious crimes generally belong to a group that believes in ethnic, religious, or national superiority, and commit these crimes in order to further that group's perceived interests.<sup>149</sup> As Professor Mark Drumbl notes, "For some people the value of killing or dying for a cause actually exceeds the value of living peacefully without the prospect of punishment."<sup>150</sup> For these persons, the threat of prosecutions has no deterrent effect because the benefit of the crime outweighs any risk of punishment.<sup>151</sup>

Second, the majority of human rights abusers are not likely to view the risk of international prosecution—which is very low<sup>152</sup>—as a significant cost. The most likely targets of international prosecutions—rebel groups and oppressive dictators in weak states—already face a number of extra-legal sanctions that far

147. See Ernest Van Den Haag, *The Criminal Law as a Threat System*, 73 J. CRIM. L. & CRIMINOLOGY 769, 771 (1982). For a general discussion of the economic theory of criminal law, see Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

148. The rational choice theory of deterrence, for example, would predict that defendants who face long-term prison sentences would likely accept plea bargains, especially if the evidence against them is strong. In Rwanda, however, many defendants have rejected plea bargains because they view the international trial as an opportunity to explain and justify their actions to the rest of the world. Thus, the benefit of standing by their cause outweighs the threat of long-term imprisonment. If these actors are not deterred by prison sentences after they are already in custody (and imprisonment is almost certain) it is unlikely that they would be deterred by the possibility of imprisonment while they were plotting to commit the massacres. See Nancy Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 58 VAND. L. REV. 69 (2006).

149. Drumbl, *supra* note 145, at 567-68. Since members of the group often share the same ideology, the perpetrators of these crimes do not deviate from the norms of the society. Rather, societal influences not only make the commission of the crime appear to be more acceptable, but actually fuel the perpetrators' decision to commit these heinous crimes. Professor Dan Kahan notes that social influence plays a role in individuals' decisions to commit crimes. Individuals tend to conform to the behavior and expectations of the other persons in their group. Thus, if the members of a certain community generally condone acts of violence against members of another group, the persons in the first group are more likely to decide to commit violent acts that they would not commit if they lived in a group that did not condone violence. Kahan, *supra* note 139, at 2484-85.

150. Drumbl, *supra* note 145, at 591.

151. See Julian Ku & Jide Nzelibe, *Do International Crime Tribunals Deter or Exacerbate Humanitarian Abuses?*, 84 WASH. U. L. Q. (forthcoming 2007).

152. Due to limitations on international prosecutions, the risk of prosecution is relatively low. Because of these limitations, plea bargains are relatively frequent, reducing the amount of time a criminal may expect to remain behind bars. Plea bargains may also interfere with the victims' right to truth. Prosecutors may offer to drop certain charges against defendants in exchange for a guilty plea on other charges. In *Prosecutor v. Plavsic*, for example, Plavsic pled guilty to one charge of committing crimes against humanity. In return, the prosecutor dropped seven charges, including genocide and conspiracy to commit genocide. Thus, the court did not inquire into the alleged acts of genocide, and the victims of the alleged genocide were denied the right to seek justice and to have the alleged perpetrator accept responsibility for this crime. See Drumbl, *supra* note 145, at 594-95; Combs, *supra* note 148.

exceed the formal sanctions imposed by international law.<sup>153</sup> Rebels groups, for example, are likely to be killed, jailed, or tortured if captured.<sup>154</sup> Similarly, oppressive dictators are often overthrown and killed in military coups.<sup>155</sup> Because human rights abusers are willing to subject themselves to these severe risks, Professors Ku and Nzelibe argue that the nominal risk of prosecution is unlikely to pose any real deterrent effect.

Even if prosecutions do not deter criminals, one could argue that prosecutions are necessary to incapacitate the perpetrators of these crimes. After all, incapacitation, not deterrence, is more likely to account for the reduction of most violent crimes.<sup>156</sup> Incapacitation, however, may not be a justifiable reason for imprisoning international criminals because states can prevent these criminals from committing future crimes without incarcerating them. Perpetrators of serious crimes under international law are capable of committing such crimes because of the unique circumstances in which they operate: they are in a position of power; they live amidst a time of conflict and strife; the international community is unwilling to intervene; etc. Unlike common criminals, states can prevent recidivism of international crimes by taking measures to alter these unique circumstances. The state can remove the perpetrators from power, dismantle armies, confiscate assets, raise public awareness, destroy networks, and alter the norms that prevailed during the time in which the atrocities occurred. One of the main objectives of truth and reconciliation commissions, for instance, is to discover the factors that created an environment in which such crimes could occur, so that the state can take measures to ensure that such an environment does not arise in the future.<sup>157</sup>

Significantly, perpetrators of serious crimes under international law are not common criminals. They are often motivated by an ideology of group superiority, and are therefore less likely to alter their behavior because of the threat of prosecution. Unlike common criminals, however, the state or the international community can prevent these perpetrators from committing future crimes by changing the unique circumstances which allow them to carry out large scale crimes. Since perpetrators of serious crimes under international law are not common criminals, it is unclear whether the objectives of the Western criminal

153. Ku & Nzelibe, *supra* note 151, at 21-29 (manuscript).

154. According to Ku and Nzelibe, between 1955 and 1991, 28 percent of participants in coups (successful and unsuccessful) were killed. *Id.* at 23.

155. Over half of all African leaders in this time period (1955-1991) have been killed, jailed, or exiled. *Id.* at 21.

156. See Levitt, *supra* note 144, at 368. In the U.S. criminal system, jail sentences reduce crime by preventing common criminals, who are capable of committing similar crimes as soon as they are released onto the streets, from committing these crimes for the duration of their sentence. Although sociologists and economists often disagree as to the deterrent effect of prison sentences, they both agree that prison sentences do lower crime rates. Since lowering crime rates is our primary goal, determining whether this reduction is a result of deterrence or incapacitation is less important in the domestic system.

157. See Dugard, *supra* note 38, at 308-09 (noting that the ultimate goal of truth and reconciliation commissions is to "put in place legal institutions that will obstruct the recurrence of the events that gave rise to the process").

law systems—retribution, incapacitation, and deterrence—are well suited to balance the competing interests of justice and peace in the international arena.<sup>158</sup>

## 2. Prosecutions Limit the Form of Justice Victims May Seek

The argument that amnesties prevent victims from seeking justice may be true in certain countries, but the opposite may be true in others. As Professor Alvarez notes, international tribunals are accountable to, and respond most readily to, international lawyers' jurisprudential and other agendas and only incidentally to the needs of victims of mass atrocity.<sup>159</sup> International lawyers have created the international criminal system based largely on Western domestic criminal systems. Calls for prosecution reflect the Western notion of justice, but largely ignore the means by which individuals in non-Western countries achieve justice. Refusing to recognize amnesties may deny victims the opportunity to use traditional methods of reconciliation and forgiveness to deal with crimes.<sup>160</sup> Often, the victims and the bereaved do not wish to seek retribution on the offenders, but instead desire to know what happened, mourn the loss of their loved ones, and return to normalcy.<sup>161</sup> Although the international community should strive to uphold the victims' right to justice, it should listen to the victims in determining whether prosecution is the best method for securing justice.

Many persons in the war-torn region of northern Uganda, for example, favor amnesty for the guerrilla groups and desire using traditional tribal methods of reconciliation rather than criminal prosecutions imposed by the ICC.<sup>162</sup> Victims seek the chance to speak publicly about their suffering, want some amount of reparations, and desire the opportunity to employ traditional restorative justice mechanisms.<sup>163</sup> Ensuring that countries use democratic procedures, especially procedures that guarantee victims an active role, can help ensure victims' right to seek an appropriate method for reconciliation and justice.

158. *Id.* at 567.

159. Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 410 (1999).

160. See generally Carrie J. Niebur Eisnagle, *An International "Truth Commission": Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT'L L. 209 (2003).

161. *Id.* at 234.

162. *Victims of the LRA War Speak Out on Treatment of Rebels*, THE MONITOR, August 10, 2005, available at <http://allafrica.com/stories/200508100302.html> [hereinafter *Victims Speak Out*]. In April 2005, the ICC announced that it was close to issuing its first ever arrest warrants to rebel leaders of the Lord's Resistance Army in Uganda. The Ugandan government alleges that the LRA rebels have committed a number of atrocious crimes, including rape, massacre, and abduction of children. See Marc Lacey, *Victims of Uganda Atrocities Choose a Path of Forgiveness*, N.Y. TIMES, April 18, 2005, at A1 [hereinafter *Victims of Uganda*].

163. *Victims Speak Out*, *supra* note 162. The Acholi people of northern Uganda, for example, recently gathered to witness 28 defected members of the LRA perform a tribal ritual of forgiveness. One by one, the ex-combatants stepped in a broken egg; the egg which symbolized innocent life, purified them of their sins. *Victims of Uganda*, *supra* note 162, at A1.

### 3. Amnesties May Help and Hinder Democratic Transitions

There is anecdotal evidence to support claims that amnesties both help and hinder democratic transitions. The amnesties in Honduras, El Salvador, and Guatemala did not stop the violence and likely contributed to creating a climate of impunity. Amnesties have helped democratic transitions, however, in many other countries.

Amnesties can promote democratic transitions in two ways. First, amnesty legislation can establish truth and reconciliation commissions, which might otherwise be impossible if the perpetrators of the crimes were simultaneously prosecuted.<sup>164</sup> These commissions can bring to light the information necessary to allow the community to understand what happened, why it happened, and how to prevent such events from happening in the future. A number of scholars argue that exposing this information is essential in order for nascent democratic states to reconcile the various segments of society after a period of conflict.<sup>165</sup> Charles Villa-Vicencio, Director of the Institute for Justice and Reconciliation in South Africa, notes, "Democracy requires getting to know one another, gaining a new insight into what happened, an empathetic attempt to understand why it happened and ultimately who was responsible."<sup>166</sup>

Amnesties also allow countries to focus prosecutorial resources on nonpolitical crimes.<sup>167</sup> Prosecuting common crimes helps restore a culture of lawfulness,<sup>168</sup> especially if the government sends the message that amnesty is a unique

164. The UN Commission on Human Rights has acknowledged the importance of truth and reconciliation commissions: "For the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators, including their accomplices of these violations, are essential steps towards rehabilitation and reconciliation." UN Commission on Human Rights, Res. 2002/79, April 25, 2002. Scholars, however, have noted that seeking justice and truth may be incompatible objectives. Criminal trials are ill-suited to reveal the facts and circumstances surrounding the atrocities, thus leaving many questions unanswered. Courts generally ignore the bigger question of why the perpetrators were able to commit such atrocities, and instead focus on discrete acts. Furthermore, as with all criminal trials, accurate information is often buried in order to ensure the defendant receives a fair trial. Truth commissions, on the other hand, can reveal a more complete and accurate picture of the events that precipitated and facilitated the commission of the human rights abuses. See Charles Villa-Vicencio, *Why Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 211-12 (2000).

165. See, e.g., Kamali, *supra* note 102, at 92.

166. Villa-Vicencio, *supra* note 164, at 213.

167. In the aftermath of periods of widespread human rights abuses, states are simply not able to prosecute all perpetrators. Richard Goldstone, *Forward to MARTHA MINNOW, BETWEEN VENGEANCE AND FORGIVENESS* ix (1998) (cited in Kamali, *supra* note 102, at n.3) Thus, states may either decide to focus efforts on prosecuting a select few of the perpetrators of serious crimes under international law, or devote their efforts to prosecuting common criminals. Selectively prosecuting violators of human rights deprives the country of the benefits of an amnesty, but also may present its own costs to society. First, if the prosecutions are hastily carried out, or if the justice system has not gained sufficient credibility, society may see these prosecutions as mere attempts at revenge or "victors justice." Kamali, *supra* note 102, at 93. Second, prosecuting a select few of the perpetrators may send the message that the mass violence was the fault of a few individuals, and not a more systematic problem. Drumbl, *supra* note 145, at 588. This practice also grants *de facto* amnesty to a large number of guilty persons, without demanding any accountability from them in exchange.

168. See *id.* (noting that crime rates generally increase in transitional countries, and arguing that it is necessary for emerging democratic states to prosecute these crimes in order to break the

method of dealing with past political crimes and incorporates some sort of accountability mechanism in the amnesty legislation.<sup>169</sup> Incorporating accountability measures also sends the message that the country condemns the acts, even if it does not prosecute.

In South Africa, pursuant to the amnesty legislation, the National Party, which had ruled the country for the past 40 years, turned over power to the newly elected democratic government formed under the interim constitution. The amnesty helped avoid civil war, and the transfer of power was accomplished with little bloodshed.<sup>170</sup> Today, South Africa boasts perhaps the most democratic, transparent government on the continent.<sup>171</sup>

Haiti provides another important example. The amnesty deal in 1994 successfully ended the human rights abuses of the military regime, and President Aristide returned to power with little bloodshed. Although the situation in Haiti became violent in 2004, this was largely due to Aristide's poor governance, and not from a sense of lawlessness created by the amnesty a decade earlier.<sup>172</sup>

Thus, while it is true that certain amnesties may hinder democratic transitions, well-drafted amnesties may promote the transition to democracy and the restoration of the rule of law. Specifically, those amnesties that require full disclosure of the events surrounding the crimes, strengthen human rights protections, and incorporate elements of restorative justice, are best suited to help the transition to democracy.

### *C. Arguments in Favor of the Use of Amnesties*

#### *1. May be Necessary to End Hostilities*

The most compelling reason to accept amnesties is that they may be necessary to end hostilities in a country. Ending hostilities, and preventing the commission of future crimes, is a benefit to the international community that competes with the benefit of bringing those perpetrators to justice. Although the international community has an interest in seeking justice, this interest may yield to the greater demands of preserving the lives of the innocent. As one human rights advocate questioned: "What should one do if the quest for justice and retribution hampers the search for peace, thereby prolonging a war and increasing the number of deaths, the amount of destruction, and the extent of human suffer-

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cycle of violence).

169. Some government officials argue that noncriminal measures, such as truth commissions, lustration laws, and civil liability, may not be merely the second best option when prosecution is impossible, but "may be better suited to achieving the aims of justice." Scharf, *eXile Files*, *supra* note 42, at 347.

170. Kamali, *supra* note 102, at 119.

171. Rachel L. Swarns, *South Africa Urges West to Ease Censure of Zimbabwe*, N.Y. TIMES, Nov. 17, 2002 (noting that South Africa "is often hailed as one of the most democratic nations on the continent"). This is not to say that South Africa has completely overcome the problems associated with its history of racism.

172. Scharf, *eXile Files*, *supra* note 45, at 345.

ing?"<sup>173</sup>

In many conflicts, the international community may take one of three courses of action: (1) it can intervene militarily and put an end to the hostilities; (2) it can allow the hostilities to continue and seek justice after the conflict ends; or (3) it can attempt to terminate the conflict by negotiating a peace deal.<sup>174</sup> This third option is ideal, yet the reality is that parties to a conflict are often less likely to accept peace or relinquish power if they face prosecution.<sup>175</sup> Thus, peace negotiators may need to use an amnesty deal as a carrot to encourage parties to cease hostilities.

If the perpetrators know that the UN or the ICC will refuse to recognize any such amnesty, negotiators may lose an important tool for brokering peace. Unless the international community is willing to use force to remove a rogue regime—or help a government which is unable to stop the atrocities within its own borders—cooperation of the leaders is necessary to stop the violence and restore order.<sup>176</sup> Although granting amnesties may offend the international community's sense of justice, there will inevitably be a "fundamental tension . . . between what the parties could negotiate and agree to among themselves and what [is] just in the ideal sense."<sup>177</sup>

Although it is difficult to speculate about how events might have transpired in the past, we can plausibly say that a number of past conflicts would have continued, and a number of innocent people would have died, if the international community had not recognized amnesty deals. President Clinton, for example, commented that the Haitian amnesty deal was necessary to avert "massive bloodshed" and "extended occupation" by the military regime.<sup>178</sup> Likewise,

173. Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249, 249 (1996) [hereinafter *Human Rights in Peace Negotiations*].

174. Former U.S. Secretary of State James Baker commented that because the majority of Americans would not have supported military intervention in Yugoslavia, there were only two available options: "negotiate a peace deal or let the parties fight it out." JAMES A. BAKER, III, *THE POLITICS OF DIPLOMACY* 635-36 (1995) (quoted in *Human Rights in Peace Negotiations*, *supra* note 173, at 251).

175. In a letter to members of the U.S. Congress, the Colombian Ambassador Luis Alberto Moreno wrote, "The Colombian Congress determined that if it set the bar too high in terms of punishment and other prerequisites for combatants to enter the peace process, they would not come forward. They would simply continue to wage war against our society." Letter from Luis Alberto Moreno, Colombian Ambassador to the United States to members of Congress (July 8, 2005) (on file with author) [hereinafter *Letter to Congress*]. In Uganda, head peace negotiator, Betty Bigombe, has expressed concerns that the possible ICC arrest warrants will pressure the rebels in the LRA to terminate peace talks and return to the mountains. See *Uganda: Profile of Internal Displacement*, Global IDP Project, available at <http://www.reliefweb.int/library/documents/20050globalidp-uga-10Aug.pdf>. Likewise, the International Truth and Reconciliation Commission for Sierra Leone concluded that the government believed in good faith that the RUF "would not agree to end hostilities if the Agreement were not accompanied by a form of pardon or amnesty. . . . The Commission is unable to declare that it considers amnesty too high a price to pay for the delivery of peace. . . ." A Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Chapter 6, at 4 [hereinafter *A Witness to Truth*] (quoted in Schabas, *supra* note 8, at 163).

176. See Scharf, *eXile Files*, *supra* note 45, at 343.

177. *Human Rights in Peace Negotiations*, *supra* note 173, at 252.

178. President Bill Clinton, Remarks at White House Press Conference (Sept. 19, 1994)

General Pinochet agreed to relinquish power after the government approved his self-enacted amnesty, but threatened to rise up against the newly formed democratic government if any of his officers were prosecuted.<sup>179</sup> Furthermore, history indicates that attempts to prosecute members of the former regime encourage members of that regime to “close ranks, challenge democratic institutions, or attempt to overthrow the incipient democratic government.”<sup>180</sup>

More recently, in Uganda, the locally initiated Amnesty Act proved to generate a breakthrough in negotiations between the Ugandan government and the Lord’s Resistance Army (“LRA”). In December, 2004, peace negotiator Betty Bigombe used the prospect of amnesty to convince the LRA rebels to meet with government officials for the first time in the history of the 29 year conflict.<sup>181</sup> Professor Julian Ku noted that “the apparent success of this round of peace talks has been an informal assurance by the International Criminal Court that it would not pursue enforcement of arrest warrants against the rebel LRA leaders.”<sup>182</sup> Many Ugandans are concerned that the threat of ICC arrests (the warrants have not been formally withdrawn<sup>183</sup>) may hinder the prospect for peace in this war-torn region. As one observer commented, “Why would rebel leaders surrender . . . only to risk ending up in prison?” After 20 years of war, he observed, “the people here seem ready to make a stark trade-off. Giving up justice for the hope of a chance at peace.”<sup>184</sup> The ICC will soon have to “choose between justice or peace. This is an agonizing choice, but a necessary one.”<sup>185</sup>

## 2. Amnesties Avoid Placing Costs on Conflict-Ridden Societies

Opponents of amnesties argue that prosecutions are necessary to vindicate humanity’s interest in seeking justice for crimes that offend the norms of all mankind. Since all of humanity has an interest in deterring serious crimes under international law, all of mankind should bear the costs of attaining this benefit. Yet, refusing to recognize amnesties places the cost of justice (a good for the entire international community) on conflict-ridden states.<sup>186</sup> People living in states

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(quoted in Scharf, *Swapping Amnesty for Peace*, *supra* note 11, at 9).

179. CHILE: A COUNTRY STUDY 216 (Rex Hudson ed., 1994).

180. Scharf, *Swapping Amnesty for Peace*, *supra* note 11, at 9 (noting that Uruguayan President Julio Maria Sanguinetti passed amnesty legislation in order to avert the potential military uprising precipitated by government attempts to prosecute officers of the former military regime).

181. Victims of LRA War Speak Out on Treatment of Rebels, THE MONITOR, Aug. 10, 2005, available at <http://allafrica.com/stories/200508100302.html>.

182. Julian Ku, Truce Reached in Uganda: The ICC’s Dilemma Continues, Aug. 27, 2006, available at <http://www.opiniojuris.org/posts/1156658264.shtml>.

183. *Id.* (“[A]s far as I know, the arrest warrants have not been formally withdrawn so the ICC could still be planning to seek enforcement at some point in the future. In fact, because the LRA is going to withdraw into southern Sudan under the truce, the ICC could (and probably already has) demanded that the Sudanese government arrest the LRA leaders.”).

184. Oliver Murray, *Ugandan War Shows No Signs of Letting Up*, CTV Television (Gulu, Northern Uganda) (Aug. 13, 2005).

185. Ku, *supra* note 182.

186. See Villa-Vicencio, *supra* note 164, at 212 (noting the need to balance the international community’s right to justice with the people’s right to peace).

in which the crimes occur may have to bear extended hostilities in order for the international community to receive the benefit of bringing perpetrators to justice. Such a result may have been unavoidable several decades ago when international lawyers viewed sovereignty as a barrier to intervention. Today, as the notion of sovereignty has been redefined, this result is no longer acceptable:<sup>187</sup> “The quest for justice for yesterday’s victims of atrocities should not be pursued in such a manner that it makes today’s living the dead of tomorrow.”<sup>188</sup>

In the past two decades, the international community has redefined the theory of sovereignty. The Westphalian notion of sovereignty, in which states are permitted to handle their internal affairs free from international interference, has largely been discarded.<sup>189</sup> Two developments have altered this historical notion of sovereignty. First, as the world becomes increasingly interconnected, events in one country influence the rest of the world, and thus countries have a greater interest in what occurs within the boundaries of other countries.<sup>190</sup> Second, the belief that humans have certain fundamental rights is inconsistent with the notion that states may freely commit certain acts within their own borders.<sup>191</sup>

Today we see sovereignty as a benefit that is conditioned on a state’s ability to meet certain obligations.<sup>192</sup> States have a duty to protect their own people, in addition to the obligation to abide by international law and respect the sovereignty of other nations. So long as a state satisfies these duties, it may retain sovereignty. If a state violates these obligations—i.e., it commits massive human rights abuses against its own people or it invades another sovereign state—it cannot hold sovereignty as a shield to prevent other states from acting.<sup>193</sup>

As a result of our changing views on sovereignty, and the belief that humans possess nonderogable rights, there is an emerging consensus that all countries have an obligation to prevent serious human rights abuses. The UN High Level Panel on Threats, Challenges and Change recently concluded that the international community has the duty to intervene in states that are unable or unwilling to protect their people against “genocide and other large-scale killing,

187. In 1999, UN Secretary General Kofi Annan asked, “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?” *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges, and Change*, UN Doc. A/59/565, at Foreword (2004), available at <http://un.org/secureworld/report.pdf> [hereinafter *A More Secure World*].

188. *Human Rights in Peace Negotiations*, *supra* note 173, at 258.

189. In 1949, the International Court of Justice stated that sovereignty entails “the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States.” *Corfu Channel Case (U.K. v. Alb.)*, 1949 ICJ 39, 43. In the post-World War II world, absolute state sovereignty was seen as crucial to maintain stability in a world marked by vast inequalities in state power.

190. Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grant Themes of UN Reform*, 99 A.J.I.L. 619, 629 (2005).

191. See Slye, *supra* note 6, at 1175-76.

192. Slaughter, *supra* note 190, at 628.

193. *A More Secure World*, *supra* note 187, at 16 (stating that the “UN Charter’s strong bias against military intervention is not to be regarded as absolute when decisive action is require on human protection grounds”).

ethnic cleansing or serious violations of international humanitarian law.”<sup>194</sup> Although the UN Charter authorizes the Security Council to “take measures necessary to maintain international peace and security,”<sup>195</sup> many academics and state officials argue that countries may legally intervene in third countries to prevent or terminate massive human rights abuses.<sup>196</sup>

The ability of states to prosecute perpetrators of serious crimes under international law and the ability of states to intervene to stop human rights abuses are both based on the same theory: that all states have an interest (and perhaps an obligation) in preventing and deterring certain crimes that “shock the conscience of mankind” or “pose a clear and present danger to international security.”<sup>197</sup> In light of this emerging norm allowing humanitarian intervention, states that assert universal jurisdiction over perpetrators of serious crimes under international law also have the authority to intervene to stop human rights abuses. Yet, while states are generally reluctant to multilaterally intervene to prevent or stop human rights abuses, they are eager to hold perpetrators accountable for their actions.<sup>198</sup> Given that the ability to violate sovereignty in order to prosecute stems from the same authority to intervene, countries can only justify the decision to not intervene by determining that the benefit of stopping the injury (the serious violation of international law) is not worth the cost associated with military intervention.

This determination may, in many cases, be appropriate. The inevitable loss of life associated with military intervention may not outweigh the benefit achieved by stopping the crime against the international community. Of course, the international community might choose a third option: not intervening and seeking justice after the conflict has ended. Yet, this course of action, if pursued regardless of a domestic amnesty, places the cost of achieving this benefit on the persons in the conflicted state—precisely those whom are most affected by the crimes—because peace negotiators may not be able to use amnesty to encourage

194. *Id.* at 57.

195. UN Charter, Chapter VII, Article 42.

196. *See, e.g.*, Robin Cook, Speech to the American Bar Association Lunch (2000) (cited in INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 905 (Jeffrey Dunoff et al. eds., 2002) (“When faced with an overwhelming humanitarian catastrophe, which a government has shown it is unwilling or unable to prevent or is actively promoting, the international community should intervene.”). Although Cook stated that “wherever possible, the authority of the Security Council should be secured,” he made clear that such authorization was not required for states to intervene to stop such human rights abuses. NATO intervention in Kosovo provides the clearest example of a justifiable military intervention to stop human rights abuses. Although the Security Council did not authorize the intervention under its Article 51 powers, the Security Council later declared NATO’s actions as “legitimate”. *See* Secretary General’s Statement on NATO Military Action Against Yugoslavia, UN Doc. SG/SM/6938 (1999) (“It is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace.”).

197. *A More Secure World*, *supra* note 187, at 31.

198. Prior to NATO’s intervention in Yugoslavia, and the subsequent acceptance of this action by the international community, states could justify the decision to stand by and prosecute after the conflict had ended by claiming that, absent Security Council authorization, they were powerless to prevent the atrocities. Thus, prosecuting the criminals was the only mechanism available to achieve justice and deter future crimes. This excuse is no longer available.

a cessation to the hostilities.<sup>199</sup> Essentially, by pursuing this course of action, the international community says: “We are not willing to risk the loss of our own soldiers in seeking justice, but we are willing to allow more people in the conflict-ridden state to die in order to preserve the right to seek justice on behalf of mankind.” Placing the cost of justice on the most afflicted party is not consistent with the UN’s assertion that states have a “responsibility to protect” populations which are unable to protect themselves.<sup>200</sup>

When the international community decides not to intervene, it should allow peace negotiators and victims in the country in which the crimes occur to balance the competing interests of bringing criminals to justice and preventing future deaths. Peace negotiators and victims may find that the benefit of saving future victims from ongoing conflict outweighs the cost of allowing the perpetrators to avoid prosecution.<sup>201</sup> Since all humans have an interest in preventing and deterring serious crimes under international law—and seeking justice when they do occur—all humans should share the cost of achieving this benefit. When third party states decide that the injury to the international community does not warrant the risk of military intervention, it should not place the cost of seeking justice for this injury on the persons most affected by the conflict.

### 3. Opportunity to Establish a Customary Norm for “Legitimate” Amnesties

It is not feasible for the international community to stop all human rights abuses from occurring and it does not have the resources to punish all criminals under international law. Thus, the United Nations is left with two choices. It can refuse to recognize all amnesties and accept the costs described above. Or, it can recognize amnesties that meet certain standards, thereby helping to crystallize the emerging norm in international law that requires accountability – but not necessarily prosecution – for serious violations of international law. The UN should recognize that, in many cases, properly drafted amnesties may accommodate the competing interests of justice and peace, and work to ensure that states design their amnesty laws in ways that strike the optimal balance between these two goals. The next Part discusses how amnesties can strike this balance.

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199. See Newman, *supra* note 9, at 350 (arguing that if we read the Rome Statute to prohibit all amnesties, we “generate costs for conflict-ridden states”).

200. The UN report states that “this responsibility also requires that in some circumstances action must be taken by the broader community of states to support populations that are in jeopardy or under serious threat.” *A More Secure World*, *supra* note 187, at 17. Prolonging a conflict—by refusing to recognize an amnesty deal—in order to secure a benefit for the international community clearly undermines this responsibility.

201. If the international community believes that the victims do not properly consider the costs to the international community, they can always remedy the situation by deciding to intervene. The Truth and Reconciliation Commission in Sierra Leone concluded in its report: “The Commission also recognizes the principle that it is generally desirable to prosecute perpetrators of serious human rights abuses,” but the Commission is “unable to declare that it considers amnesty too high a price to pay for the delivery of peace to Sierra Leone.” *A Witness to Truth*, *supra* note 175.

#### IV.

#### BALANCING THE TRADE-OFF OF JUSTICE FOR PEACE

This Article has established that amnesties that provide some degree of accountability do not violate international law, but likewise do not prevent other countries or international institutions from asserting jurisdiction. As argued in the last Part, however, there may be reasons for the UN to recognize certain amnesties. This Part now addresses the remaining question: What should be recognized as a legitimate amnesty? This Part argues that there is no model amnesty. Each conflict presents unique circumstances and challenges that leaders and negotiators must consider when negotiating truces or drafting amnesty laws. Thus, the UN should take a pragmatic approach in determining whether to recognize an amnesty for perpetrators of serious crimes under international law.

Amnesties entail trading one good (justice) in order to obtain another good (peace). In determining whether to recognize an amnesty, one must carefully consider whether the amnesty strikes the appropriate balance between these two goods in light of the circumstances of the conflict. The key to achieving this balance is to maximize the advantages that amnesties generally provide, while at the same time minimize the costs associated with foregoing prosecution. Thus, the “optimal” amnesty (assuming amnesties are a necessary evil) is one that ends hostilities and avoids placing the cost of justice on the conflict-ridden state, but also holds criminals accountable for their actions, ensures that they are unable to commit serious human rights abuses in the future, and is the result of the victims’ desire to seek reconciliation or restorative justice.

##### *A. The Balancing Test*

As explained below, the UN can determine whether an amnesty accommodates the competing interests of justice and peace by looking at:

- (1) The process by which the amnesty was enacted;
- (2) The substance of the amnesty legislation; and
- (3) The domestic and international circumstances.

The following chart briefly presents the factors that the UN should weigh. No single factor should be determinative, and the UN should be free to give more or less weight to the various factors given the exigencies of the time and the circumstances on the ground. The factors will be more fully discussed below.

<b>Factors Favoring Recognition</b>	<b>Factors Against Recognizing Amnesty</b>
<b>PROCESS</b>	<b>PROCESS</b>
The amnesty legislation was enacted through democratic procedures.	The amnesty was enacted through authoritarian decree.
Voters had access to unbiased information, sufficient to allow them to make an informed decision.	The government controlled the information available to the voters.
The victims of the atrocities supported the amnesty.	The majority of the population supported the amnesty because they condoned the actions of the perpetrators.
<b>SUBSTANCE</b>	<b>SUBSTANCE</b>
The amnesty holds the persons covered by the amnesty accountable for their actions.	The amnesty legislation does not create any mechanism to hold perpetrators of serious crimes under international law accountable for their actions.
The amnesty takes steps to ensure that the persons covered are not able to commit similar crimes in the future.	The amnesty does not take any steps to prevent the commission of future crimes.
<b>INT'L CIRCUMSTANCES</b>	<b>INT'L CIRCUMSTANCES</b>
The amnesty is necessary to end the hostilities.	The amnesty is not used as a tool of last resort.
The international community is not willing to intervene to stop the hostilities.	The international community is willing to intervene.

There are several pros and cons associated with employing a balancing test rather than a per se rule. The principal cost of the balancing test is that it creates uncertainty for both peace negotiators and the parties who would potentially be covered under the amnesty. Rebel leaders may be less likely to agree to an amnesty, and thus stop the hostilities, if they are not certain that the UN, the ICC, or other states will recognize the offered amnesty deal. The most obvious benefit of adopting a balancing test is that it provides flexibility to the United Nations and state leaders. We cannot foresee all the circumstances of the future, and

adopting a per se rule might bind the United Nations' hands when the benefits of approving an amnesty overwhelm the costs, as most people agree occurred in South Africa.<sup>202</sup> In the end, the benefits of adopting a balancing test seem to outweigh the costs. By modeling an amnesty deal after the positive factors described in this Part, peace negotiators can be fairly certain that the international community will recognize the amnesty deal<sup>203</sup> and that it will incorporate elements best suited to maximize the delicate balance between justice and peace.

### 1. Process

The United Nations should first look to the procedures by which the amnesty was enacted. Two groups of people have the greatest interest in determining whether to grant amnesty to perpetrators of serious crimes under international law: the potential victims and the actual victims. The potential victims of the conflict, which may include all persons in a given region, have an interest in preserving their own lives. The actual victims have an interest in seeking justice for their injuries. The UN should strive to protect the interests of both of these groups.<sup>204</sup>

In order to determine whether the amnesty reflects the interests of these two groups, the UN should consider whether:

- (1) The amnesty was passed by democratic procedures;
- (2) The people had access to adequate information; and
- (3) The victims—potential and actual—favored the amnesty.

First, the UN should look to whether the amnesty was enacted through democratic procedures.<sup>205</sup> Democratic procedures ensure that the persons affected by the crimes have a role in determining the country's response. In most cases, the democratic enactment of an amnesty should counsel in favor of international recognition.<sup>206</sup> Justice Goldstone, for example, stated that the Truth and Recon-

202. Richard Goldstone, *International Human Rights at Century's End*, 15 N.Y.L. SCH. J. HUM. RTS. 241, 258 (1999) (quoting Professor Ellmann that amnesty, which has its costs, was the "price to pay for a peaceful transition from apartheid to democracy"). See also Kamali, *supra* note 102, at 121 ("Even Archbishop Desmond Tutu admitted that 'without some amnesty provisions, our reasonably peaceful transition from repression to democracy would instead have become a blood-bath.'").

203. The creation of some mechanism to submit the proposed amnesty to the UN General Assembly or the ICC *ex ante* would further help peace negotiators in their efforts to formulate a workable, yet internationally acceptable, solution to end the violence.

204. Ideally, the interests of these groups will converge. The groups may both wish to prosecute the perpetrators of these human rights abuses. Alternatively, both groups may choose to grant amnesty. In this case, the concern that the amnesty violates the victims' right to justice is diminished. Finally, if the potential victims and actual victims differ, the UN may have to balance their respective interests, looking to other factors in the balancing test.

205. Other commentators have suggested that amnesties may be acceptable, assuming other conditions are met, so long as the majority of the citizens have endorsed this course of action. See, e.g., Villa-Vicencio, *supra* note 164, at 216-18.

206. See, e.g., Burke-White, *supra* note 101, at 471-72; Draft Protocol to the Statute of the International Criminal Court on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition (cited in O'SHEA, *supra* note 25, at 330).

ciliation Commission was “morally justified because it was created by South Africa’s first democratically elected legislature – a legislature that represents the victims of apartheid.”<sup>207</sup>

Similarly, the UN should be hesitant to recognize an amnesty enacted through authoritarian decree. In these cases, it is almost impossible to discern whether the victims and those affected by the crimes desired the amnesty. There is at least one situation, however, in which the lack of democratic procedures may not necessarily weigh against international recognition. It is foreseeable that peace negotiators may have to conduct secret negotiations with rebel forces, and would therefore not be able to go through the legislative system. In these emergency cases, the UN should not automatically withhold recognition but should focus on the other factors in the balancing test.

The UN should also look to whether voters had access to unbiased information. The democratic process ultimately depends on the free exchange of ideas.<sup>208</sup> A truly democratically enacted amnesty requires that the citizens of the country have access to objective information, sufficient to weigh adequately the costs and the benefits of enacting the amnesty legislation. The ability to vote is of little benefit if the state is able to distort or limit the information that is available to the voters.

Finally, the UN should consider whether the victims, or the persons in the conflict-ridden region, favored granting the amnesty. The democratic enactment of an amnesty does not necessarily guarantee that the amnesty reflects victims’ wishes. In countries in which the hostilities were widespread, such as Afghanistan, the democratic process may adequately take into account the wishes of the victims. In cases in which the victims were in the minority, however, procedures alone may not be sufficient to uphold the rights of victims in determining whether to seek justice or reconciliation. One can easily imagine a scenario in which the victims of a country constitute a small minority while the perpetrators of the crimes have the support of the majority.<sup>209</sup> In such cases, the majority might approve an amnesty for the perpetrators because they share the same ideology as the perpetrators, not because they value peace over justice.

To prevent such situations from arising, the UN should carefully evaluate the extent to which victims participated in the democratic process. Victims should have a significant role in determining whether to grant amnesty to the perpetrators of the crimes. This role may include increased opportunities to par-

207. Kamali, *supra* note 102, at 126.

208. In one of his more memorable passages, Justice Holmes stated: “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

209. The conflict in Sudan represents such a scenario. The janjaweed, a militia made up of Arab-Muslims, has committed a number of crimes against the black-Christian minorities. It is plausible that the majority of the Sudanese population, comprised mostly of Arabs, might vote to grant amnesty to the janjaweed. In Sudan, 70 percent of the population is Sunni-Muslim while five percent is Christian. CIA Fact Book: Sudan, available at <http://www.cia.gov/cia/publications/factbook/geos/su.html#People>.

ticipate in the electoral process or greater access to participate in public debate. The UN should be hesitant to recognize amnesties that the victims or the persons in the conflict-ridden area (the potential victims) clearly do not support.

## 2. *Substance*

The UN should consider recognizing those amnesties that take substantive measures to achieve some of the benefits commonly associated with prosecution: accountability and incapacitation. The grant of amnesty should not entail the grant of impunity.

### *i. Holding Perpetrators Accountable*

Amnesties that include mechanisms—such as truth commissions, civil liability, and noncriminal penalties—to hold perpetrators of serious crimes under international law accountable for their actions are more legitimate than amnesties that don't provide accountability for two reasons. First, as discussed in Part II, customary international law may require countries to take steps to hold these criminals accountable. The UN should be extremely hesitant to recognize amnesties that violate a country's international legal obligations. The UN plays a paramount role in developing international legal norms and ensuring that countries abide by these norms; it therefore has a duty to promote the equal and just application of international law to the various member states. The UN would lose some of its credibility in calling on states to abide by international law if it allows other states to escape their international obligations.

Second, demanding accountability can achieve some of the benefits unique to amnesties. Truth commissions, for example, can help the victims find out what happened to their loved ones and who was responsible for their fates. Truth commissions can also shed light on the factors that facilitated the commission of the crimes, and therefore help prevent them from reoccurring. Accountability measures can also provide some of the benefits commonly associated with prosecution. Lustration laws and laws requiring criminals to compensate the victims, for example, increase the costs of criminal behavior and inform the perpetrators of these crimes, and their sympathizers, that the community does not condone their actions.<sup>210</sup>

### *ii. Incapacitation*

The United Nations should carefully consider whether the amnesty legislation incorporates measures to insure that the criminals receiving amnesty will not return to violence. A number of past amnesties have been ineffective be-

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210. For a discussion of lustration laws in post-Cold War Europe, see Roman David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)*, LAW & SOC. INQUIRY 387 (2003).

cause they failed to incorporate measures that would prevent the commission of future human rights abuses. The Sierra Leone Lome Accords, for example, were repeatedly violated by the Revolutionary United Front (RUF) rebels. Although the Lome Accords called for the rebels to put down their weapons, they did not contain sufficient enforcement measures, nor did they require the rebels to relinquish control over the diamond rich areas of Sierra Leone.<sup>211</sup>

Amnesty laws may take steps to incapacitate those covered by the amnesty by dismantling the group's army or militia, forcing the combatants to turn in their weapons, requiring members to disclose information about their operations (including the identities of the leaders), requiring the criminals to relocate to more secure parts of the country, and ensuring that anyone who violates the terms of the amnesty is subject to prosecution. The UN may also be able to increase the effectiveness of these measures by committing peacekeeping troops to monitor the enforcement of the amnesty agreement.

Requiring governments to incorporate incapacitation measures is critical to justify forgoing prosecution. We normally justify incarcerating criminals based on three overlapping theories: deterrence, incapacitation, and retribution. Jail sentences reduce the crime rate by deterring economically motivated criminals and incapacitating violent criminals.<sup>212</sup> Although international prosecutions may not deter potential perpetrators of serious crimes under international law, prosecutions could still be worthwhile based on their incapacitation effect, so long as the benefit from incapacitating criminals outweighs the costs of refusing to recognize amnesties. If amnesties, however, can achieve the same incapacitation effect as prosecutions,<sup>213</sup> the international community can receive the benefit of ensuring that criminals do not commit future crimes, while avoiding the costs that result from rejecting amnesties.<sup>214</sup>

### 3. *International Circumstances: The Necessity of Ending the Conflict*

The United Nations should also consider the international and domestic circumstances at the time the amnesty was passed. The UN should be more amenable to accept amnesties when it appears that the amnesty is reasonably necessary to end the hostilities. As described above, this avoids placing the cost of justice on the conflict-ridden state.<sup>215</sup>

Likewise, the UN should be reluctant to recognize amnesties when there are reasonable alternative means for ending the conflict. The international community has a substantial interest in seeking justice for serious crimes under in-

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211. See Macaluso, *supra* note 67, at 350-52.

212. See *supra* notes 142-145 and accompanying text.

213. Given the fact that individuals may only be in a position to commit crimes against humanity if special circumstances are present—the perpetrators have access to weapons, can spread propaganda, can avoid the enforcement power of the state, etc.—we can achieve an incapacitation effect by eliminating these special circumstances.

214. See discussion *supra* Part III.C.

215. See discussion *supra* Part III.C.2.

ternational law. We should not relinquish our right to demand justice unless it is necessary to prevent the imminent loss of lives. Thus, the UN should consider whether domestic military efforts might achieve peace, the possibility and costs of multi-lateral intervention, and the plausibility of other measures that would not deprive the international community of its right to seek justice. If no alternative means exist, however, the international community should be reluctant to place the cost of achieving justice on the conflict-ridden state.

Even if no other means are available to end the hostilities, the UN should weigh the costs of the continuing hostilities against the benefit of demanding justice for these crimes. In some cases, the cost of prolonging the conflict may be small compared to the benefit of holding the perpetrators accountable for their actions. For example, at the tail end of the conflict in Rwanda, the UN could have determined that the acts of genocide were so heinous that the need to bring the instigators to justice outweighed the fatalities that might result from the ongoing hostilities. Favoring prosecution over peace in such circumstances might inevitably place the cost of achieving justice on the conflict-ridden state, but the UN could plausibly determine that such inequity is necessary in order to achieve a greater demand for justice.

#### V.

#### SHOULD THE UN SUPPORT THE AMNESTIES IN ALGERIA AND COLOMBIA?

The UN must soon resolve its equivocal approach towards amnesties, as a number of countries have recently passed or are considering amnesty legislation.<sup>216</sup> On September 29, 2005, the people of Algeria passed the Charter for Peace and National Reconciliation (“the Charter”) in a nationwide referendum. President Abdelaziz Bouteflika championed this amnesty as an opportunity to “turn the page” on Algeria’s recent bloody conflict.<sup>217</sup> In June 2005, Colombia passed amnesty legislation hoping to bring one of the world’s bloodiest and longest enduring conflicts to an end. While a number of countries have stated that they support the efforts of Algeria and Colombia to end the bloody conflicts, several human rights organizations have called on the UN and the ICC to reject the amnesties and prosecute the perpetrators of the crimes.<sup>218</sup>

The UN should carefully consider the impact that its position regarding these two amnesties may have on the development of customary international law. Although customary international law may prohibit blanket amnesties, scholars have been unable to discern any other customary obligation due to divergent state practice. The UN has the opportunity to crystallize emerging norms

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216. In addition to Algeria and Colombia, the government of Afghanistan has also extended amnesty to some lower-level Taliban officials. It is currently considering widening the amnesty to cover any militant who lays down his weapons. See *Taliban Leader ‘Rejects Amnesty’* BBC NEWS, May 10, 2005 available at [http://news.bbc.co.uk/go/pt/fr/-/2/hi/south\\_asia/4533051.stm](http://news.bbc.co.uk/go/pt/fr/-/2/hi/south_asia/4533051.stm).

217. Slackman, *supra* note 14, at A4.

218. See *War Crimes Probe Urged*, *supra* note 17.

that demand some of the features described in the previous Part, and to set an example for other countries that may consider passing amnesty legislation.

This Part will apply the proposed balancing test to the amnesties in Algeria and Colombia. Section A provides some background information about the civil war in Algeria which will place the amnesty in its political context and demonstrate the gravity of the crimes committed. Section A then discusses the key provisions of the amnesty and applies the amnesty to the balancing test proposed in the last Part. Section B focuses on the Colombian amnesty and proceeds in the same manner. Section C determines whether these amnesties strike an appropriate balance between justice and peace and offers a recommendation to the international community on whether to accept the two amnesties.

### *A. The Charter for Peace and National Reconciliation*

#### *1. A Brief History of the Human Rights Abuses in Algeria*

The Charter for Peace and National Reconciliation is President Bouteflika's latest attempt to end the civil war in Algeria. The violence started in 1992 after the country's first democratic multi-party elections for Parliament.<sup>219</sup> Preliminary reports from the election indicated that the Islamic Salvation Front (FIS), an Islamic party that had declared its opposition to democracy,<sup>220</sup> was set to win a majority of seats in Parliament. The military, concerned that an Islamic government would jeopardize its power and hinder economic development, annulled the elections and declared martial law.<sup>221</sup> The military established a transitional government and banned the FIS from all political participation.<sup>222</sup> The FIS subsequently split into two separate groups: the Islamic Salvation Army (AIS), which sought to overthrow the authoritarian regime and reinstate the democratically elected government, and the Armed Islamic Group (GIA), which sought to impose an extremist form of Islamic law throughout the country.<sup>223</sup>

The AIS focused its insurgency at government targets. The GIA, which had more radical objectives, attacked both civilian and military targets and was re-

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219. Ray Takeyh, *Islamism in Algeria: A Struggle Between Hope and Agony*, 2 MIDDLE EAST POL'Y 62, 68 (2003).

220. The FIS's stance was a bit contradictory. Although they officially declared that they did not believe in democracy, the party nonetheless participated in the democratic elections. This led many to believe that the FIS's approach to democracy was "one vote, one time." The party's true objectives, however, were uncertain due to ideological divides within the party. A number of the party's members adhered to the more extremist version of Islam and opposed democracy because it elevated the will of the people over the will of God. These individuals advocated the establishment of an Islamic government in Algeria. Other members in the party, however, viewed Islam as a way to restore Algeria's cultural heritage, enact social reforms, and end the corruption in the government. See Claire Heristchi, *The Islamist Discourse of the FIS and the Democratic Experiment in Algeria*, 11(4) DEMOCRATIZATION 111, 1222-23 (2004).

221. Takeyh, *supra* note 219, at 69.

222. Heristchi, *supra* note 220, at 111.

223. Quintan Wiktorowicz, *Centrifugal Tendencies in the Algerian Civil War*, 23(3) ARAB STUDIES QUARTERLY 65, 68 (2001).

sponsible for the worst human rights abuses. 1996, the religious leader of the GIA issued a fatwa declaring that all persons who did not support the GIA cause were apostates and therefore legitimate targets of the jihad.<sup>224</sup> The GIA subsequently targeted civilians who engaged in conduct that the GIA deemed un-Islamic, including secularists, homosexuals, persons seen consuming drugs or alcohol, immodest women, and even pre-pubescent girls who did not wear the traditional hijab.<sup>225</sup> The GIA also attempted to expand the sphere of Islamic influence by killing all persons who served as potential obstacles to the spread of extremist Islam. Thus, the GIA targeted state run schools, members of the press, academics, and leaders of civil institutions.<sup>226</sup> Thousands died in public bombings. Thousands others died as the GIA entered villages and hacked civilians to death using knives, machetes, and swords. One commentator noted, "Ordinary citizens were maimed, decapitated, and burned alive at an alarming rate."<sup>227</sup>

The state security forces did little to stop the violence, and even contributed to the increasing number of deaths. Human rights organizations allege that the government committed a number of serious human rights abuses during the conflict, including massacres, torture, and forced disappearances.<sup>228</sup> According to civilian reports, security forces dressed as insurgents killed scores of innocent civilians in an attempt to turn public opinion against the militants.<sup>229</sup> The government also routinely kidnapped and tortured suspected militants.<sup>230</sup> An Ad Hoc Commission has determined that state security forces are responsible for over 6,000 disappearances; human rights organizations estimate that the number is much higher.<sup>231</sup>

The violence decreased in 1998 when the AIS issued a unilateral cease fire.<sup>232</sup> The AIS had been opposed to the GIA's attacks on civilian targets and did not support the GIA's radical version of Islam. Furthermore, the AIS was concerned that the GIA's actions undermined its credibility and popular support, thus hindering its efforts to restore the democratically elected government. After the AIS ceased its operations, the government focused its efforts on eliminating

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224. *Id.* at 69.

225. *Id.* at 70.

226. *Id.* at 71-72.

227. *Id.* at 69.

228. Human Rights Watch, *Algeria: Human Rights Developments (1996)*, available at [http://www.hrw.org/reports/1997/WR97/ME-01.htm#P89\\_36462](http://www.hrw.org/reports/1997/WR97/ME-01.htm#P89_36462) (stating that "the regular security forces and militias also committed gross abuses, including extrajudicial executions, 'disappearances' and torture. Persons arrested by the security forces were sometimes later found dead, their deaths attributed to armed clashes or attempted prison escapes.").

229. Slackman, *supra* note 14, at A4.

230. Algeria Watch, a human rights organization dedicated to observing human rights in Algeria, claims that Algerian security forces regularly tortured suspected terrorists. One ex-soldier, who is now living in asylum in the U.K., recounts that security agents would drill holes in suspects' stomachs and insert cables into their anuses. See Algeria Watch, "Conscript Tells of Algeria's Torture Chambers," Nov. 3, 1997, available at <http://www.algeriawatch.org/mrv/mrvort/Reda.htm>.

231. *Algerian Human Rights Watch*, *supra* note 70.

232. Takeyh, *supra* note 219, at 72.

the GIA and reduced their numbers significantly.<sup>233</sup>

## 2. *The Charter for Peace and National Reconciliation*

In 1999, the military named Abdelaziz Bouteflika as President, and he immediately set out on a campaign to end the civil war that left between 100,000 and 150,000 dead.<sup>234</sup> Bouteflika has generally had success in these efforts. The government estimates that fewer than 1,000 armed rebels actively oppose the government, a significant decrease from the estimated 25,000 at the height of the war.<sup>235</sup> The President's latest effort to establish peace, the Charter for Peace and National Reconciliation, received broad domestic support, and was passed by 97 percent of the voters.<sup>236</sup> According to Bouteflika, the amnesty is the only way for Algeria to improve the economy, attract foreign investment, and mend ties with the West.<sup>237</sup> The key provisions of the amnesty include:

- Amnesty to all rebels who lay down their weapons, except for persons who committed "public bombings, rapes, or collective massacres";<sup>238</sup>
- Amnesty to all persons already incarcerated, or sentenced in absentia, so long as they did not commit the aforementioned crimes;<sup>239</sup>
- The "commutation of and remission of sentence" for persons guilty of public bombings, rapes, and collective massacres;<sup>240</sup>
- Pardons for "individuals already sentenced and imprisoned for supporting terrorism";<sup>241</sup>
- A declaration that "[t]he people who have disappeared are considered as victims of the nation's tragedy and their heirs have the right to compensation";<sup>242</sup>
- A declaration that "the right to engage in political activities cannot be extended to anyone who participates in terrorist activities."<sup>243</sup>

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233. *Id.*

234. The exact number of deaths is unknown. Various news sources and policy groups estimate that at least 100,000 people, mostly civilians, have died. Other organizations estimate that this number is low. Compare Slackman, *supra* note 14, at A4; (estimating that 100,000 civilians have died) with Suzan Grego, *Algerian Charter Risks Reinforcing Impunity and Undermining Reconciliation*, International Center for Transitional Justice, Sep. 26, 2005 (estimating that up to 200,000 have died).

235. REUTERS, *Algerian Rebels Said to Reject Amnesty*, N.Y. TIMES, October 2, 2005, at A3.

236. *Algerian Voters Back Peace Plan*, BBC NEWS, Oct. 4, 2005, available at <http://news.bbc.co.uk/2/hi/africa/4296474.stm>.

237. *Id.*

238. Charter for Peace and National Reconciliation, Art. II § 2. An English translation of the Charter is available at [http://www.algerianembassy.org.uk/charter\\_for\\_peace\\_and\\_national\\_r.htm](http://www.algerianembassy.org.uk/charter_for_peace_and_national_r.htm).

239. *Id.* at Art. II § 5.

240. *Id.* at Art. II § 8.

241. *Id.* at Art. II § 6.

242. *Id.* at Art. IV.

243. *Id.* at Art. III § 3.

### 3. *Exoneration of the state for its role in the violence.*

The Charter blames rogue state agents for any acts of violence committed by state security forces, but maintains that state institutions are not responsible for any massive or systematic attacks against civilian populations. It states: "The sovereign Algerian people reject any allegation intended to impute to the State a policy of disappearances."<sup>244</sup>

The provisions of the Charter are rather vague. The President is charged with filling in the details and can "take all measures aim[ed] at turning its provisions into a reality."<sup>245</sup> Thus, the precise contours of the amnesty are uncertain and may change as the reconciliation process moves forward.

### 4. *Balancing the Trade-off*

The Charter has been widely criticized by human rights groups. Yet, President Bouteflika's promises of amnesty have dragged Algeria out of a brutal decade-long civil war that left over a hundred thousand dead. For some, the Charter brings the promise of peace; to others, it betrays the innocent victims of the civil war. Both sides, of course, are correct. The following discussion applies the balancing test proposed in the last Part—examining the procedures by which the Charter was passed, the substantive provisions of the amnesty, and the international circumstances—to determine whether the Charter strikes an acceptable balance between justice and peace.

#### *i. Process*

##### *a. The Charter was Democratically Approved with the Support of the Victims*

The Charter encompasses a number of measures that favor recognition by the international community. The Charter was passed by democratic procedures and received enormous domestic support. The government reports that 80 percent of Algeria's 18.3 million eligible voters took part in the referendum.<sup>246</sup> Of these, 97 percent voted to approve the Charter.<sup>247</sup> Thus, voters appeared to agree with Bouteflika and believe that the amnesty will help close a brutal chapter in Algeria's history. One voter reported, "We are fed up with the tears, it's time to forget the past and build a future."<sup>248</sup>

Furthermore, many victims of the conflict support the amnesty. There is no evidence that a majority overwhelmed the wishes of the victims, or that the ma-

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244. *Algerian Human Rights Watch*, *supra* note 70.

245. Charter for Peace and National Reconciliation, *supra* note 238, at Art. V § 4.

246. Michael Slackman, *Algerian Voters Said to Approve President's Postwar Plan*, N.Y. TIMES, Oct. 1, 2005, at A3.

247. *Algerians Approve Amnesty*, *supra* note 84.

248. *Voters Back Peace Plan*, *supra* note 236.

majority of the population supported the amnesty because they condoned the perpetrators' actions. The civil war in Algeria affected the entire country. The killings were targeted at the general population, rather than an isolated minority of people. Thus, the vote to approve the amnesty reflects the wishes of many, or most, of the victims.

*b. The Lack of Neutral Information*

Although the amnesty was democratically enacted, it is unclear whether the public was adequately informed about the costs of the amnesty prior to the referendum. The government controls the television and radio stations and therefore exercised significant power over the voters' access to information.<sup>249</sup> Furthermore, the state has reportedly prevented critics of the amnesty from expressing their views.<sup>250</sup> The lack of access to neutral and objective information undermines the otherwise fair democratic process.

*ii. Substance*

*a. Reparations to Victims*

One positive aspect of the Charter is that it provides reparations to the family members of the disappeared. Many of the families of the disappeared are in immediate need of assistance, and this provision will help ameliorate some of the pain that these families have suffered. The Charter also declares that the government shall "take all appropriate measures to enable the beneficiaries of disappeared persons to cope with this terrible ordeal in dignity."<sup>251</sup> This provision is important to rectify the social ostracization that many families have suffered, mostly because of government efforts to cast doubt on their claims that state agents had abducted their family members.<sup>252</sup> Providing victims with compensation for injuries is not only just, but may even be required under international law.<sup>253</sup>

*b. The Charter Demands Accountability of Some Perpetrators, but not Most*

The Charter demands accountability for some perpetrators of especially serious crimes. The absolute amnesty does not extend to those persons who committed public bombings, rapes, or collective massacres. (These persons, however, still benefit from the Charter, which provides reduced sentences for these

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249. See BBC, Country Profile: Algeria, at [http://news.bbc.co.uk/1/hi/world/middle\\_east/country\\_profiles/790556.stm](http://news.bbc.co.uk/1/hi/world/middle_east/country_profiles/790556.stm) (stating that the "opposition and civil society still have no routine access to state media").

250. Slackman, *supra* note 14, at A4.

251. Charter for Peace and National Reconciliation, *supra* note 238, Art. IV, § 3.

252. *Algerian Human Rights Watch*, *supra* note 70.

253. See *supra* note 91 and accompanying text.

crimes.) This provision may mean that a large number of the militants will serve jail time, given that bombings and massacres were a preferred method of killing during the civil war. It is unclear, however, how the government plans to determine who will fall within this exception to the absolute amnesty.

The main concern with the Charter is that it does not demand accountability for many other serious crimes under international law. The amnesty covers individuals who committed torture, indiscriminate killings of civilians, and enforced disappearances. Persons who committed these crimes will not be held accountable in any way under the amnesty, nor will the public ever learn about their acts.<sup>254</sup> In fact, the government promises to provide apartments and financial assistance to those rebels who lay down their weapons and request amnesty.<sup>255</sup>

The lack of accountability measures may hinder the process of reconciliation. The families of the disappeared may not be able to forget the past until they learn the fate of their loved ones. As demonstrated in countries such as South Africa, the disclosure of truth can help members of society deal with the pain that they suffer and allow them to forgive those parties most responsible for it.<sup>256</sup> A number of Algerians expressed this view. As one Algerian stated, "I do not want the government to give me money to compensate the loss of my son. I want it to tell me the truth, and why the security forces kidnapped him—no more but not less."<sup>257</sup> Another person reiterated these concerns: "We want the truth about the fate of our loved ones. My mother is still keeping my brother's things in order, in case he returns."<sup>258</sup> Many Algerians believe that forgetting the atrocities betrays the innocent who died in the conflict.<sup>259</sup>

This lack of accountability, and the provisions that foreclose inquiry into the alleged crimes, may also violate the country's international legal obligations. Specifically, they undermine the duty, identified by both domestic and international courts, to investigate humanitarian abuses.<sup>260</sup> This fact weighs heavily against recognition.

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254. The Charter for Peace and National Reconciliation explicitly disaffirms any state responsibility for crimes committed by the state security forces. It states that the "sovereign Algerian people reject all allegations aiming at rendering the State responsible for deliberate disappearances." Article IV. Human Rights Watch noted that legislation passed to implement the Charter, provides up to five years in prison for any statement concerning the "national tragedy" which "harms" state institutions, the "good reputation of its agents" or the "image of Algeria internationally." The government has recently jailed a number of journalists under this law, further chilling public debate. Eric Goldstein, *Algeria's Amnesty Decree*, Human Rights Watch, April 10, 2006, available at <http://www.hrw.org/english/docs/2006/04/12/algeri13169.htm>.

255. Bernhard Schmidh, *Algeria's Referendum: The Draft Charter for Peace and National Reconciliation*, QANTARA, available at [http://www.qantara.de/webcom/show\\_article.php/\\_c-476/\\_nr-441/i.html](http://www.qantara.de/webcom/show_article.php/_c-476/_nr-441/i.html).

256. See, e.g., Marianne Geula, *South Africa's Truth and Reconciliation Commission as an Alternative Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57 (2000).

257. *Voters Back Peace Plan*, *supra* note 236.

258. Slackman, *supra* note 14, at A6.

259. Craig S. Smith, *Many Algerians are Not Reconciled by Amnesty Law*, N.Y. TIMES, June, 28, 2006, at A3.

260. See *supra* notes 94, 97, 111-114 and accompanying text.

*c. The Charter Absolves the State of Responsibility*

Another concern with the Algerian amnesty is that it prevents the government from being held accountable for its role in the commission of serious crimes under international law. The Charter prohibits people from “question[ing] the integrity of all the agents who served [Algeria] with dignity,” and proclaims that the “people reject all allegations aiming at rendering the State responsible for deliberate disappearances.”<sup>261</sup> Algeria’s Ad Hoc Commission on the Disappeared indicates that the state systematically committed serious crimes under international law and is responsible for over 6,000 disappearances.<sup>262</sup> Human rights organizations also accuse Algerian security forces of torture. The Charter denies the state’s responsibility for these acts, blaming them instead on rogue state agents. It further declares that these agents “have been punished by law” and “cannot be used as a pretext to discredit the whole of the security forces.”<sup>263</sup> The claim that the state did not order these disappearances is extremely dubious, and Human Rights Watch notes that no state agent has ever been prosecuted for crimes committed during the civil war.<sup>264</sup> The refusal to investigate these allegations may violate Algeria’s obligations under the Convention Against Torture, which it ratified in 1989. This refusal is also troubling because it allows those responsible for serious crimes to remain in positions of power.<sup>265</sup>

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261. Charter for Peace and National Reconciliation, *supra* note 238, Art. IV.

262. *Algerian Human Rights Watch*, *supra* note 70.

263. Charter for Peace and National Reconciliation, *supra* note 238, Art. IV.

264. *Algerian Human Rights Watch*, *supra* note 70.

265. Amnesties that benefit government actors pose unique problems. For one, these amnesties are less likely to prevent those covered by the amnesty from committing future atrocities. States have the force, resources, and control over their territory necessary to commit atrocious crimes at any moment. When the persons receiving amnesty also retain power, there is no reason to believe that they will not return to commit similar crimes in the future since they still have the means to commit these crimes. Thus, self-enacted amnesties are likely to have little or no effect of incapacitation.

More significantly, the international community has a greater interest in bringing government officials who commit serious crimes under international law to justice. Crimes committed by the state threaten the international community in a way that crimes committed by non-state actors do not. Government-sponsored crimes pose a systemic inversion of sovereignty and threaten to undermine the theory of state sovereignty that has served as the foundation for international politics for the past several centuries. The theory of sovereignty is grounded on the notion that all individuals are better off if we cede certain powers, such as that of self-defense and seeking retribution, to a centralized government. In exchange for these powers, the government accepts the obligation, among others, to protect its citizens from domestic and international threats and to seek justice when one citizen commits a wrong against another citizen. When a government commits crimes against its own people, it uses the very powers that justify its existence to the detriment of the people who relinquished the power. These crimes undermine the justification for state sovereignty, and if widespread, threaten to dissolve the system altogether. *See* Luban, *supra* note 121.

*d. The Charter Does Not Incapacitate the Militants*

The Charter does not appear to take steps to ensure that those covered by the amnesty will not return to the armed struggle.<sup>266</sup> The Charter extinguishes judicial proceedings against individuals who give themselves up to the authorities, and pardons those persons already convicted of crimes other than public bombings, rape, and collective massacres. The Charter does not indicate how the government will prevent those persons released from jail from rejoining the existing militant groups. Moreover, because the amnesty does not take any steps to resolve the issues that created the initial unrest, there is little reason to expect those pardoned fighters to permanently put down their weapons.<sup>267</sup> The Charter may actually encourage militants to keep fighting because it does not place any time limit on the grant of amnesty. Thus, combatants do not have an incentive to give up the fighting because they know that they can receive amnesty in the future. In fact, one of the militant groups has stated that the jihad will continue.<sup>268</sup>

*iii. International Circumstances**a. The Charter Is Not Necessary to End the Conflict*

The fact that the amnesty is offered at the end of the civil war also suggests that the international community should be hesitant to recognize it. The vast majority of militants have already laid down their weapons, and therefore the amnesty is not necessary to prevent the imminent and widespread loss of life. As noted above, the AIS declared a unilateral cease-fire in 1998, and many members of the GIA have defected or have quit fighting. Officials estimate that there are only 1,000 militants still operating.<sup>269</sup>

This fact has led many observers to question Bouteflika's motive for proposing the Charter. Many critics suggest that the Charter is a political move, intended to consolidate the President's power by "winning the gratitude of two important constituencies, the security services . . . and the Islamists."<sup>270</sup> While the international community should strive not to place the cost of justice on the persons most affected by the atrocities, it should not waive its right to justice just because it is in one government's political interests.

Before determining whether the international community should support the Charter for Peace and National Reconciliation, this Article examines an amnesty recently enacted in Colombia. This comparison will help elucidate the costs and benefits of the two countries' approaches to dealing with internal con-

266. In June 2006, the *New York Times* reported that the fighting was not yet over, despite the fact that approximately 40,000 persons have applied for amnesty. Smith, *supra* note 258, at A3.

267. Ali Benhadjar, a former rebel leader, stated "that the [the government] is just giving people money and telling them to be quiet. This is not a solution." Smith, *supra* note 259, at A3.

268. *Algerian Rebels Said to Reject Amnesty*, REUTERS, Oct. 2, 2005.

269. *Algerians Approve Amnesty*, *supra* note 84.

270. Michael Slackman, *Top Algerians Prefer Amnesia to Accountability on War*, N.Y. TIMES, Sept. 25, 2005, at A1.

flicts that have resulted in widespread violations of international law and hundreds of thousands of deaths.

### *B. The Justice And Peace Law*

The Colombian Congress passed the Justice and Peace Law in June 2005, in an attempt to end the civil strife that has plagued the country for the past forty years. The following subsection briefly discusses the background of the conflict. This discussion is necessary to put the amnesty in context, illustrating the destruction that the conflict has already caused and the failure of other attempts to bring peace to the country. This Section then discusses the key provisions of the amnesty legislation and subjects the amnesty to the balancing test.

#### *1. A Brief Overview of the Civil Strife in Colombia*

The human rights catastrophe in Colombia is the worst in the Western Hemisphere.<sup>271</sup> As Jan Egeland, human rights coordinator for the United Nations stated, "It has the biggest number of killings in the Western Hemisphere. It's the biggest humanitarian problem, human rights problem, the biggest conflict in the Western hemisphere."<sup>272</sup> From 2002 to 2004 alone, the conflict displaced over two million persons,<sup>273</sup> only Sudan has higher numbers of displaced persons. Likewise, it has witnessed thousands of cases of kidnappings,<sup>274</sup> acts of terrorism,<sup>275</sup> torture, and other human rights abuses.

The violence in Colombia dates back to the formation of Colombia's two main leftist guerrilla groups, the Fuerzas Armadas Revolucionarias de Colombia (FARC) and the Ejercito Liberacion Nacional (ELN). The FARC and the ELN, self-proclaimed Marxists, have waged guerrilla warfare for the past 40 years, attempting to overthrow the government and institute agrarian reform, redistribution of property, and increased state control over the economy.<sup>276</sup> The FARC and ELN control much of rural Colombia and finance their armed struggle by providing protection to the drug cartels, holding wealthy citizens for ransom,

271. *Crisis Facing Colombians is Called Worst in Hemisphere*, N.Y. TIMES, May 11, 2004, at A6. For a brief description of Colombia's bloody history, see Pedro Ruz Gutierrez, *Bullets, Bloodshed and Ballots; For Generations Violence has Defined Colombia's Turbulent Political History*, ORLANDO SENTINEL, Oct. 31, 1999, at G1.

272. *Crisis Facing Colombians is Called Worst in Hemisphere*, *supra* note 271.

273. *Id.*

274. Since 2000, over 7,000 persons have been kidnapped for monetary purposes. See Colombian Ministry of Defense, *Logros y Retos de la Política de Defensa y Seguridad Democrática*, available at [http://www.colombiaemb.org/opencms/opencms/system/galleries/download/defense/Seguridad\\_Democratica\\_06.pdf](http://www.colombiaemb.org/opencms/opencms/system/galleries/download/defense/Seguridad_Democratica_06.pdf).

275. The Colombian government states that over 5,000 acts of terrorism have been committed since 2000. *Id.*

276. Jorge Esquirol, *Can International Law Help? An Analysis of the Colombian Peace Process*, 16 CONN. J. INT'L L. 23, 30 (2000). The FARC formed shortly after the U.S. helped lead an attack on a Communist inspired peasant cooperative in southern Colombia. The survivors of the attack, which pitted 16,000 military personnel against a small band of armed peasants, formed the FARC with Manuel Marulanda acting as the first leader.

and levying taxes against Colombians living in territory within their control.<sup>277</sup>

In the 1980s, the violence increased with the formation of the major right wing paramilitary group, the Auto-Defensa Unida Colombiana (AUC). The AUC originated as a number of "small defense groups" employed by landowners and businessmen to protect them from guerrillas. As the AUC grew in power, it started to exert greater influence over certain regions and to engage in illicit activities to fund its operations.<sup>278</sup> The AUC and the guerrillas now clash as much over control of drug trafficking as they do over ideology. Although the AUC has often collaborated with the Colombian military in combating the FARC and ELN, it is responsible for some of the worst human rights atrocities in Colombia, including massacres, torture, forced disappearances, and extrajudicial killings.<sup>279</sup>

The Colombian government has been unsuccessful in its attempts to end the hostilities. In 1984, Colombian President Belisario Betancur negotiated a truce with the guerrillas, but the truce ended one year later when a leftist group attacked the Palacio de Justicia in Bogota, killing eleven Supreme Court justices.<sup>280</sup> In 1998, President Pastrana also attempted to negotiate peace with the FARC and even ordered the withdrawal of military forces from a 42,000 square kilometer area in southern Colombia, granting the FARC almost total control over the area.<sup>281</sup> The FARC, however, continued its attacks and expanded coca production in its newly acquired territory. After the FARC hijacked a Colombian airliner in February 2002, Pastrana ordered the military to reassert control over the ceded territory. The FARC withdrew into the mountains but continued its attacks against the military, paramilitary groups, and civilians.

In 2002, President Uribe was elected, primarily because of his plan to dismantle the guerrilla and paramilitary groups. Uribe has had some success in meeting this promise. Murders, massacres, and kidnappings have decreased significantly in the past three years. In 2002, the AUC declared a unilateral cessation of hostilities. Shortly after, AUC leaders agreed to remain within a concentration zone for the duration of peace talks with the government.<sup>282</sup> Although the AUC has frequently violated this cease-fire, the government has continued peace negotiations.<sup>283</sup> President Uribe's most recent and ambitious proposal to

277. See generally Human Rights Watch, *War Without Quarter* (1998), available at <http://www.hrw.org/reports98/colombia>.

278. Today, the AUC membership is about 20,000 strong. Adam Isacson, *Peace – or "Paramilitarization?"*, Center for International Policy Report (July 2005) [hereinafter Isacson, *Peace or Paramilitarization*].

279. Arturo Carrillo-Suarez, *Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, 15 AM. U. INT'L L. REV. 1, 16-18 (1999).

280. State Department Website, available at <http://www.state.gov/r/pa/ei/bgn/35754.htm> [hereinafter *State Department*].

281. GEOFF SIMONS, *COLOMBIA: A BRUTAL HISTORY* 191 (2004).

282. Ambassador William Wood, *The Peace Process with the AUC in Colombia*, June 28, 2004 at <http://bogota.usembassy.gov/wwwsw32.shtml>.

283. Since the AUC announced the ceasefire in 2002, over 8,000 members of the paramilitary group have voluntarily disarmed. *U.S. Applauds Uribe*, *supra* note 83.

end the internal strife, the Justice and Peace Law, is the result of these negotiations.

## 2. *The Amnesty Deal*

In June 2005, the Colombian legislature approved the Justice and Peace Law.<sup>284</sup> The Law, although initially tailored for the AUC, extends to all politically motivated groups, including the FARC. The key provisions of the law are as follows:

- Articles 10 and 11 provide that in order to be eligible for the amnesty benefits, combatants must disarm, turn over illicitly gained assets, and admit to past crimes.
- Article 29 establishes that combatants who had committed certain serious crimes under international law will not receive complete amnesty, but will receive reduced sentences of five to eight years. During the duration of the sentence, the detainees must contribute to their “resocialization” through work or study. The law provides that the 18 months spent negotiating the terms of the amnesty will be deducted from the length of the sentence, and permits most sentences to be served in rural haciendas under house arrest.
- If a combatant seeking amnesty does not make a fully accurate or complete confession, Article 25 states that the combatant may still receive the benefits of the amnesty legislation so long as the combatant later admits to the charges and the omission was unintentional. The government may, however, increase the length of the sentence by 20 percent for the unintentional omission of grave crimes. Persons who intentionally conceal their crimes can be prosecuted to the full extent of Colombia’s criminal laws.
- Article 42 establishes the Fund for the Reparation of Victims and Regional Commissions for the Restitution of Property. Illegally acquired assets will be deposited into the reparation fund and dispersed to the victims.
- Article 44 creates the National Reparation and Reconciliation Commission which will be led by Colombia’s Vice President and will include representatives from the victims.

The Colombian government recently embarked on a campaign to rally international support for the amnesty. In front of crowds in Madrid, Spain, President Uribe described the Justice and Peace Law as a law that provides justice and reparation to victims, not a law of pardon and oblivion.<sup>285</sup> In response to allegations that the law is too lenient, he responded, “I beg that you and all the members of Amnesty International make the intellectual exercise and prepare to respond to the other sector, to the guerilla, to the ELN and FARC, who demand total amnesty, total pardon, whatever the gravity of their crimes.”<sup>286</sup>

In a letter to members of the U.S. Congress, Colombian ambassador Luis Moreno acknowledged that the legislation had faults. “The law is far from per-

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284. Justice and Peace Law, *supra* note 16.

285. Press Release, Office of the President, Colombia, “President Uribe Asks to Compare Justice and Peace Law With Other Peace Initiatives in the World” (July 11, 2005), <http://www.presidencia.gov.co/sne/2005/julio/11/12112005.htm>.

286. *Id.*

fect and because we are seeking peace and justice simultaneously, it is inevitable neither cause will be served perfectly.”<sup>287</sup> He then asked the congressmen to compare the Justice and Peace Law to other amnesties around the world: “In comparison to other peace processes around the world and every previous peace process in our country’s history, Colombia is applying a higher standard of justice by requiring full confessions of violations, and providing a level of punishment, before any legal benefits can be bestowed.”<sup>288</sup>

Thus far, President Uribe’s efforts to assure international cooperation with the amnesty have been successful. The European Union Council adopted a council conclusion stating, “if the new law is effectively and transparently implemented it would make a positive contribution to the search of peace in Colombia.”<sup>289</sup> The Bush Administration has also pledged its support.<sup>290</sup> Under Secretary of State for Political Affairs Nicholas Burns recently defended the legislation from critics: “Some have argued that the law is not tough enough on members of paramilitary forces. Ultimately, however, the balance between peace and justice is a decision for Colombians to make for themselves.”<sup>291</sup>

A number of human rights activists are more skeptical of the legislation.<sup>292</sup> These organizations have leveled three main criticisms against the amnesty law. First, the law may not adequately facilitate the truth behind many of the crimes, or the circumstances in which they occurred. Combatants may have little incentive to fully disclose their crimes; if evidence of un-confessed crimes is later brought forth, the combatant can still receive the benefit of the amnesty by confessing and stating that the omission was unintentional.<sup>293</sup> Moreover, the bill does not expose or acknowledge the military’s role in the human rights abuses. The bill effectively allows the government to place sole responsibility for the atrocities on the paramilitaries and the guerrillas without acknowledging its own collaboration with the AUC.<sup>294</sup>

Second, the bill may provide *de facto* immunity to many combatants who do not disclose their crimes. The legislation provides for only 20 prosecutors and 150 investigators. After a combatant confesses his crime, the prosecutor has 36 hours to decide whether to press charges and then 60 days to complete its in-

287. *Letter to Congress*, *supra* note 175.

288. *Id.*

289. Council of the European Union, Council Conclusions on Colombia, 2678<sup>th</sup> Council Session, Luxembourg, Oct. 3, 2005, available at [http://ec.europa.eu/comm/external\\_relations/colombia/doc/ccc\\_03-10-05\\_en.pdf](http://ec.europa.eu/comm/external_relations/colombia/doc/ccc_03-10-05_en.pdf).

290. *U.S. Applauds Uribe*, *supra* note 77.

291. *Id.*

292. Amnesty International, for example, stated that the Justice and Peace Law “will exacerbate Colombia’s endemic problem of impunity, and risks demobilized paramilitaries being reintegrated into the armed conflict.” Amnesty International Press Release, “Colombia: Justice and Peace Law will guarantee impunity for human rights abusers,” April 26, 2005, available at <http://web.amnesty.org/library/print/ENGAMR230122005>.

293. “Without Peace and Without Justice,” Colombian Commission of Jurists, available at [www.coljuristas.org](http://www.coljuristas.org) [hereinafter *Without Peace*].

294. *Id.*

vestigation.<sup>295</sup> Critics argue that this time frame is insufficient to allow the government to prepare a case against a combatant charged with committing crimes against humanity.<sup>296</sup>

Third, some critics worry that the law will fail to demobilize the paramilitary and guerrilla networks. Combatants are not required to reveal the structure of their organization or leadership.<sup>297</sup> Furthermore, even if a combatant confesses his crime the benefits of the amnesty are not conditioned on the complete demobilization of the paramilitary or rebel groups. Thus, leaders may receive amnesty even though their subordinates continue to operate.

### *3. Balancing the Tradeoff*

These concerns with the law are well founded. As the Colombian government readily admits, the Justice and Peace Law has its flaws. Yet, all amnesties will inevitably fall short of what the international community might ultimately desire. The important question is not whether the amnesty is perfect in all respects, but whether it is an acceptable compromise between justice and peace.

#### *i. Process*

##### *a. Democratically Enacted with Support of Victims*

The Justice and Peace Law was democratically enacted by the Colombian Congress. The legislation was debated in Colombia for over two years before it was finally enacted and has undergone a number of modifications resulting from political compromises.<sup>298</sup> According to the U.S. State Department, “the legislation is the result of more than two years of transparent, democratic debate.”<sup>299</sup> Moreover, there is no evidence that the Colombian government attempted to control the debate or silence opponents of the legislation.<sup>300</sup>

The enactment of the bill does not suggest that the wishes of the victims were overwhelmed by a majority, or that perpetrators had the support of the majority of the population. As is the case in Algeria, nearly everyone in Colombia has been affected by the forty years of civil strife. In addition to the tens of thousands who have been injured or killed, three million persons have been displaced in the past decade.<sup>301</sup> Although many individuals in rural communities distrust the government and the military—mostly because of its perceived col-

295. Justice and Peace Law, *supra* note 16, Articles 17 and 18.

296. *See Without Peace*, *supra* note 293; Press Release, Adam Isacson, “A response to the Colombian Embassy’s July 12 letter to Congress regarding paramilitary demobilizations”, Center for International Policy (July 14, 2005), available at <http://ciponline.org/colombia/050714memo.pdf> [hereinafter *Response to Ambassador*].

297. *Response to Ambassador*, *supra* note 296.

298. *Letter to Congress*, *supra* note 175.

299. *Supra* note 83.

300. *Id.*

301. *See supra* notes 272-275 and accompanying text.

laboration with the AUC—President Uribe enjoys broad domestic support.<sup>302</sup> The FARC and the AUC, on the other hand, are generally despised by Colombians.

*ii. Substance*

*a. The Law Demands Accountability*

The Justice and Peace Law goes further than previous amnesties in demanding accountability for perpetrators of serious crimes under international law. It requires combatants to disclose their crimes in order to receive the benefits of the legislation. So long as courts make it clear that combatants cannot easily evade the full disclosure requirement—by scrutinizing any claim that a previous omission was unintentional—combatants will have a great incentive to fully confess their crimes.<sup>303</sup>

Furthermore, the law requires combatants to turn over illegally acquired assets, which are then used to compensate the victims of the conflict. This serves to penalize the combatants but also provides the victims with redress for their suffering. Providing victims compensation for injuries is not only just, but may even be required under international law, as the Inter-American Court of Human Rights has suggested.<sup>304</sup>

More significantly, the Justice and Peace Law mandates limited “imprisonment” for perpetrators of serious crimes. Even though these perpetrators may spend their sentences under house arrest or in relatively luxurious “jails,”<sup>305</sup> this provision does more to hold perpetrators accountable than any previous amnesty legislation, including the widely lauded South African amnesty deal. Consequently, it sends a message to the people that the government does not condone the guerrillas’ and paramilitaries’ actions, and that anyone who commits such acts will be held legally accountable.

*b. The Amnesty May Not Prevent the Rebels from Committing Future Crimes*

However, it is unclear whether the Justice and Peace Law will successfully incapacitate combatants who receive amnesty for their crimes. On one hand, the law requires combatants to identify themselves, put down their arms, and turn over illegal assets.<sup>306</sup> Those who serve reduced sentences will not be able to

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302. Recent polls place Uribe’s approval ratings at 78 percent, the highest of any leader in Latin America. Juan Forero, *Colombian President Scrambling in Fight to Run Again*, N.Y. TIMES Oct. 8, 2005, at A6.

303. Although some critics argue that combatants are unlikely to fully disclose their crimes, courts may encourage full disclosure by placing the burden on the defendant to prove that his omission was unintentional. After all, it does not seem plausible that a combatant would easily forget committing crimes against humanity.

304. See *supra* note 93 and accompanying text.

305. See *supra* note 284 and accompanying text.

306. Ambassador Luis Alberto Moreno claims that this amnesty legislation will enable the

commit crimes while they serve their time, a period ranging from five to seven years. On the other hand, the law fails to take a number of steps that would help ensure that the paramilitary and guerrilla groups are successfully dismantled.<sup>307</sup> Ideally, the legislation would require combatants to fully disclose more than their identity and their past crimes. The government may need more information—such as the identity of the rebel leaders, operations strategy, strength of numbers, training bases, etc.—to successfully dismantle the groups. Dismantling the existing groups not only improves the immediate security of the country, but will help ensure that the persons covered by the amnesty do not return to fight upon completion of their sentences. Critics suggest that the administration rejected this full disclosure requirement in order to protect certain government officials or wealthy landowners who might be implicated in the commission of crimes.<sup>308</sup>

*c. The Amnesty may Prevent Accountability for State Actors*

As with the Algerian amnesty, the UN should be concerned that the Justice and Peace Law will indirectly absolve state actors for their participation in crimes. Although the law does not directly grant amnesty to state actors, it does not require the state to acknowledge its involvement in human rights atrocities.<sup>309</sup> The UN should place pressure on the Uribe Administration to investigate the role that the government and the military have played in the commission of widespread human rights abuses. If Colombia truly desires to eliminate the culture of impunity, it must disclose its collaboration with the AUC and any direct involvement in attacks on civilian populations.

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government for the first time to “monitor [the combatants’] actions to ensure they do not return to a life of violence.” *Letter to Congress, supra* note 175.

307. See Isacson, *Peace or Paramilitarization, supra* note 278, at 3 (“Dismantlement is such an important issue that, if Colombia fails to include provisions to guarantee it, the Center for International Policy will be forced to recommend that the United States deny financial support to Colombia’s paramilitary demobilization process.”).

308. Several commentators are also concerned that even if the law successfully disbands the AUC and the FARC, these combatants will form smaller “mafia-like” organizations. As the paramilitaries and guerrillas become less ideologically driven, and confrontations between the groups become less frequent, they have less incentive to maintain large, national military-like organizations. There is evidence that this process has accelerated since negotiations started with the government in 2003. See Isacson, *Peace or Paramilitarization, supra* note 278, at 4.

309. In 2005, reports of crimes committed by security forces increased. The High Commissioner for Human Rights in Colombia received allegations of massacres committed by security forces in Antioquia, Arauca, and Boyaca. The Commissioner observed an increase in allegations of sexual crimes and extrajudicial killings. The Commissioner also reported that the security forces allegedly cooperated with the AUC in coordinated raids against rural towns. REPORT OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE SITUATION OF HUMAN RIGHTS IN COLOMBIA paragraphs 117-18 (2005).

*iii. International Circumstances*

*a. The Amnesty is a Tool of Last Resort*

The duration of the conflict and the failure of past efforts to establish peace suggest that the UN should be more willing to recognize the amnesty.<sup>310</sup> The country has battled various guerrilla groups for over forty years, leaving hundreds of thousands dead and millions displaced. The government attempted to negotiate peace deals with the FARC in 1984-87, 1991, 1992, and 1998-2002, but each attempt ultimately failed. The brutalities only increased in the 1980s as drug traffickers and wealthy landowners organized the AUC to defend them against attacks by the FARC and the ELN, each side committing heinous crimes against civilians perceived to be loyal to the opposing side. Cease-fires with both the FARC and the AUC have routinely been violated. Military incursions into paramilitary and guerrilla strongholds have had some success but have inflicted countless casualties on civilians and forced hundreds of thousands to move away from these conflict-ridden regions. Although the AUC has called a cease-fire, the FARC continues to commit serious crimes.<sup>311</sup> The Colombian government has decided to grant amnesty only after repeated efforts to end the conflict have failed. Thus, it appears reasonably certain that the amnesty may be the only way, absent multi-lateral military intervention, to end the hostilities. Refusing to recognize the amnesty now places the cost of justice on the Colombian people, a population that has witnessed countless horrors.

Finally, it is important to note that Colombia does not violate any treaty obligations by offering amnesties or reduced sentences to combatants. The Geneva Conventions do not apply because this is a domestic conflict; the Convention Against Torture does not apply because the law covers non-state actors; and there is no evidence of genocide. The amnesty law does not violate customary international law because it does provide some degree of accountability and redress for victims.

*C. Recommendation*

This is an extremely important decision for the international community. The legal status of amnesties is currently at a crossroads. Although scholars and jurists suggest that amnesties may be illegal under international law, state practice rebuts the assertion that all amnesties for serious crimes under international law are per se invalid. Nevertheless, there are emerging norms that demand greater accountability for serious crimes under international law. The international response to these amnesties may indicate the future of amnesties in general. If the UN and the international community reject both amnesties, custom-

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310. See *supra* Part V.A.

311. See Associated Press, *Colombians Keep Uribe in Power in Landslide; U.S. Ally has Led Fight v. Rebels*, WASH. POST, May 29, 2006, at A17 (noting that although the AUC has called a ceasefire, "an end to the violence perpetrated by leftist rebels remains elusive").

ary international law may soon follow. If, on the other hand, the international community accepts one or both, it can set the standard for future amnesties. Thus, the debate surrounding the Charter for Peace and National Reconciliation and the Justice and Peace law has greater implications than the fate of several thousand combatants.

The UN should not support the Algerian amnesty. As the balancing test suggests, the Charter does not strike an appropriate balance between justice and peace. Although the majority of Algerians voted in favor of the Charter, the international community also has an interest in seeking justice for the serious crimes under international law that the militants committed during the course of the civil war. The international community should only relinquish this right in order to achieve a greater good.

The Charter does not provide this greater good. It fails to provide many of the benefits associated with prosecution, and essentially asks the nation and the world to forget about the heinous acts committed by the Islamic militants. The Charter does not demand any accountability from the militants, except those who committed public bombings, rapes, or collective massacres. Militants who committed indiscriminate murders, extrajudicial killings, or forced disappearances, however, do not have to answer for their crimes. The Charter likewise absolves the state of all responsibility for its part in the atrocities, and denies the families of the victims any opportunity to determine the fate of their loved ones. Recognizing the Algerian amnesty will undermine the emerging norm in international law that demands some form of accountability for perpetrators of serious crimes under international law.<sup>312</sup>

Neither does the amnesty offer many of the benefits to the international community that amnesties often provide. The amnesty is not necessary to end the hostilities. The AIS has already declared a unilateral cease-fire against the government, and the number of militants has dwindled significantly in the past years. Since the amnesty is not necessary to prevent the deaths of many innocent victims, seeking justice on behalf of the international community does not place the cost of justice on the conflict-ridden state.

The UN, on the other hand, should support Colombia's Justice and Peace Law. The law incorporates many of the positive characteristics of amnesties described in this Article, and the positive aspects of the amnesty outweigh the negative ones. Specifically, it was enacted through transparent, democratic procedures; the amnesty demands greater accountability than previous amnesty deals; and the amnesty comes after repeated attempts to end the hostilities have failed. This is not to say that the amnesty is perfect. Ideally, it would incorporate measures to ensure that the combatants cannot return to a life of violence and would provide the prosecution with greater resources. Demanding that amnesties achieve almost all of the benefits of prosecution, however, is to ignore the reali-

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312. Shortly before this Article was scheduled for publication, the *N.Y. Times* reported that "interviews with dozens of people affected by Algeria's approach suggest that its amnesty program is less a model than a cautionary tale." Smith, *supra* note 259, at A3.

ties that the peace negotiators face and would create a *de facto* prohibition against amnesties. There will inevitably be a gap between what is just in the ideal sense and what the parties can in fact negotiate. This is precisely why the UN should subject amnesties to a balancing test, weighing the pros and cons of each amnesty in light of the specific circumstances surrounding its enactment.

The Justice and Peace Law, while not perfect, may be the best opportunity to establish peace after forty years, and at the same time provide accountability demanded by the international community. The international community can remedy some of the deficiencies in the legislation by lending support to the Colombian government in its attempts to demobilize the rebels, encouraging the judiciary to demand full disclosure of past crimes, and pressuring the government to cease cooperating with the AUC.

Importantly, accepting the Justice and Peace Law preserves the ability of other governments to use amnesties to end horrible conflicts in their own countries. Rejecting the Justice and Peace Law—which goes further than any previous amnesty to demand accountability—and requiring countries to do more to hold perpetrators accountable, may place too great a burden on peace negotiators and *de facto* make amnesties illegal. Demanding greater accountability may push that balance too far to the side of justice, ignoring the equally compelling demand for peace and preservation of life. In determining whether to recognize this amnesty, it is important that the international community consider whether it wants to eliminate the use of amnesties altogether.

## VI. CONCLUSION

It is time to rethink the value that amnesties, if properly drafted, may provide to the international community. Unless the international community is willing to intervene whenever serious crimes under international law occur – and recent atrocities in Africa and elsewhere demonstrate that it is not – amnesties may provide one of the only mechanisms for bringing peace to a conflict-ridden region, thus helping to prevent the deaths of hundreds or thousands of innocent civilians. In determining whether to recognize an amnesty, the international community must weigh the competing interests of justice and peace. Justice requires that we hold perpetrators of serious crimes under international law accountable—though not necessarily through criminal punishment—for their actions. Justice also demands that amnesty deals be enacted through democratic procedures, which take into account the victims' wishes. Peace, on the other hand, demands that the international community does not deprive conflict-ridden states of their only mechanism for ending the hostilities. While the international community has an interest in prosecuting persons who commit atrocious acts, this interest does not always trump the interest of those in the war torn region of restoring peace and preserving their own lives. Peace also demands that any amnesty legislation take measures to ensure that the combatants covered by the amnesty cannot return to commit similar acts in the future.

The international community is currently at a crossroads. While states have continued to pass amnesties and negotiate peace deals, many UN officials and international legal scholars have argued that granting amnesties to perpetrators of serious crimes under international law violates international legal norms. These exhortations for greater accountability have had some effect: states increasingly incorporate mechanisms into amnesty deals for holding perpetrators of crimes accountable for their actions. The UN and international legal scholars should applaud these efforts and recognize amnesties that attempt to strike the appropriate balance between justice and peace. If they choose not to, their calls for change will fall on deaf ears, and they may lose their unique ability to influence the development of customary international law.