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# Cracking the Toughest Nut: Colombia's Endeavour with Amnesty for Political Crimes under Additional Protocol II to the Geneva Conventions

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**CRACKING THE TOUGHEST NUT: COLOMBIA'S ENDEAVOUR  
WITH AMNESTY FOR POLITICAL CRIMES UNDER ADDITIONAL  
PROTOCOL II TO THE GENEVA CONVENTIONS**

MARIE-CLAUDE JEAN-BAPTISTE \*

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## INTRODUCTION

After more than five decades of conflict that left more than 220 thousand men, women, and children dead and over six million displaced, the Colombian government in 2012 initiated negotiations with the Revolutionary Armed Forces of Colombia (FARC), the country's largest and longest standing guerrilla group. On August 24, 2016, the government and the FARC announced that they had reached a final, integral, and definitive agreement on all the points on their agenda: (1) land and rural development; (2) political participation; (3) bilateral ceasefire and disarmament—including security guarantees for FARC members as they reintegrate civilian life as well as measures to combat illegal armed groups; (4) illicit drugs; (5) accountability and reparations for victims—including the creation of a truth commission; and (6) implementation and verification mechanisms. This “General Agreement for the Termination of the Conflict and the Construction of a Stable and Sustainable Peace in Colombia” was submitted to a popular vote via a plebiscite on October 2<sup>1</sup> and President Juan Manuel Santos ordered a definitive ceasefire effective August 29th.<sup>2</sup>

On October 2, voters narrowly rejected the peace deal due in part to concerns regarding the amnesty to FARC members and the FARC's participation in politics.<sup>3</sup> The government and the FARC resumed negotiations to take into account the concerns of those who voted against the agreement. A new agreement was reached on November 11<sup>th</sup> which maintains the key provisions on amnesty. The revised agreement was ratified on December 1—bypassing another popular vote.<sup>4</sup> Colombia has never been so close to peace.

Earlier in the process, on September 23, 2015, in a historic meeting in Havana, Cuba, Colombian President Juan Manuel Santos and FARC leader Timochenko announced that the two parties had reached an agreement on transitional justice, including accountability and reparations for victims, one of the most contentious items on their agenda. On December 15, 2015, the two parties published the detailed agreement on “Victims of the Conflict: Integral System for Truth, Justice, Reparation and non-Repetition” (Victims and Justice Agreement), including provisions for the “Special Jurisdiction for Peace” (SJP), and the “Human Rights Commitment.”<sup>5</sup>

The agreement calls for the creation of an integral system of truth, justice, and reparation including a “Commission for the Clarification of Truth,

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<sup>1</sup> Helen Murphy, *Colombia's Santos Calls Peace Plebiscite in Oct.*, REUTERS (Aug. 30, 2016, 12:27 PM), <http://www.reuters.com/article/us-colombia-peace-idUSKCN11526Y>.

<sup>2</sup> Andrew Schipani, *Colombian President Declares Definitive Ceasefire with Farc*, FINANCIAL TIMES (Aug. 25, 2016), <https://www.ft.com/content/c687cb74-418a-3e1f-afa1-d419b7376c8d>.

<sup>3</sup> Julia Symmes Cobb & Nicholas Casey, *Colombia Peace Deal Is Defeated*, N.Y. TIMES (Oct. 2, 2016), <http://www.nytimes.com/2016/10/03/world/colombia-peace-deal-defeat.html>.

<sup>4</sup> Nicholas Casey, *Colombia's Congress Approves Peace Accord With FARC*, N.Y. TIMES (Nov. 30, 2016), <http://www.nytimes.com/2016/11/30/world/americas/colombia-farc-accord-juan-manuel-santos.html>; *Colombia Approves Amnesty Agreed in Farc Peace Deal*, B.B.C. (Dec. 28, 2016), <http://www.bbc.com/news/world-latin-america-38455493>.

<sup>5</sup> Acuerdo sobre las Víctimas del Conflicto: “Sistema Integral de Verdad, Justicia, Reparación y No Repetición,” incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos, Dec. 15, 2015, <http://wp.presidencia.gov.co/sitios/especiales/Documents/20150921-declaracion-proceso-paz/docs/Punto5-Victimas.pdf> (last visited Jan. 12, 2016).

Coexistence, and Non-Repetition” (Truth Commission), a “Special Search Unit” to try to locate the many disappeared, and the SJP. The SJP will include trial and appellate courts and will provide for expedited trials for those who recognize their responsibility and participate in the Truth Commission process. Those in this category will also benefit from lower sentences, between five to eight years, and will serve their sentence under a special, flexible detention regime. Those who do not recognize their responsibility could face up to twenty years in prison under ordinary prison conditions.

The agreement also provides that the government will, at the end of hostilities, grant the widest possible amnesty for political crimes and crimes connected to political crimes. These crimes for purposes of the amnesty include: rebellion, sedition, rioting, illegal possession of weapons, murder in combat that is compatible with international humanitarian law, conspiracy to commit the crime of rebellion, and other connected crimes. The amnesty extinguishes investigations as well as administrative and disciplinary proceedings for conduct that is subject to the amnesty.

Excluded from the amnesty are: crimes against humanity, genocide, war crimes, the taking of hostages, serious deprivations of liberty, torture, forced displacement, enforced disappearance, extrajudicial executions, sexual violence, child abduction, and recruitment of child soldiers. Common crimes with no connection to the conflict or rebellion are also excluded from the amnesty. Crimes excluded from the amnesty will be prosecuted by the SJP and perpetrators will be required to participate in truth proceedings. There is a possibility that offenders amnestied for political crimes and related offenses could still be subject to the SJP for other crimes not contemplated in the amnesty including serious offenses.

The amnesty will extend only to members of the FARC and those who have been convicted of political crimes or crimes connected to political crimes in the ordinary justice system, but not in the military courts. It does not apply to the military. The agreement contemplates that the national legislature will enact a law to determine which crimes are subject to amnesty, along with the criteria for which crimes are connected to political crimes. A “Special Chamber” within the SJP will have responsibility for granting amnesty and making the determination of which crimes are connected to political crimes. The amnesty law will also set out the details of the constitution and workings of the Special Chamber. Victims of crimes for which perpetrators have received amnesty would still be eligible for reparations.

The amnesty law was approved by congress and signed by the President on December 30<sup>th</sup>, 2016. It is currently pending review before the Constitutional Court. The law maintains the main provisions regarding amnesty for FARC members detailed in the agreement. The article was written prior to the enactment of the amnesty law and therefore bases its analysis on the proposed amnesty in the peace agreement, which is mirrored in the law.

The Victims and Justice Agreement specifically refers to international humanitarian law as the legal authority for the amnesty for political crimes. Commentators and members of the negotiating team have indicated that the amnesty provisions are based on Article 6.5 of Additional Protocol II to the

Geneva Conventions (Protocol II), which states that, “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”<sup>6</sup>

This legal brief proposes to track the contours of existing international law on amnesty for political crimes under Protocol II in an attempt to determine whether the amnesty agreed upon in Colombia is indeed compatible with international law—specifically, Protocol II. The conclusion is that all relevant sources of international law—including the Rome Statute, United Nations (U.N.) statements, and decisions of the Inter-American Human Rights System—support the granting of amnesty for political crimes as proposed in the Colombian peace accord.

## I. ORIGINS OF AMNESTY

Amnesty is a sovereign act of forgiveness which prevents punishment of crimes committed in the past and is usually granted to a group of persons as a whole.<sup>7</sup> In most cases, “it provides for immunity from the usual operation of the law and prevents criminal, administrative, disciplinary and civil proceedings.”<sup>8</sup>

Amnesty originated in early attempts to promote peace between warring states or the state and rebels, and to ensure lasting victory over conquered territory. In 40 BCE, a revolt overthrew the oligarchic provisional government in Athens known as the “Thirty Tyrants,”<sup>9</sup> resulting in a civil war. An agreement was brokered to put an end to the conflict, the principles of which included the prosecution of criminal acts and amnesty for all other acts associated with the war.<sup>10</sup> It stated that no one should be accused or punished after amnesty had been decreed for wrongs and offenses committed on either side. Athenians had to take an oath respecting the amnesty.

Following the Athenian experience, amnesties continued to be used and to become increasingly accepted as a way of ending rebellions or riots and ensuring lasting peace and reconciliation. For example, the Thirty Years War arose out of the Revolt of Bohemia, which had been rooted in religious tensions exacerbated by the Peace of Augsburg of 1555.<sup>11</sup> The circumstances required a radical disregard of the war’s offenses if a suitable peace was to be achieved, and this led to the addition of an amnesty provision in the Westphalia peace treaty in 1648. This amnesty covered criminal and civil liabilities and prohibited all acts of

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<sup>6</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 6.5, June 8, 1977 [hereinafter Protocol II].

<sup>7</sup> Some amnesties granted while a conflict is ongoing to encourage rebels to surrender and disarm give combatants a deadline by which to surrender; any eligible crimes committed up to that deadline are included even if committed after the amnesty was enacted.

<sup>8</sup> Anja Seibert-Fohr, *Amnesties* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (MPEPIL) 2 (Rüdiger Wolfrum ed., 2010), [opil.ouplaw.com/home/EPIL](http://opil.ouplaw.com/home/EPIL).

<sup>9</sup> See N.G.L. HAMMOND, A HISTORY OF GREECE TO 322 B.C. 443–48 (1st ed. 1957).

<sup>10</sup> *Id.* at 447.

<sup>11</sup> See generally G. PAGÈS, THIRTY YEARS WAR 1618–1648 (David Maland & John Hooper, trans., Harper & Row 1971) (1939).

retribution. Similarly, the Russo-Turkish War of 1828–29 concluded with a grant of amnesty to all belligerents. These amnesties covered mostly combatants from opposing States and protected them from criminal prosecution. “Their purpose was to encourage erasure of the past and prevent resurrection of hostilities out of revenge.”<sup>12</sup>

The post-World War II period saw a dramatic increase in non-international conflicts pitting state forces against domestic armed groups. Despite the change in the nature of the conflicts, amnesties continued to serve as an incentive to end those conflicts.<sup>13</sup> Even with the advent of international justice mechanisms and the increased focus on fighting impunity, amnesties continue to find use for their contribution to peace and reconciliation following conflicts.<sup>14</sup>

#### A. *The Geneva Conventions and Protocol II*

The Four Geneva Conventions of 1949 and their Additional Protocols together form the core of international humanitarian law, which is the law governing the conduct of hostilities. This is also known as the law of war or the law of armed conflict. All countries in the world “are bound by the four Geneva Conventions of 1949, which, in times of armed conflict, protect wounded, sick and shipwrecked members of the armed forces, prisoners of war, and civilians.”<sup>15</sup> Over three-quarters of all States are currently party to the two 1977 Protocols additional to the Conventions.<sup>16</sup> Additional Protocol I protects the victims of international armed conflicts and Additional Protocol II (Protocol II) the victims of non-international armed conflicts.<sup>17</sup>

The first provision of international law on non-international armed conflict was Common Article 3 to the Geneva Conventions.<sup>18</sup> Protocol II came later and was designed to develop the law of internal armed conflict beyond the limited concepts outlined in Common Article 3. It was the first international treaty devoted exclusively to non-international armed conflicts.<sup>19</sup>

Protocol II applies in non-international armed conflict taking place in the territory of a Contracting State between the armed forces and dissident armed forces or other organized armed groups with a responsible command and territorial control.<sup>20</sup> Protocol II is applicable only in non-international armed

<sup>12</sup> Seibert-Fohr, *supra* note 8, ¶ 1.

<sup>13</sup> Anja Seibert-Fohr, *Transitional Justice in Post-conflict Situations* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (MPEPIL) ¶ 2-5 2011 (Rüdiger Wolfrum ed., 2010), [opil.ouplaw.com/home/EPIL](http://opil.ouplaw.com/home/EPIL).

<sup>14</sup> José E. Alvarez, *Alternatives to International Criminal Justice*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 25, 34 (Antonio Cassese, ed., 2009) (“Amnesties are nonetheless the most consistently used ‘alternative’ to national or international criminal accountability. . . . [T]he fact remains that amnesties have been deployed by virtually every society in every age and will probably continue to be at least attempted even in the age of internationalized criminal courts.”).

<sup>15</sup> Int’l Comm. of the Red Cross, *The Geneva Conventions of 1949 and their Additional Protocols* (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> (last visited Dec. 10, 2015).

<sup>16</sup> Int’l Comm. of the Red Cross, *The ICRC’s Mandate and Mission*, <https://www.icrc.org/en/man-date-and-mission> (last visited Dec. 10, 2015).

<sup>17</sup> *Id.*

<sup>18</sup> Int’l Comm. of the Red Cross, *The Geneva Conventions of 1949 and their Additional Protocols*, *supra* note 15.

<sup>19</sup> *Id.*

<sup>20</sup> Protocol II, *supra* note 6, art. 1.

conflicts involving a High Contracting Party and a dissident armed group exercising some territorial control.<sup>21</sup>

According to the International Committee of the Red Cross (ICRC), the leading authority on the Geneva Conventions, “in the years since the adoption of Protocol II, there has been an emergent acceptance of the principles underlying Protocol II, if not the Protocol itself in its entirety.”<sup>22</sup> An ICRC study of customary international humanitarian law concluded that Additional Protocol II had been accepted by States as declaratory of customary international law.<sup>23</sup> As such, it arguably applies even to States that have not formally adopted it. Protocol II was adopted at the “Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts,” which took place in Geneva from 1974 to 1977.<sup>24</sup> Colombia participated in the conference and joined in its adoption.<sup>25</sup> Colombia ratified the Protocol in 1995.<sup>26</sup>

The Protocol’s provision on amnesty was included in the first draft that the ICRC submitted to the conference.<sup>27</sup> The provision remained substantially similar throughout the negotiations and there was wide consensus in favor of the provision.<sup>28</sup> Indeed, no State contested the idea that amnesty may be granted for participation in hostilities at the end of conflicts.<sup>29</sup> The debate concerning the provision centered on whether amnesty should be mandatory or recommended and who has the power to grant such amnesty.<sup>30</sup> However, the basic idea of such amnesty was not contested.

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<sup>21</sup> See *id.* (stating that the article does not apply to international conflict related to Protocol I).

<sup>22</sup> Emily Crawford, *Geneva Conventions Additional Protocols II (1977)*, in 2 THE LAW OF ARMED CONFLICT AND THE USE OF FORCE: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 390, 392 (Frauke Lachenmann & Rüdiger Wolfrum eds., 2017).

<sup>23</sup> 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, 188–90 (prtg. 2009).

<sup>24</sup> See Library of Congress, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (2010), [https://www.loc.gov/tr/frd/Military\\_Law/RC-dipl-conference-records.html](https://www.loc.gov/tr/frd/Military_Law/RC-dipl-conference-records.html) (last visited on Jan. 9, 2017).

<sup>25</sup> 1 INT’L COMM. OF THE RED CROSS, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 4–5 (1978).

<sup>26</sup> Int’l Comm. of the Red Cross, List of State Parties to Protocol II, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=475](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475) (last visited Jan. 9, 2017).

<sup>27</sup> See 4 INT’L COMM. OF THE RED CROSS, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 32–36 (1978) (outlining the suggested amendments to the draft Protocol II’s Article 10: Penal Prosecutions that would later become Article 6).

<sup>28</sup> See *id.*; see also Int’l Comm. of the Red Cross, Introduction to Online Archive of Protocol II Provisions, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument> (last visited Jan. 9, 2017) (stating that the “essential substance of the draft” remained intact during the amendment process before the Diplomatic Conference).

<sup>29</sup> See *id.*, at 32–36 (the table of amendments for Article 10: Penal Prosecutions, discussing amnesty, shows that no party suggested removing the provision).

<sup>30</sup> See Naomi Roht-Arriaza, *Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitations, and Superior Orders*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 57, 59 (Naomi Roht-Arriaza ed., 1995) (discussing the debate over the non-mandatory nature of the amnesty provision during the negotiations for Protocol II).

## II. PROTOCOL II AND THE COLOMBIAN CONFLICT

The conflict between the Colombian government, a High Contracting Party, and the FARC, a dissident armed group with territorial control, indisputably falls under Protocol II. Colombian courts have also held that it applies to the conflict between the Colombian army and the FARC,<sup>31</sup> and, according to the Colombian Constitutional Court, the Protocol is part of the “Constitutional Block.”<sup>32</sup> Protocol II is also binding on Colombia as customary international law.

The purpose of Article 6.5 of Protocol II, and the amnesty it calls for, is to assist the return to normal life in countries that have suffered internal conflict. The Protocol at a minimum actively encourages States to adopt such amnesty by using the word “shall”:

At the end of hostilities, the authorities in power *shall* endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.<sup>33</sup>

Article 6.5 is quite restrictive, however, and is concerned strictly with combatant immunity—that is, only conduct related to normal or standard participation in hostilities. It does not extend to conduct that amounts to war crimes and other serious international crimes, including at a minimum, crimes against humanity and genocide.<sup>34</sup> At the time of its adoption, the Soviet Union stated, in explanation of its affirmative vote, that the provision could not be construed to enable war criminals, or those guilty of crimes against humanity, to evade punishment.<sup>35</sup> The ICRC itself has adopted this interpretation, which moreover is compatible with the obligation under the Conventions to prosecute alleged perpetrators of war crimes.<sup>36</sup>

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<sup>31</sup> Corte Suprema de Justicia (C.S.J.) [Supreme Court], Sala. de Casación Penal – Segunda Instancia de Justicia y Paz septiembre 21, 2009, M.P: Sigifredo Espinoza, Radicado 32.022, Gaceta Judicial [G.J.] (No. 299, P. 195) (Colom.). (ruling that Common Article 3 and Additional Protocol II are applicable to the Colombian conflict); República de Colombia, Ministerio de Defensa Nacional, Directiva Permanente No. 10 2007. June 6, 2007 (declaring that the provisions contained in both Common Article 3 and Additional Protocol II were applicable to the situation in Colombia).

<sup>32</sup> A “Constitutional Block” is “[a] set of norms and principles with constitutional rank that . . . encompasses 1) the Constitution *stricto sensu*, 2) international declarations of human rights, such as the Universal Declaration and the American Declaration, and 3) human rights treaties ratified by the States.” Manuel Eduardo Góngora Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* 162 (Inter-American Institute of Human Rights, 2011). See Corte Constitucional [C.C.] [Constitutional Court], abril 25, 2007, Sentencia C-291/07, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 1995, Sentencia C-225/95, Gaceta de la Corte Constitucional [G.C.C.] (p.46) (Colom.).

<sup>33</sup> Protocol II, *supra* note 6, art. 6.5 (emphasis added).

<sup>34</sup> Seibert-Fohr, *supra* note 8, ¶¶ 12–13.

<sup>35</sup> See Roht-Arriaza, *supra* note 30, at 59.

<sup>36</sup> Int’l Comm. of the Red Cross, *Customary International Law, Rule 159: Amnesty*, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule159#Fn\\_41\\_10](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule159#Fn_41_10) (last visited Dec. 10, 2015). Some transitional justice scholars have argued that this interpretation of Article 6(5) is an overreach and that neither the Soviet Union’s explanation of vote nor state practice provides sufficient ground for such an

A key question is whether amnesty pursuant to the Protocol extends to certain offenses under domestic law connected with the participation in hostilities, commonly referred to as political crimes<sup>37</sup> so long as they do not amount to war crimes, grave breaches of the Geneva Conventions, or other international crimes. There is no internationally accepted definition of political crimes and each country has defined the concept differently. The Protocol itself does not include a list of crimes connected to the participation in hostilities that could benefit from amnesty and there are no authoritative interpretations of what those crimes might be. A study by the author of amnesties adopted under the Protocol that have been accepted both domestically and by the international community, including the UN, shows that the offenses deemed “related to the participation in hostilities” are the same as the notion of political crimes in other areas of the law—in extradition law, for example.

Article 6.5 of Protocol II can therefore be deemed to apply to political crimes and by extension to crimes connected to political crimes. For a political crime to qualify for amnesty under the Protocol, however, it must not constitute a war crime or a serious international crime including genocide and crime against humanity. The same applies to connected crimes. Even if the original political crime qualifies for amnesty under Protocol II, the connected crime cannot be amnestied if it is a war crime, and vice versa. For example, if a rebel group engages in an attack against government troops, the attack itself may be considered a political crime and subject to amnesty under Protocol II; however, if in the course of the attack, the group indiscriminately murders civilians, this connected crime is a war crime and cannot be amnestied. Protocol II is therefore not a blanket endorsement of amnesty for political crimes. It includes an important caveat, which is that the acts must not constitute war crimes or serious international crimes. This is an important distinction to keep in mind as we discuss and analyze amnesty under Protocol II throughout this brief.

### III. AMNESTY FOR POLITICAL CRIMES UNDER PROTOCOL II IS PERMISSIBLE UNDER THE ROME STATUTE

Colombia signed the Rome Statute of the International Criminal Court (ICC) on December 10, 1998 and ratified it on August 5, 2002.<sup>38</sup> Even though the Statute prohibits reservations, Colombia made a declaration under Article 124 and

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interpretation. They point to the fact that amnesties including those covering grave violations continue to be adopted and no international treaty to date includes such a prohibition. *See*, Legal Status of Amnesty, Third party intervention in the case of *Marguš v. Croatia*, Application no. 4455/10 (May 29, 2013); Louise Mallinder, *The End Of Amnesty Or Regional Overreach? Interpreting The Erosion Of South America's Amnesty Laws*, 65 INT'L & COMP. L. Q., no. 3, 2016, at 645–80; Louise Mallinder, *Amnesties' Challenge to the Global Accountability Norm?: Interpreting Regional and International Trends in Amnesty Enactment*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY 69, 69–96 (Francesca Lessa & Leigh A. Payne eds., 2012).

<sup>37</sup> Dieter Fleck, *The Law of Non-International Armed Conflict*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 581, 581–610 (Dieter Fleck ed., 3rd ed. 2013).

<sup>38</sup> Rome Statute of the International Criminal Court, *opened for signature* Jul. 17, 1998, U.N.T.S. Vol. 2187 (entered into force July 1, 2002).

opted out of ICC's jurisdiction for seven years regarding war crimes when they are alleged to have been committed by Colombian nationals or on Colombian territory.<sup>39</sup> By doing so, the government at the time sought to gain more time and freedom to provide as broadly as possible an amnesty to illegal armed groups participating in the longstanding civil conflict.

Colombia's declaration expired on November 1, 2009. Therefore, the ICC now has full jurisdiction over crimes against humanity, war crimes, and genocide regarding Colombia. The Office of the Prosecutor of the ICC (OTP) has been examining the situation in Colombia and has assessed it in its 2011 report on preliminary examination activities<sup>40</sup> and in its 2012 interim report.<sup>41</sup> In the latter, the OTP concluded that there were reasonable bases to believe that crimes against humanity and war crimes have been committed by the FARC, other armed groups, and state actors in Colombia and that those crimes fall under the jurisdiction of the ICC.<sup>42</sup> Therefore, it decided to open a preliminary examination of the situation in Colombia. Since then, the OTP has conducted a visit (April 2013) and a mission (February 2015) and has issued a report on Colombia.<sup>43</sup> In September 2015, the OPT welcomed the announcement by the Colombian Government and the FARC of an agreement on transitional justice, which includes the creation of the SJP and the provision on amnesty for political crimes. The OPT announced that it will analyze the agreement as part of its preliminary examination of the situation in Colombia<sup>44</sup> and noted with approval that the agreement excludes the granting of amnesty for war crimes and crimes against humanity.

The Rome Statute addresses only serious international crimes such as war crimes, crimes against humanity, and genocide. It has already been established that amnesties for these crimes would not be permissible under Protocol II. The Rome Statute does not address political crimes and is therefore not concerned with the issue of amnesty for political crimes under Protocol II. In fact, the deputy prosecutor of the ICC, speaking at a conference in Bogota organized by the Vance Center in May 2015, stated that the OTP takes no position on the question of amnesty for political crimes, such as rebellion, treason, or sedition, as these crimes do not fall under the Court's jurisdiction.<sup>45</sup> It follows that amnesty for such crimes therefore would not contravene the Rome Statute.

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<sup>39</sup> Rome Statute of the International Criminal Court, Colombia Declarations, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en#EndDec).

<sup>40</sup> The Office of the Prosecutor of the International Criminal Court, *Report on Preliminary Examination Activities* ¶¶ 61–87, Dec. 13, 2011.

<sup>41</sup> The Office of the Prosecutor of the International Criminal Court, *Situation in Colombia Interim Report*, Nov. 2012.

<sup>42</sup> *Id.* ¶¶ 5–6.

<sup>43</sup> International Criminal Court, *Colombia*, [https://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/colombia/Pages/colombia.aspx](https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/colombia/Pages/colombia.aspx) (last visited Mar. 8, 2016).

<sup>44</sup> See Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia, [https://www.icc-cpi.int/Pages/item.aspx?name=otp\\_stat\\_24-09-2015](https://www.icc-cpi.int/Pages/item.aspx?name=otp_stat_24-09-2015) (last visited Mar. 8, 2016).

<sup>45</sup> James Stewart, Deputy Prosecutor, Int'l Criminal Court, *Transitional Justice in Colombia and the Role of the International Criminal Court*, Keynote Speech (May 13, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-13-05-2015>.

Less clear is the issue of connected crimes, such as murder or arbitrary detention that may have been committed in pursuance of these political crimes. Logic would dictate that the permissibility of amnesty for political crimes would extend to such connected crimes lest the amnesty be an empty gesture. Indeed, the crimes of rebellion, sedition, and treason almost always involve the commission of other violent crimes and the OTP must have taken into account this scenario when it stated that it takes no position on amnesty for political crimes. Such connected crimes can therefore also be amnestied so long as they do not reach the threshold of "widespread and systematic attack directed against the civilian population"<sup>46</sup> which could constitute crimes against humanity or are not committed "as part of a plan or policy or as part of a large-scale commission of such crimes"<sup>47</sup> which could constitute war crimes. It is worth noting that the OTP's statement following the announcement of the transitional justice agreement is silent on the provision of amnesty for political crimes and crimes connected to political crimes. This would be consistent with their earlier statement that political crimes of the kinds contemplated in the Colombian amnesty fall outside the jurisdiction of the Court.

#### IV. AMNESTY FOR POLITICAL CRIMES UNDER PROTOCOL II IS CONSISTENT WITH THE POSITION OF THE UN ON AMNESTY

The UN has also recognized the value of amnesty to facilitate the reintegration of members of armed opposition forces and to foster national reconciliation, while endorsing the view that amnesties are not permissible for "international crimes," such as war crimes, genocide, crimes against humanity, or other serious violations of international humanitarian law.<sup>48</sup> The UN Secretary General has included a reservation to that effect in the case of Sierra Leone. In 2004, the UN Secretary General reported that "carefully crafted amnesties can help in the return and reintegration of [armed groups] and should be encouraged."<sup>49</sup> UN Secretary General Kofi Annan noted in 2000 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."<sup>50</sup> UN bodies, including the Security Council, have encouraged, sponsored, and supported various amnesties. For example, the UN Security Council encouraged the granting of amnesties for political crimes in South Africa, Angola, and Croatia as has the UN General

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<sup>46</sup> Rome Statute of the International Criminal Court art. 7, *opened for signature* Jul. 17, 1998, U.N.T.S. Vol. 2187 (entered into force July 1, 2002).

<sup>47</sup> Rome Statute of the International Criminal Court art. 8, *opened for signature* Jul. 17, 1998, U.N.T.S. Vol. 2187 (entered into force July 1, 2002).

<sup>48</sup> U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 22, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter *U.N. Report on Sierra Leone*].

<sup>49</sup> U.N. Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 32, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *U.N. Report on Rule of Law and Transitional Justice*].

<sup>50</sup> *U.N. Report on Sierra Leone*, *supra* note 48.

Assembly in Afghanistan and Kosovo.<sup>51</sup> The UN Commission on Human Rights adopted resolutions in support of amnesty for political crimes in Bosnia and Herzegovina and Sudan.<sup>52</sup>

The current UN position can thus be described as favoring amnesties so long as they do not include war crimes and other serious international crimes. It is worth noting that the UN's norms and standards have been developed and adopted by countries across the globe and have been accommodated by the full range of legal systems of Member States, whether based in common law, civil law, Islamic law, or other legal traditions and therefore bring a certain legitimacy that individual state practice alone could not achieve.<sup>53</sup>

#### V. AMNESTY FOR POLITICAL CRIMES UNDER PROTOCOL II IS PERMISSIBLE UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS

The jurisprudence of the Inter-American Human Rights System is unequivocal on the impermissibility of amnesty for grave human rights violations.<sup>54</sup> The Inter-American Commission on Human Rights (Commission or IACHR) and the Inter-American Court of Human Rights (Court or IACtHR) have reviewed such amnesties in countries throughout the hemisphere and found them to be incompatible with the American Convention on Human Rights (Convention).<sup>55</sup>

We, however, must separate amnesty for grave human rights violations from amnesty for political crimes. Neither the Commission nor the Court has yet ruled on amnesty for political crimes. Therefore, should the Colombian amnesty be challenged in the Inter-American System, it would be an issue of first impression. In the following section, we look at the jurisprudence of the Commission and Court on amnesty in general and draw some inferences about the compatibility of the Colombian amnesty with this jurisprudence.

The Commission in several cases has reiterated the same view on amnesty, a view, which in the Commission's own words, is now a crystallized doctrine. The doctrine is the following: amnesty laws violate various provisions of the American Declaration as well as the Convention, and amnesty laws and other legislative measures that prevent or halt the investigation and prosecution of state agents who may be responsible for serious violations of the American Declaration

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<sup>51</sup> S.C. Res. 1120, ¶¶ 724–25 (July 14, 1997).

<sup>52</sup> S.C. Res. 190, ¶ 1(c) (June 9, 1964); S.C. Res. 191, ¶ 4(b) (June 18, 1964); S.C. Res. 473, ¶ 7(a) (June 13, 1980); S.C. Res. 1055, ¶ 9 (May 8, 1996); S.C. Res. 1120, ¶ 79 (July 14, 1997); G.A. Res. 47/141, ¶ 8 (Mar. 1, 1993); G.A. Res. 48/152, ¶ 12 (Feb. 7, 1994); G.A. Res. 53/164 (Feb. 25, 1999).

<sup>53</sup> *U.N. Report on Rule of Law and Transitional Justice*, *supra* note 49.

<sup>54</sup> *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001).

<sup>55</sup> *Id.*; *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 138(m) (June 15, 2005); *Gomes Lund v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 180 (Nov. 24, 2010); *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 225 (Feb. 24, 2011); Inter-Am. Comm'n H.R., *Report on the Human Rights Situation in El Salvador*, OEA/Ser.L/II.85, doc. 28 rev. (1994).

or Convention violate multiple provisions of said instruments.<sup>56</sup> Indeed, in many ways, the Commission's view on amnesty is quite strict, even compared with the Court's.

The Inter-American Commission has had the opportunity to analyze Article 6.5 of Protocol II in light of the American Declaration and Convention, and in particular, in relation to the conflict in Colombia. According to the Commission, the amnesty permitted under Article 6.5 is not applicable in cases of serious human rights violations, as interpreted by the Inter-American Court's jurisprudence.<sup>57</sup> These serious human rights violations, in the Commission's view, are not limited to just the crimes recognized under the Geneva Conventions but include a larger panoply of crimes.<sup>58</sup> For States, such as Colombia, that are subject to human rights obligations under the Declaration and Convention, the prohibition on amnesty extends not only to the crimes prohibited under the Geneva Conventions, but also to other serious violations of physical integrity prohibited by the Convention and Declaration, as interpreted by the Commission and the Court.<sup>59</sup> Commenting on the ICRC's study on customary international humanitarian law in particular, the IACHR points out that the study does not consider those other international human rights obligations that are binding upon the States, namely those contained in the Declaration and Convention.<sup>60</sup> Those international human rights obligations further restrict States' actions under the Geneva Conventions; therefore, conduct that may be legal under the Geneva Conventions may not be so under the American Convention.<sup>61</sup>

Even if it is clear that amnesty for political crimes not amounting to war crimes is legitimate under the Geneva Conventions, a separate analysis must be made under the Convention. As a party to the Convention, Colombia is bound by its provisions and the jurisprudence of the IACHR and the IACtHR interpreting the Convention. Only those crimes that are not considered serious human rights violations in the Inter-American jurisprudence can qualify as political crimes and be eligible for amnesty. As the IACtHR stated: amnesty laws that extend to grave human rights violations, violate inalienable rights recognized under the Convention and prevent the investigation, prosecution, and punishment of grave human rights violations are incompatible with the Convention.<sup>62</sup>

The seminal case on amnesty in the Inter-American system is *Barrios Altos v. Peru*, where the Petitioners challenged, among other things, the application of the amnesty law in Peru, which prevented the investigation of the violations alleged in the case. In a now famous passage, the Court held that:

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<sup>56</sup> See Inter-Am. Comm'n H.R., *Report on the Human Rights Situation in El Salvador*, OEA/Ser.L/V/II.85, doc. 28 rev.

(1994).

<sup>57</sup> Inter-Am. Comm'n H.R., *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, ¶ 269, OEA/Ser.L/V/II., doc. 49/13 (Dec. 31, 2013).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001); *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶138(m) (June 15, 2005); *Gomes Lund v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 180 (Nov. 24, 2010); *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 225 (Feb. 24, 2011).

[A]ll amnesty provisions . . . 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>63</sup>

The Court also found that the amnesty law violated the victims' right to judicial protection and that "[t]his type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation."<sup>64</sup>

The Court reiterated this position in a subsequent Peruvian case, *La Cantuta v. Peru*.<sup>65</sup> In this case, the Court found that Peru had violated the Convention by applying the amnesty law after it had been declared null and void by the Court in the *Barrios Altos* case. The Court classified the events in this case as "international crimes" and "crimes against humanity."<sup>66</sup>

In the case of *Almonacid-Arellano v. Chile*, the Court struck down the amnesty law in Chile, finding: "[T]he Chilean State must carry out a judicial investigation of the facts related to Mr. Almonacid-Arellano's death, attribute responsibilities, and punish all those who turn out to be participants."<sup>67</sup> The Court first looked at whether the murder of Mr. Almonacid-Arellano was a crime against humanity and found that it was.<sup>68</sup> The Court then proceeded to find that Chile had violated its obligations under the Convention by keeping the amnesty law on the books even though it was not systematically applied. The Court found that Chile should have repealed or annulled the law.

In the case *Moiwana Community v. Suriname*,<sup>69</sup> the Court had a chance to look at a different kind of amnesty law, one that most closely resembles the Colombian amnesty. The amnesty law excluded crimes against humanity, but the domestic courts had classified a series of extrajudicial executions as ordinary crimes, not crimes against humanity, and applied the amnesty to the case. The State argued that it was within its powers to grant amnesty for conduct that did not amount to crimes against humanity and pointed to similar amnesties enacted elsewhere (although it did not specify which ones). It further argued that it was within a state's discretion to waive prosecution of certain conduct if such a decision protected other interests "that form part of that government's responsibilities, such as bringing about peace and order."<sup>70</sup> Although it did not

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<sup>63</sup> *Barrios Altos v. Peru*, Judgment, ¶ 41.

<sup>64</sup> *Id.* ¶ 43.

<sup>65</sup> *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006).

<sup>66</sup> *Id.* ¶ 95.

<sup>67</sup> *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 150 (Sept. 26, 2006).

<sup>68</sup> *Id.* ¶¶ 90, 99.

<sup>69</sup> *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

<sup>70</sup> *Id.* ¶ 138(m).

have the occasion to decide on the validity of the amnesty law itself, the Court nevertheless emphasized that:

[I]n response to the extrajudicial killings that occurred . . . , the foremost remedy to be provided by the State is an effective, swift investigation and judicial process, leading to the clarification of the facts, punishment of the responsible parties, and appropriate compensation of the victims.<sup>71</sup>

It further recalled that the amnesty law, in any case, could not pose an obstacle to the investigation and prosecution of the alleged violations.

In *Gelman v. Uruguay*,<sup>72</sup> the Court analyzed the application of Uruguay's Expiry Law, which prevented the investigation of the forced disappearance of Maria Claudia Gelman and other violations committed against the victims in the case. The amnesty law, which covered police and security agents, had been upheld by Uruguay's highest court and ratified in a referendum. The Inter-American Court reiterated its position on "the non-compatibility of amnesty laws related to serious human rights violations with international law and the international obligations of States."<sup>73</sup> The Court also made reference to article 6.5 of Protocol II and cited with approval the ICRC's interpretation that it does not apply to war crimes and crimes against humanity. The Court also went to great lengths to point out that other jurisdictions, including UN treaty bodies, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, and domestic courts of members of the Organization of American States also have found proposed amnesty for serious human rights violations to be contrary to established international norms. The Court cited as examples of serious violations "torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance."<sup>74</sup> The Court further held that:

[A]mnesty laws are, in cases of serious violations of human rights, expressly incompatible with the letter and spirit of the Pact of San José, given that they violate the provisions of Articles 1(1) and 2, that is, in that they impede the investigation and punishment of those responsible for serious human rights violations and, consequently, impede access to victims and their families to the truth of what happened and to the corresponding reparation, thereby hindering the full, timely, and effective rule of justice in the relevant cases. This, in turn, favors impunity and arbitrariness and also seriously affects the rule of law, reason for which, in light of International Law, they have been declared to have no legal effect.<sup>75</sup>

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<sup>71</sup> *Id.* ¶ 166(m).

<sup>72</sup> *Gelman v. Uruguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011).

<sup>73</sup> *Id.* ¶ 195.

<sup>74</sup> *Id.* ¶ 225.

<sup>75</sup> *Id.* ¶ 226.

The Court continued, saying: “[A]mnesty laws affect the international obligation of the State in regard to the investigation and punishment of serious human rights violations”<sup>76</sup> and “[t]he incompatibility with the Convention includes amnesties of serious human rights violations . . . .”<sup>77</sup> The Court declared without effect the Uruguayan Expiry Law, finding irrelevant the fact that the amnesty had been approved by popular referendum.

*Gomes Lund v. Brazil* is one of the Inter-American Court’s most recent amnesty decisions involving the arbitrary detention, torture, and forced disappearance of members of the communist party and peasants during a military campaign to eradicate the guerrilla of Araguaia.<sup>78</sup> The Court reiterated its ruling in cases, such as *Almonacid*, *Barrios Altos* and *La Cantuta*, regarding the non-applicability of amnesty in cases of grave human rights violations. It then struck down the amnesty law declaring it without legal effect. Later, the Court clarified that the “Amnesty Law . . . lacks legal effects regarding serious human rights violations.”<sup>79</sup> Does this mean that the amnesty would still be valid for other less serious political crimes? The Court recognized as a positive step the creation of a truth commission, particularly in complying with the right to truth, but found that “the activities and information that this commission will eventually obtain do not substitute the obligation of the State to establish the truth and ensure the legal determination of individual responsibility by means of criminal legal procedures.”<sup>80</sup>

In the next amnesty case, *Massacre of El Mozote and nearby Places v. El Salvador*,<sup>81</sup> the Inter-American Court seemed to signal a willingness to depart, at least to some extent, from its earlier stance on amnesty. The Court took into consideration the negotiation process that brought an end to the conflict citing, in several parts, the peace agreements. The Court seemed to give serious consideration to the intent and objectives of the parties to the peace accord. For example, it cited the terms of the peace accord regarding ending impunity and found that the amnesty law directly contradicted this objective and is therefore contrary to the letter and spirit of the peace accord. The Court also took into account the fact that the amnesty arose in the context of an internal armed conflict to which Additional Protocol II applied and found it “pertinent”<sup>82</sup> to analyze the compatibility of the amnesty with the American Convention “in light” of the provisions of Protocol II.<sup>83</sup> The Court reiterated its position that amnesty is

<sup>76</sup> *Id.* ¶ 227.

<sup>77</sup> *Id.* ¶ 229.

<sup>78</sup> See generally *Gomes Lund v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.219 (Nov. 24, 2010).

<sup>79</sup> *Id.* ¶ 180.

<sup>80</sup> *Id.* 297.

<sup>81</sup> *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.225 (Oct. 25, 2012).

<sup>82</sup> *Id.* ¶ 284.

<sup>83</sup> The Court has held that the Geneva Conventions may be used as a tool of interpretation of the American Convention but cannot be used to attribute responsibility to states for their violations. *E.g.*, “Mapiripán Massacre” v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 134, ¶ 115 (Sept. 15, 2005); *Bámaca Velásquez v. Guatemala*, Merits, Inter-Am. Ct. H.R. (ser.C) No. 70, ¶ 209 (Nov. 25, 2000); *Serrano Cruz Sisters v. El Salvador*, Preliminary Objections, Inter-Am. Ct. H.R. (ser.C) No. 118, ¶ 119 (Nov. 23, 2004).

prohibited for grave human rights violations, such as war crimes, but left open the possibility that amnesty might be permissible in cases of lesser violations. It ultimately found that the application of the amnesty law to the *El Mozote* case lacked legal effect because it violated the State's obligation to investigate, prosecute, and punish grave human rights violations.

The concurring decision of Judge Garcia-Sayan, signed by four other judges, was perhaps more reflective of the Court's perceived shifting stance on amnesty. Judge Sayan made the case for looking at the context of the enactment of an amnesty and its objectives, particularly in situations of internal conflict, citing Article 6.5 of Protocol II. For Judge Sayan, it was "necessary" for the Court to consider the peace accords and the provisions of Protocol II.<sup>84</sup>

In its latest amnesty case, *García Lucero v. Chile*, which again challenged the Chilean amnesty law, the Court reiterated its finding in *Almonacid* that the amnesty law violates the American Convention, because it seeks to grant amnesty for crimes against humanity and prevents the investigation and punishment of those responsible.<sup>85</sup> The Court however declined to decide on the validity of the amnesty law in this specific case because "it has not been proved that the mere existence of Decree Law No. 2.191 was the cause of the failure to open an investigation into what happened in the case of Mr. García Lucero . . . ."<sup>86</sup>

The Inter-American Court's jurisprudence on amnesty is not homogenous. The one consistent trend seems to be that amnesty is incompatible with the Convention if it concerns grave human rights violations, prevents the investigation, judgment, and punishment of perpetrators, and violates victims' rights to reparations.<sup>87</sup>

Given the lack of full clarity in the Inter-American Court's jurisprudence, it is hard to predict what kind of amnesty might withstand a challenge before the Court. The main uncertainties concern: (1) whether the Court's position that amnesty is impermissible in cases of grave human rights violations means that it is permissible in cases of lesser violations; and (2) what violations are considered grave human rights violations. Also unclear is how the Court would balance the right of victims, particularly the right to judicial guarantees and judicial protection, with the right to peace and the political objectives achieved by the amnesty.

Given the Court's perceived shifting stance on amnesty, however, it may well use the Colombian case to clarify its jurisprudence. More interesting would be further development of the Court's jurisprudence using the Geneva Conventions as a tool of interpretation of the American Convention. Like in *El Mozote*, Protocol II also applies to the conflict in Colombia, and the Court is likely to analyze the Colombian amnesty "in light" of the Protocol's provision on amnesty under Article 6.5, which allows amnesty for acts related to the participation in hostilities so long as they do not rise to the level of war crimes. The decision in

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<sup>84</sup> Massacres of El Mozote, Concurring Opinion of Judge Diego Garcia-Sayán, ¶ 10.

<sup>85</sup> *García Lucero v. Chile*, Preliminary Objection, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 267, ¶¶ 150, 154 (Aug. 28, 2013).

<sup>86</sup> *García Lucero*, ¶ 154.

<sup>87</sup> See Luigi Crema, *Are Amnesties Still an Option? A Non-Policy Based Critique of the Inter-American Approach*, (The Center for Civil and Human Rights, University of Notre Dame, Working Paper No. 6, 2013).

*El Mozote* seems to suggest the Court's willingness to go in that direction, and it may very well do so in the case of the Colombian amnesty.

#### VI. THE DEFINITION OF POLITICAL CRIMES AND CRIMES THAT CAN BE CONSIDERED CONNECTED TO POLITICAL CRIMES FOR PURPOSES OF AMNESTY UNDER PROTOCOL II

There is no generally accepted or authoritative definition of political crimes in international law. The most reliable definition of the concept of political crimes is found in extradition law. A political offense exception is found in almost all extradition treaties, and domestic courts are often called upon to interpret this definition. Extradition law and domestic judicial interpretation are the principal sources for the “generally accepted and defensible definition of political [crimes].”<sup>88</sup> For example, South Africa's Truth and Reconciliation Commission relied on the political offenses definition in extradition law to determine whether to grant amnesty.<sup>89</sup> It is reported that the Commission relied on a survey of extradition law by the former president of the European Commission of Human Rights<sup>90</sup> for the UN.<sup>91</sup>

Based on this general approach under extradition treaties, we can identify two types of political crimes. The first type is crimes against the state as an institution, such as treason, sedition, and espionage, which are “pure” political crimes. The second type is “related political crimes,” which are ordinary crimes, sometimes even serious crimes such as murder, that become a political crime because “the perpetrator pursued some political purpose, [or] the act had some political consequence or was performed in a political context.”<sup>92</sup>

When called upon to determine whether the political offense exception applies in extradition cases, domestic courts have developed three different approaches:

- The objective approach looks at the nature of the act regardless of the context or the motivations of the actor and identifies some acts as purely political. Under this approach, only acts that are defined as crimes against the

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<sup>88</sup> Ronald C. 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, 224 (2002).

<sup>89</sup> See Sam Garkawe, *The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?*, 27 MELB. U. L. REV. 334, 353 (2003) (stating that the two main criteria for the Truth and Reconciliation Commission's amnesty process were a result of “a survey of state practice in defining and applying the ‘political offence’ exception to extradition law”).

<sup>90</sup> Established in 1954, the European Commission on Human Rights considered cases first, before they went on to the European Court of Human Rights. The Commission was abolished in 1998 and its functions were assumed by the Court. International Justice Resource Center, *European Court of Human Rights*, <http://www.ijrcenter.org/european-court-of-human-rights> (last visited January 20, 2017).

<sup>91</sup> Slye, *supra* note 88, at 227.

<sup>92</sup> Johan Rautenbach, *Namibia—The Release of Political Prisoners Revisited*, 15 S. AFR. Y.B. INT'L L. 148–49, (1989–90).

- state, such as sedition and treason, qualify as political crimes.
- The objective context approach looks at the context in which the act was committed—for example, in a conflict or uprising—and looks at the relationship between the act in question and the conflict. In its narrowest version, this approach requires that the act be part of a power struggle to gain control of the state, but the mere fact that an act is committed with a motive to further some political cause is not enough to make it political for purposes of the exception.<sup>93</sup>
  - The subjective motive approach looks at the motivation of the actor, whether he or she committed the act out of political conviction or not. This approach identifies both the political and common criminal aspects of the crime, and asks whether the political aspect outweighs the common criminal aspect when looking at the accused's motivation, the circumstances surrounding the commission of the crime, and the proportionality between the political objectives pursued and the means employed.

The first two objective tests are found mostly in common law systems, while the third subjective test is commonly found in civil law systems.<sup>94</sup>

Another source of guidance for the definition of political crimes and crimes connected to political crimes are the Norgaard Principles, developed by and named for Carl Aage Norgaard, a Danish national and president of the European Commission on Human Rights who was asked at the time of the Namibian settlement to frame guidelines defining the concept of a political prisoner.

For Norgaard, the quintessential element for a crime to be considered a political crime is the existence of a political motive. One must look at the political advantage gained by committing the act, the specific act committed, and the “degree of connection between the criminal offence and the political element.”<sup>95</sup> Moreover, “it is not essential that the person who actually carried out the offence should himself be politically motivated. In this view, an offence committed under orders or duress may be political if its commission was procured for a political purpose.”<sup>96</sup> There is no requirement that a crime be reasonable or necessary to be considered a political crime. The following factors, dubbed the Norgaard Principles, are to be taken into account in determining whether an offense is political or not:

- (1) the motivation of the offender—that is, whether the crime was committed for a political or personal motive;

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<sup>93</sup> Slye, *supra* note 88, at 224–25.

<sup>94</sup> *Id.* at 225.

<sup>95</sup> Rautenbach, *supra* note 92, at 150.

<sup>96</sup> *Id.* at 152.

- (2) the circumstances in which the crime was committed, in particular whether it was committed in the course of or as part of a political uprising or disturbance;
- (3) the nature of the political objective, whether for instance it is an attempt to overthrow the government or force a change in policy;
- (4) the legal and factual nature of the crime, including its gravity;
- (5) the object of the crime—that is, whether it was committed against government personnel and property or directed primarily against private citizens and their property; and
- (6) the relationship between the crime and the political objective being pursued—for example, the directness, proximity, relationship or proportionality between the crime and the objective pursued.<sup>97</sup>

Norgaard also argued that it is not enough that a crime was committed following orders or under duress for it to be a political crime.<sup>98</sup> It is also important to analyze the connection between the act and the political objective, and whether the act actually furthers the political objective. For example, a member of the rebel group in Namibia stayed at the house of a father and his sixteen-year-old daughter.<sup>99</sup> The rebel was dressed in uniform and carried a weapon. He sexually assaulted the daughter during the night.<sup>100</sup> Norgaard found that, even if this man was a member of the rebel group, the particular act in question—that is, the assault—was not part of his rebel activities and there was no political motive attached to it.<sup>101</sup> Therefore it could not be considered a political crime.

## VII. COMPARATIVE EXPERIENCES IN AMNESTY FOR POLITICAL CRIMES UNDER PROTOCOL II

We have selected a few examples of amnesties for political crimes that might shed helpful light on the concept, for purposes of analyzing the compatibility of the Colombian amnesty with Protocol II. These amnesties are similar to the Colombian amnesty in that they were enacted in the context of a non-international armed conflict, were the result of a negotiated peace agreement without clear victors, and covered political crimes.

This study is by no means exhaustive as there are many other examples of amnesties in non-international armed conflict that have not been included here.

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<sup>97</sup> See Emily H. McCarthy, *South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation?*, 3 MICH. J. RACE & L. 183, 209–210 (1997) (enumerating the Carl Aage Norgaard's factors).

<sup>98</sup> See Rautenbach, *supra* note 92, at 153.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

None of these examples in our judgment constitutes a fully unobjectionable amnesty. There are several aspects of these amnesties that are problematic in their conception and implementation. Despite such imperfections, however, many lessons and good practices can be gleaned from these examples, which may be useful to the Colombian experience. The study includes the amnesty laws of the following countries: South Africa (1995); Ivory Coast (2003 and 2007); Democratic Republic of the Congo (2003, 2005, 2009 and, 2014); Senegal (2005); Angola (2002); El Salvador (1992); Kosovo (1999); and the Central African Republic (2008). We identify major trends from the selected amnesties, discuss lessons learned, and draw some general connections with Colombia.

#### A. *Amnesty is Justified to Foster Peace and Reconciliation*

A true understanding of amnesty requires looking at the rationale behind the granting of the amnesty. States grant amnesty to achieve peacekeeping, nation-building, and reconciliation objectives. Historically, states in conflict considered amnesty a necessary means to end wars, to maintain tranquility, and to establish democracy—or, at least, civilian rule.<sup>102</sup> In this sense, amnesty can be understood as part of nation-building.<sup>103</sup> The countries that we surveyed have all adopted amnesties under the rationale of achieving peace and reconciliation.

The postscript of the Interim Constitution in South Africa expressly provided that amnesty would be granted to advance the goals of reconciliation and reconstruction of society.<sup>104</sup> The Promotion of National Unity and Reconciliation Act of 1995 (the “Act”) which established the Truth and Reconciliation Commission (TRC) expressly stated that the objective of the TRC “shall be to promote national unity and reconciliation.”<sup>105</sup> The decision by the Constitutional Court of South Africa, in a challenge to the Act’s amnesty provisions, made clear the centrality of reconciliation as well as disclosure of the truth regarding past atrocities as the motivations for the amnesty regime.<sup>106</sup> One of the justifications for the amnesty in South Africa was that the country was facing a military stalemate and neither side in the struggle—the state nor the liberation movements—had defeated the other, and hence nobody was in a position to enforce so-called victor’s justice.<sup>107</sup>

Even if reconciliation is the stated purpose of an amnesty, it does not always achieve this result or is not perceived by the population as having done so. A 1998 study by South Africa’s Centre for the Study of Violence and Reconciliation

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<sup>102</sup> Gwen K. Young, *Amnesty and Accountability*, 35 U.C. DAVIS L.R. 427, 434 (2002).

<sup>103</sup> *Id.* at 436.

<sup>104</sup> See Marianne Geula, Note, 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, 62 (2000) (discussing the postscript of the Interim Constitution in South Africa). In relevant part, the postscript states: “In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.” *Id.* (quoting S. Afr. (Interim) Const., 1993).

<sup>105</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 ch. 2, § 3 (S. Afr.).

<sup>106</sup> See *Azanian Peoples Organisation (Azapo) v. The President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC) (S. Afr.).

<sup>107</sup> See Gary J. Bass, *War Crime Tribunals*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 229, 236 (Keith E. Whittington et al. eds., 2008) (discussing the creation of the South African Truth and Reconciliation as a product of a military stalemate and lack of any “victor’s justice”).

and the Khulumani Support Group, which surveyed several hundred victims of human-rights abuse during the apartheid era, found that most felt that the TRC had failed to achieve reconciliation between the black and white communities. They believed that justice was a prerequisite for reconciliation rather than an alternative to it, and that the TRC had favored the perpetrators of abuse.<sup>108</sup> Some critics of the TRC argued that its “strong emphasis on amnesty led to judgment of the actions of individuals, rather than the effects of the apartheid system as a whole.”<sup>109</sup>

In El Salvador, the view was that there were no “losers” in the civil war.<sup>110</sup> The Salvadoran amnesty was thus seen as being an integral part of the country’s transition from war to peace.<sup>111</sup> In Kosovo, one of the rationales for the 2013 amnesty law<sup>112</sup> following the war with Serbia was to facilitate peace by encouraging all Kosovars to forget about the wartime past and offering nearly everyone a clean slate and equal opportunities under Kosovar law. The law pardoned local Serbs who agitated against the authority of Kosovo’s government after Kosovo proclaimed its independence from Serbia in 2008.<sup>113</sup> In the Ivory Coast, the overriding purpose of the amnesty law<sup>114</sup> was to contribute to national reconciliation, stability of the country, and to move beyond the war by offering a clean slate and equal opportunities. In Angola, the Lusaka Protocol, which brought a negotiated end to the conflict between the government and the rebel group National Union for the Total Independence of Angola (UNITA), included the provision of amnesty to all militants involved in the civil war. Law 4/2002, which implemented the amnesty, specified that it was a “necessary legal and political guarantee for the promotion and fulfillment of the process of national reconciliation.”<sup>115</sup>

The Central African Republic (CAR) passed a General Amnesty Law<sup>116</sup> in September 2008 that granted amnesty for crimes committed by the government

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<sup>108</sup> Jasmina Brankovic, *Accountability and National Reconciliation in South Africa*, 2 EDICIONES INFOJUS: DERECHOS HUMANOS, no. 4, 2013 at 55–86.

<sup>109</sup> Mich. State Univ., *Exploring the Truth and Reconciliation Commission* at 2, OVERCOMING APARTHEID, <http://overcomingapartheid.msu.edu/unit.php?id=65-24E-3&page=1> (last visited Jan. 10, 2017).

<sup>110</sup> Kevin Dolliver, Steven Kanel, & David Robeck, *El Salvador’s Amnesty Law: A Monument to Impunity?* (May 2, 2013) (capstone project, Latin American and Hemispheric Studies Program, George Washington University), <https://elliott.gwu.edu/sites/elliott.gwu.edu/files/downloads/acad/lahs/el-salvador-amnesty-2013.pdf> (last visited Jan. 10, 2017).

<sup>111</sup> *Id.*

<sup>112</sup> Ligjit Nr. 04/L-209 për amnistinë, GAZETA ZYRTARE E REPUBLIKËS SË KOSOVËS [G. ZYRTARE] [OFFICIAL GAZETTE OF THE REPUBLIC OF KOSOVA], 19 Sept. 2013 (Kos.), *English translation available at* <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8895>.

<sup>113</sup> Fatos Bytyci, *Kosovo adopts amnesty for minority Serbs*, REUTERS (July 11, 2013), <http://www.reuters.com/article/us-kosovo-serbia-amnesty-idUSBRE96A0P120130711>.

<sup>114</sup> Loi 2003-309 du 8 août 2003, portant amnistie [Law 2003-309 of August 8, 2003 Granting Amnesty], JOURNAL OFFICIEL DE LA RÉPUBLIQUE DE CÔTE D’IVOIRE [JORCI] [OFFICIAL JOURNAL OF THE REPUBLIC OF THE IVORY COAST].

<sup>115</sup> Lei No. 4/02 de 4 de Abril de 2002 DIÁRIO DA REPÚBLICA DE ANGOLA [OFFICIAL GAZETTE OF ANGOLA] (ser. 1).

<sup>116</sup> Loi 2008-020 du 13 octobre 2008 portant amnistie generale a l’endroit des personnalités, des militaires, des elements et responsables civils des groupes rebelles [Law 2008-020 of October 13, 2008 Granting General Amnesty to Personalities, Military, Civilian Elements and Civilians of the Rebel Groups]; *see also* Law 2008-020 of October 13, 2008 (Cent. Afr. Rep.) *translated in* INT’L FED’N FOR HUMAN RIGHTS, CENTRAL AFRICAN REPUBLIC—DÉJÀ-VU: PEACE (DIS)AGREEMENTS THAT ARE DETRIMENTAL TO VICTIMS 45–46 (2008), <https://www.fidh.org/IMG/pdf/RCA513a2009.pdf> (last visited Jan. 10, 2016).

and the rebel forces from March 2003—when forces loyal to former President Ange-Félix Patassé and rebel leader François Bozizé fought a bitter civil war—to the end.<sup>117</sup> The General Amnesty Law was “[p]resented as a means of working towards national reconciliation and enabling all the protagonists in the conflict to take part in political dialogue.”<sup>118</sup> The amnesty was passed pursuant to the last of several peace agreements reached between the State and various military bodies over 2007 to 2008.<sup>119</sup> The granting of a general amnesty was seen by many as an essential precondition to ensuring an open dialogue in the peace process.

### *B. Amnesty is a Tool for Disarmament, Demobilization, and Reintegration*

Several of the amnesties that we surveyed included as a benefit of the amnesty the reintegration of rebel fighters into mainstream politics or the military. This was seen as a key component of the peace, as these rebel groups could now voice their grievances through the democratic process instead of taking up arms.

In El Salvador, the amnesty had as a stated objective the incorporation of the guerrilla forces into the legal political system. Similarly, in Kosovo, the 2013 amnesty law aimed at contributing to the integration of the Serbian minority into the existing Kosovo institutions. In CAR, the General Amnesty Law was presented as a way of enabling all the protagonists in the conflict to take part in political dialogue.

In Angola, UNITA’s leadership declared the rebel group a political party and officially demobilized its armed forces following the amnesty. The Angolan government signed several agreements with rebel groups which allowed rebels to join the military or obtain senior positions in the government and state-run companies; a number of amnestied fighters of the Cabinda Enclave Liberation Front (*Frente para a Libertação do Enclave de Cabinda*, FLEC), were incorporated into the Angolan Armed Forces (*Forças Armadas Angolanas*, FAA).<sup>120</sup> According to a report from Human Rights Watch,<sup>121</sup> the Memorandum of Understanding of Luena, as the peace accord is known, provided for the reintegration and demobilization of ex-combatants who would receive certain benefits including, among other things, identity cards, five months’ salary, transportation stipends of \$100, packages for resettlement with non-food products, and access to training courses.

One of the conditions for individuals to receive amnesty under the Angolan law was presenting themselves to the Angolan authorities within forty-five days

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<sup>117</sup> Law 2008-020 of October 13, 2008 (Cent. Afr. Rep.); see also INT’L FED’N FOR HUMAN RIGHTS, *supra* note 116, at 6–8; *Central African Republic: Untangling the Political Dialogue*, AFRICA BRIEFING No. 55 (Int’l Crisis Grp., Nairobi/Brussels), Dec. 9, 2008, at 6 (describing the application of the amnesty law to government and rebel forces).

<sup>118</sup> INT’L FED’N FOR HUMAN RIGHTS, *supra* note 116, at 31.

<sup>119</sup> See *id.* at 30–31 (outlining the timeline of the peace agreements with military bodies starting in Feb. 2007); see also *Central African Republic: Untangling the Political Dialogue*, *supra* note 117, at 6 (discussing the history of the amnesty law).

<sup>120</sup> *FAA Chief of Staff Urges Soldiers to Defend Nation’s Interests*, ALLAFRICA (Jan. 8, 2007), <http://allafrica.com/stories/200701080832.html> (last visited January 20, 2017).

<sup>121</sup> Nadejda Marques, *Struggling Through Peace: Return and Resettlement in Angola*, 15 HUMAN RIGHTS WATCH 16 (2003).

from the date the law became effective. According to news reports, the time period was one of the most controversial aspects of the law, as some representatives felt that it did not give sufficient time to individuals who were internally displaced (of whom there were approximately two million), in weakened conditions, or those that had left the country.<sup>122</sup>

A similar scenario took place in the CAR. The amnesty law set rebel groups “a 60-day deadline ‘to end violence and adopt an immediate and unconditional ceasefire’ . . . [and] submit to arrangements for ‘gathering in assembly areas, for disarmament and reconversion.’”<sup>123</sup> This is widely regarded as having been unrealistic. It therefore had the consequence that rebel groups were denied amnesty while government forces benefited from it.<sup>124</sup> These experiences demonstrate how timeframe, as well as the logistics for the amnesty, need to be carefully planned.

Additionally, the great majority of the amnesties we surveyed included as conditions for granting the amnesty that the rebels lay down their weapons and renounce violence. Some amnesties did not include these requirements such as the 2005 and 2009 Democratic Republic of Congo (DRC) amnesties.

### *C. The Amnesty Excludes War Crimes, Genocide, Crimes against Humanity and Other Grave Human Rights Violations*

The comparative study includes amnesties that were enacted both before and after the Rome Statute. Of the countries surveyed, only El Salvador is subject to the Inter-American jurisprudence which states that amnesties are impermissible in cases of grave human rights violations. We therefore observed a wide range of approaches in the way the amnesties dealt with the international law requirement that serious international crimes cannot be the subject of amnesty. Some amnesties, as a product of the political and legal realities of their time, do not include such exceptions. This approach is no longer possible given that the international norm on the impermissibility of amnesties for war crimes and grave human rights violations has now crystallized. Other amnesties did include an exception for war crimes, genocide, and crimes against humanity. It is worth noting that only the amnesties that excluded these crimes, either as core or connected crimes, can be deemed to comply with Protocol II.

The DRC has adopted three amnesty laws, all of which exclude war crimes, genocide, and crimes against humanity. The 2014 amnesty law in the DRC also excludes “terrorism, offences of torture, cruel, inhuman or degrading treatment, rape and other sexual offences, the use, conscription or enlisting of child soldiers and other widespread violations considered to be grave violations of human rights.”<sup>125</sup> Also excluded from the ambit of the law are “misappropriation of

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<sup>122</sup> *Parlamento angolano aprova Lei da Anistia que permite o cessar-fogo da Unita* [Angolan Parliament approves Amnesty Law that allows the Unita ceasefire], UOL ULTIMA NOTICIA (Luanda) (Apr. 2, 2002), <http://noticias.uol.com.br/lusa/ultnot/2002/04/02/ult611u10394.jhtm>.

<sup>123</sup> *Central African Republic: Untangling the Political Dialogue*, *supra* note 117, at 6.

<sup>124</sup> *See id.*

<sup>125</sup> Loi 2014-006 du 11 février 2014 portant amnistie pour faits insurrectionnels, faits de guerre et infractions politiques [Law 2014-006 of Feb. 11, 2014 Granting Amnesty for Insurrectional Acts, Act of War and Political Offenses], JOURNAL OFFICIEL DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO [JORDC]

public funds and looting, as well as monetary exchange offences and drug trafficking.”<sup>126</sup>

El Salvador's 1992 Law of National Reconciliation provided that amnesty would be excluded for persons who, according to the Truth Commission, participated in grave acts of violence.<sup>127</sup> Upon the publication of the Commission's report revealing that several members of the army, the courts, and even the President had taken part in such grave violations, a new law was adopted providing for blanket amnesty for all crimes, including grave violations. Here, we only purport to use the original version of the law enacted in 1992, which excludes grave violations, and not the amended 1993 version.<sup>128</sup> It is worth recalling the Inter-American Court's decision in the case of *El Mozote*, which involved the 1993 version of the Salvadoran amnesty law. The Court did not repeal the amnesty law but found that it could not be applied to the facts in the case.<sup>129</sup> Moreover, there is the concurring opinion of Judge Garcia Sayan, which encourages looking at the context and circumstances surrounding the passing of amnesty laws, particularly when they involved a negotiated end to a conflict.<sup>130</sup>

In Kosovo, the amnesty law excludes acts that constitute serious violations of international humanitarian law and criminal offenses that result in grievous bodily injury or death.<sup>131</sup> In the Ivory Coast, the amnesty excludes offenses that constitute serious violations of human rights and international humanitarian law, offenses classified by the Ivorian Penal Code as crimes, and offenses against the law of nations.<sup>132</sup>

In the CAR, the amnesty excludes genocide, crimes against humanity, and war crimes. Article 7 also set out additional exclusions:

- Those who have voluntarily carried out acts of robbery, rape, looting, burning, voluntary destruction, sabotage, hindrance of freedom of movement;
- Those who have voluntarily committed . . . murders, . . . assault or battery, . . . acts of violence, threats, torture, cruel, inhuman or degrading treatment or any other violation of the

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[OFFICIAL JOURNAL OF THE DEMOCRATIC REPUBLIC OF CONGO] art. 4, Feb. 11, 2014 (translation provided by the author). The original French states, “[L]e terrorisme, les infractions de torture, de traitements cruels, inhumains ou dégradants, les infractions de viol et autres violences sexuelles, l'utilisation, la conscription ou l'enrôlement d'enfants et toutes autres violations graves, massives et caractérisées des droits humains.” *Id.*

<sup>126</sup> *Id.* (translation provided by the author). The original French states, “Sont également exclus, les infractions de détournement des deniers public et de pillage, de même que les infractions à la réglementation de change et le trafic des stupéfiants.”

<sup>127</sup> Decreto No. 147, 23 Jan. 1992, Ley De Reconciliacion Nacional [Law of National Reconciliation], DIARIO OFICIAL [D.O.] [OFFICIAL GAZETTE], art. 6, 23 Jan. 1992 (El Sal.).

<sup>128</sup> In July 2016, the Constitutional Chamber of El Salvador's Supreme Court declared the 1993 amnesty law unconstitutional in part because it grants amnesty for conducts that may constitute crimes against humanity or war crimes in violation of international law including Protocol II. *See, e.g.*, 44-2013AC, de las 12:00 p.m., 13 July 2016, Sala de lo Constitucional, D.O. [Constitutional Chamber] p. 144 (El Sal.).

<sup>129</sup> *See Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.225 (Oct. 25, 2012).

<sup>130</sup> *See generally id.* (Sayan, J., concurring).

<sup>131</sup> Ligjit Nr. 04/L-209 për amnistinë, G. ZYRTARE ch. II, art. 4 §§ 1.2–1.3, 19 Sept. 2013 (Kos.), *English translation available at* <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8895>.

<sup>132</sup> Law 2003-309 of August 8, 2003 Granting Amnesty, art. 4 (Côte d'Ivoire).

physical or moral integrity of a human being and property.<sup>133</sup>

#### D. *Amnesty for Political Crimes*

All of the selected amnesties applied to political crimes; some of the laws explicitly use the term political crimes, but others do not. For those that do not specifically refer to political crimes, we can infer from the nature of the acts described in the amnesty that they indeed were referring to political crimes. These selected amnesties therefore provide an interesting comparison of the types of crimes that can be considered political crimes for the purpose of amnesty under Protocol II, as long as they do not constitute war crimes or grave breaches of the Geneva Conventions. Moreover, when available, we look at the interpretation of these provisions by domestic and international courts, as well as truth and reconciliation commissions, to get a better understanding of the nature of the crimes that can be deemed political or connected to political crimes.

In the DRC, the 2003<sup>134</sup> and 2005<sup>135</sup> amnesties cover “acts of war [and] political and opinion breaches of the law.” “[A]cts of war” are “acts inherent to military operations authorized by the laws and customs of war, which, during the war, have caused injury to another person”<sup>136</sup> while “war crimes” are defined as “all breaches of the laws of the DRC committed during the war and which are not authorized by the laws and customs of war.”<sup>137</sup> The distinction between acts of war and war crimes, therefore, is between those acts that are authorized by the laws and customs of war (acts of war), and those that are not (war crimes). The 2009 Amnesty Law covers, in addition to acts of war, acts of insurgency, which are defined as acts of collective violence that threaten the institutions of the State or its territorial integrity.<sup>138</sup> The 2005 Amnesty Law includes as political crimes illegal actions against the state or public administration committed with a political motive or when the circumstances surrounding the act are of a political nature.<sup>139</sup>

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<sup>133</sup> Law 2008-020 of October 13, 2008 (Cent. Afr. Rep.) *translated in* INT’L FED’N FOR HUMAN RIGHTS, *supra* note 116, at 46.

<sup>134</sup> Loi 2003-001 du 15 avril 2003 portant amnistie pour faits de guerre, infractions politiques et d’opinion [Law 2003-001 of Apr. 15, 2003 Granting Amnesty For Acts of War, Political and Opinion Breaches of Law], JORDC, Apr. 17, 2003, p. 3 (Dem. Rep. Congo) (translation provided by the author).

<sup>135</sup> Loi 2005-023 du 19 decembre 2005 portant amnistie pour faits de guerre, infractions politiques et d’opinion [Law 2005-023 of Dec. 19, 2005 Granting Amnesty For Acts of War, Political and Opinion Breaches of Law] (Dem. Rep. Congo) (translation provided by the author).

<sup>136</sup> *Id.* (translation provided by the author).

<sup>137</sup> Loi 2002-024 du 18 novembre 2002 portant code penale militaire [Law 2002-024 of Nov. 18, 2002 Military Penal Code], JORDC ch. III, Nov. 18, 2002, art. 173 (Dem. Rep. Congo) (translation provided by the author). The original French version states, “Par crime de guerre, il faut entendre toutes infractions aux lois de la République commises pendant la guerre et qui ne sont pas justifiées par les lois et coutumes de la guerre.” *Id.*

<sup>138</sup> Loi 2009-003 du 7 mai 2009 portant amnistie pour faits de guerres et insurrectionnels commis dans les provinces du nord-kivu et du sud-kivu [Law 2009-003 of May 7, 2009 Granting Amnesty for Acts of War and Insurrections Committed in the Provinces of North Kivu and Sout Kivu], JORDC, MAY 7, 2009, art. 2 (Dem. Rep. Congo), (translation provided by the author). The original French version states, “[F]ait insurrectionnels, les actes de violence collective de nature à mettre en péril les institutions de la République ou à porter atteinte à l’intégralité du territoire national.” *Id.*

<sup>139</sup> Law 2005-023 of Dec. 19, 2005 (Dem. Rep. Congo) (translation provided by the author). The original French version states, “[L]es actes illégaux d’administration ou de gestion du territoire dont le mobile et/ou les circonstances revêtent un caractère politique.” *Id.*

We can see that these amnesties look at the nature and circumstances of the act to determine whether or not it is political. This is similar to the subjective motive approach we discussed earlier. One interesting feature of the DRC 2005 amnesty is that it “allowed for the retroactive pardon and commutation of convictions for the acts falling under the amnesty law.”<sup>140</sup>

In South Africa, the amnesty law used the term “acts associated with a political objective,” rather than the term “political crimes.” An “act associated with a political objective” is defined as “any act or omission which constitutes an offence or delict, which, according to criteria specified in subsection (3), is associated with a political objective, and which was advised, planned, directed, commanded, ordered or committed within or outside the Republic.”<sup>141</sup> The criteria listed in subsection (3) are:

- (a) The motive of the person who committed the act, omission or offence;
- (b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of, or as part of, a political uprising, disturbance or event, or in reaction thereto;
- (c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
- (d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent, State property, personnel, or against private property or individuals;
- (e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organization, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and;
- (f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued . . . .<sup>142</sup>

Subsection (3) also excludes from the definition of “act associated with a political objective” any act, omission, or offence committed by any person who acted

- (i.) for personal gain: [P]rovided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the state or a former state, political organisation or liberation movement, shall

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<sup>140</sup> *DRC Amnesty Law: Amnesty must not Equal Impunity*, FOCUS: 2009 (Int'l Ctr. for Transitional Just., New York, N.Y.), 2009, at 1.

<sup>141</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 ch. 4, § 20(2) (S. Afr.).

<sup>142</sup> *Id.* § 20(3).

- not be excluded only on the grounds of that person having received money or anything of value for his or her information; or
- (ii.) out of personal malice, ill-will or spite, directed against the victim of the acts committed.<sup>143</sup>

The South African model is by far the most detailed in terms of its definition of political crimes in the text of an amnesty law itself and the inclusion of the criteria for determining if an act is a political crime or not. The model resembles closely the Norgaard principles and the subjective motive approach we saw earlier. Based on this model, South Africa's TRC Amnesty Committee granted amnesty for violent offenses that involved "political crimes" (such as, for example, sabotage, bombings of government installations, abductions of political opponents,<sup>144</sup> arms smuggling,<sup>145</sup> and similar offenses). Other crimes for which the amnesty was granted included:

- Assassinations and attempted assassinations of police officers, political leaders or opponents and other persons;
- murders and attempted murders of civilians accused of being informers or collaborators with police or the state security forces;
- abductions, attempted abductions, and unlawful detentions by personnel of the police or state security forces or of other organizations;
- other acts of public violence, including: bombings and attempted bombings of police stations, railway lines, military targets, other governmental targets, arson, and other malicious damage to government property or other property;
- acts of sabotage against the government and infrastructure and related installations, including those involving electrical systems and oil refineries;
- smuggling of weapons into South Africa or the unlawful possession, storage, or distribution of firearms or other weapons or of ammunition by personnel of the state security forces, members of anti-apartheid organizations, or other persons;

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<sup>143</sup> *Id.*

<sup>144</sup> *See generally* TRUTH & RECONCILIATION COMM'N OF S. AFR., 6 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT § 3 ch. 1 at 181–263 (2003) (discussing the widespread use of abductions of political opponents as a tactic during the South African conflict, including by (among others) members of the South Africa Security Forces, by the African National Congress (ANC) and its allied organizations and self-defense units, by the Inkatha Freedom Party, by members of extreme right-wing organizations, and to a lesser extent by persons involved in "street justice" or "people's courts" initiatives.).

<sup>145</sup> *See id.* § 3 ch. 2 at 264–337. In a number of cases the Amnesty Committee granted amnesty for illegal movement into or out of South Africa of weapons and explosives. These amnesty applications, which were handled by the Amnesty Committee without a hearing (as arms smuggling on its own does not involve gross violations of human rights), were submitted most often by members of the South African security forces, but some applications were also submitted by members or supporters of the ANC or its related organizations.

- armed robberies and attempted robberies of money, firearms and other property from banks, other businesses, universities, government institutions, white farmers, and other victims, including members of rival political organizations.

Many of the armed robberies and attempted robberies for which amnesty was granted involved the robbery of cash and other property for the express purpose of financing the operations of the political organizations of which the applicants were members or supporters, in compliance with the policies of the organizations and upon instructions by their leadership. The Amnesty Committee granted amnesty in these cases where the evidence supported the conclusion that the applicants committed the thefts in compliance with the policies of the organization of which the applicants were members or with a bona fide belief that committing the offenses would advance the political struggle waged by their political organization, whereas amnesty was refused when the Committee concluded that the applicant had been acting for reasons of personal gain.<sup>146</sup>

We should note that the South African TRC was heavily criticized for allowing certain parties “to get away with murder” and failing to apply the criteria for amnesty in an even-handed manner and without regard to the notoriety of the applicants or status of the victims.<sup>147</sup>

Law N° 2005-05 dated 17 February 2005,<sup>148</sup> also known as the “Ezzan” Law in Senegal, grants amnesty to those persons who had participated in the assassination of a Constitutional Court judge during the contested 1993 legislative elections and a violent attack on a political figure in 2003.<sup>149</sup> The law is applicable to all crimes, as long as they were committed in relation to general or local elections, and had a political motive. It applies also to persons already convicted. In Senegal, we see one of the broadest languages for amnesty. The amnesty law applies to all crimes or misdemeanors committed in Senegal or abroad related to the elections if the act was committed with a political motive. Again, we see the political motive requirement. The law also states that those who benefit from the amnesty do not incur the right to be reinstated into their posts within the public administration.

In El Salvador, the 1992 amnesty law extended to “every person that has participated as immediate authors, mediate authors, and accomplices in the

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<sup>146</sup> See, e.g., *Thabo Paulos Mtjikelo* 1998 AC/98/0020 (S. Afr.); *Zakhele Jan Simelane* 1999 AC/99/0209 (S. Afr.); *Mlungiseleli Cyves Ndamane* 1999 AC/99/0231 (S. Afr.); *Sithembele Micheal Khala* 1999 AC/99/0310 (S. Afr.). Amnesty was also granted for armed robberies involving theft of weapons and ammunition on the instruction of leadership of the political organization, including armed robberies by self-defense unit members of police stations. See, e.g., *Cyril Chisoma* 2000 AC/2000/139 (S. Afr.).

<sup>147</sup> See Nick Childs, *South Africa Concludes Healing Process*, B.B.C. (May 31, 2001, 9:56 PM), <http://news.bbc.co.uk/2/hi/africa/1363184.stm> (discussing the varying perceptions of the TRC at the time).

<sup>148</sup> Loi 2005-05 du 17 février 2005 portant loi d’amnistie [Law 2005-05 of Feb. 17, 2005 Amnesty Law], JOURNAL OFFICIEL DU SENEGAL [JOS] [OFFICIAL GAZETTE OF SENEGAL], Feb. 17, 2005 (Sen.).

<sup>149</sup> Article 1 states, “Amnesty is granted, as of right, for all criminal or correctional offenses committed, either in Senegal or abroad, in relation to the general or local elections that were committed with a political motivation, between 1 January 1983 and 31 December 2004, whether or not their perpetrators were tried.” *Id.* at art. 1 (translation provided by the author); see also Tidiane Sy, *Senegal Opposition to Amnesty Law*, B.B.C. (Jan. 11, 2005, 7:02 PM), <http://news.bbc.co.uk/2/hi/africa/4166291.stm>.

commission of political common crimes and those related to them, and in common crimes committed by over twenty people, except for the commission of the crime of kidnapping.”<sup>150</sup> There is no explanation for why kidnapping was excluded from the amnesty. We wonder if this is another example of the sensitivity towards kidnapping because of how prevalent it was during the conflict and how much it affected the population. Although not particularly more heinous than other crimes that may be included under the definition, kidnapping may have been a particularly unpopular crime in El Salvador. The amnesty also covered bribery and conflicts of interest of public officers, murder, infanticide, abortion, insurrection, sedition, and conspiracy.<sup>151</sup> In El Salvador, we see one example of murder as a crime connected to political crimes. The 1992 Salvadoran amnesty also applied to handicapped and non-combating members of the Farabundo Marti National Liberation Front<sup>152</sup> who were outside the country, and were taken into custody for political crimes.<sup>153</sup>

In Kosovo, the amnesty law covered, among others, goods smuggling and tax evasion.<sup>154</sup> To its north, Kosovo borders with Serbia—of which it previously was a part—and this area is mostly populated by ethnic Serbs. With the collapse of the socialist regime, the region was in great chaos. Goods smuggling from one country to the other was a daily occurrence, and, for many, was the only source of revenue.<sup>155</sup> Moreover, in light of Serbia’s continued refusal to acknowledge Kosovo’s independence, many would argue that there was no actual border, as Kosovo—even after the independence was declared—was not an independent state.<sup>156</sup> As for tax evaders, those Kosovo Serbs who did not recognize the new state did not pay taxes. In addition to goods smuggling and tax evasion, the Kosovo amnesty law applies to the following crimes: misuse of economic authorizations, prohibited trade, and avoiding payment of mandatory custom fees.<sup>157</sup>

Kosovo thus is a good illustration of how amnesty can include economic crimes as well as political crimes. Other crimes that are relevant in the Colombian context and are included in the Kosovar amnesty include the following: armed rebellion; endangering the territorial integrity of Kosovo; endangering the constitutional order by destroying or damaging public installations and facilities; espionage; alliance for anti-constitutional actions;

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<sup>150</sup> Decreto No. 147, 23 Jan. 1992, Ley De Reconciliacion Nacional [Law of National Reconciliation], D.O, art. 1, 23 Jan. 1992 (El Sal.) (translation provided by the author).

<sup>151</sup> *Id.*

<sup>152</sup> A left-wing guerilla group that opposed government forces during El Salvador’s civil war. *El Salvador, 12 Years of Civil War*, THE CENTER FOR ACCOUNTABILITY AND JUSTICE, <http://cja.org/where-we-work/el-salvador/> (last visited Oct. 27, 2016).

<sup>153</sup> Decreto No. 147, 23 Jan. 1992, Ley De Reconciliacion Nacional [Law of National Reconciliation], D.O, arts. 3–4, 23 Jan. 1992 (El Sal.).

<sup>154</sup> Ligjit Nr. 04/L-209 për amnistinë, G. ZYRTARE ch. II, art. 3, 19 Sept. 2013 (Kos.), *English translation available at* <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8895>.

<sup>155</sup> See *Kosovo’s Smugglers Mourn End of Golden Age*, BALKANINSIGHT (Nov. 16, 2011), <http://www.balkaninsight.com/en/article/kosovo-s-smugglers-mourn-end-of-golden-age/1589/5> (last visited on Jan. 11, 2016) (discussing the lucrative nature of the smuggling between Serbia and Kosovo after NATO’s intervention in the Kosovo War of 1998–1999).

<sup>156</sup> See Marc Champion, *Recognize Kosovo or Pay the Price*, BLOOMBERG (Feb. 29, 2016, 2:00 AM), <https://www.bloomberg.com/view/articles/2016-02-29/recognize-kosovo-or-pay-the-price?>

<sup>157</sup> Ligjit Nr. 04/L-209 për amnistinë, *supra* note 154, art. 3.

inciting national, racial, religious or ethnic hatred, discord, or intolerance; unauthorized ownership, control, or possession of weapons; and obstructing officials in performing official duties and attacking them.

The 2003 amnesty law in the Ivory Coast covers crimes such as attack against State authorities and public order, disturbance of public order, participation in armed gangs, unlawful possession of arms, organization of armed gangs, and murder.<sup>158</sup> Here again we see a mix of “pure political crimes” and crimes connected to political crimes, such as murder. The Ivorian law has an interesting feature in that it excludes “economic offences,”<sup>159</sup> which include compromising trust of the public in the national economy, any form of theft, pillage or misappropriation of foodstuffs or goods, and destruction or misappropriation of agricultural products.<sup>160</sup>

As in the majority of the amnesty laws we surveyed, the Angolan law does not specifically refer to “political crimes” but we can infer by the nature of the crimes covered that they are “political crimes.” The law applies to “all crimes against the security of the State committed in the context of the Angolan armed conflict” and “all military crimes . . . except for violent crimes that result in death included in section 3 of article 18 and in section 3 of article 19 of Law 4/94 of 28 January . . . .”<sup>161</sup> These sections refer to military crimes against a superior officer or a subordinate officer that result in death. There is no clear reason for these exclusions.

In the CAR, the amnesty law extends to crimes such as threatening state security or national defense and for related defenses, embezzlement of public funds, and assassinations and complicity in assassinations.<sup>162</sup> The amnesty also applies to people in exile.<sup>163</sup>

#### E. *Amnesty and Reparations*

The countries we surveyed had a mixed approach regarding reparations. Some amnesty laws preclude victims from recovering civil damages or monetary reparations while others leave open the possibility of civil damages. For example, in the DRC, the 2005 and 2009 amnesty laws do not prejudice the victims’ ability to recover civil damages, particularly for damages to property.<sup>164</sup>

In South Africa, the amnesty was deemed to extinguish civil, as well as criminal, liability.<sup>165</sup> Both the Appellate Court and the Constitutional Court

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<sup>158</sup> Law 2003-309 of August 8, 2003, art. 3 (Côte d’Ivoire).

<sup>159</sup> *Id.* art. 4(a).

<sup>160</sup> *Id.* art. 4(c).

<sup>161</sup> Lei No. 4/02 de 4 de Abril de 2002 DIÁRIO DA REPÚBLICA DE ANGOLA [OFFICIAL GAZETTE OF ANGOLA] (ser. 1) art. 1(1) and 1(3).

<sup>162</sup> See Law 2008-020 of October 13, 2008 (Cent. Afr. Rep.) *translated in* INT’L FED’N FOR HUMAN RIGHTS, *supra* note 116, at 45.

<sup>163</sup> *Id.*

<sup>164</sup> See Law 2005-023 of Dec. 19, 2005 (Dem. Rep. Congo) (translation provided by the author); law 2009-003 of May 7, 2009, pmb. (Dem. Rep. Congo) (translation provided by the author).

<sup>165</sup> *Azanian Peoples Organisation (Azapo) and Others v. The President of the Republic of South Africa*, 1996 (8) BCLR 1015 (CC) paras. 6–7 (S. Afr.).

confirmed this interpretation of the amnesty law in the *Azapo* case.<sup>166</sup> The amnesty law provided that the TRC would

make recommendations to the President [of South Africa] with regard to (i) the policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims, [and] (ii) measures which should be taken to grant urgent interim reparation to victims.<sup>167</sup>

The Act established the TRC's Committee on Reparation and Rehabilitation (RRC) to perform these functions.<sup>168</sup> As part of its final report, the TRC submitted to the government a document entitled *A Summary of Reparation and Rehabilitation Policy, Including Proposals to be Considered by the President*.<sup>169</sup> That document further explains that only those who made statements to the TRC, or were referred to in another person's statement to the TRC, can be considered for reparations;<sup>170</sup> this is a provision which has proved quite controversial and which continues to be challenged today. In general, there has been much criticism of South Africa's implementation of the TRC's recommendations on reparations. Of the countries that have implemented reparations based on truth commission recommendations, South Africa is said to be the only country to have restricted reparations only to those registered as victims by the TRC, thereby limiting compensation to approximately 17,000 victims when the real number of victims is said to be much higher.<sup>171</sup> These victims have been excluded from the process without redress.<sup>172</sup> The government has also been criticized for failing to make a comprehensive assessment of the needs of the victims; however, the efforts of victims' groups to persuade the government to reopen registration for victims have not been met with success thus far.<sup>173</sup>

In El Salvador, the various negotiations that led to the 1992 amnesty did not include reparations for victims. It is the Commission on the Truth for El Salvador that, in its report entitled *De la Locura a la Esperanza*, made recommendations for reparations for victims and their families, namely moral and material reparations.<sup>174</sup> In Senegal, the amnesty law does not prevent victims or third

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<sup>166</sup> *Id.* para 50.

<sup>167</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 ch. 2, § 4(f) (S. Afr.).

<sup>168</sup> *Id.* § 23.

<sup>169</sup> TRUTH & RECONCILIATION COMM'N OF S. AFR., A SUMMARY OF REPARATION AND REHABILITATION POLICY, INCLUDING PROPOSALS TO BE CONSIDERED BY THE PRESIDENT, <http://www.justice.gov.za/trc/reparations/summary.htm> (last visited Mar. 21, 2016).

<sup>170</sup> *Id.* § 2(2).

<sup>171</sup> See Sufiya Bray, *Reparation in South Africa: the 'unfinished business' of the TRC*, TRUTH AND MEMORY (July 8, 2014), <http://www.khulumani.net/truth-memory/item/979-article-on-the-unfinished-business-of-reparations-in-south-africa-in-the-pan-african-reparation-perspectives-bulletin.html>.

<sup>172</sup> *Id.*

<sup>173</sup> See Int'l Ctr. for Transitional Just., *Ignoring Cries for Justice, South Africa Fails Victims of Apartheid-era Crimes*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (Jan. 7, 2013), <https://www.ictj.org/news/ignoring-cries-justice-south-africa-fails-victims-apartheid-era-crimes>.

<sup>174</sup> U.N. TRUTH COMM'N, DE LA LOCURA A LA ESPERANZA: LA GUERRA DE 12 AÑOS EN EL SALVADOR [FROM MADNESS TO HOPE: THE 12 YEAR WAR IN EL SALVADOR] (1993).

parties from seeking damages before civil courts. In Angola, no reparations were included in the amnesty law.

Reparations for victims were not included in the Kosovo amnesty law. That said, Article 5 of the law reads that “[t]he granting of amnesty shall not affect the rights of third parties which are based upon a sentence or a judgment.”<sup>175</sup> Interpreting the law, the Constitutional Court held that “the perpetrators of amnestied offenses having caused damage to third parties should remain accountable for paying compensation to the victims who should have an efficient and effective legal remedy to satisfy their rights”<sup>176</sup> and that “in certain classes of criminal offences foreseen to benefit from amnesty, where damage to property has been caused to individuals, these provisions of the Law on Amnesty effectively violate the right to the peaceful enjoyment of one’s possessions as protected by Article 1 First Protocol of the [European Convention on Human Rights].”<sup>177</sup> Other than these provisions, the law is silent on the issue of reparations to victims.

In the Ivory Coast, the amnesty law provides that “[i]n the interest of national reconciliation and national solidarity, the State shall ensure, through all relevant means, reparation for damages caused by the offences covered by this Amnesty Act. The methods of compensation, reparation and rehabilitation shall be determined by the law.”<sup>178</sup> A Commission Dialogue Vérité et Réconciliation was created for the purpose of compensating the victims of the conflicts.<sup>179</sup>

The amnesty law in the CAR provides that the amnesty “does not prejudice the civil interests of victims”<sup>180</sup> and requires that the related criminal file be made available to parties in civil proceedings, and that any criminal court seized by order or remand before the promulgation of the law retains jurisdiction over the civil interests of victims.<sup>181</sup> However, the international non-government organization (NGO), the International Federation for Human Rights, has noted that this provision is “unrealistic” as no positive step towards reparations was taken.<sup>182</sup> Courts lack the political will or ability to make adverse findings, and victims are in any event afraid to come forward.<sup>183</sup>

There does not seem to be a uniform approach on reparations and particularly civil damages, or the right of third parties to recover damages after the enactment of amnesty laws. Some countries preserved that right while others did not. It would be interesting to see to what extent, in cases where victims or third parties could seek damages, they have availed themselves of that right and to what extent it endangered the amnesty or the reconciliation sought to be achieved by the amnesty.

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<sup>175</sup> Ligjiti Nr. 04/L-209 për amnistinë, G. ZYRTARE ch. II, art. 5, 19 Sept. 2013 (Kos.), *English translation available at* <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8895>.

<sup>176</sup> Constitutional Court Sept. 3 2013, KO 108/13 para. 120 (Kos.).

<sup>177</sup> *Id.* para. 154.

<sup>178</sup> Law 2003-309 of August 8, 2003, art. 10 (Côte d’Ivoire).

<sup>179</sup> HUMAN RIGHTS WATCH, TO CONSOLIDATE THIS PEACE OF OURS: A HUMAN RIGHTS AGENDA FOR CÔTE D’IVOIRE (Dec. 2015), [https://www.hrw.org/sites/default/files/report\\_pdf/cdi1215\\_4up.pdf](https://www.hrw.org/sites/default/files/report_pdf/cdi1215_4up.pdf).

<sup>180</sup> INT’L FED’N FOR HUMAN RIGHTS, *supra* note 116, at 33.

<sup>181</sup> *Id.* at 34.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 34–35.

F. *Criticism/Limitations of Amnesties for Political Crimes and the Political Crimes Definition*

One key issue that surfaced in studying amnesty laws enacted in other countries under circumstances similar to Colombia's is the need for greater clarity in the definition of the political crimes covered under amnesty laws. Amnesty laws tend to be worded in vague terms, and in many cases, this has led to abuses of the law where conduct that may not fall under the amnesty laws is still amnestied because the terms of the laws are so vague. Moreover, the vagueness also leads to a misperception on the part of the population that the amnesty is a form of impunity or that the beneficiaries are "getting away with murder." This is even more important since most amnesties are implemented within deeply divided communities that are still recovering from the abuses committed during the conflict. The need for clarity in defining political crimes and crimes connected to political crime is evident in the experiences of these selected countries.

Clarity is even more important when the amnesty is purportedly adopted under Protocol II. In fact, Article 6.5 of Protocol II, which encourages amnesty, is quite restrictive. It encourages amnesty for political crimes only—that is, those crimes related to the conduct of hostilities. Therefore, the amnesty that Protocol II calls for does not extend to war crimes, grave breaches of the Geneva Conventions, or crimes against humanity and genocide. A political crime that is also a war crime or a grave breach of the Geneva Conventions cannot be amnestied under Protocol II. This extends to crimes connected to political crimes. Even if the core political crime is not a war crime, if the connected crime is, it cannot be amnestied under Protocol II.

In the Democratic Republic of Congo, for example, the vagueness of the amnesty laws has led to a perception that these laws have perpetuated and even encouraged impunity. Moreover, Congolese legislation does not define political crimes. Vague penal and military laws have resulted in the amnesty laws covering a much broader scope, resulting in blanket immunity.<sup>184</sup> Some critics have observed that members of the military and rebel groups have been involved in atrocity crimes that would be excluded under the amnesty laws. Nevertheless, due to the vagueness of the law, they could still argue that their actions are political, and therefore covered by the amnesty laws.<sup>185</sup> The amnesty laws are thus perceived as protecting perpetrators of grave violations.

In El Salvador, the Inter-American Commission criticized the definition of political crimes included in the amnesty—namely, crimes committed by twenty or more people and connected to the armed conflict.<sup>186</sup> It considered that such a

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<sup>184</sup> See TYRONE SAVAGE, INST. FOR SECURITY STUD. AFR. PAPER 130, IN QUEST OF A SUSTAINABLE JUSTICE: TRANSITIONAL JUSTICE AND HUMAN SECURITY IN THE DEMOCRATIC REPUBLIC OF THE CONGO 5–6 (2006).

<sup>185</sup> PATRICIA PINTO SOARES, THE INTERNATIONAL CRIMINAL COURT IN SEARCH OF ITS PURPOSE AND IDENTITY 183 (TRISTINO MARINIELLO ed., 1st. ed. 2015).

<sup>186</sup> COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS [INTER-AMERICAN COMMISSION ON HUMAN RIGHTS], INFORME ANUAL DE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS 1992–1993 [ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1992–1993] (Mar. 12, 1993), <https://www.cidh.oas.org/annualrep/92span/cap.4a.htm> (translation provided by the author).

broad definition would impair the effort to end the culture of impunity in El Salvador.<sup>187</sup> This is another illustration of the importance of having a clear definition of the crimes that are covered by the amnesty and of ensuring that these definitions be compatible with domestic and international law.

Broad and vague language leads to broad interpretation, resulting in more crimes than originally intended being included in the amnesty, thereby increasing the perception that the amnesty is a form of impunity. When people can see exactly what is and is not included in the amnesty, they understand better that the amnesty is a limited measure that does not apply to all crimes.

Another issue with the vague and broad language of amnesty laws in relation to the crimes they cover is that, in most of the jurisdictions we surveyed, there is no definition of political crimes in the criminal codes or other domestic instruments. (This was the case, for example, in the Democratic Republic of Congo, Senegal, and El Salvador). This leaves open to interpretation the concept of political crimes.

### *G. Amnesties Have Limited Temporal Scope*

All of the amnesties in the countries we surveyed were limited in temporal scope. In South Africa, applicants could apply for amnesty for any act, omission, or offense associated with a political objective committed between March 1, 1960 and December 5, 1993 (the date the final agreement was reached in the political negotiations);<sup>188</sup> the cut-off date was later extended to May 10, 1994 (the date of the inauguration of the first democratically elected president in South Africa).<sup>189</sup> In Senegal, the amnesty law only applied to actions that took place between January 1, 1983 and December 31, 2004.<sup>190</sup> In the Ivory Coast, amnesty was also limited to criminal offenses committed from September 17, 2000 to September 19, 2002.<sup>191</sup>

### *H. Amnesties and Due Process Guarantees*

In South Africa, any party aggrieved by a decision of the TRC had the right to approach the South African High Court for a review of the decision. The court is not meant to consider whether the decision is correct, but rather whether it is justifiable. It does not retry the matter, but simply concerns itself with whether the Commission's decision is justifiable in the sense that there is a rational connection between the facts of the particular application and the decision. The review court, however, does consider the merits of the application in order to decide whether the rational connection has actually been established.<sup>192</sup> In Kosovo, citizens were able to challenge the amnesty law all the way to the

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<sup>187</sup> *Id.* (translation provided by the author).

<sup>188</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 ch. 4, § 20(7)(c) (S. Afr.).

<sup>189</sup> 6 AMNESTY COMMITTEE, THE LEGAL BASIS OF THE AMNESTY PROCESS 1-8 (2003).

<sup>190</sup> Law 2005-05 of Feb. 17, 2005 (Sen.) (translation provided by the author).

<sup>191</sup> Law 2003-309 of August 8, 2003, art. 3 (Côte d'Ivoire).

<sup>192</sup> AMNESTY COMMITTEE, *supra* note 189, at 15-16.

constitutional courts.<sup>193</sup> In the case of Senegal, the law was referred to the African Commission for Human and Peoples' Rights by local and international NGOs claiming violation of the right to a fair trial.<sup>194</sup> However, the complaint was ruled inadmissible by the Commission on the ground that the applicants had failed to exhaust all national remedies before making the application.<sup>195</sup>

### *I. Support of the International Community for the Amnesty*

The international community has for the most part been in favor of amnesties for political crimes in the context of a negotiated end to a non-international armed conflict for the objective of achieving peace and reconciliation.

The 2005 and 2009 amnesties in the Democratic Republic of Congo received support from the international community, including regional African neighbors and the UN, which was involved in brokering the accord in the first place. These observers recognized that the amnesty was necessary in order to achieve peace.<sup>196</sup> Indeed, the UN Security Council and other UN bodies, the Southern Africa Development Community (SADC), the African Union (AU), and the UN Organization Mission in the Democratic Republic of the Congo (MONUC) all played a key role in brokering the 2002 Transition Agreement.<sup>197</sup> The 2009 Goma Peace Agreement included heavy involvement, and therefore support, of the UN, the United States, and the European Union (E.U.).<sup>198</sup>

In El Salvador, the UN played a key role in the negotiations that led to the amnesty. The Truth Commission, which was created under the amnesty law, was also set up by the UN and received its support during its operation.<sup>199</sup> The Commission was made up of three international commissioners, appointed by the Secretary-General of the UN<sup>200</sup>

In Kosovo, the E.U. and United States representatives voiced strong support for the amnesty law. The E.U. was a strong proponent of the law,<sup>201</sup> as it would open the way to Serbia and Kosovo's E.U. accession talks.<sup>202</sup>

In Angola, the amnesty law received broad international support. The UN Secretary General's special representative for African Affairs, Ibrahim Gambari,

<sup>193</sup> Ligjit Nr. 04/L-209 për amnistinë, G. ZYRTARE ch. III, art. 10, 19 Sept. 2013 (Kos.), *English translation available at* <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8895>.

<sup>194</sup> Organisation nationale des droits de l'Homme v. Senegal, Communication 304/2005, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 5 (Nov. 29, 2006), [http://www.achpr.org/files/sessions/40th/comunications/304.05/achpr40\\_304\\_05\\_eng.pdf](http://www.achpr.org/files/sessions/40th/comunications/304.05/achpr40_304_05_eng.pdf).

<sup>195</sup> *Id.* ¶ 45.

<sup>196</sup> Peace Agreement Between the Government and Le Congrès National Pour La Defense Du Peuple (CNDP), Mar. 23, 2009, <http://www.peaceagreements.org/wggsite/downloadAgreementDocument/id/2180>.

<sup>197</sup> LAURA DAVIS & PRISCILLA HAYNER, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *DIFFICULT PEACE, LIMITED JUSTICE: TEN YEARS OF PEACEMAKING IN THE DRC* 10 (2009).

<sup>198</sup> *Id.* at 10–11.

<sup>199</sup> Permanent Representative of El Salvador, Letter Dated Oct. 8, 1991 from Permanent Representative of El Salvador to the Secretary-General, U.N. DOC. A/46/553 (Oct. 9, 1991).

<sup>200</sup> *Id.*

<sup>201</sup> Joint Statement, EU Special Representative, Joint Statement by the EUSR, the Heads of Mission of EU Member States in Kosovo and the United States Embassy (July 9, 2013).

<sup>202</sup> *Id.*; Fatos Bytyci, *Kosovo Adopts Amnesty for Minority Serbs*, REUTERS, July 11, 2013, <http://www.reuters.com/article/us-kosovo-serbia-amnesty-idUSBRE96A0P120130711>.

travelled to Angola to witness the signing of the ceasefire agreement.<sup>203</sup> That same year, the UN Security Council replaced the UN Observer Mission in Angola with UN Mission in Angola, a larger—non-military—political presence.<sup>204</sup>

## CONCLUSION

The purpose of amnesties is to bring an end to conflicts and foster reconciliation so society can move forward, as well as facilitating the reintegration of the groups that opposed the government during the conflict. This understanding of amnesty goes back to the earliest examples of the Greeks and the Romans.<sup>205</sup> The vast majority of amnesty laws include peace and reconciliation as their stated purpose. The UN's support for amnesty is also based on its capacity to foster peace, reconciliation, and reintegration. These are essential to rebuilding the fabric of society torn by wars. It is important that the amnesty in Colombia be presented and understood by the Colombian people in this context. It is worth recalling the words of Archbishop Desmond Tutu, chairperson of the South African TRC:

Amnesty is not meant for nice people. It is intended for perpetrators. . . . Amnesty is a heavy price to pay. It is, however, the price the negotiators believed our country would have to pay to avoid an "alternative too ghastly to contemplate."<sup>206</sup>

The international legal regime on amnesty has evolved and the endorsement of amnesties for political crimes that do not amount to war crimes under Article 6.5 of Protocol II is the strongest demonstration of the acceptance of such amnesties under international law. As we have seen, neither the Rome Statute nor the Inter-American jurisprudence pose an obstacle to an amnesty for political crimes and crimes connected to political crimes. The international community has endorsed such amnesties in the past, and a comparative analysis of amnesties throughout the world further reinforces the permissibility of such amnesties under international law.

Colombia is one of the first countries to adopt an amnesty for political crimes with a clear reference to Protocol II. Colombia is also the first country to contemplate amnesty and a transitional justice process under the jurisprudence of both the ICC and the Inter-American Human Rights System. The Colombian experience is therefore precedent setting, and all care must be taken to get it right. There is no indication that the amnesty, as it has been articulated so far, violates

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<sup>203</sup> See Charlayne Hunter-Gault, *Peace Pact Signed in Angola*, CNN (Apr. 4, 2002, 8:52 AM), <http://edition.cnn.com/2002/WORLD/africa/04/04/angola.peace/>; see also DAVID SEDDON & DANIEL SEDDON-DAINES, A POLITICAL AND ECONOMIC DICTIONARY OF AFRICA 35–36 (Cathy Hartley ed., 2005).

<sup>204</sup> See SEDDON & SEDDON-DAINES, *supra* note 203, at 35–36 (discussing the U.N. Security Council mandate to establish the United Nations Mission in Angola in August 2002).

<sup>205</sup> CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* 502 (2nd ed. 1934).

<sup>206</sup> I TRUTH & RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMM'N OF SOUTH AFRICA REPORT 1–12 (1998).

international law. On the contrary, as we have seen, it is very much in line with the recent evolution of international law on amnesty. An amnesty such as the one proposed in Colombia, adopted under Additional Protocol II to pursue the interest of peace and reconciliation, and which covers the mere participation in hostilities and political crimes related to that participation that do not rise to the level of war crimes, crimes against humanity, or genocide, is compatible with international law. Where the amnesty is coupled with other truth and justice mechanisms, such as a truth commission, as is the case in Colombia, its legitimacy is only reinforced.