A HARD THOUGHT PEACE? THE COLOMBIAN PEACE AGREEMENT, AND DUTIES TO PROSECUTE AND PUNISH UNDER INTERNATIONAL LAW

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ABSTRACT

In 2016, the Government of Colombia and the Colombian Revolutionary Armed Forces-Popular Army (FARC-EP) agreed to end a decades-long internal conflict through the Comprehensive Peace Agreement (CPA). Although it has been praised for its attention to victims' rights, the CPA has been criticized for including provisions for amnesty and alternate sentencing for perpetrators. This article analyzes whether amnesty and alternative sentencing under the CPA are compliant with international and regional law. The article examines obligations with respect to these two issues under international treaty and customary law, the Rome Statute, and the American Convention on Human Rights. It is argued that the significant criticism as to the CPA's amnesties and alternative sentencing are misplaced. The CPA exceeds a large majority of its obligations and reveals that a number of the assumptions about the existence of duties to prosecute and punish under international law are premature. Many of these obligations are nascent and developing, and in this way the CPA may itself contribute to this development and provide a model for future resolution of conflict in accordance with international law.

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INTRODUCTION

"In 2005, I graduated from high school, but since only one or two out of ten Afro-Colombians ever get accepted into university, I got stuck. I started working in a collective public transport service as an assistant. We covered a dangerous route; there were a number of armed actors in the area. Almost all of Quibdó was divided.

In April 2006, a massacre took place and the paramilitaries killed six young guys. Then some time later, in August, several paramilitaries were killed in a disco and from then on everything was just a time bomb. The next day some guys from the FARC got on our bus, looking like the American dream, and when the bus got to the corner where the paramilitaries had been buried, a gun fight broke out. The bus driver cried because he didn't know what to do. They made us climb up a hill and lie on the ground. Four people died and about forty were injured. The FARC guys left and then the next odyssey began. We had to leave the bus and escape.

I was left with such psychosocial trauma that I couldn't bear to have a person standing behind me. I felt as if my heart was going to come out of my mouth. I moved to Medellín where I lasted two months. The paramilitaries started to look for me because they thought I belonged to the FARC and the FARC started to look for me because they thought I was going to talk; and the police were looking for me too, because they thought I had been an accomplice in the shooting.

Eventually I had no option but to return to my house in Quibdó because I couldn't get a job. People began to gossip and I had to learn to live with that. I explained I had nothing to do with the shooting and people left me alone for a while. Then the paramilitaries started mass recruitment, and they

sent me an ultimatum: if I didn't enlist, it was goodbye. They would kill me. I contacted a man who helped me get out of there. I moved to Pasto in September 2007 but started receiving threatening phone calls from the paramilitaries, so I had to cut myself off from the world. I thank God and the people he put in my path, because they really gave me a hand. Without them I wouldn't be telling this story. The PCN, the Black Communities Process, took my case to the Ministry of Internal Affairs and they gave me money to relocate. The bad thing about the city is that no matter where I am people look at me strangely and try to avoid me."[1]

Most experts agree that the Colombian conflict has lasted over 50 years.[2] Its main guerrilla force began open conflict with the government in 1964, and this conflict has resulted in approximately eight million people becoming victims of international crimes.[3] Over 80 percent of deaths relating to the conflict were of civilians.[4] There was a

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[1] WORLD BANK, VOICES: STORIES OF VIOLENCE AND HOPE IN COLOMBIA, REPORT NO. 50461 (Sept. 22, 2009) 18–20, https://documents.worldbank.org/pt/publication/documents-reports/documentdetail/174331468243579792/voices-stories-of-violence-and-hope-in-colombia. Permission was obtained by the author from the Bogotá office of the World Bank to reproduce this account.

[2] *See* SERGIO JARAMILLO CARO & FABRA-ZAMORA, THE COLOMBIAN PEACE AGREEMENT: A MULTIDISCIPLINARY ASSESSMENT 25 (Jorge Luis Fabra-Zamora et al. eds., 2021). For a history of violence in Colombia prior to 1964, *see* DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF (1993); ROBERT A. KARL, FORGOTTEN PEACE: REFORM, VIOLENCE, AND THE MAKING OF CONTEMPORARY COLOMBIA (2017).

[3] Nelson Camilo Sanchez Leon, *Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia?*, 110 AM. J. INT'L L. UNBOUND 172, 172 (2016); Lily Rueda Guzman & Barbora Holá, *Punishment in Negotiated Transitions: The Case of the Colombian Peace Agreement with the FARC-EP*, 19 INT'L CRIM. L. REV. 127, 128 (2019).

[4] ESTADÍSTICAS DEL CONFLICTO ARMADO EN COLOMBIA, https://www.centrodememoriahistorica.gov.co/micrositios/informeGeneral/estadisticas.html (last visited May 8, 2023).

significant interest in ending the conflict, but the repeated failures of peace negotiations were in no small part due to the difficulty that the Government of Colombia had with managing the issue of accountability for crimes perpetrated by participants to the conflict.[5]

In late 2016, the government of Colombia and the Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo (FARC-EP) agreed to the terms of the Comprehensive Peace Agreement (CPA). The CPA sets out a broad regime of terms upon which the government and the FARC-EP would cease hostilities.[6] It was approved by the Congress of Colombia, despite being rejected by the public in a plebiscite and then subject to modifications.[7]

Colombia is reportedly the first State that has attempted to make peace with a militarily powerful, active, non-state fighter while also being under the supervision of treaty mechanisms such as the Inter-American Court of Human Rights (IACtHR) and the International Criminal Court (ICC).[8] On 14 December 2020, the Office of the Prosecutor (OTP) published its report on its preliminary activities, and stated that "Colombian authorities, in overall, have taken

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[5] Gustavo Alvira, *Toward a New Amnesty: The Colombian Peace Process and the Inter-American Court of Human Rights*, 22 TUL. J. INT'L & COMP. L. 119, 140 (2013); PRISCILLA HAYNER, THE PEACEMAKER'S PARADOX: PURSUING JUSTICE IN THE SHADOW OF CONFLICT 203–06 (2018); Claudia Josi, *Accountability in the Colombian Peace Agreement: Are the Proposed Sanctions Contrary to Colombia's International Obligations?* 42 SOUTHWESTERN. L. REV. 401, 402 (2017).

[6] ONUR BAKINER, AS WAR ENDS: WHAT COLOMBIA CAN TELL US ABOUT THE SUSTAINABILITY OF PEACE AND TRANSITIONAL JUSTICE 231-37 (2019).

[7] Caroline D. Kelly, *Contextual Complementarity: Assessing Unwillingness and "Genuine" Prosecutions in Colombia's Special Jurisdiction For Peace*, 48 GEO. J. INT'L L. 807, 807 (2017).

[8] Josi, *supra* note 5, at 412. For an examination of the impact of such supervision, *see* Courtney Hillebrecht et al., *The Judicialization of Peace*, 59 HARV. INT'L L. J. 279 (2018).

meaningful steps to address conduct amounting to ICC crimes."[9] However, the OTP made it clear that its monitoring and activities have not ceased. Notwithstanding a recent agreement to close its lengthy investigation of alleged crimes perpetrated in Colombia and defer to the Colombian mechanisms for accountability, the possibility remains that an investigation by the OTP might be reopened.[10] Thus, Colombia's efforts to implement a peace agreement under the supervision of the IACtHR and ICC are ongoing.

Part I will introduce the concepts of peace and justice and their relationship both in the context of a state in transition from conflict to peace and in the Colombian context. Part II will consider the CPA's compliance with duties to criminalize and prosecute "international core crimes" (primarily, crimes against humanity and war crimes). It will analyze the CPA to ascertain the crimes which will be subject to prosecution and the crimes which might benefit from amnesty. A comparison will be made between these provisions and the obligations that apply Colombia to prosecute crimes under treaty law, customary international law, the Rome Statute and the American Convention on Human Rights (ACHR). Part III is concerned with the alternative sentencing provisions that apply to persons prosecuted for international core crimes under the auspices of the CPA. It analyzes these provisions, and ascertains whether this alternative sentencing regime complies with Colombia's obligations under treaty law,

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[9] INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2020 ¶¶ 152–53 (2020). But see ¶¶ 38-39, ¶ 154.

[10] See Cooperation Agreement Between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia, arts. 3, 6 (Oct. 2, 2021), https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia.

customary international law, the Rome Statute and the ACHR.

The Colombian conflict is perhaps the most scrutinized peace process to date, and is highly instructive for present and future peace initiatives. It has been called "innovative," "the most victim-centred comprehensive peace agreement ever negotiated,"[11] and the "most planned and deliberated-upon" transitional justice model in the world.[12] Nevertheless, it included provisions for amnesty, and alternate non-custodial sentencing for perpetrators of international core crimes. These provisions have been called the "most controversial" aspects of the agreement.[13]

While they will inevitably be politically controversial, this article argues that these provisions should not be considered legally controversial. It shows that a duty to prosecute core international crimes is unlikely to exist under international law nor under the Rome Statute, although it likely does exist under regional law. Notwithstanding, Colombia for the most part exceeds these obligations by ensuring international core crimes are investigated and prosecuted, even though amnesty is available for other (political) crimes. This article also shows that international law provides minimal guidance on a duty to punish core international crimes once prosecution is initiated, except for a likely requirement that punishment is to be proportionate to the rights violated. Meanwhile the Rome Statute and the ACHR appear to provide for a requirement to impose punishment for convictions of core international crimes. However, this punishment might be imposed in a form that is not strictly punitive, so long as it achieves broader goals of restorative justice and it is

[11] BAKINER, *supra* note 6, at 208.
[12] BAKINER, *supra* note 6, *at* 231.
[13] *Id.*

implemented in tandem with other more victim-centric post-conflict mechanisms such as truth commissions and reparations. The Colombian example therefore reinforces these preexisting efforts in developing the law of sentencing with respect to mass perpetration of core international crimes, by imposing a punishment that is non-custodial in nature but which requires perpetrators to contribute to post-conflict reconstruction, truth-telling, and reparations for victims.

I. PEACE, JUSTICE, AND THE CPA

A. Peace and justice: uncomfortable allies?

Peace can be conceptualized in a "negative" sense as an absence of direct and open violence, or in a "positive" sense, as the presence of cooperation, equity, equality and culture of peaceful resolution of dispute: the absence of structural violence.[14] "Justice" is a similarly contested concept, but has been defined by the UN Secretary-General as "accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs."[15]

Those who advocate for "peace over justice" commonly do so from the perspective that less punitive forms of peace are necessary to ensure conflicting parties are not disincentivized by fear of sanctions from coming to the

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[14] JOHAN GALTUNG, JOHAN GALTUNG: PIONEER OF PEACE RESEARCH (2013).

[15] United Nations Secretary-General, *UN Approach to Rule of Law Assistance*, RULE OF L. BLOG (Apr. 2008) https://www.un.org/ruleoflaw/blog/document/guidance-note-of-the-secretary-general-un-approach-to-assistance-for-strengthening-the-rule-of-law-at-the-international-level/.

bargaining table and agreeing to a cessation of hostilities.[16] The logic is that few combatants are willing to lay down arms if it means appearing before a criminal court and facing a term of imprisonment, especially where such judicial institutions face significant legitimacy deficits and accusations of historic bias.[17] Punishment or "naming and shaming" of political figures implicated in conflict-era violations is said to jeopardize political viability during a time of fragile peace.[18] Parties to a conflict which prosecute their members can face dangers to their institutional survival, while "purging" opposition groups can lead to rivalries and retaliations, in a time of minimal trust and a need for cooperation.[19] If post-conflict peace can be theorized as politically expedient bargains among conflicting parties, punitive measures risk unravelling these and reigniting conflict.[20] This is especially so as punitive measures often threaten influential elites of political, economic and military institutions directly, which retain the

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[16] JEMIMA GARCÍA-GODOS, RESEARCH HANDBOOK ON INTERNATIONAL LAW AND PEACE 403 (Cecilia M. Bailliet ed., 2019).

[17] Sanchez, *supra* note 4, at 173; Héctor Olasolo Alonso, *Reflections on the Need for Some Degree of Harmonization between the International Normative Framework of Ius Cogens Crimes and Transitional Justice: Special Attention to Criminal Proceedings and Truth Commissions* 120, in THE NUREMBURG PRINCIPLES IN NON-WESTERN SOCIETIES: A REFLECTION ON THEIR UNIVERSALITY, LEGITIMACY AND APPLICATION 115 (Ronald Slye ed., 2016).

[18] INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, CHALLENGING THE CONVENTIONAL: CAN TRUTH COMMISSIONS STRENGTHEN PEACE PROCESSES? (2014).

[19] Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357, 401 (1999).

[20] Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SEC. 5, 8 (2003).

ability to remobilize against their former foes.[21] Because a significant portion of a post-conflict population has often either acquiesced to, collaborated with or joined one side to the conflict, any strong demand for accountability will likely polarise these populations and may inflame wider social tensions.[22]

Nevertheless, there are strong arguments in favor of a punitive form of justice being essential for peace. One argument is that accountability for past human rights abuses in the form of punishment is often in line with public and political opinion.[23] Illustrative of this concern, an examination of reconciliation in South Africa following the dismantling of apartheid concluded that many victims perceived this process to be a failure, because they had a strong belief that reconciliation could occur only if perpetrators received a measure of accountability for their crimes.[24] Amnesties provided to these perpetrators were perceived as unduly favoring the interests of the perpetrators.[25] If certain groups with access to tools of violence perceive unmet claims for justice, political protest and violence is a possibility and a condition of negative peace is jeopardized.[26]

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[21] Cyanne E. Loyle & Christian Davenport, *Transitional Injustice: Subverting Justice in Transition and Post-cConflict Societies*, 15(1) J. HUM. RTS. 126, 133 (2016).
[22] Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 COLUM. J. TRANSNAT'L L. 89, 128 (2001).
[23] Sanchez, *supra* note 4, at 173.
[24] Marie-Claude Jean-Baptiste, *Cracking the Toughest Nut: Colombia's Endeavour with Amnesty for Political Crimes under Additional Protocol II to the Geneva Conventions*, 7 NOTRE DAME J. INT'L & COMP. L. 27, 47 (2017) (citing Jasmina Brankovic, *Accountability and National Reconciliation in South Africa*, 2 EDICIONES INFOJUS: DERECHOS HUMANOS 55-86, (2013).
[25] *Id*.
[26] Rama Mani, *Balancing Peace with Justice in the Aftermath of Violent Conflict*, 48 DEVELOPMENT 25, 28 (2005).

A further argument is that some measure of punishment is an important foundation for rule of law to fully take root in a post-conflict society. "Rule of law" is a phrase that is used more often than it is defined, and must be distinguished from "restoring order."[27] It is the system in which all persons in a community, particularly political leaders or security personnel, are subject to law consistent with human rights norms.[28] Communities and civil society may harbor serious doubts in the efficacy of a legal system if the government cannot bring to account elites complicit in human rights atrocities.[29] Failing to address impunity during conflict can give rise to a legitimacy deficit in the legal system and government, because if the legal system does not respond to serious crimes of the past, civilians live in doubt that this same system can protect their own interests from future human rights violations.[30]

A decision to 'forget' past atrocities may miss an opportunity to address issues of structural violence that drove the conflict in the first place.[31] A lack of rule of law may also embolden would be violators to continue to

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[27] Lauren Marie Balasco, *The Transitions of Transitional Justice: Mapping the Waves From Promise to Practice*, 12 J. HUM. RTS. 198, 203 (2013).

[28] Jennifer Chiang, *A Call to Action—Examining Nepal's Post-Conflict Strategy Toward Persons Accused of Gross Human Rights Abuses*, 81 FORDHAM L. REV. 939, 944 (2013).

[29] Geoff Dancy et al., *Stopping State Agents of Violence or Promoting Political Compromise? The Powerful Role of Transitional Justice Mechanisms*, 1 AM. POL. SCI. A. CONF. ANN. MEETING 26 (Aug. 30, 2013).

[30] RENÉE JEFFERY, AMNESTIES, ACCOUNTABILITY, AND HUMAN RIGHTS 132 (2014).

[31] Dáire McGill, *Different Violence, Different Justice? Taking Structural Violence Seriously in Post-Conflict and Transitional Justice Processes*, 6 STATE CRIME J. 79, 82–83, 85–86, 89 (2017).

perpetrate human rights violations.[32] An absence of rule of law also risks engendering possible exercises of vigilante justice by victim groups against perpetrators for perceived wrongs.[33] Conversely, rule of law exists and is seen to exist where a pattern emerges in which human rights violations are held to account, and "systematic justice" is applied to individuals irrespective of privilege or status.[34] International criminal law is an important symbolic expression of standard of conduct for political disagreement.[35] Nevertheless, short-term peace has been called the "single most important determinant" of long-term peace, and what is required for the former is not necessarily the same as for the latter.[36] Remedying atrocities and lasting peace are both adversarial and interdependent notions.[37]

Of course, implicit in this discussion is an assumption of a punitive form of justice. Retributive justice, which is the prosecution and punishment of perpetrators of crimes, is only one form of justice.[38] There is evidence that victims of armed conflict perceive "justice" as encompassing much more than prosecutions.[39] Some argue that transitional

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[32] Simon Chesterman, *Rough Justice: Establishing the Rule of Law in Post-Conflict Territories*, 20 OHIO ST. J. ON DISPUTE RESOLUTION 69, 76 (2005).
[33] Chiang, *supra* note 28, at 946.
[34] Dancy et. al., *supra* note 29, at 26.
[35] MARINA AKSENOVA, HUMAN RIGHTS NORMS IN 'OTHER' INTERNATIONAL COURTS 132, 140 (Martin Scheinin ed., 2019).
[36] David Mendeloff, *Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm*, 6 INT'L STUD. REV. 355, 362 (2004).
[37] ELLEN LUTZ, TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 325, 327 (Naomi Roht-Arriaza & Javier Mariecurrena eds., 2006).
[38] García-Godos, *infra* note 242, at 401.
[39] Simon Robins, *Transitional justice as an elite discourse: Human rights practice between the global and the local in post-conflict Nepal*, 1 UNIV. OF YORK 9-11 (2010).

justice mechanisms should be focused towards adequate reparations to victims, so that their basic needs can be met and socio-economic and political grievances may be resolved.[40] They may also seek to elevate the experience of the victim through truth-telling proceedings.[41] In a context in which a system protecting fundamental rights has failed and there is a trust deficit, some argue the accountability efforts should be redirected from consequentialism towards trust-building, and should contain a communicative element, through which perpetrators are made to understand the wrongfulness of their actions.[42]

Furthermore, "limited criminal sanction," where wrongs are exposed as part of diminished punishment, may satisfy some victim demands whilst avoiding aggravating politically and socially volatile contexts.[43] Perhaps what is essential is that civilians see a "good faith effort" to apply justice to past human rights atrocities, and that impartiality slowly but surely infiltrates the justice system.[44]

B. Peace and justice in the Colombian context

The history of the Colombian conflict is long and complex, with its roots in decades of structural violence. The beginning of open conflict is placed between 1948 to 1964 upon the establishment of leftist guerrilla movements that were a response to violence by the political establishment against civilians and marginalized political

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[40] EGERIA NALIN, PEACE MAINTENANCE IN AFRICA 135, 149 (Giovanni Cellamare & Ivan Ingravallo eds., 2018).
[41] AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY, DIALOGUE, AND COMMUNITY ACTION: TRUTH AND RECONCILIATION IN GREENSBORO 47, 48 (Spoma Jovanovic ed., 2012).
[42] Paul Seils, *Square Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace*, 1 INT'L CENTRE FOR TRANSITIONAL JUST. 9-11 (2015).
[43] Dancy et al, *supra* note 29, at 25.
[44] Chiang, *supra* note 28, at 944.

groups.[45] These movements generally sought reforms to rural poverty, land dispossession and political marginalization,[46] but also formed with a goal of self-defense from state-sanctioned violence.[47]

The Colombian conflict was seen as infamously intractable.[48] It involved many different actors sometimes in competition with one another and responsible for 'spoiler' acts of violence during key peace discussions, while drug trafficking and the inability of the state to assert control over large tracts of the country's geography also prolonged the conflict.[49] Certainly, the government and the FARC-EP could also be accused of entering negotiations without any intention of arriving at a negotiated solution.[50] Notwithstanding, since the 1980s the government has signed at least nine peace agreements with various armed

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[45] For more information on this history, *see, e.g.*, FABIO ANDRÉS DÍAZ PABÓN, JUSTICE AND RECONCILIATION IN COLOMBIA: TRANSITIONING FROM VIOLENCE 15, 15 (Fabio Andrés Díaz Pabón ed., 2018); MAURIZIO TINNIRELLO, DIFFERENT APPROACHES TO PEACE AND CONFLICT RESEARCH 103, 103-20 (Robert C. Hudson & Hans-Joachim Heintze eds., 2008); Zakia Shiraz, Unending War? The Colombian Conflict, 1946 to the Present Day (2014) (PhD thesis, University of Warwick), http://wrap.warwick.ac.uk/66992/; Armando Martinez, *Remodifying Colombian Peace Process: A Critical Perspective and Demand for Justice*, 20 CARDOZO J. CONFLICT RESOL. 617 (2019).

[46] ANDRÉS GARCÍA TRUJILLO, PEACE AND RURAL DEVELOPMENT IN COLOMBIA: THE WINDOW FOR DISTRIBUTIVE CHANGE IN NEGOTIATED TRANSITIONS 33, 41, 60–61 (2021); Frances Thomson, *The Agrarian Question and Violence in Colombia: Conflict and Development*, 11, J. AGRARIAN CHANGE, 321 (2011); Renata Segura & Delphine Mechoulan, *Made in Havana: How Colombia and the FARC Decided to End the War,* 5 INT'L PEACE INST. (2017).

[47] Elena M. Valencia, *Theories of Compliance in International Conflict: The Place of the Third Geneva Convention in Colombian Armed Conflict*, 21 TEMP. INT'L & COMP. L.J. 445, 448–49 (2007).

[48] CARO & FABRA-ZAMORA, *supra* note 4.

[49] Segura & Mechoulan, *supra* note 46, at 5-9; DÍAZ PABÓN, *supra* note 45, at 29.

[50] CARLO NASI, TRUTH, JUSTICE AND RECONCILIATION IN COLOMBIA: TRANSITIONING FROM VIOLENCE 35 (Fabio Andrés Díaz Pabón ed., 2018).

groups, while violence with other groups continued.[51] Different governments found common ground in their struggle to achieve a peace solution with the main leftist guerrilla groups, the FARC-EP and the ELN.[52]

After the election of Álvaro Uribe as President in 2002 and again in 2006, the government of Colombia escalated its use of military strength aimed at forcing guerrilla groups to negotiate.[53] In addition, the State established demobilization, disarmament and reintegration initiatives and transitional justice frameworks.[54] Despite the increase of military efforts against the FARC-EP, it became clear that the victory sought by the government could only come at prohibitive cost and loss of legitimacy, as the counter-insurgency had resulted in the deaths of 4,000 civilians and achieved no decisive victory.[55] The FARC-EP, influenced by the impossibility of achieving military victory, began its seventh set of peace discussions with the government in October 2012 in Havana, Cuba.[56]

In August 2016, the government of Colombia and the FARC-EP agreed to the terms of the CPA which set out a broad regime upon which the two parties would cease hostilities.[57] The *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace* was signed on 26 September 2016 by Juan Manuel Santos on behalf of

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[51] DÍAZ PABÓN, *supra* note 45, at 15.
[52] *Id*.
[53] *Id.* at 26-27.
[54] *Id*.
[55] NASI, *supra* note 50, at 36.
[56] JUNE S. BEITTEL, CONGR. RSCH. SERV., R42982, COLOMBIA'S PEACE PROCESS THROUGH 2016 6 (2016); Guzman & Hola, *supra* note 4, at 143-44.
[57] DIEGO FERNANDO TARAPUÉS SANDINO, TRANSITIONAL JUSTICE IN COLOMBIA: THE SPECIAL JURISDICTION FOR PEACE 63, 65 (Kai Ambos & Stefan Peters eds., 2022).

the Government of Colombia, and Rodrigo Londoño of the FARC-EP.[58]

The terms of the agreement were put to the Colombian public in a plebiscite held on 2 October 2016.[59] This plebiscite was not legally necessary, but the negotiators saw this as an important step in bolstering the legitimacy of the agreement.[60] The parties asked the Colombian population the following question: "Do you support the Final Agreement to end the conflict and build a stable and lasting peace?."[61] To the surprise of many, a slim majority of voters (50.21 percent) voted "No," while 49.78 percent of voters voted "Yes."[62] The vote was characterized by low turnout, with only 37.43 percent of registered voters participating in the plebiscite, or approximately 13 million out of 34.8 million eligible voters.[63] One of the main

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[58] Nicholas Casey, *Colombia Signs Peace Agreement With FARC After 5 Decades of War*, N.Y. TIMES (Sept. 26, 2016), https://www.nytimes.com/2016/09/27/world/americas/colombia-farc-peace-agreement.html.

[59] For more information on the role of plebiscite in Colombian law, *see* Santiago García-Jaramillo & Daniel Currea-Moncada, *The Colombian Tale of Two Legal Revolutions*, 53 CORNELL INT'L L. J. 1, 15-18 (2020); CARO & FABRA-ZAMORA, *supra* note 4, AT 263, 271-73.

[60] Aila M. Matanock & Miguel García-Sánchez, *The Colombian Paradox: Peace Processes, Elite Divisions & Popular Plebiscites*, 146 DŒDALUS 152, 155 (2017); García-Jaramillo & Currea-Moncada, *supra* note 59, at 15. García-Jaramillo and Currea-Moncada describe the fast-track legislative mechanism that a "yes" vote majority would have engaged, and the subsequent ruling of the Colombian Constitutional Court that enabled a later version of the CPA to be implemented with just presidential approval and congressional endorsement: *see id.* at 16-18, 21.

[61] Translation from: "¿Apoya el acuerdo final para terminación del conflicto y construcción de una paz estable y duradera?"

[62] PLEBISCITO 2 OCTUBRE 2016, REGISTRADURÍA NACIONAL DEL ESTADO CIVIL (2016) (available at https://elecciones.registraduria.gov.co/pre_plebis_2016/99PL/DPLZZZZZZZZZZZZZZZZZ_L1.htm); Observers have noted that in districts "most directly affected" by the conflict, the vote was overwhelmingly "yes," *see* HAYNER, *supra* note 5, at 211.

[63] *Id.*

concerns articulated by the Colombian population was that the agreement conceded too much to personnel of the FARC-EP at the expense of the interests of victims, by not subjecting many perpetrators of atrocities to imprisonment.[64]

Following the rejection of the public, the terms of the CPA were modified and signed by Santos and Londoño on 24 November 2016.[65] This CPA was then approved by the two houses of the Colombian Congress on 30 November 2016 without further voter consultation.[66] On 24 March 2017, the UN Secretary-General António Guterres received a signed version of the 24 November 2016 CPA from Colombian President Juan Manuel Santos Calderón.[67]

The CPA is not the only mechanism in Colombia in place to manage crimes committed by armed groups in this conflict.[68] Law No 975 of 2005 on Justice and Peace and

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[64] Hillebrecht et al., *supra* note 8, at 291; REBEKKA FRIEDMAN ET AL., AS WAR ENDS: WHAT COLOMBIA CAN TELL US ABOUT THE SUSTAINABILITY OF PEACE AND TRANSITIONAL JUSTICE 305, 320 (James Meernik et al. eds., 2019); *but see* JACQUELINE H.R. DEMERITT ET AL., AS WAR ENDS: WHAT COLOMBIA CAN TELL US ABOUT THE SUSTAINABILITY OF PEACE AND TRANSITIONAL JUSTICE 68, 86-87 (James Meernik et al., eds., 2019).

[65] Diana Rico Revelo & Cecilia Emma Sottilotta, *Barriers to Peace? Colombian Citizens' Beliefs and Attitudes Vis-à-Vis the Government-FARC-EP Agreement*, STUD. IN CONFLICT & TERRORISM 1, 3 (2020); For an overview of the amendments, *see* HAYNER, *supra* note 5, at 212-33.

[66] Kelly, *supra* note 7, at 807; The Centro Democrático political party boycotted the vote. This party was founded by former President and longstanding critic of the CPA, Álvaro Uribe. FABRA-ZAMORA ET AL., *supra* note 4, at 9; for an analysis of the decision by the Colombian Constitutional Court, in particular the Court's interpretation of "public endorsement" as a required step in enacting the law, *see* García-Jaramillo & Currea-Moncada, *supra* note 59, at 17-19.

[67] U.N. SCOR, 272nd Sess., U.N. Doc. S/2017/272 (Nov. 24, 2016).

[68] *See* Hector Olasolo & Joel M.F. Ramirez Mendoza, *The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition*, 15 J. INT'L CRIM J. 1011, 1013 (2017); MARCO ALBERTO VELÁSQUEZ RUIZ, TRUTH, JUSTICE AND RECONCILIATION IN COLOMBIA

the Legal Framework for Peace of 2012 pre-dated the CPA as mechanisms to manage cases of alleged crimes. Ultimately, these works did not receive a positive reception among the non-government forces due to the lack of participation of such groups in their formulation and the perception that the proposed terms of imprisonment were overly harsh.[69] Nor did the CPA involve every party to the conflict. Paramilitary organizations such as the *Ejército de Liberación Nacional* (ELN) which reportedly boasts 3,000 fighters,[70] and the *Ejército Popular de Liberación* (EPL), whose fighters number in the low hundreds,[71] both maintain hostilities, although a ceasefire set in upon the emergence of the coronavirus pandemic in 2020.[72] Nevertheless, the CPA has led to the FARC-EP's transition from a major armed group to a political party, and to a reduction in conflict-related acts of violence.[73]

Researchers Joshi and Quinn theorize comprehensive peace agreements as "strategic peace building – that is, an integrated collection of parallel and reinforcing processes aimed at promoting reconciliation between warring groups, fostering better state-society relations, overcoming fear and

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TRANSITIONING FROM VIOLENCE 50 (Fabio Andrés Díaz Pabón ed., 2018).

[69] Olasolo & Ramirez Mendoza, *supra* note 68, at 1013.

[70] Steven Grattan, *Four years after FARC peace deal, Colombia grapples with violence Conflict News*, AL JAZEERA (Nov. 24, 2021), https://www.aljazeera.com/features/2020/11/24/four-years-after-peace-deal-colombia-grapples-with-violence.

[71] Ted Piccone, *Peace with Justice: The Colombian Experience with Transitional Justice*, 1 FOREIGN POL'Y AT BROOKINGS 8 (2019); *see also* Juan Diego Cárdenas, *Colombia Decides EPL is No Longer Major Threat*, INSIGHT CRIME (Apr. 19, 2021), https://insightcrime.org/news/colombia-decides-epl-no-longer-major-threat/.

[72] *Colombia's ELN rebels call ceasefire over coronavirus,* BBC NEWS (Mar. 30, 2020), https://www.bbc.com/news/world-latin-america-52090169.

[73] Guzman & Holá, *supra* note 3, at 128.

insecurity, and addressing the root causes of civil war."[74] Consistent with this, the CPA is enormous and contains a dizzying array of initiatives addressing various drivers of conflict: researchers Leyva and Correa found that the CPA contained 70 percent more provisions than the international average for such agreements.[75] It concerns 64 organizations and traverses 35 areas of policy including development, children's rights, disarmament, electoral reform, media reform, minority rights, refugees, truth and reconciliation, women's rights, and land reform.[76] Approximately 146 of the 578 stipulations in the CPA addressed issues of economic and social development.[77] This article will focus on the section of the CPA devoted to Victims of the Conflict. The Special Jurisdiction for Peace (Jurisdicción Especial de Paz, or JEP) is created by the CPA as "perhaps the central institution" for delivering to victims' truth, justice and reparation.[78]

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[74] Madhav Joshi & Jason Michael Quinn, *Implementing the Peace: The Aggregate Implementation of Comprehensive Peace Agreements and Peace Duration after Intrastate Armed Conflict*, 47 BRIT. J. OF POL. SCI. 869, 871-72 (2017).

[75] Santiago Leyva & Pablo Correa, *The Complexity of the Organizational Design for Implementation of a Peace Accord: A Predictable Obstacle To The Peace Agreement With The FARC, in* AS WAR ENDS: WHAT COLOMBIA CAN TELL US ABOUT THE SUSTAINABILITY OF PEACE AND TRANSITIONAL JUSTICE 22, 29-30 (James Meernik, Jacqueiline H.R. DeMeritt, & Mauricio Uribe-López eds., 2019).

[76] *Id*. *See also* C. Sophia Müller, *The Role of Law in Enforcing Peace Agreements: Lessons Learned from Colombia*, 26(1) J. CONFLICT & CONFLICT L. 117, 121-22 (2021).

[77] Joshi & Quinn, *supra* note 72, at 212.

[78] Danilo Rojas Betancourth, *The Special Jurisdiction for Peace: Main features and legal challenges*, *in* THE COLOMBIAN PEACE AGREEMENT: A MULTIDISCIPLINARY ASSESSMENT 161 (Jorge Luis Fabra-Zamora, Andrés Molina-Ochoa & Nancy C. Doubleday eds., 2021) ; TARAPUÉS SANDINO, *supra* note 57, at 63-64; Kai Ambos & Susann Aboueldahab, *The Special Jurisdiction for Peace and Impunity: Myths, Misperceptions and Realities*, in TRANSITIONAL JUSTICE IN COLOMBIA:

Procedurally, its structure and competence were enacted by Congress through Legislative Act 01 of 2017.[79] The following section describes its jurisdiction, which will assist in understanding the crimes perpetrated during the conflict which are subject to judicial processes.[80]

C. The Special Jurisdiction for Peace

The CPA established the Special Jurisdiction for Peace as an accountability framework outside the pre-existing Colombian judiciary, to exercise autonomous judicial functions over the issues within its jurisdiction.[81] The CPA establishes it as the "judicial component of the comprehensive system for truth, justice, reparation and non-repetition."[82] Nevertheless, the Colombian Constitutional Court has affirmed that "the JEP is not a single judicial body, but a jurisdiction with different institutions."[83]

THE SPECIAL JURISDICTION FOR PEACE 37, 40-41 (Kai Ambos & Stefan Peters eds., 2022).

[79] Betancourth, *supra* note 78, at 161.

[80] Ambos & Aboueldahab, *supra* note 78, at 39.

[81] Betancourth, *supra* note 78, at 161.

[82] Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Nov. 24, 2016, U.N. Doc. S/2017/272 https://colombia.unmissions.org/sites/default/files/s-2017272_e.pdf [hereinafter CPA]. This text will be relied upon below. Other versions exist. *See e.g.*, version at https://theasiadialogue.com/wp-content/uploads/2018/02/acuerdo-final-ingles.pdf.

[83] SANDINO, *supra* note 57, at 74-75 citing Constitutional Court, Judgment C-080 of 2018. Tarapués Sandino examines the institutional character of the JEP, including the various chambers which together make up the JEP, arguing that it is a "*sui generis*" jurisdictional institution. The primary institution is the Tribunal for Peace which performs as the "high court" of the jurisdiction and is itself made up of four sections: two chambers which hear allegations of crimes at first instance, one Review Section and one Appeals Section. Otherwise, there are institutions which define legal situations but do not undertake trials. These are the Chamber for the Recognition of Truth, Responsibility and the Determination of Facts and Conduct; the

Its objectives are extremely wide-ranging, being "to realise the victims' right to justice, offer truth to Colombian society, protect victims' rights, contribute to achieving a stable and lasting peace, and take decisions that offer full legal certainty to those who participated directly or indirectly in the internal armed conflict."[84]

The JEP is concerned with acts that were committed "due to, during or in direct or indirect connection with the armed conflict," which is shown where the existence of the armed conflict "played a substantial part" in the ability or decision of the perpetrator to commit the act.[85] The CPA is thus extremely specific about which acts are regarded as having no nexus to the conflict, and these acts would be adjudicated by ordinary criminal courts. The CPA further provides for a specific method to resolve disputes in jurisdiction between the JEP and any other jurisdiction.[86] A further limitation on the jurisdiction of the JEP is that it may only consider cases where the accused person "participated directly or indirectly in the armed conflict."[87] It has exclusive jurisdiction over these crimes, meaning no other domestic judicial body may sit in judgment over them.[88]

Chamber for Amnesty or Pardon; and the Chamber for the Definition of Legal Situations.

[84] CPA art. 5.1.2.2.

[85] CPA art. 5.1.2.9.

[86] CPA art. 5.1.2.9.

[87] CPA art. 5.1.2.15.

[88] Josi, *supra* note 5, at 408. Mazuera Zuluaga and Pabón Giraldo point out that Legislative Act 01 of 2017 requires that the crimes be perpetrated before 1 December 2016 for the JEP to have jurisdiction, meaning continuing or permanent crimes that are found to occur after this date could be subject to ordinary criminal law: *see* Andrés Gustavo Mazuera Zuluaga & Liliana Damaris Pabón Giraldo, *The special jurisdiction for peace in Colombia: possible International conflicts of jurisdiction*, 17(2) REVISTA JURÍDICAS, 29, 35 (2020). However, Ambos & Aboueldahab point out that Transitional Article 5 of Legislative Act No. 01 provides for crimes with a continuing effect beyond 1 December 2016: *see* Kai Ambos & Susann Aboueldahab,

For domestic purposes, the CPA was not a law, and so it was necessary for the government to implement legislation to give effect to its terms.[89] Therefore, the existence and competence of the JEP was incorporated into the Colombian Constitution by Legislative Act 01 of 2017,[90] which passed Congress on 4 April 2017. Various complexities encumbered the passage of this legislation.[91] On 24 November 2017, the Colombian Constitutional Court delivered a judgment that largely confirmed the constitutionality and enforceability of the Legislative Act 01 of 2017.[92]

The amnesty provisions were created by Act 1820 of 2016.[93] This legislation, enacted on 30 December 2016,

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Command Responsibility and the Colombian Peace Process, *in* THE QUEST FOR THE CORE VALUES IN THE APPLICATION OF LEGAL NORMS ESSAYS IN HONOR OF MORDECHAI KREMNITZER 259, 262 n.9 (Khalid Ghanayim & Yuval Shany eds., 2022).

[89] COLOMBIA: THE SPECIAL JURISDICTION FOR PEACE, ANALYSIS ONE YEAR AND A HALF AFTER ITS ENTRY INTO OPERATION, INT'L COMM'N OF JURISTS 13, n.28 (2019).

[90] Acto Legislativo No. 1 de 2017 y el establecimiento del sistema integral de verdad, justicia, reparación y no repetición (4 April 2017), http://www.suin-juriscol.gov.co/viewDocument.asp?ruta=Acto/30030428. In Colombia, Constitutional amendments are implemented by Congress by "Legislative Acts," rather than ordinary legislation; Betancourth, *supra* note 78, at 161.

[91] The Constitutional Court ultimately sided with Congress: *see* García-Jaramillo & Currea-Moncada, *supra* note 59, at 71. *See also*, María Paula Saffon Sanín, *The Colombian peace agreement A lost opportunity for social transformation?*, in THE COLOMBIAN PEACE AGREEMENT: A MULTIDISCIPLINARY ASSESSMENT 70, 78 (Jorge Luis Fabra-Zamora, Andrés Molina-Ochoa & Nancy C Doubleday eds., 2021), which describes that members of Congress "sabotaged" the speed with which the enacting legislation was passed.

[92] *See* Corte Constitucional [C.C.] [Constitutional Court], noviembre 17, 2017, Judgment, C-674/2017 (Colom.). Tarapués discusses numerous features of the judgment: *see* SANDINO, *supra* note 57.

[93] *See* Kai Ambos, *Transitional Justice in Colombia: The Amnesty Law 1820 of 2016 and the international legal framework*, *in* THE COLOMBIAN PEACE AGREEMENT: A MULTIDISCIPLINARY ASSESSMENT 123 (Jorge Luis Fabra-Zamora, Andrés Molina-Ochoa & Nancy C Doubleday eds., 2021).

provided guidelines for participants in the conflict to apply for amnesty and pardon.[94] On 1 March 2018, the Colombian Constitutional Court found that this law was largely constitutional. However, it found that in order to benefit from the amnesty, an individual must participate in truth-telling and must be willing to pay compensation to victims through the JEP.[95] The JEP was given legislative force by the *Statutory Act Regarding the Special Jurisdiction for Peace* (JEP Statutory Act)[96] which was passed by Congress on 6 June 2019.[97]

II. DUTY TO PROSECUTE AND PROHIBITION OF AMNESTY

Amnesty is a legal measure that has the effect of removing the prospect and consequences of criminal liability.[98] As alluded to above, blanket amnesties prevent investigation and prosecution, while conditional amnesties prevent investigation and prosecution where the person

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[94] *Id*.

[95] *Id.* at 124. Ambos at 131 discusses the relevant case, which was *Judgment C-007/18*, Constitutional Court of Colombia (1 March 2018).

[96] Proyecto de ley Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz, bill no. 8/2017 (Senate) https://comisionprimerasenado.com/proyectos-de-ley-en-tramite/171-proyecto-de-ley-estatutaria-no-08-de-2017-senado-016-de-2017-camara-estatutaria-de-la-administracion-de-justicia-en-la-jurisdiccion-especial-para-la-paz-procedimiento-legislativo-especial-p.

[97] The delay is explained by legal and political disputes over the implementation of the CPA. Ambos, *supra* note 93, at 138 n.64, citing Kai Ambos & Susann Abouelddahab, *Colombia: Time for the ICC Prosecutor to Act?*, EJIL:TALK! (Apr. 2, 2019), https://www.ejiltalk.org/colombia-time-for-the-icc-prosecutor-to-act/.

[98] MARK FREEMAN, NECESSARY EVILS: AMNESTIES AND THE SEARCH FOR JUSTICE 13 (2009).

who might benefit from the amnesty agrees to abide by certain conditions.[99]

Scholars have opined that blanket amnesties are "unequivocally" prohibited by international law,[100] and that States have a duty to prosecute at least the most heinous crimes, including genocide, war crimes, and crimes against humanity.[101] They have also argued that states have a duty to prosecute perpetrators of international core crimes perpetrated on their territory and/or by their nationals.[102]

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[99] Kai Ambos, *The legal framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC*, *in Building a Future on Peace and* Justice. *Studies on Transitional Justice, Peace and Development* 19, 20 (Kai Ambos, Judith Large, & Marieke Wierda eds., 2009). A good example of conditional amnesty was under the framework of the South African Truth and Reconciliation Commission in the 1990s, which amnestied participants on the condition that they took part in truth-telling; *see* Kate Allan, *Prosecution and Peace: A Role for Amnesty before the ICC*, 39 DENV. J. INT'L L. & POL'Y 239, 284 (2011). Allan also discusses other case studies involving amnesty, including Uganda and Sierra Leone.

[100] *See e.g.* Ambos, *supra* note 99, at 55; Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 497 (2003) in relation to the Rome Statute and blanket amnesties; Jean-Baptiste, *supra* note 24, at 49; ANGELA SCHLUNCK, AMNESTY VERSUS ACCOUNTABILITY: THIRD PARTY INTERVENTION DEALING WITH GROSS HUMAN RIGHTS VIOLATIONS IN INTERNAL AND INTERNATIONAL CONFLICTS (2000) cited in Anja Seibert-Fohr, *The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions*, 7 MAX PLANCK Y.B. OF THE UN 553 n.16 (2003).

[101] NALIN, *supra* note 40, at 155-56; Josi, *supra* note 5, at 412; Priscilla Hayner, *Negotiating Justice: The Challenge of Addressing Past Human Rights Violations*, *in* CONTEMPORARY PEACEMAKING: CONFLICT, PEACE PROCESSES AND POST-WAR RECONSTRUCTION 328 (John Darby & Roger MacGinty eds., 2008) citing Naomi Roht-Arriaza, *Transitional Justice and Peace Agreements*, INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY 13 (2005) and citing Christine Bell, *Negotiating Justice? Human Rights and Peace Agreements*, INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY 82-84 (2006).

[102] *See e.g.* Miles M. Jackson, *The Customary International Law Duty to Prosecute Crimes against Humanity: A New Framework*, 16 TUL. J.

Both advocates and critics of amnesty have given an incomplete analysis of the law on the obligation to prosecute and on the prohibition of amnesty.[103]

However, these claims on the state of international law warrant closer examination. The frequency with which amnesties are issued suggests either that international law is not sufficiently firm on amnesties and obligations to prosecute acts in internal conflict, or that there is widespread non-compliance with it.[104] Although a duty to prosecute does not necessarily follow from a prohibition on amnesty,[105] the law on either point is highly relevant for the other.[106]

A duty to prosecute must be distinguished from universal jurisdiction. Universal jurisdiction refers to the ability of a State to assert jurisdiction over a crime even though it may not have a territorial nexus to the crime and its national may not be involved in the crime as a perpetrator or a victim. Importantly, universal jurisdiction is very likely a right states hold (or a "permission" they

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INT'L & COMP. L. 117, 117 (2008); Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 LEIDEN J. INT'L L. 5, 15-16 (1994).

[103] Marika Giles Samson, *On 'Tempered Complementarity': The International Criminal Court and the Colombian Peace Process*, 8 CAN. J. HUM. RTS. 151, 161 (2019).

[104] Markos Karavias, *Duty to Prosecute*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 305, 306 (Antonio Cassese ed., 2009); JACOPO ROBERTI DI SARSINA, TRANSITIONAL JUSTICE AND A STATE'S RESPONSE TO MASS ATROCITY 234 (2019).

[105] Louise Mallinder, *The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws*, 65 ICLQ 645, 670 (2016).

[106] Prosecutor v. Saif Al-Islam Gaddafi, Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute, ICC-01/11-01/11-662, ICC Pre-Trial Chamber I ¶ 77 (Apr. 5, 2019); Kai Ambos, *Defences in International Criminal Law: Exceptions in International Law?*, *in* EXCEPTIONS IN INTERNATIONAL LAW 365 (Lorand Bartels and Federica Paddeu eds., 2020).

enjoy) in respect of core international crimes, but it is not a duty.[107]

A. CPA and Prosecution

Large sections of the Colombian and international community believed that there were blanket amnesties provided for in the CPA.[108] On the contrary, this section shows that the text of the CPA made significant efforts to confine the scope of amnesty. The implications of this confined scope are analyzed further below, following a consideration of the international legal obligations of the duty to prosecute.

The first restriction on amnesty is that it is conditional on the armed groups ending hostilities and fulfilling the terms of the CPA.[109] The second restriction is that amnesty is only available for "rebels" belonging to organizations which signed the CPA, or those "accused or convicted of political or related crimes."[110] The third and most important restriction is that crimes that might be considered for amnesty are "political and related crimes committed in the development of the rebellion," the meaning of which is set out in illustrative terms: "[p]olitical and related crimes will, for example, include rebellion, sedition and attempted coup, as well as the illegal bearing of firearms, killings in combat as defined under international humanitarian law,

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[107] ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY IN THE INTERNATIONAL CRIMINAL LAW REGIME 93-94 (2005); ANNELEN MICUS, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AS A SAFEGUARD FOR JUSTICE IN NATIONAL TRANSITIONS: FROM AMNESTY LAWS TO ACCOUNTABILITY IN ARGENTINA, CHILE AND PERU 8 (2015); Seibert-Fohr, *supra* note 100, at 256.
[108] Josi, *supra* note 5, at 409.
[109] CPA art. 5.1.2.10.
[110] CPA art. 5.1.2.23.

criminal conspiracy for the purposes of rebellion and other related crimes."[111]

In relation to the third restriction, the agreement provides criteria to determine "actions related to a political crime," which are to be assessed by the Judicial Panel for Amnesty and Pardon.[112] The "inclusive" criteria includes "crimes specifically linked to the course of the rebellion committed in connection with the armed conflict," crimes for which the "victim" was the State, or conduct "aimed at facilitating, supporting, financing or concealing the course of the rebellion."[113]

The agreement is also reasonably clear on which crimes *cannot* be amnestied, that is, the "exclusive" criteria. Amnesty is not available to those who perpetrated "crimes against humanity nor other crimes set out in the Rome Statute."[114] Article 5.1.2.40 reiterates which crimes would not be subject to amnesty:

> Crimes against humanity, genocide, serious war crimes — that is to say, all systematic violations of international humanitarian law — hostage taking or other serious deprivations of freedom, torture, extrajudicial executions, forced disappearances, rape and other forms of sexual violence, child abduction, forced displacement and the recruitment of minors will all be ineligible for an amnesty or pardon or equivalent benefits, as established in the Rome Statute.
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> […]

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[111] CPA art. 5.1.2.38.
[112] CPA art. 5.1.2.49.
[113] CPA art. 5.1.2.39. The CPA stated that the latter was not an international core crime: see art. 5.1.2.39. These provisions are reflected in Amnesty Law 1820 at art. 23.
[114] CPA arts. 5.1.2.25, 5.1.2.39.

> The rules will specify the scope and reach of these acts in accordance with the provisions of the Rome Statute, international human rights law and international humanitarian law.[115]

To further remove doubt, the CPA expresses that "[c]ommon crimes unrelated to the rebellion" are ineligible for amnesty, or at least, for amnesty through the JEP.[116] Perpetrators of crimes that are ineligible for amnesty were required to be subject to the JEP.[117]

The CPA is also clear that recipients of amnesties still have extant obligations. Article 5.1.2.27 provides that the granting of amnesty does not relieve the beneficiary of any "duty to contribute, individually or collectively, to clarification of the truth".[118] Indeed, in order to benefit from amnesty, perpetrators are required to cooperate fully with truth-telling procedures and reparations, or face the risk of prosecution under the ordinary criminal system.[119]

Having set out the crimes which can and cannot benefit from amnesty, the analysis will turn to the obligations of international criminal law (if any) on states with respect to prosecution of international core crimes.

B. Duties to Prosecute and Amnesties

Until the end of the Cold War, the international community generally deferred significantly to the domestic politics of states with respect to the question of prosecution

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[115] CPA art. 5.1.2.40.
[116] CPA art. 5.1.2.41.
[117] CPA art. 5.1.2.27.
[118] *Id*.
[119] This requirement was declared by the Constitutional Court of Colombia in 2018, and perhaps goes beyond the terms of the JEP. *See* Ambos, *supra* note 93, at 131-32.

or amnesty for combatants in internal conflict.[120] However, as the following paragraphs demonstrate, recent developments in international criminal law have eroded these assumptions.[121]

1. International law

The International Court of Justice Statute contains the most universally recognized statement on the sources of international law.[122] Article 38(1) of this Statute provides that the International Court of Justice is to apply international conventions, international custom, general principles of law "recognized by civilized nations," and judicial decisions and the teachings of highly "qualified publicists."[123] The term "international conventions" in article 38(1) refers to international treaties ratified by States

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[120] Christine Bell, *Peace Settlements and International Law: From Lex Pacificatoria to Jus Post Bellum*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW 499, 517-18 (Nigel White & Christian Henderson eds., 2013); Manuel Iturralde, *Colombian Transitional Justice and the Political Economy of the Anti-Impunity Transnational Legal Order*, in TRANSNATIONAL LEGAL ORDERING OF CRIMINAL JUSTICE 234, 237-38 (Gregory Shaffer & Ely Aaronson eds., 2020).

[121] *See* CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA 240-41 (2008).

[122]This is notwithstanding the Statute's more limited application as determining the sources of law for the International Court of Justice to consider, interpret and apply when determining cases before it. *See* THOMAS RAUTER, JUDICIAL PRACTICE, CUSTOMARY INTERNATIONAL CRIMINAL LAW AND NULLUM CRIMEN SINE LEGE 89-90 (2017); GLEIDER I. HERNÁNDEZ, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 30 (2014).

[123] Statute of the International Court of Justice, art. 38, June 26, 1945, 33 U.N.T.S. 933.

as parties, while international custom refers to what is commonly known as international customary law.[124]

a. Treaty-based obligations

Certain treaty regimes impose obligations on ratifying states to investigate possible perpetrations of international crimes, and either to prosecute or extradite the alleged perpetrators.[125] Commonly referred to as *aut dedere aut judicare* ("to prosecute or extradite"), this obligation usually requires states that assume it to either submit a suspected perpetrator of the relevant crime to that state's own competent authorities, or to extradite them to another state "concerned."[126]

For example, article 7 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that:

> The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 ['acts of torture'] is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.[127]

The International Court of Justice (ICJ) has considered that where a suspected perpetrator of an act of torture is on the territory of a State party, article 7 requires that State party to "submit the case to the competent authorities for

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[124] Samantha Besson, *Theorizing the Sources of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 163-85 (Samantha Besson & John Tasioulas eds., 2010).
[125] MICUS, *supra* note 107, at 44.
[126] *Id*. at 16-17.
[127] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7, Dec. 10, 1984, 1465 U.N.T.S. 85.

the purpose of prosecution."[128] The ICJ interpreted this and the preceding articles, including article 6(2), to require a State party to "adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts."[129] Such an inquiry is to take place "immediately from the time that the suspect is present in its territory,"[130] and a State party is required to prosecute a suspected perpetrator of torture "as soon as possible."[131]

Similar treaty obligations exist for the crime of genocide,[132] and the crime against humanity of enforced disappearance.[133] In relation to war crimes, the Geneva Conventions generally provide for prosecute-or-extradite obligations.[134] However, these Conventions concern

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[128] Questions relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal), Judgment, 2012 I.C.J. 422, (Jul. 20) [hereinafter "Belgium v. Senegal"].
[129] *Id.* at ¶ 91.
[130] *Id.* at ¶ 94.
[131] *Id.* at ¶ 117.
[132] Convention on the Prevention and Punishment of the Crime of Genocide arts. V, VI, Dec. 9, 1948, 78 U.N.T.S. 227 [hereinafter "Genocide Convention"]. Although article VI does not require States parties to prosecute suspected perpetrators of genocide where the suspected genocide occurred outside their territory, where an "international penal tribunal" is established which has jurisdiction for that alleged genocide, art. VI requires the State party to prosecute the individual or "hand them over for trial by the competent international tribunal." *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. 2007 43, 187, 442 (Feb. 26).
[133]International Convention for the Protection of All Persons from Enforced Disappearances arts. 9, 11, Dec. 13, 2010, 2716 U.N.T.S. 3 (hereinafter Convention on Enforced Disappearances).
[134] For example, article 146 of the *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in

conflict that is classified as international.[135] Doubts exist as to whether these principles apply to non-international armed conflict. Common Article 3 to the Geneva Conventions, which concerns internal armed conflict, is not explicit about a duty to prosecute in relation to war crimes in non-international armed conflict,[136] in contrast to the explicit obligation of states to prosecute grave breaches of humanitarian law in international armed conflict. Because this duty to prosecute war crimes perpetrated in internal armed conflict is not made explicit, unlike for crimes perpetrated in international conflict,[137] and because there is "wide-spread reluctance" of states to prosecute internal war

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accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case." *See* Convention relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. The other Geneva Conventions contain similar provisions: *see* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; *see also* Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1959, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; *see also* Convention relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1959, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; *see* Protection of Victims of International Armed Conflicts arts. 85-88, June 8, 1977, 1125 U.N.T.S. 3. for additional Protocol I in relation to peoples "fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination" also contains such a provision.

[135] Prosecutor v. Tadić, (1995) IT-97-1-A, ICTY Appeals Chamber ¶ 80 (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) (Hereinafter "Tadić").

[136] Louise Mallinder, *Amnesties, in* THE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 419, 421 (William Schabas & Nadia Bernaz eds., 2010).

[137] Allen S. Weiner, *Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court*, 52 STAN. J. INT'L L. 211, 224 (2016); Bell, *supra* note 120, at 520.

crimes in practice,[138] it is difficult to make the case that the Geneva Conventions create a duty to prosecute war crimes in internal conflict *per se*.[139]

In fact, it appears that article 6(5) of Protocol II Additional to the Geneva Conventions of 12 August 1949 *requires* a certain type of amnesty to be afforded to participants of hostilities. Article 6(5) of Protocol II provides:

> 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.[140]

The CPA stated that this article was to apply to the peace transition in Colombia.[141]

The implication of the preceding is that there are no treaty obligations that would require Colombia to extradite or prosecute international core crimes, with the exception of the obligation to prosecute perpetrators of acts of torture, enforced disappearances, and genocide. Of course, the Rome Statute also embodies treaty obligations, but this Statute warrants its own analysis (below).

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[138] ANJA SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS 235 (2009).

[139]Compare particular war crimes that a State may be required to prosecute under specialized treaty regimes. This includes torture and enforced disappearances. However, the ICRC has interpreted State practice as establishing that the duty to prosecute war crimes applies whether or not the conflict is international. *See* International Committee of the Red Cross, *Rule 158, Prosecution of War Crimes*, at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158.

[140] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 6(5), Dec. 7, 1978 (hereinafter "Protocol II").

[141] CPA art. 5.1.2.37.

b. Customary international law

If proven to form a part of the body of customary international law, a duty to prosecute would bind all States except those that persistently object to such a duty.[142] For a rule to be a part of customary international law, there are two requirements.

The first requirement is that "State practice, including that of States whose interests are specially affected, should [be] both extensive and virtually uniform in the sense of the provision invoked."[143] This is not a requirement that State practice is perfect in the sense of applying the rule with "complete consistency" or "in absolutely rigorous conformity."[144] However, where there are acts by States that are inconsistent with the rule being argued, these must be shown to be 'breaches' of the rule rather than indications of a new rule, and evidence that non-compliant behavior is a breach can be seen in the deviant State defending its conduct by appealing to "exceptions or justifications in the rule itself."[145]

The second requirement for a rule to be considered customary international law is that the rule must exist in the *opinio juris* of States.[146] The acts of States, amounting to state practice, must also "be such, or carried out in such a way, as to be evidence of a belief that this practice is

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[142] CRYER, *supra* note 107, at 106.

[143] North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Judgment, 1969 I.C.J. 3 43, ¶ 74 (Feb. 20) [hereinafter "North Sea Continental Shelf"].

[144] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 1986 I.C.J. 14 ¶ 186 (Jun. 27).

[145] *Id*.

[146] Lucía E.M. Savini. *Avoiding Amnesty in the Age of Accountability: Colombia's Proposal for Alternative Sentencing*, Y.B. HUMANITARIAN ACTION AND HUM. RTS. 125, 134 (2015).

rendered obligatory by the existence of a rule of law requiring it."[147] The state practice must be carried out because of a belief by the States that they were "legally compelled" to do so, and where the state practice is "motivated by other obvious factors" the state practice is unlikely to be considered a rule of customary international law.[148] *Opinio juris* cannot be supported by practice that follows mere habit, courtesy, convenience or tradition.[149] Of course, this is a very difficult exercise in practice, because State actions and motivations for those actions are often highly secretive and shrouded by self-serving misinformation.[150] These two elements of customary international law are conceptually distinct, but in practice international criminal courts frequently do not separate them with precision.[151] This is perhaps because the issues before international criminal courts do not involve reciprocal rights of States, to the same degree as issues such as fishing rights before other international courts.[152]

International criminal law is no exception in relying on customary international law as a source for its doctrines. Certainly rules of custom are interpreted from State behavior rather than written documents, with the consequences that until interpreted by judicial bodies they tend to be less specific, and it is often difficult for actors to

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[147] North Sea Continental Shelf, *supra* note 143, at ¶ 77.
[148] *Id.* at ¶ 78.
[149] *Id.* at ¶ 77.
[150] *See e.g.*, Tadić, *supra* note 135, at ¶ 99.
[151] William Schabas, *Customary Law or 'Judge-Made' Law: Judicial Creativity at the UN Criminal Tribunals*, *in* THE LEGAL REGIME OF THE ICC: ESSAYS IN HONOUR OF PROF. I.P. BLISHCHENKO 83-85, 100 (Jos Doria et al eds., 2009); Harmen van der Wilt, *State Practice as Element of Customary International Law: A White Knight in International Criminal Law?* 20 INT'L CRIM. L. REV. 784, 798 (2019).
[152] Schabas, *supra* note 151, at 83-85, 100; van der Wilt, *supra* note 151, at 784.

discern these rules and be guided by their content.[153] This has been argued to violate the principle of international criminal law that individuals should only be punished if their act was, at the relevant time, defined by law as criminal ('*nullem crimen sine lege*').[154] On the other hand, international criminal law, by its nature, concerns acts widely regarded as abhorrent and there is a need for substantive justice for such acts.[155] Whatever the criticisms, there is no question that the courts which apply international law rely on customary international law, from the Nuremburg trials in 1946,[156] through to the Yugoslav trials in the 1990s,[157] and to the ICC trials today.[158]

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[153] Triestino Mariniello, *The 'Nuremberg Clause' and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence*, 82 NORD. J. HUM. RTS. 221, 222 (2013).

[154] *Id.*; s*ee also* Larissa van den Herik, *Using Custom to Reconceptualize Crimes Against Humanity, in* JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 80, 98 (Shane Darcy & Joseph Powderly eds., 2010). The application of custom in international criminal law has also been criticized because of the 'perplexity' that while customary international law is determined by the practice of States, international criminal law concerns almost exclusively the criminal behavior of individuals: *see* Yeghishe Kirakosyan, *Finding Custom: The ICJ and the International Criminal Courts and Tribunals Compared*, *in* THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW (Larissa van den Herik and Carsten Stahn eds., 2012) 149, 154.

[155] Mariniello, *supra* note 153, at 223.

[156] France v. Göring, Judgment and Sentence, International Military Tribunal ¶ 239 (Oct. 1, 1946).

[157] *See e.g.*, Tadić, *supra* note 135, at ¶ 290. For a more comprehensive discussion, *see* BIRGIT SCHLÜTTER, DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW: THEORY AND THE PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL AD HOC CRIMINAL TRIBUNALS FOR RWANDA AND YUGOSLAVIA (2010); Schabas, *supra* note 151.

[158] Rome Statute of the International Criminal Court art. 21(1)(b), July 17, 1998, UN Doc. A/CONF.183/9 [hereinafter *Rome Statute*]; *See e.g.*, Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al-Bashir (Judgment in the Jordan Referral re Al-Bashir Appeal), Case No. ICC-02/05-01/09-397-Corr, ICC Appeals Chamber (May 6, 2019) ¶ 113. In addition, Rauter points out that in the last 25

i. Customary international law, and the duty to prosecute war crimes and crimes against humanity

For international criminal law, the most common resources for discerning State practice and *opinio juris* are national legislation and domestic case law.[159]

Article 10 of the International Law Commission's Draft Articles on Crimes Against Humanity did introduce a prosecute-or-extradite obligation.[160] However, the Special Rapporteur on Crimes Against Humanity noted that the ILC was introducing prosecute-or-extradite obligations in this fashion for a "possible future convention."[161] This indicates that at present this formulation did not purport to summarize the existing state of customary international law. Moreover, the ILC Draft Articles on Crimes Against Humanity did not refer to the illegality of amnesty, and the Special Rapporteur on Crimes Against Humanity could not

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years, three separate international criminal courts have appeared to adopt a "less stringent" standard for accepting the existence state practice than the traditional "extensive and virtually uniform" standard typically required by the ICJ. The three courts are the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, the Appeals Chamber of the Special Court of Sierra Leone, and the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia. *See* RAUTER, *supra* note 122, at 137. *But see* van der Wilt, *supra* note 151, at 784 in which the author argues that the role of customary international law in the ICC is "modest."

[159] van der Wilt, *supra* note 151, at 801.

[160] "The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State." *See* Int'l Law Comm'n, Report of the International Law Commission, UN Doc A/74/10, 92 (Dec. 10, 2019).

[161] Sean D. Murphy, Fourth report on crimes against humanity, UN Doc A/CN.4/725 (Feb. 18, 2019), ¶ 200. See also Int'l Law Comm'n, Report of the International Law Commission, UN Doc A/69/10, 160-61 ¶¶ 49-55 (2014).

conclude that there was international consensus on such illegality of amnesty for crimes against humanity, recommending against including such a provision in the draft articles.[162] Crimes against humanity are criminalized under customary international law, but this does not imply a duty to prosecute those who perpetrate them.[163]

So much is apparent in relation to the crime against humanity of torture. In *Belgium v. Senegal*, the ICJ found that notwithstanding the existence of a prohibition against torture in customary international law, the widespread international practice of prohibiting torture in domestic law, the frequent denouncement of acts of torture, and the appearance of this prohibition in numerous instruments of "universal application," the Convention against Torture did not require a State to prosecute alleged perpetrators of acts of torture prior to that Convention entering into force for that State.[164] The majority considered the ICJ had no jurisdiction to consider whether an obligation to prosecute crimes against humanity existed under customary international law.[165]

However, those judges that did make a ruling on that latter question considered that there was no obligation under customary international law to extradite or prosecute.[166] In his separate opinion, Judge Abraham opined that Belgium demonstrated "only a minority" of States (51 total) had implemented laws to try war crimes committed in the course of non-international conflict or crimes against humanity.[167] Secondly, he opined that such States had implemented this legislation based on an

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[162] Sean D. Murphy, Third report on crimes against humanity, UN Doc A/CN.4/704 (Mar. 6, 2017), 136-37 ¶¶ 296-97.
[163] Mallinder, *Amnesties*, supra note 136, at ¶ 422.
[164] Belgium v. Senegal, *supra* note 128, at ¶¶ 99-100.
[165] *Id.* ¶ 54.
[166] *Id.* ¶ 35 (Judge Abraham), ¶ 18 (Judge *Ad Hoc* Sur).
[167] *Id.* ¶ 36 (Judge Abraham).

interpretation of "conventional obligations" including obligations under conventions that were not shared by all States parties to those Conventions.[168] Finally, Judge Abraham opined that the minority of States may have only criminalized those international core crimes "on the basis of a purely unilateral choice and sovereign decision, without in any sense believing that they were required to do so by some international obligation, whether conventional or customary – but solely in the *belief that international law entitled them to do so.*"[169] If Judge Abraham is correct, this would imply that no duty to prosecute perpetrators of torture exists outside of obligations of treaties that a State ratifies.

At least one court has denied the application of amnesty as a consequence of international law. The International Criminal Tribunal for the former Yugoslavia (ICTY) has considered that there is a customary obligation to prosecute or extradite grave breaches of international humanitarian law.[170] Further, it found that the customary rule against amnesties for core crimes was "well-established."[171]

However, other international judicial bodies are more equivocal on the uniformity of State practice and *opinio juris*. The Special Court of Sierra Leone (SCSL) found that it "may not be entirely correct" that a norm against amnesty for serious violations of international law has crystalized.[172]

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[168] *Id.* ¶ 37 (Judge Abraham).
[169] *Id.* ¶ 38 (Judge Abraham) (emphasis added).
[170] Prosecutor v. Blaškić, Judgment, Case No. IT-95-14, ICTY Appeals Chamber (Oct. 29, 1997) ¶ 29.
[171] Prosecutor v. Karadžić, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, Case No. IT-95-5/18-PT, ICTY Trial Chamber (Dec. 17, 2008) ¶¶ 17, 25. *See also* Prosecutor v. Furundzija, Judgment, Case No. IT-95-17/1-T, ICTY Trial Chamber (Dec. 10, 1998) ¶ 155.
[172] Prosecutor v. Kallon and Kamara, Case No. SCSL-2004-16-AR72(E), SCSL Appeals Chamber (Mar. 13, 2004), ¶ 82.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) considered that there was an "emerging consensus" prohibiting amnesties for serious international crimes, although it observed that State practice on this was "arguably insufficiently uniform."[173] The European Court of Human Rights similarly noted that amnesty in respect of core crimes was "increasingly considered to be prohibited by international law,"[174] although it had previously held that the obligation to prosecute criminals "should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty."[175] Indeed, State practice of prosecuting crimes against humanity is "meagre."[176]

While *opinio juris* is difficult to discern, the comments of Judge Abraham in the *Belgium v. Senegal* case are instructive. He ruled that in order to satisfy the criteria of customary international law, a State must go further than enacting legislation which *enables* it to exercise jurisdiction over international core crimes; it must also *require* extradition or prosecution of such crimes, and do so from a sense of obligation that arises beyond meeting a specific treaty obligation.[177] Among the States that have criminalized international core crimes, it is difficult to see a sense of obligation motivating such criminalization, that is not aspirational or linked to specific treaty regimes: in his survey of State penal codes, Kittichaisaree found only twenty-seven States that implemented the obligation to

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[173] Prosecutor v. Nuon Chea et al, Case No. 002/19-09-2007/ECCC/TC, ECCC Trial Chamber, (Nov. 3, 2011) ¶ 53.
[174] Marguš v. Croatia, Application no. 4455/10, ECHR (Nov. 13, 2012) ¶ 74.
[175] Ould Dah v. France, Application no. 13113/03, ECHR (Mar. 17, 2009) ¶ 17.
[176] Weiner, *supra* note 137, at 225.
[177] KRIANGSAK KITTICHAISAREE, THE OBLIGATION TO EXTRADITE OR PROSECUTE 123 (2018).

prosecute or extradite, although he acknowledged that this extent approached that required by the ICJ in one of its cases.[178] The absence of *opinio juris* indicates that the duty to prosecute crimes against humanity has not yet evolved into a "generally recognized norm."[179]

There are UN General Assembly resolutions that may provide support for the existence of an *opinio juris* of an obligation to prosecute international core crimes.[180] The ICJ has recognized that, although not binding, UN General Assembly resolutions may evidence the "existence of a rule or the emergence of an *opinio juris,*" depending on its wording and the circumstances of its adoption.[181] However, the issue is that it is rare for a UN General Assembly to unanimously adopt a resolution that is expressed in mandatory rather than aspirational terms, and even rarer for States to refer to these resolutions in carrying out prosecutions of international core crimes.[182]

A further impediment to the finding that *opinio juris* exists, in respect of a duty to prosecute, is that Protocol II expressly refers to the obligation for a State to grant amnesty to persons who have participated in non-international armed conflict.[183] According to the analysis of the International Committee of the Red Cross (ICRC) on State practice, there is an exception to this obligation to

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[178] *Id.* at 132-33. The relevant case was Jurisdictional Immunities of the State (Germany v. Italy), Judgment, 2012 I.C.J. 99.
[179] Mallinder, *supra* note 136, at 422.
[180] *See e.g.* Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes Against Humanity, G.A. Res 3074, 3074, U.N. Doc. A/RES/3020/(XXVII) (Dec. 3, 1973).
[181] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 4, ¶ 70 (Jul. 8).
[182] CRYER, *supra* note 107, at 107.
[183] Protocol II, *supra* note 140, at art. 6(5).

extend amnesty where a person is accused of war crimes.[184] The interpretation of the ICRC carries weight and may be supported by the exigencies of coherence in the war crimes regimes.[185] The Inter-American Court of Human Rights has interpreted this provision the same way.[186] However, in her "wider study" of amnesty laws and State practice, Mallinder found that amnesty for war crimes in internal conflict remains widespread.[187] Historic examples of states providing amnesties for international crimes abound.[188] Nor does evidence demonstrate that this practice is changing in the "age of accountability," as one study found that the practice of implementing amnesty laws has remained constant since the 1990s.[189]

In summary, there is unlikely to be an obligation to prosecute international core crimes under customary international law. Further, the analysis has shown that State

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[184] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, 691-92 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2007).
[185] Bell, *supra* note 120, at 512.
[186] *See e.g.*, Massacres of El Mozote v. El Salvador, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Oct. 25, 2012) ¶ 286 [hereinafter 'El Mozote'].
[187] Mallinder, *supra* note 136, at 421. Nevertheless, she has noted that might be a trend against amnesty in South American states, and this regional trend may be "evidence to support an emerging international trend."
[188] Javier Sebastián Eskauriatza, *The jus post bellum as 'integrity' – Transitional criminal justice, the ICC, and the Colombian amnesty law*, 33(1) LEIDEN J. INT. LAW 189, 195 (2020); DI SARSINA, *supra* note 104, at 144. However, some national courts have considered amnesties to be unlawful, for example, the Ugandan Supreme Court in the decision Thomas Kwoyelo alias Latoni v. Uganda, Supreme Court of Uganda (Apr. 11, 2015), the Argentinian Supreme Court in Simón, Case No. 17.768, Supreme Court of Argentina (Jun. 14, 2005), the Chilean Supreme Court in Sepúlveda, Supreme Court of Chile (Nov. 17, 2004), and the Uruguayan Supreme Court in Nibia Sabalsagaray, Judgment No. 365, Supreme Court of Uruguay (Oct. 19, 2009).
[189] TRICIA D. OLSEN, LEIGH A. PAYNE & ANDREW G. REITER, TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY (2010).

practice and *opinio juris* are unlikely to form the basis for such a duty.

ii. The duty to prosecute political crimes

The evidence of prohibition of amnesty for political crimes that do not amount to serious international crimes is even scarcer. There is no agreement on what a political offense is in the international legal system.[190] Defining political crimes to be crimes against the State as an institution, Jean-Baptiste concluded that the international community has been mostly supportive of amnesties for political crimes in the context of transition from conflict to peace.[191] The UN Secretary-General has signaled cautious approval of amnesties for non-core crimes, while the Security Council approved of amnesty for political crimes in South Africa, Angola and Croatia.[192] Crimes of treason, sedition, or transporting arms are often subject to amnesty, which is not controversial.[193] Moreover, political offenses feature prominently in exceptions to extradition practice of States, so that neutrality can be maintained by the international community in respect of internal political conflict and so that extradition might not be requested by the requesting State for political purposes.[194]

Bell has opined that while international law appears to permit "some level of amnesty," there is a "grey area" with respect to amnesty for crimes that are not serious violations

[190] KITTICHAISAREE, *supra* note 177, at 188.
[191] Jean-Baptiste, *supra* note 24, at 43, 61.
[192] *Id.* at 36.
[193] Hayner, *supra* note 102, at 330.
[194] KITTICHAISAREE, *supra* note 177, at 188. Article VII. The Genocide Convention provides that the crime of genocide is not a "political crime for the purpose of extradition."

of international law.[195] However, where a norm argued to apply to a State is not explicit, its content is more unstable or open to interpretation,[196] and it is more difficult to argue that the State consented to it.[197]

2. Rome Statute and the Duty to Prosecute

The Rome Statute is the treaty document that established the International Criminal Court, the world's first permanent international criminal tribunal which adjudicates the criminal responsibility of individuals for genocide, war crimes, or crimes against humanity.[198] The Statute was adopted at the Rome Conference on 17 June 1998, when more than two-thirds of States present at the conference voted in favor of the text.[199] Soon after its entry into force on 1 July 2002, Colombia ratified the Rome Statute on 5 August 2002, accepting jurisdiction of the ICC for most international core crimes from 1 November 2002, and for war crimes from 1 November 2009 onwards.[200]

The Preamble of the Rome Statute recalls that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[201] Some

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[195] Bell, *supra* note 120, at 524.
[196] *Id.* at 525.
[197] *See* Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT. L. 1, 2-33, 17-18 (2014).
[198] Margaret de Guzman & Valerie Oosterveld, *Introduction*, *in* The Elgar Companion to the International Criminal Court (Margaret de Guzman & Valerie Oosterveld eds., 2020). It also adjudicates accusations of the crime of aggression, although this crime is perpetrated by States and not individuals: *see* Rome Statute, supra note 158, at art. 8.
[199] For a fuller history of the events that led to the ratification and entry into force of the Rome Statute, *see* WILLIAM A SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE (2d ed., 2016).
[200] Ambos & Aboueldahab, *supra* note 88, at 272.
[201] *See* Rome Statute, *supra* note 158, at pmbl. In context, the relevant passage provides: "Affirming that the most serious crimes of concern

scholars opine that this passage requires States parties to prosecute perpetrators of crimes that are within the jurisdiction of the Rome Statute (i.e., crimes against humanity, war crimes, and genocide).[202] The specific mandate and the object and purpose of the treaty is to end impunity for international core crimes,[203] and from this, an obligation to prosecute the Rome Statute crimes and a prohibition against amnesties for these crimes might be inferred.[204]

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to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, […]"

[202] AKSENOVA, *supra* note 35, at 151; s*ee*, HAYNER, *supra* note 5, at 95.

[203] Diba Majzub, *Peace or Justice? Amnesties and the International Criminal Court*, 3 MELB. J. INT. LAW 247, 265 (2002).

[204] DI SARSINA, *supra* note 104, at 149. There is also an argument that the complementarity regime might be the basis for such a duty. This regime allows the ICC to assume jurisdiction of cases where a State party is unwilling or unable to prosecute a perpetrator. This regime expresses a preference for States to prosecute core crimes and it "indirectly discourages" amnesty by allowing the ICC to prosecute in spite of them, effectively acting as a "backstop" permitting the ICC to prosecute but not providing for a legal duty of States to prosecute: Mark Freeman & Max Pensky, *The Amnesty Controversy in International Law*, *in* AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 42 (Francesca Lessa & Leigh A. Payne eds., 2012) 61-65; Seibert-Fohr, *supra* note 100, at 571-73. In this way, it allows the ICC to "put pressure" on States to prosecute: Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1115 (2015). In contrast Moffett argues that: "Read together the Preamble, [the complementarity provisions] establish that under the Statute, State Parties are obliged to investigate and prosecute all international crimes." *See* Thomas Moffet, *Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo*, 16, INT'L CRIM. L. REV. 503, 506 (2016), citing JANN KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL

It is certainly true that the "duty" in the Preamble is not expressed to be confined to States parties, and as a treaty cannot be binding on a non-party, this might indicate the duty is purely aspirational. Nor is this duty well-defined.[205] The negotiations and the "ambiguous and open-ended" nature of the drafting call into question its legal enforceability against States parties.[206] The States parties had the aforementioned examples of *aut dedere aut judicare* provisions in other treaties to use if they wanted to introduce these duties to the Rome Statute.[207] Moreover, there is an absence of a duty to prosecute in the operative sections of the Statute.[208] Jones has considered that that the 'duty' in the Rome Statute does not bind States parties, but rather is better understood as a reference by the text to the existing duties (elsewhere) of States parties to investigate and prosecute.[209]

Alternatively, Nalin argues that if the Preamble describes the main purposes of the Rome Statute, and it represents the outcome of the negotiation process among State parties, then it is an *opinion juris* of the ratifying states.[210] Indeed, Roberti Di Sarsina has opined that the entry into force of the Rome Statute has reinforced the view

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CRIMINAL JURISDICTIONS 251 (2008). However, as argued below, this view has not found yet found judicial support.

[205] AKSENOVA, *supra* note 35, at 145.

[206] Markos Karavias, *Duty to Punish*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 305, 306 (Antonion Cassese ed., 2008).

[207] Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT. LAW 144, 166; Seibert-Fohr, *supra* note 100, at 573.

[208] Seibert-Fohr, *supra* note 100, at 251; Weiner, *supra* note 137, at 228.

[209] Annika Jones, *Tailoring Justice for Mass Atrocities*, in INTERNATIONAL LAW AND POST-CONFLICT RECONSTRUCTION POLICY 95, 99 (Matthew Saul & James A. Sweeney eds., 2015); *compare* the lengthy and specific regime under the Rome Statute, *supra* note 158, for cooperation with the ICC: arts. 86–102.

[210] NALIN, *supra* note 40, at 156.

that parties to the Statute are at least required to investigate and prosecute the crimes referred to in the Statute.[211]

There are no direct rulings by the ICC on the implications of the Preamble for a duty of States parties to prosecute. However, the ICC Appeals Chamber has ruled that a State party may discharge what it called a "duty to exercise [the State party's] criminal jurisdiction" by relinquishing its jurisdiction in favor of the Court.[212] The implication of this statement is that the primary duty to prosecute exists under the Rome Statute. As a comparison, the ICJ found that a State "can relieve itself of its obligation to prosecute by acceding to that request [for extradition]."[213] Some consider that upon its entry into force, the Rome Statute imposes such a duty on a State party for crimes committed within its territory.[214] If so, Colombia as a member of the Rome Statute has a duty to prosecute.

The Rome Statute is similarly absent of references to amnesty. The *travaux préparatoires* of the Rome Statute indicate this exclusion was deliberate.[215] Similarly, for the duty to prosecute, there are those that have opined that considered as a whole, "amnesties for international crimes are not compatible with the Court's mandate."[216] The ICC Prosecutor stated in a 2013 letter to the Colombian

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[211] DI SARSINA, *supra* note 104, at 129.
[212] Prosecutor v. Katanga, Judgment, ICC-01/04-01/07-OA-8, ICC Appeals Chamber, ¶ 85 (Sept. 25, 2009).
[213] Belgium v. Senegal, *supra* note 128, at ¶ 95.
[214] *See e.g.*, ANTONIO CASSESE ET AL, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1906 (2002); SCHABAS, *supra* note 159, at 48; DI SARSINA, *supra* note 104, at 128-29.
[215] Eskauriatza, *supra* note 188, at 196; Allan, *supra* note 99, at 248-49. Mallinder observes that the parties at the Rome Conference could not achieve consensus on this question: *see* Mallinder, *supra* note 136, at 423.
[216] Eskauriatza, *supra* note 188, at 196.

Constitutional Court that amnesty or suspended sentences for serious human rights violations would be considered unwillingness to prosecute, and this has been credited with changing the nature of the negotiation between the government and the FARC-EP.[217]

In 2019, the ICC Pre-Trial took the opportunity to opine on the legality under international law of blanket amnesties in the *Gaddafi*[218] case. In considering a Libyan law, which provided for conditional amnesties, the Pre-Trial Chamber considered that the particular law in that case did not provide for amnesty for the alleged crimes.[219] A consideration of legality of amnesty under international law was therefore not essential to rule on the case before it. Notwithstanding, the Pre-Trial Chamber stated that "[t]he Chamber believes that there is a strong, growing, universal tendency that grave and systematic human rights violations […] are not subject to amnesties or pardons under international law."[220] After considering many of the cases cited above, the Pre-Trial Chamber concluded that amnesties for "serious acts such as murder constituting crimes against humanity" were "incompatible with international law, including internationally recognized human rights."[221] Further, it stated that amnesties "intervene with States" positive obligations to investigate,

[217] Savini, *supra* note 146, at 142.
[218] Prosecutor v. Saif Al-Islam Gaddafi, Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute, ICC-01/11-01/11-662, ICC Pre-Trial Chamber I (Apr. 5, 2019).
[219] *Id.* at ¶¶ 58-59.
[220] *Id.* at ¶ 61.
[221] *Id*. at ¶¶ 77-78. *See also* Prosecutor v. Saif Al-Islam Gaddafi, Separate concurring opinion by Judge Marc Perrin de Brichambaut, ICC-01/11-01/11-662-Anx, ICC Pre-Trial Chamber I ¶ 147 (May 8, 2019).

prosecute and punish perpetrators of core crimes' and deny victims their rights to truth and access to justice.[222]

In 2020 when adjudicating the appeal, the ICC Appeals Chamber did not consider this question in detail, merely opining that the Pre-Trial Chamber's rulings concerning the compatibility of amnesty laws with international law were *obiter dicta* and that international law was "still in the development stage" in relation to the acceptability of amnesty laws.[223] However, one judge decided to consider this particular issue in a separate opinion. Judge Ibáñez Carranza concluded that there were "well-established law, principles and standards" prohibiting amnesties for "grave human rights violations."[224] She opined that even in transitional contexts, amnesties must be limited to "political, minor, or domestic offences that violated the interests of a State."[225] It is not clear why the other judges did not join her on this opinion. It could be that they did not agree with the reasoning, but it may also be that they considered it unnecessary to consider this question for the purposes of that case.

Neither majority decision of the Pre-Trial Chamber and Appeals Chamber referred to the Preamble of the Rome

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[222] *Id*. at ¶ 77.

[223] Prosecutor v. Saif Al-Islam Gaddafi, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute" of 5 April 2019, ICC-01/11-01/11-695, ICC Appeals Chamber ¶ 96 (Mar. 9, 2020).

[224] Prosecutor v. Gaddafi, Separate and Concurring Opinion of Judge Luz del Carmen Ibáñez Carranza on the Judgment on the appeal of Mr. Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute," ICC-01/11-01/11-695-AnxI, ICC Appeals Chamber ¶ 25 (Apr. 21, 2020).

[225] *Id.* at ¶ 122.

Statute. It is not known why the ICC did not consider the effect of the Preamble, but one possible interpretation is that it was not considered an enforceable duty. Supporting this inference is that the Chamber was certainly presented with the argument, as the Prosecution did refer to the drafting of the Preamble in its application.[226] On the other hand, Judge Ibáñez Carranza in her separate opinion considered that the drafting of the preamble was a basis for inferring an international obligation to prosecute "perpetrators of international crimes."[227] Thus, there is some judicial support for the argument that the Preamble imposes a duty on States parties to prosecute core international crimes, but the Chambers did not take the opportunity to rule on this question. The majority judgments of the Pre-Trial Chamber and Appeals Chamber give greater consideration for the issue of whether customary international prohibited such a practice, and the indication of the superior court was that it did not.

In relation to amnesty for political crimes, such crimes would not likely be crimes under the Rome Statute.[228] The

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[226] Prosecutor v. Saif Al-Islam Gaddafi, Prosecution Response to Mr Saif Al-Islam Gaddafi's Appeal against the "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute,'" ICC-01/11-01/11-671, ICC Appeals Chamber (Jun. 11, 2019), ¶ 86.

[227] Prosecutor v. Gaddafi, Separate and Concurring Opinion of Judge Luz del Carmen Ibáñez Carranza on the Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute," ICC-01/11-01/11-695-AnxI, ICC Appeals Chamber, ¶ 134 (Apr. 21, 2020). Judge Ibáñez Carranza also considered that amnesties for international crimes are "considered illegal under international law": ¶ 133.

[228] James Stewart, *Transitional Justice in Colombia and the Role of the International Criminal Court*, ICC 15 (May 13, 2015). Further, as mentioned, Judge Ibáñez Carranza considered in her separate opinion that amnesty for political crimes in a transitional context might be permissible.

Deputy Prosecutor has noted that the Office of the Prosecutor "takes no view" with respect to amnesties for political crimes, as such crimes were not within the ICC's jurisdiction.[229]

While some argue that the Rome Statute might be an expression of customary international law,[230] the better answer is that at most, the Rome Statute "restate[s], reflect[s] or clarif[ies]" certain customary rules while contributing to the development of other customary rules.[231] There would need to be an extensive practice by non-States parties, informed by a belief that such practice was a legal duty,[232] for the contents of the Rome Statute to be considered an expression of customary international law. Moreover, only 121 of the 193 United Nations member States are parties to the Rome Statute.

3. Regional Law and the Duty to Prosecute

The *American Convention on Human Rights*[233] requires Colombia as a State party to respect and ensure a wide-ranging array of rights, including the rights to life,[234] to physical, mental and moral integrity,[235] to personal liberty

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[229] *Id*.
[230] *See e.g*., Philippe Kirsch, *Foreword,* in ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY xiii (Knut Dörmann, Louise Doswald-Beck & Robert Kolb eds., 2003).
[231] Prosecutor v. Furundžija, Judgment, Case No. IT-95-17/1-T, ICTY Trial Chamber (Dec. 10, 1998) ¶ 227. See also Allan, *supra* note 99, at 292.
[232] North Sea Continental Shelf*, supra* note 143, at ¶ 77.
[233] American Convention on Human Rights, opened for signature 22 November 1969, 1144 U.N.T.S. 123 [hereinafter American Convention or ACHR].
[234] *Id.* at art. 4(1).
[235] *Id.* at art. 5(1).

and security,[236] to a hearing for the determination of rights and obligations,[237] to judicial protection including recourse to a competent court for protection against acts that violate fundamental rights.[238] The Inter-American Court of Human Rights is a judicial institution which interprets the Convention, and issues binding decisions to States parties for alleged violations of Convention rights.[239]

Inter-American Court of Human Rights jurisprudence is extensive on the duty to prosecute.[240] Nevertheless, such standards are probably "in advance" of other systems and cannot necessarily be extracted and applied to other contexts where the Convention has no application.[241] The American context is unique, owing to the extensive treaty-based regime of rights, the prevalence of amnesty laws in South American countries during the 1970s and 1980s, and the rise of democratization in the region.[242] However, the European jurisdiction has also considered these issues and

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[236] *Id.* at art. 7(1).
[237] *Id.* at art. 8(1).
[238] *Id*. at art. 25(1).
[239] *Id*. at art. 63(1); Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. UNIV. INT'L L. REV. 195, 197-98 (2013); For an analysis of the history, dynamics and impact of the decision-making of the Inter-American Court of Human Rights, *see* James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court* 102 AM. J. INT'L L. 768, 780-95 (2008).
[240] Mallinder, *supra* note 136, at 673-74.
[241] *Id*.
[242] *Id*.; Elin Skaar, Cath Collins, & Jemima García-Godos, *Conclusions: The uneven road towards accountability in Latin America*, in TRANSITIONAL JUSTICE IN LATIN AMERICA: THE UNEVEN ROAD FROM IMPUNITY TOWARDS ACCOUNTABILITY 275, 292-95 (Elin Skaar, Jemima Garcia-Godos & Cath Collins eds., 2016); *see also* Seibert-Fohr, *supra* note 100, at 51-52, 108-09.

there are indications that the two legal traditions may be converging.[243]

In the *Barrios Altos v. Peru*[244] case, the Court considered the effect of two Peruvian laws that gave amnesty to government security forces and civilians who had perpetrated human rights violations between 1980 and 1995.[245] It was determined that a "self-amnesty" law which has the effect of preventing investigation and prosecution of "serious human rights violations" infringes the rights of victims of atrocities to a hearing and judicial protection.[246] This was because it "lead[s] to the defenselessness of victims and perpetuate[s] impunity," and "prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation."[247] The Court thus viewed a duty to prosecute from a victims' rights lens.[248]

In subsequent cases, the Court found that notwithstanding the characterization of the law as amnesty, self-amnesty or "political agreement,"[249] and notwithstanding public referenda supporting its implementation by a democratic government,[250] the law is incompatible with the Convention if it leaves unpunished

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[243] Cavallaro & Brewer, *supra* note 239, at 827. For an analysis of the jurisprudence of the European Court of Human Rights, *see* Miles Jackson, *Amnesties in Strasbourg*, 38 OJLS 451, 472-74 (2018). Jackson argues that the ECtHR would likely consider an amnesty as impermissible, but that there should be a margin afforded to States to use amnesty for political ends that are legitimate.

[244] Barrios Altos and La Cantuta v. Peru, Merits, Inter-Am. Ct. H.R. (ser. C) No. 75, (Mar. 14, 2001) [hereinafter 'Barrios Altos'].

[245] *Id*. at ¶ 2.

[246] *Id*. at ¶ 41.

[247] *Id*. at ¶ 43.

[248] AKSENOVA, *supra* note 35, at 144.

[249] Gomes Lund et al v. Brazil, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 174–175 (Nov. 24, 2010) [hereinafter Gomes Lund].

[250] Gelman v. Uruguay, Merits, Inter-Am. Ct. H.R. (ser. C) No. 221 ¶ 238 (Feb. 24, 2011).

serious violations in international law.[251] The amnesty's underlying purpose, and not the process of its adoption, made it a breach of international law.[252]

The IACtHR expanded these principles beyond cases of amnesty. The obligation to investigate exists notwithstanding the absence of a complaint by a victim or their next of kin.[253] In *Rochac Hernández v. El Salvador*, the amnesty law in question had not prevented prosecution.[254] However, the Court determined that the right of access to justice required an effective investigation by El Salvador to determine "corresponding criminal responsibilities within a reasonable time" for an enforced disappearance.[255] El Salvador had violated the Convention not because it had legally protected violators from prosecution. Rather, the violation occurred because perpetrators had not been identified and brought to trial, and because victims (in this case, next of kin of the disappeared) did not know the truth of the "facts of the violations and the corresponding responsibilities."[256] Any State party's violation of obligations that leads to harms requires the

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[251] The Court modified the position that *all* violations of Convention rights must be investigated, prosecuted and punished to only "grave violations" or "serious violations," but these latter categories clearly encompass the core international crimes: LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY 707 ¶ 27.17 (2011). It is not clear what persuaded the Court to modify this position.

[252] El Mozote, *supra* note 186, at ¶ 8 (Judge García-Sayán).

[253] Gomes Lund, *supra* note 249 at ¶ 256(c).

[254] Rochac Hernández et al. v. El Salvador, Judgment: Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 285 (Oct. 14, 2014) [hereinafter 'Rochac Hernández'].

[255] *Id.* at ¶ 139.

[256] *See* Herzog v. Brazil, Judgment: Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 353 (Mar. 15, 2018) ¶ 328 [hereinafter "Herzog"].

State party to "guarantee" the violated rights and to "re-establish" the previous situation.[257]

The Court has also confined the permissibility of using the military court jurisdiction to adjudicate violations of the Convention. This jurisdiction may adjudicate on situations where alleged offenders were personnel on active duty and where crimes violate the specific legal interests of the military forces.[258] However, the prosecution of human rights violations "always corresponds to the common or ordinary system of justice" and never to the military criminal jurisdiction.[259]

In the *El Mozote v. El Salvador* case, the IACtHR ruled that a State party has an obligation to prosecute the "masterminds and perpetrators" of grave violations.[260] Responsibility of senior officials was regarded as an "essential ingredient" to transitional justice.[261]

However, "extensive amnesties" may be permitted under Protocol II, provided that crimes against humanity and war crimes remain subject to criminal investigation and prosecution.[262] The IACtHR has confirmed that when hostilities cease, it may be permissible for amnesty laws to be implemented "when hostilities cease in non-international armed conflicts to enable the return to peace, provided they do not cover up war crimes and crimes against humanity, which cannot remain unpunished."[263]

These decisions made limited analysis of State practice beyond the region. With respect, the IACtHR may have overstated when it labelled the prohibition on amnesty as a

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[257] *Id.* at ¶ 360.
[258] *Id.* at ¶ 247.
[259] *Id.* at ¶ 247.
[260] El Mozote*, supra* note 186, at ¶ 317.
[261] *Id.* at ¶ 35 (Concurring Opinion of Judge García-Sayán).
[262] *Id.* at ¶ 286.
[263] Herzog, *supra* note 256, at ¶ 280.

"universal trend" in the international sphere.[264] However, these decisions of the IACtHR were referred to extensively in the aforementioned decisions of the ICC Pre-Trial Chamber in the *Gaddafi* case, and the ICC Appeal Chamber opinion of Judge Ibáñez Carranza, indicating that their principles have the potential to take root elsewhere.[265]

Notwithstanding the exceptions discussed below, these decisions are powerful statements of the unlawfulness of amnesty for international core crimes, the duties to investigate and prosecute perpetrators of international core crimes, and of the requirement to provide truth and reparations to victims. They also indicate that amnesty for crimes that are not international core crimes may be permissible, especially if they facilitate the end of hostilities.[266]

a. Colombia, and the Law for Prosecution and Amnesty

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[264] *Id*. at ¶ 283.

[265] Niccoló Pons & Drazan Dukic, *Perspectives on the Interplay between the Inter-American Court of Human Rights and the International Criminal Court*, 7 INTER-AM. & EUR. HUM. RTS. J. 159, 162-63 (2014). *See e.g.*, Prosecutor v. Saif Al-Islam Gaddafi, Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute, ICC-01/11-01/11-662, ICC Pre-Trial Chamber I (Apr. 5, 2019), ¶ 62-66; Prosecutor v. Gaddafi, Separate and Concurring Opinion of Judge Luz del Carmen Ibáñez Carranza on the Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute," ICC-01/11-01/11-695-AnxI, ICC Appeals Chamber (Apr. 21, 2020), ¶ 67-96. *See also* Paolo Caroli, *The Interaction between the International Criminal Court and the European Court of Human Rights—The Right to the Truth for Victims of Serious Violations of Human Rights: The Importation of a New Right?*, *in* JUDICIAL DIALOGUE ON HUMAN RIGHTS: THE PRACTICE OF INTERNATIONAL CRIMINAL TRIBUNALS 263 (Paolo Lobba and Triestino Mariniello eds., 2017)

[266] Mallinder, *supra* note 136, at 660.

In summary, there are no solid obligations on Colombia to prosecute core international crimes perpetrated in non-international conflict. Exceptions exist for some particular treaty obligations in relation to acts of torture, enforced disappearances and genocide. There is scant evidence of an international customary law prohibiting the use of amnesty in respect of such crimes. Moreover, there are no rules prohibiting the use of amnesty for political crimes, and indeed, Protocol II may require their use for internal conflict.[267] In particular, while the Rome Statute strongly encourages domestic prosecution of core international crimes, the balance of the evidence indicates that there is no duty to undertake such prosecution absent a further agreement by States parties to introduce this duty.

Therefore, Colombia exceeds its international legal obligations by requiring the JEP to investigate and prosecute core crimes, while allowing for amnesty in relation to political crimes. There is an open question as to how crimes that are *connected* to political crimes will be investigated and prosecuted by Colombian authorities, as political crimes such as rebellion or treason almost always involve commission of other related violent crimes.[268] However, the specific and detailed prohibition of amnesty for core crimes under the CPA reduces the risk of amnesty being afforded for abhorrent violent acts that are related to political crimes. The agreement specifically requires any killings perpetrated in conflict to be "as defined under international humanitarian law" in order to be considered for amnesty.[269]

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[267] Jean-Baptiste, *supra* note 24, at 43, 61.
[268] *Id.* at 36. *See also* Sang Wook Daniel Han, *The International Criminal Court and National Amnesty*, 12 AUCKLAND. UNIV. LAW REV. 97, 121 (2006).
[269] CPA art. 5.1.2.38.

In providing for a process by which international core crimes are investigated and litigated, and in providing only limited circumstances under which amnesty is afforded, Colombia's CPA also generally complies with the aforementioned duties under the ACHR. Indeed, during the negotiations that produced the CPA, parties used international obligations to "legitimate their policy preferences."[270] This process of using international norms to shape the resolution of peace negotiations is to be encouraged.[271]

There is also evidence that differences in drafting of the CPA are differences in form rather than substance. Critics argued that the criminalization of "*serious* war crimes … committed as part of a *systematic attack*" adds elements to the Rome Statute definition of war crimes and therefore makes it harder to prosecute war crimes.[272] As the OTP has pointed out, it is perfectly possible for war crimes to have been committed in a manner that was not systematic.[273] However, the Colombian Constitutional Court has recognized this inconsistency between the terms of the Amnesty Law 1820 of 2016 and the Rome Statute, and it struck down the elements additional to the Rome Statute in its interpretation of the provision.[274]

However, as alluded to above, the Rome Statute and the ACHR demonstrate a concern for prosecution of those most responsible for core crimes, including senior leaders who have not directly committed crimes but who have been

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[270] Hillebrecht et al., *supra* note 8, at 294.
[271] Hyeran Jo, Beth A. Simmons & Mitchell Radtke, *Conflict Actors and the International Criminal Court in Colombia*, 19(4), J. INT'L CRIM. JUST. 959, 976-77 (2021); Robinson, *supra* note 100, 504-05.
[272] AKSENOVA, *supra* note 35, at 146.
[273] INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2017 ¶¶ 146 (2017).
[274] Ambos, *supra* note 93, at 127.

involved in masterminding or facilitating their perpetration.[275] Further, accountability for State agents has been notoriously lacking in transitional contexts.[276] The CPA regimes for command responsibility, and liability of State agents, warrant closer examination.

(i) Command responsibility

Originally the CPA referred to Rome Statute Article 28 for command responsibility.[277] However, reportedly in response to protests by military officials, this reference was removed.[278] There are a number of textual discrepancies between the final law and the Rome Statute.

Ultimately, article 24 of Legislative Act 01 of 2017 purports to give constitutional effect to the CPA. It provides for the circumstances in which superior Colombian Security Forces officers will be responsible for acts perpetrated by their subordinates.[279] This constitutional

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[275] HAYNER, *supra* note 5; Weiner, *supra* note 137, at 235.

[276] Natalie Sedacca, *The 'turn' to Criminal Justice in Human Rights Law: An Analysis in the Context of the 2016 Colombian Peace Agreement*, 19 HUM. RTS. L. REV. 315, 339 (2019).

[277] *Amicus Curiae Brief before the Constitutional Court of Colombia*, ECCHR (May 2017) n.8 (citing Oficina del Alto Comisionado para la Paz, *Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera* ¶ 44 (Nov. 12, 2016)).

[278] Hector Olasolo & Jannluck Canosa Cantor, *The Treatment of Superior Responsibility in Colombia: Interpreting the Agreement Between the Colombian Government and the FARC*, 30 CRIM. L. FORUM 61, 95-96 (2018).

[279] "The determination of command responsibility cannot be exclusively based on rank, hierarchy or scope of jurisdiction. The responsibility of members of the "Fuerza Pública" [Colombian Security Forces] for acts committed by their subordinates must be based on the *effective control over the respective conduct*, the *knowledge based on the information at their disposal* before, during and after the commission of the respective conduct, as well as the means at their disposal to prevent the commission or continued commission of the

amendment was given legislative force by article 68 of the JEP Statutory Act.[280]

As the Legislative Act 01 of 2017 did not enact provisions with respect to the FARC-EP commanders, article 67 of the JEP Statutory Law gave effect to the terms of article 5.1.2.59 of the CPA, providing for the circumstances in which officers of the FARC-EP will be responsible for the actions of their subordinates.[281]

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punishable conduct, in so far as permitted by factual circumstances, and if already occurred, further the relevant investigations.

It will be understood that effective command and control of the military or police superior over the acts of his subordinates exists, when the following concurring conditions are demonstrated:

a. That the criminal act or acts were committed within the area of responsibility assigned to the unit under his or her command in accordance with the corresponding jurisdiction, and are related to activities under his or her responsibility;

b. That the superior had the *legal and material capacity to issue, modify and enforce orders*;

c. That the superior had the effective capacity to develop and execute operations within the area where the criminal acts where committed, according to the corresponding level of command;

d. That the superior had the material and direct ability to take adequate measures to prevent or suppress the criminal act or acts of his or her subordinates, provided that he or she had the actual or updatable knowledge of their commission": Translation from *Amicus Curiae Brief before the Constitutional Court of Colombia*, ECCHR (May 2017) 6 (emphasis added). Original Spanish language legislation is available at: http://www.suin-juriscol.gov.co/viewDocument.asp?ruta =Acto/30030428 (emphases added). *See also* Ambos & Aboueldahab, *supra* note 88, at 270.

[280] Olasolo & Canosa Cantor, *supra* note 278, at 65.

[281] "The responsibility of FARC-EP officers for the actions of their subordinates will need to be based on *effective control of the respective conduct*, the *knowledge of it based on information available to them* in advance of, during and after the action was committed, as well as the means within their power to prevent it and, it having taken place, to take the corresponding decisions. Command responsibility cannot be based exclusively on rank or hierarchy.

Effective control of the respective conduct shall be construed to mean a real possibility for the officer to have exercised appropriate control over his subordinates in relation to commission of the criminal acts, in the sense established in international law;" CPA art. 5.1.2.59.

The first issue with the State commander rule is that command responsibility under the Colombian law for actions of subordinates was based on, *inter alia*, "effective control over *the respective conduct*."[282] Meanwhile, for superior responsibility, article 28(a) of the Rome Statute requires that the crimes be committed by "forces under [the superior's] effective command and control, or effective authority and control." This drafting refers to a hierarchical relationship with subordinates.[283] It does not refer to control over the underlying criminal conduct, or "the respective conduct" of the perpetrators, which is the language of the Legislative Act 01 of 2017. The Colombian drafting is arguably closer to a standard for indirect perpetration under the Rome Statute, and may create a more difficult burden of proof for prosecutors.[284]

Secondly, Legislative Act 01 of 2017 considers "knowledge based on the information at their disposal."[285] The likeliest interpretation of this is that the commander's actual knowledge of the specific conduct must be proven in order for liability to be found.[286] In contrast, the ICC Pre-Trial Chamber has found that negligence in *failing to* acquire knowledge of a subordinate's illegal conduct satisfies the knowledge requirement.[287] Legally speaking, actual knowledge is harder to prove.[288]

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[282] Legislative Act 01 of 2017, *supra* note 90, at art. 24.
[283] Prosecutor v. Bemba, Judgment, ICC-01/05-01/08-3343, ICC Trial Chamber (Mar. 21, 2016) 85–6, 90 ¶¶ 184, 194 [hereinafter 'Bemba'].
[284] Olasolo & Canosa Cantor, *supra* note 278, at 99.
[285] Legislative Act 01 of 2017, *supra* note 90, at art. 24.
[286] AKESNOVA, *supra* note 35, at 146.
[287] Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ICC Pre-Trial Chamber II (June 15, 2009) 153 ¶ 432.
[288] Martinez, *supra* note 45, at 630.

Thirdly, Legislative Act 01 of 2017 requires that the superior "had the legal and material capacity to issue, modify and enforce orders."[289] The OTP considers that this is a requirement for the perpetrator to hold *de jure* authority.[290] In fact, the ICC Trial Chamber has confirmed that *de facto* control may also be a basis for a finding of criminal responsibility for commanders.[291] An ICC Appeals Chamber majority also considered that geographic distance between commander and subordinates does not preclude the possibility of criminal responsibility.[292] However, the CPA's *de jure* conceptualization of authority and the requirement of actual knowledge on the part of commanders of the actions of subordinates may not capture *de facto* commanders, who in fact exercise command even if they do not possess legal authorization to do so. Regional crimes may not be attributable to commanders based in Bogotá sending subordinates to geographic areas that are (legally speaking) outside their responsibility.[293] Further, rebel leaders may escape responsibility where they order attacks on government authorities that result in collateral murder of civilians, an occurrence about which they "should have known" even if they did not have actual knowledge.[294]

Finally, there is no CPA provision for superior responsibility of civilians. In contrast, article 28(a) of the Rome Statute provides for liability of military commanders.[295] Article 28(b) applies a different standard

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[289] Legislative Act 01 of 2017, *supra* note 90, at art. 24. *See* n.306 for an extract of the provision.
[290] OFFICE OF THE PROSECUTOR 2017, *supra* note 273, at ¶ 145.
[291] Bemba, *supra* note 287, at 85-86 ¶ 184.
[292] Prosecutor v. Bemba, Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2, ICC Appeals Chamber ¶¶ 33-36 (Jun. 8, 2018).
[293] AKSENOVA, *supra* note 35, at 146.
[294] Martinez, *supra* note 45, at 635.
[295] Rome Statute, *supra* note 90, at art. 28(a).

for "superior and subordinate relationships not described in paragraph (a)," which would include civilian commanders.[296]

ii. State agents

The CPA explicitly provides for different fields of law applying to different agents in the conflict. The agreement provides for a "differentiated treatment" of State agents, which was to take into account "operating rules governing the Colombian armed forces in relation to international humanitarian law."[297] The effect of this provision is that State personnel are not judged strictly according to international law standards. Rather, they are only subject to international criminal laws that were incorporated in domestic Colombian criminal legislation at the time of the perpetration of the alleged acts. Further, there is a presumption of legality for their actions that prosecutors must disprove.

Meanwhile, the responsibility of FARC-EP members is considered with reference to "international humanitarian law, international human rights law and international criminal law."[298] This appears to provide scope for the application of lower standards of behaviour when compared to standards applied against State agents. Perhaps reflective of this are indications that there is a disproportionate targeting of non-State actors by the JEP.

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[296] *Id*. at art. 28(b); James D. II Levine, *The Doctrine of Command Responsibility and Its Application to Superior Civilian Leadership: Does the International Criminal Court Have the Correct Standard*, 193 MIL. L. REV. 52, 78-79 (2007). For more on *Rome Statute* art. 28, *see* Volker Nerlich, Superior Responsibility under Article 28 ICC Statute, 5 J. INT'L CRIM. JUST. 665 (2007).
[297] CPA art. 5.1.2.44.
[298] CPA art. 5.1.2.59.

Goebertus found that of the 12,422 persons over whom the JEP has claimed jurisdiction, 78.3 percent were former members of the FARC-EP, while 20.9 percent were members of the Colombian armed forces.[299]

iii. Accountability deficit?

Accountability deficits for State agents have been an observable problem in transitional contexts.[300] Hayner points to obstacles such as evidentiary issues and corruption as limiting prosecution of State officials in transition.[301] State commanders may have responsibility for notorious crimes perpetrated in Colombia such as the "false positives" murders of civilians.[302] These alleged crimes involved government security forces knowingly killing civilians and framing their identities as guerrillas killed in combat, so that progress in the conflict could be demonstrated.[303] Although accountability mechanisms preceding the JEP revealed the potential role of Colombians in these crimes, prosecutors apparently have not acted on this evidence.[304] Possibly reflecting the narrowed definitions described above, in 2017 the OTP noted that only 17 of 29 commanders allegedly responsible for false positives faced investigations.[305] Additionally, the OTP's report noted that the Colombian government had not

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[299] JUANITA GOEBERTUS ESTRADA, THE COLOMBIAN PEACE AGREEMENT: A MULTIDISCIPLINARY ASSESSMENT 110, 117 (Jorge Luis Fabra-Zamora et al. eds., 2021).
[300] Sedacca, *supra* note 276, at 339.
[301] *Id*.
[302] INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019 119-28 (2019).
[303] Samson, *supra* note 103, at 155; OFFICE OF THE PROSECUTOR 2017, *supra* note 273, at ¶ 132.
[304] Martinez, *supra* note 45, at 631.
[305] OFFICE OF THE PROSECUTOR 2017, *supra* note 273, at ¶ 135.

provided to its offices information regarding investigations or prosecutions of State officials that it had requested.[306]

Despite the OTP and IACtHR prioritization of high-level State responsibility, Colombia's scrupulous drafting failed to extend such accountability, and undermined what has been argued to be an otherwise comprehensive regime of responsibility for international core crimes.

III. DUTY TO PUNISH

Equally significant as the definition of crimes is their implementation.[307] Impunity involves a *de jure* or *de facto* inability to bring perpetrators to account, which may also arise from a failure of a State to duly punish those responsible for core crimes.[308] Punishment that is illusory is no punishment at all.

Part III considers whether the CPA fulfils its international obligations regarding the punishment for international crimes. The CPA's provisions for the reduction of sentences and alternative penalties present problems *vis-à-vis* Colombia's obligations to prosecute and punish such crimes.[309]

A. Alternative sentencing in the CPA

The CPA expressly stated its commitment to enacting restorative justice. Article 5.1.2.6 provides, *inter alia*, that one of the "paradigms" guiding the operation of the JEP is application of restorative justice.[310] The agreement expresses that "the primary goal" of restorative justice to be

[306] *Id.* at ¶ 142.
[307] AKSENOVA, *supra* note 35, at 147.
[308] DI SARSINA, *supra* note 104, at 129.
[309] *Id.* at ¶ 160.
[310] CPA art. 5.1.2.6.

"to repair the harm done and make reparation to the victims of the conflict, especially in order to put an end to the social exclusion triggered by their victimization," and it is to address, "first and foremost, the needs and dignity of the victims and it comes with a comprehensive approach guaranteeing justice, truth, and a commitment to ensuring that what happened will never be repeated."[311] These principles are reflected in the alternative sanctions of the CPA. Where a case is not eligible for amnesty, in order for the relevant person to receive the sanctions within the powers of the JEP, that person is required to "fulfil the conditions on truth, reparation and non-repetition."[312] The CPA was also clear that the imposition of any sanctions by the JEP would not disqualify a person from political participation.[313]

In its regime for sentencing, the CPA distinguished between two broad categories of alleged perpetrators: those who make "acknowledgement of the truth and responsibility," and those who do not make such acknowledgment.[314]

The Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts and Conduct investigates actions and receives reports from victims, human rights organizations, and judicial or administrative sources, and assesses them in relation to jurisdictional issues only.[315] Cases in which individuals do not acknowledge responsibility for alleged actions are referred to either the Investigation and Indictment Unit or the First

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[311] *Id*.
[312] CPA art. 5.1.2.11.
[313] CPA art. 5.1.2.36.
[314] CPA art. 5.1.2.45.
[315] CPA art. 5.1.2.48. The institution has also been called the Chamber for the Recognition of Truth, Responsibility and the Determination of Facts and Conduct: *See* TARAPUÉS SANDINO, *supra* note 57, at 74-75 (citing Law 1957 of 2019, arts. 79, 81 and 84).

Instance Chamber of the Tribunal for Peace, which may decide whether "adversarial" trial proceedings are to be initiated.[316] Members of the Tribunal and Panel must be "highly qualified justices" experienced in international law or conflict resolution, while the Unit should be populated by legal professionals.[317]

Those who have committed "very serious offences" have the opportunity to "acknowledge truth and responsibility" before the JEP. There are four possible outcomes:

i. *Special sanctions*: The accused fully acknowledges their crimes before the JEP before a trial commences. They receive a special sanction lasting between five years and eight years, incorporating reparatory and restorative functions, as well as "effective restrictions on freedoms and rights" including restrictions on movement, and guarantees of non-repetition.[318] Such restrictions are not to amount to imprisonment or equivalent forms of detention;[319]
ii. *Alternative sanctions*: The accused initially denies the crimes before a trial commences but later admits the conduct "prior to the ruling" of the First Instance Chamber. In this case, a "harsher" penalty is imposed than if (i) had occurred.[320] The alternative sanction is "of an essentially retributive nature involving deprivation of liberty for between five and eight years."[321] This appears to be a

[316] CPA arts. 5.1.2.47, 5.1.2.48(n), 5.1.2.54(a).
[317] CPA arts. 5.1.2.65, 5.1.2.66.
[318] CPA art. 5.1.2.60.
[319] *Id*.
[320] CPA art. 5.1.2.54(c).
[321] *See* CPA art. 5.1.2.60.

requirement of prison or "other form of detention;"[322]

iii. *Ordinary sanctions*: The accused denies the crimes and is convicted of them, leading to the imposition of an "ordinary sanctions."[323] These sanctions are to perform the "functions provided for in criminal legislation" and is to consist of "actual deprivation of liberty" for between 15 and 20 years;[324] or

iv. *No sanctions*: The accused denies the crimes, the prosecution fails to prove them, and no conviction is made.

Minimum and maximum sanctions apply regardless of the number of offences found to have been perpetrated. Where ordinary sanctions are imposed, there is a scope for penalty reductions "provided the person convicted undertakes to contribute to their social rehabilitation through work, training, or study during the time they are deprived of their liberty."[325] Further, for alternative sanctions, where the person did not play a "decisive role in the most serious and representative conduct," regulations can provide for sanctions for as low as two years.[326]

The sanction imposed will depend on the truth given, the act's gravity, the level of participation and responsibility, and commitments to reparations towards victims and guarantees of non-recurrence.[327] Article 5.1.2.75 provides a substantial and detailed list of appropriate special sanctions, alternative sanctions, and ordinary sanctions. Special sanctions include reparations,

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[322] *Id.*
[323] CPA art. 5.1.2.54(b).
[324] *See* CPA art. 5.1.2.60.
[325] *Id.*
[326] *Id.*
[327] CPA art. 5.1.2.75.

building and repair of infrastructure, and development programs, in consultation with affected communities.[328]

To qualify for the special and alternative sanctions, an accused must provide "full truth, reparation for the victims and guarantees of non-repetition."[329] This means providing an "exhaustive and detailed" account of the acts committed and circumstances in which they occurred.[330]

B. International law and alternative sentencing

The provisions for the reduction of sentences and alternative penalties raise issues *vis-à-vis* the obligations to investigate and prosecute international crimes and serious violations of international law.[331]

The first section will consider the international law applicable to sentencing for international crimes. Because of the scarcity of international law sources which expressly provide guidance regarding sentencing, this section will also consider the practices of international and national courts with respect to sentencing for international core crimes. The second section will consider the Rome Statute and alternative sentencing. The final section will analyze the Inter-American regional human rights law and jurisprudence.

1. International law and sentencing

Even accepting that international criminal law permits some degree of flexibility in a transition state's response to mass atrocities, it is clear that there will be a point at which

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[328] *Id*.
[329] CPA art. 5.1.2.13.
[330] *Id*.
[331] DI SARSINA, *supra* note 104, at 160.

a light sanction becomes illusory, and a State has circumvented the value of prosecution by refusing to adequately sentence a perpetrator.[332]

However, international law provides limited guidance on the types of sentences required for convictions for international crimes.[333] If one takes the view that there is no general duty to prosecute international core crimes outside of treaty regimes, it might not be altogether surprising that there is no duty to punish the perpetration of such crimes. Limiting the development of common principles for sentencing is the fact that human rights treaties do not usually provide for criminalization of offences and a requirement to prosecute.[334] Sentencing for international core crimes (by international and domestic courts) is also a neglected area of research.[335] Notwithstanding, commentary outside of the Colombian context is usually marked by calls for "harsh justice" for perpetrators of international crimes, in line with the seriousness of the offending.[336]

Certain duties to punish are expressed in treaties. The Convention against Torture requires that States parties make the offences "punishable by appropriate penalties which take into account their grave nature."[337] Similarly, the Convention on Enforced Disappearances requires "appropriate penalties which take into account [the crime's]

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[332] Eskauriatza, *supra* note 188, at 192; Jens David Ohlin, *The Right to Punishment for International Crimes*, *in* WHY PUNISH PERPETRATORS OF MASS ATROCITIES?: PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 257 (Florian Jeßberger & Julia Geneuss eds., 2020).
[333] Kelly, *supra* note 7, at 827.
[334] Sedacca, *supra* note 276, at 318.
[335] BARBORA HOLA, ENCYCLOPAEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 2643, 2644 (Gerben Bruinsma & David Weisburd eds., 2018).
[336] Margaret M. deGuzman, *Harsh Justice for International Crimes*, 39 YALE J. INT'L. L. 1, 2 (2014).
[337] Convention against Torture, *supra* note 127, at art. 4.

extreme seriousness."[338] The Genocide Convention provides vaguer guidance, referring to the duty of States parties to "provide effective penalties" to those found guilty of genocide.[339] Likewise, the Geneva Conventions require High Contracting Parties to "enact any legislation necessary to provide effective penal sanctions" for persons committing grave breaches of those Conventions.[340] However, there are no obligations under the Common Article 3 of the Geneva Conventions, which applies to non-international armed conflict.[341] The ICRC Meeting on Experts concluded that in order to meet international obligations with respect to international humanitarian law, States should implement criminal legislation in which the "punishment must be in proportion to the seriousness of the crime."[342]

Some scholars contend that international law clearly expresses a duty to sanction persons found responsible for international crimes.[343] However, codified principles or

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[338] Convention on Enforced Disappearances, *supra* note 133, at art 7.
[339] Genocide Convention, *supra* note 132, at art. V.
[340] *See* e.g. Geneva Convention I, *supra* note 134, at art. 49; Geneva Convention II, *supra* note 134, at art. 50; Geneva Convention III, *supra* note 134, at art. 129; Geneva Convention IV, *supra* note 134, at art. 146.
[341] M Gandhi, *Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunals*, ISIL Y.B. INT'L HUMANIT. REFUG. L. 1 (2001).
[342] Cristina Pellandini, *National Measures to Repress Violations of International Humanitarian Law, Report of the Meeting on Experts*, INTERNATIONAL COMMITTEE OF THE RED CROSS, 24 (1997). *See also* Beatriz E. Mayans-Hermida & Barbora Holá, *Balancing 'the International' and 'the Domestic': Sanctions under the ICC Principle of Complementarity*, 18(5) J. INT. CRIM. JUST. 1103 (2020). In which the authors argue that "under ICL [international criminal law] adequate sanctions seem to be those proportional to the gravity of the offense and the culpability of the convicted person," noting that proportionality varies widely: *see id*. at 1115.
[343] *See e.g.*, Josi, *supra* note 5, at 404.

guidelines on what might be an "appropriate," "effective" or "proportionate" penalty are lacking, and the issue is under-researched.[344] This lack of guidance might be because the conferences drafting the treaties of international courts give the issue scarce attention.[345] Forging agreement between different States on sentencing principles is very difficult, and it likely would encumber the priority of these conferences which is to establish agreement as to crimes.[346] The result would be that judicial sentencing discretion is very wide, compared to domestic criminal law.[347] There are further difficulties with conceptualizing proportionality that are perhaps unique to international criminal law.[348] Tribunals in their judgments

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[344] Mayans-Hermida & Holá, *supra* note 342, at 1115-16.

[345] MARGARET M. DEGUZMAN, THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 932, 932, 944 (Carsten Stahn ed., 2015).

[346] *Id*.

[347] Barbora Hola, ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (Gerben Bruinsma & David Weisburd eds., 2014).

[348] THOMAS WEIGEND, PROPORTIONALITY IN CRIME CONTROL AND CRIMINAL JUSTICE 308, 310-15 (Emmanouil Billis et al., eds., 2021). Weigend identifies challenges to sentencing international crimes including the fact that such crimes are very often perpetrated by an individual within a hierarchy, and that individual cases often have significant differences between them. D'Ascoli also observes that as prosecutions of international crimes generally concern extremely abhorrent acts that have perpetrated immense harm, it might be difficult for any punishment to satisfy every person's expectation of what is "commensurate" to those crimes: *see* SILVIA D'ASCOLI, SENTENCING IN INTERNATIONAL CRIMINAL LAW: THE UN AD HOC TRIBUNALS AND FUTURE PERSPECTIVES FOR THE ICC 292 (London: Bloomsbury Publishing Plc, 2011). The author argues that because of this argument, "the traditional conceptual understanding of 'proportionality' as a sentencing principle needs to be dropped in the international trial context." Meanwhile, van Sliedregt argues that unlike domestic law, the enforcement of international law requires that different states with different legal traditions impose sentences, which inevitably produces conflicting norms: *see* Elies van Sliedregt, *Punishment and the Domestic Analogy: Why It Can and Cannot Work*, in WHY PUNISH PERPETRATORS OF MASS ATROCITIES? PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 81, 101 (Florian Jeßberger & Julia

have also failed to provide more than a "laundry list of rationales for punishment."[349] Judges in different tribunals have demonstrated different priorities in relation to sentencing.[350] The required remedy for human rights violations is still the subject of debate, and has been linked primarily by regional legal bodies, to the right to access to justice by victims.[351] Some UN human rights bodies insist on punishment as being part of the duty to investigate and prosecute violations.[352] Under this view, punishment should "seek to be proportional to the crimes committed and not [be] illusory."[353]

States likely have broad discretion in defining sanctions, and at the most, these sanctions must be proportional to the gravity of the crime.[354] Examining the existing practices of international and domestic courts for international crime may provide some guidance into the

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Geneuss eds., 2020). Finally, Crow notes that different international judicial institutions are established by legal mechanisms pushed by different international actors, which creates different impetuses for punishment: *see* Kevin Crow, *The Opacity of Proportionality in International Courts: Could Categories Clarify?*, 51 GEO. WASH. INT'L L. REV. 289, 313-14 (2019).

[349] J.D. Ohlin, *Proportional Sentences at the ICTY, in* THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 332 (B. Swart, G. Sluiter and A. Zahar eds., 2011); DEGUZMAN, *supra* note 345, at 946.

[350] Mayans-Hermida & Holá, *supra* note 342, at 1115.

[351] Josi, *supra* note 5, at 404; Ohlin, *supra* note 359.

[352] Seils, *supra* note 42, at 3 (citing *Andreu v. Colombia*, Communication No. 563/1993, UN Human Rights Committee (Oct. 27, 1995)); *see also* Inter-American Court of Human Rights cases below which also impose this requirement.

[353] Seils, *supra* note 42, at 15; Weigend, *supra* note 348, at 306-07; *see also* D'ASCOLI, *supra* note 348, at 292 who also argues that proportionality "is in theory applicable and should provide some guidance" to sentencing for international crimes. However, she argues that proportionality should be considered differently for international core crimes than for traditional domestic crimes.

[354] Josi, *supra* note 5, at 405-06.

meaning of proportionality when it comes to sentencing of international core crimes.[355]

The practice of international criminal courts and tribunals appears to be punishment of convicted persons through imprisonment. Their statutes provide minimal specific guidance in relation to sentencing,[356] and the case law demonstrates an aversion to "a definitive list of sentencing guidelines," given the discretionary nature of the exercise.[357] Nevertheless, the statutes of the ICTY, ICTR, ICC, and SCSL all require, at a minimum, that a term of imprisonment be imposed as punishment for a conviction.[358] They also provide the possibility of early release during the term of imprisonment.[359] Further, the most important factors in sentencing are usually the gravity of the offence and the individual circumstances of the perpetrator.[360]

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[355] Mayans-Hermida & Holá, *supra* note 342, at 1106; D'ASCOLI, *supra* note 348, at 11. This is especially the case because domestic jurisdictions tend to have significant varying legal traditions: *see* van Sliedregt, *supra* note 348, at 81-82.

[356] Mark A. Drumbl, *'And Where the Offence Is, Let the Great Axe Fall': Sentencing under international criminal law*, *in* WHY PUNISH PERPETRATORS OF MASS ATROCITIES? PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 297, 300 (Florian Jeßberger & Julia Geneuss eds., 2020).

[357] Prosecutor v. Krstić, Judgement, Case No: IT-98-33-A, ICTY Appeals Chamber (Apr. 19, 2004) ¶ 242.

[358] Statute of the Special Court for Sierra Leone (adopted 16 January 2002) art. 19(1) [hereinafter SCSL Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993) art. 24(1) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda (adopted 8 November 1994) art. 23(1) [hereinafter ICTR Statute]; Rome Statute, *supra* note 90, at art. 77(1). Some of these statutes allow penalties relating to fines or return of property to be imposed in addition to, but not instead of, imprisonment.

[359] SCSL Statute, *supra* note 358, at art. 23; ICTY Statute, *supra* note 358, at art. 28; ICTR Statute, *supra* note 358, at art. 27; Rome Statute, *supra* note 90, at art. 110.

[360] SCSL Statute, *supra* note 358, at art. 19(2); ICTY Statute, *supra* note 358, at art. 24(2); ICTR Statute, *supra* note 358, at art. 23(2). *See also* HOLA, *supra* note 335, at 2648.

In a study of nine international criminal courts and tribunals since the end of the Second World War, it was found that the average determinate prison sentence (that is, a sentence that was not death or life imprisonment) was 15.3 years.[361] The convicted perpetrators in this sample were a mixture of high-ranking (40 percent), middle-ranking (29 percent), low-ranking (24 percent) and foot soldiers (7 percent).[362] The ICTY was found to impose an average sentence of 15.6 years in a study of 82 convictions.[363] Although its precise meaning varied significantly, scholars have also found the principle of proportionality, especially as to gravity of the offence and individual circumstances of the perpetrator, to be a consistent feature of international courts and tribunals.[364] Some of the variance may be attributable to differing mandates of the judicial institutions, and the need to individualize sentencing based on the facts before the particular court.[365]

In the domestic sphere, the number of prosecutions of international core crimes is relatively low, especially for

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[361] Alette Smeulers, Barbora Holá, & Tom van den Berg, *Sixty-Five Years of International Criminal Justice: The Facts and Figures*, 13 INT'L CRIM. L. REV. 7, 39 (2013). The courts and tribunals were the International Military Tribunal (Germany), International Military Tribunal for the Far East (Japan), ICTY, ICTR, ICC, SCSL, ECCC, Special Tribunal for Lebanon, and the Special Panels of Dili.

[362] *Id.* at 40.

[363] Barbora Holá, *Vertical Inconsistency of International Sentencing? The ICTY and Domestic Courts in Bosnia and Herzegovina*, *in* LEGACIES OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 405, 416 (Carsten Stahn, Carmel Agius, Serge Brammertz & Colleen Rohan eds., 2020).

[364] *See e.g.*, Barbora Holá, International Sentencing: 'A Game of Russian Roulette or Consistent Practice?' (PhD Thesis, Vrije Universiteit Amsterdam, 2012) at 38.

[365] Drumbl, supra note 356, at 297.

crimes against humanity.[366] However, imprisonment is invariably the sentence ordered for war crimes.[367] Hola and Brehm completed a study on defendants and sentencing practices of international, domestic and *gacaca* courts which all examined crimes perpetrated during the 1994 Rwandan genocide.[368] For offenders who participated in violence during the genocide but were not involved in planning of attacks, the median sentence was 13 years imprisonment (range 1 to 30 years) for domestic courts, and median 15 years imprisonment (range 3 months to 30 years) for *gacaca* courts.[369] Notably, one-third of *gacaca* sentences were commuted to community service.[370] However, sentences of 10 years or less were given for crimes causing injury without intent to kill.[371] This indicates that where death was occasioned, a lengthy term of imprisonment was expected.

Separately, Hola compared Bosnia and Herzegovinian sentencing, which employ mandatory minimum and maximums, and found that the average sentence for entity courts was 6.1 years for exclusively war crimes, while for the State court, dealing with more complex cases, the average was 12.9 years for war crimes and crimes against

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[366] Joseph Rikhof, *Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*, 20(1) CRIM. L. FORUM 1, 15-25, 51 (2009).
[367] *Id*.
[368] Barbora Holá & Hollie Nyseth Brehm, *Punishing Genocide: A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and Gacaca Courts*, 10 GENOCIDE STUD. PREVENTION: INT'L J. 59 (2016). *Inkiko gacaca* courts were a form of community justice instituted in Rwanda until 2012 that processed almost two million cases of alleged crimes committed during the 1994 Rwanda genocide, by authorizing locally elected officials to preside over proceedings in public places. *Id*. at 63-64.
[369] *Id.* at 75-76.
[370] *Id*. at 75.
[371] *Id.* at 76.

humanity defendants.[372] The "vast majority" of these defendants had no authority or low-rank.[373] Meanwhile, Vajda examined 109 convictions in Croatian domestic courts, and found that the usual case of war crimes occasioning death received 8.82 years imprisonment on average, with the vast majority (70 percent) of all convicted persons receiving to 5 to 15 years imprisonment.[374] In an analysis of four Ethiopian trials resulting in 3,760 persons convicted for international core crimes, Metekia found that sentences ranged from imprisonment for 2 years to capital punishment, and that loss of liberty was the "primary" form of punishment, although he acknowledges such decisions were characterized by a lack of transparency.[375] In other contexts, more high-profile perpetrators of international core crimes received substantial prison sentences.[376]

Overall, it has been shown that even in multilateral treaty regimes, the obligation to punish is no more specific than to impose an appropriate or proportional penalty,[377] and imprisonment is not mentioned in those regimes.[378] One can see that sentence severity with respect to international core crimes is far from uniform.[379] In many

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[372] Holá, *supra* note 363, at 416-17.
[373] *Id.* at 420.
[374] Maja Munivrana Vajda, *Domestic Trials for International Crimes – A Critical Analysis of Croatian War Crimes Sentencing Jurisprudence*, 19 INT'L CRIM. L. REV. 15, 26-27 (2019).
[375] Tadesse Simie Metekia, *Punishing Core Crimes in Ethiopia: Analysis of the Domestic Practice in Light of and in Comparison, with Sentencing Practices at the UNICTS and the ICC*, 19 INT'L CRIM. L. REV. 160, 162, 166, 189-90 (2019).
[376] *See e.g.*, Juan-Pablo Perez-Leon-Acevedo, *Sentencing Factors Concerning Those Most Responsible for International Crimes in Peru: An Analysis vis-à-vis International Criminal Court Sources*, 19 INT'L CRIM. L. REV. 95 (2019).
[377] D'ASCOLI, *supra* note 348, at 292.
[378] Seils, *supra* note 42, at 3.
[379] DEGUZMAN, *supra* note 345, at 9-10.

instances, defendants before international criminal courts and tribunals are treated in sentencing less severely than for many domestic crimes before domestic courts.[380] This is so even though international courts and tribunals, by their nature, tend to sit in judgment over the most serious and large-scale offending.[381]

These studies indicate that, where prosecution is undertaken by a State and convictions are recorded for international core crimes, a term of imprisonment appears to be almost universally imposed.[382] This is so, even for low-ranking perpetrators. However, if an obligation to punish was found to exist, it is unlikely to extend further than a requirement of avoiding gross disproportionality.[383] In relation to the Colombian context, some have opined that sentences of fifteen to twenty years' imprisonment may be "far more lenient" than elsewhere.[384] The examples above show that, where acknowledgment is not made by accused persons before the JEP, those persons in fact face more severe sentences than in many prosecutions elsewhere.

Where acknowledgment is made by Colombian accused persons, the sanctions provided by the CPA are significantly lighter than prevailing practice on the international and domestic plane. However, those making a case that the CPA's special and alternative sanctions are

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[380] MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 154 (2007).
[381] *Id*.
[382] Mayans-Hermida & Holá, *supra* note 342, at 1121.
[383] Savini, *supra* note 146, at 145; Seils, *supra* note 42, at 3. *See also* Sergey Vasiliev, *Punishment Rationales in International Criminal Jurisprudence: Two Readings of a Non-question*, *in* WHY PUNISH PERPETRATORS OF MASS ATROCITIES? PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 45, 58 (Florian Jeßberger & Julia Geneuss eds., 2020), in which Vasiliev argues that ICTY and ICTR sentencing discussion centre around "sentencing principles applicable across all cases (individualization, proportionality and consistency)."
[384] Eskauriatza, *supra* note 188, at 194.

"proportional" to the crime perpetrated would point to the judicial character of the institutions and their presiding officials, and the role of guarantees of non-recurrence, reparations and the restorative quality of community works.[385] It is argued that these additional elements, in tandem with the lack of clarity in international standards, make it unlikely that the CPA is in breach of international law as a result of its use of alternative sentencing.

2. Rome Statute and Sentencing

The Rome Statute offers little explicit guidance with respect to appropriateness of alternative sentencing,[386] and the Court does not yet have a clear stance on these issues, notwithstanding substantial commentary by the Office of the Prosecutor.[387] As for other treaty-based international courts and tribunals, the ICC is required to impose custodial sentences in the event that a conviction is found, taking into account the gravity of the crime, and the individual circumstances of the defendant.[388] Further, the Appeals Chamber has ruled that the ICC Statute does not authorize the Court to impose suspended sentences in its own proceedings.[389] However, these provisions relate to the functions of the ICC as a court and have no direct application to domestic proceedings commenced in the relevant national jurisdiction.

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[385] Sedacca, *supra* note 276, at 329; Savini, *supra* note 146, at 145; Josi, *supra* note 5, at 417-18.
[386] Kelly, *supra* note 7, at 815.
[387] *Id.* at 836; HAYNER, *supra* note 5, at 202.
[388] Rome Statute, *supra* note 90, at arts. 77(1), 78(1).
[389] Prosecutor v. Bemba, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial ChamberVII entitled "Decision on Sentence pursuant to Article 76 of the Statute," ICC-01/05-01/13-2276-Red, ICC Appeals Chamber (Mar. 8, 2018) ¶ 80.

The ICC's complementarity regime places the primary obligation on States parties to prosecute alleged perpetrators of international crimes, and the ICC may only investigate and prosecute perpetrators where States parties have failed to do this.[390] Articles 17 and 53 of the Rome Statute provide for a minimum standard that national criminal proceedings must meet in order to avoid the possibility of the ICC intervening.[391] A State party's failure to deliver this standard has the consequence that the case in question can become admissible under the ICC's complementarity regime. Sentencing by domestic authorities is an important component of this regime, even though its exact role is unclear.[392] Although the existence of a duty to prosecute under the Rome Statute was questioned above, it is submitted that Colombia's decision to initiate measures of accountability for international crimes opens the alternative sentencing mechanisms imposed by the JEP to the scrutiny required by these Rome Statute provisions. This standard may act as a quasi-duty to punish.

Under the rules of the ICC, the Prosecutor as the person tasked with committing resources to proving criminality must first decide whether to initiate an investigation into allegations of criminality.[393] When deciding whether to initiate an investigation, the Prosecutor must consider whether investigation and prosecution is in the "interests of justice" under Article 53 of the Rome Statute.[394] This includes consideration of the "interests of victims."[395]

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[390] Mayans-Hermida & Holá, *supra* note 342, at 1104.
[391] JO STIGEN, THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS 190 (2008).
[392] Mayans-Hermida & Holá, *supra* note 342, at 1105.
[393] Rome Statute, *supra* note 90, at art. 53.
[394] *Id*. at arts. 53(1)(c), 53(2)(c); HAYNER, *supra* note 5, at 99-100.
[395] Rome Statute, *supra* note 90, at arts. 53(1)(c), 53(2)(c); HAYNER, *supra* note 5, at 99-100.

Important factors for the Prosecutor would be the prospect of further victimization in Colombia if hostilities did not end, and the need for perpetrator cooperation with proceedings if non-judicial mechanisms such as truth seeking and reparations were to work.[396] This is assuming they are not a device to shield perpetrators from accountability (below). However, the Prosecutor has stated that local instability and the need for peace and security will not deter investigation.[397] Indeed, it decided to intervene in Uganda in 2004, despite such difficulties. Nevertheless, Colombia's lack of blanket amnesty and the truth and work programs for convicted perpetrators distinguish it from Uganda.[398]

Article 17(1) provides for the circumstances in which that case is inadmissible before the ICC. This will be where the State party is "unwilling or unable genuinely" to investigate or prosecute the case.[399] Where the State party has investigated but decided not to prosecute, the case will be admissible before the ICC where that decision "resulted from the unwillingness or inability of the State genuinely to prosecute."[400] With the possible exception of the command responsibility issue analyzed in Part II above, there is no issue as to the *fact* of Colombia's investigation or prosecution under the JEP, assuming it is properly implemented.

The issue then becomes whether Colombia, in providing for reduced and non-custodial sentences, is

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[396] NALIN, *supra* note 40, at 163. *But see* Seibert-Fohr, *supra* note 100, at 578-79 who argues that the Statute requires the Prosecutor to consider case-specific factors but not more generalised conditions such as the need for broad reconciliation.
[397] NALIN, *supra* note 40, at 162; DI SARSINA, *supra* note 104, at 153.
[398] DI SARSINA, *supra* note 104, at 155.
[399] Rome Statute, *supra* note 90, at art. 17(1)(a).
[400] *Id*. at art. 17(1)(b).

unwilling or unable to investigate or prosecute international core crimes. It is submitted that this is the clearest expression of the issue of adequacy of sentencing under the Rome Statute. Article 17(2) of the Rome Statute provides that, in determining unwillingness, the Court is to consider, *inter alia*, whether proceedings are undertaken for the purpose of "shielding" the accused from criminal responsibility, and whether proceedings are "not being conducted independently or impartially," including in a manner which is "inconsistent with an intent to bring the person concerned to justice."[401]: Article 17 is designed to allow the ICC to intervene in a case where domestic judicial systems or sham trials with "sympathetic national judiciaries" protect perpetrators from true accountability, as its drafters were concerned with ensuring that an accused "does not evade justice."[402] The drafters explicitly sought to ensure that States parties would not impose a sentence that is "manifestly inadequate for the offence."[403]

In a Separate and Concurring Opinion, Judge Ibáñez Carranza of the ICC Appeals Chamber stated that the challenges of transitional contexts "cannot override victims' need for accountability and redress for the violations suffered", and that such accountability efforts must be "meaningful."[404] She opined that in such contexts, "some forms of amnesties can be resorted to in order to achieve reconciliation," although they "cannot include gross violations of human rights and serious violations of

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[401] *Id.* at art. 17(2).
[402] For a consideration of this provision, *see* Prosecutor v. Gaddafi, ICC-01/11-01/11-565, Judgment on the appeal of Mr. Abdullah Al-Senussi, ¶¶ 224, 228 (Jul. 24, 2014) [hereinafter "Gaddafi"].
[403] *Id.*; *see also* Kelly, *supra* note 7, at 817.
[404] Prosecutor v. Gaddafi, Separate and Concurring Opinion of Judge Ibáñez Carranza on the Judgment on the appeal of Mr Saif Al-Islam Gaddafi, ICC-01/11-01/11-695-AnxI, ¶ 123 (Apr. 21, 2020).

humanitarian law."[405] She did not directly address the issue of reduced sentences, other than to point out that Article 110 of the Rome Statute provides for conditions for reducing a convicted person's sentence. Such conditions would preclude reductions in sentences "that may result in impunity and affect victims' rights."[406] If sentencing is conceived in purely retributive terms, there is a strong argument that alternative sentencing is inadequate to the seriousness of core international crimes.[407]

The Deputy Prosecutor has, albeit non-authoritatively, claimed that a sentence which was "manifestly inadequate" would vitiate the "genuineness" of the proceedings.[408] Further, the Prosecutor declared in 2013 that *suspended* sentences for serious human rights violations would likely be considered an unwillingness to prosecute.[409] In 2014, she warned the Colombian authorities that "a sentence that is grossly or manifestly inadequate, in light of the gravity of the crime and the form of participation by the accused" would not be considered genuine by the OTP.[410] In 2016, she stated that the "effectiveness of restrictions on liberty" imposed on criminally responsible individuals would be persuasive in her calculation of whether sentencing objectives were fulfilled by the CPA.[411]

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[405] *Id.* at ¶ 121.
[406] *Id.* at ¶ 135.
[407] Mayans-Hermida & Holá, *supra* note 342, at 1105.
[408] Stewart, *supra* note 228, at 12; Samson, supra note 103, at 176. This is notwithstanding the fact that sentencing is not expressly mentioned in Rome Statute art. 17. *Id.*; *see also* Kelly, *supra* note 7, at 815.
[409] Savini, *supra* note 146, at 142.
[410] INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2014 ¶ 114 (2014).
[411] INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2016 ¶ 257 (2016).

Some thus argue that sentences for core crimes must be significant and consistent with those delivered by international courts, and sentences of less than ten years' imprisonment are at risk of being considered "indefensible" by the ICC.[412] It must be said that the few ICC sentences have ranged from nine years[413] to thirty years,[414] although the low rate of convictions for ICC prosecutions may be contributing to this range. Perhaps the issue of the CPA's sentencing is not so much the length of sentence, but rather its non-custodial aspect.

The Deputy Prosecutor opined that sentences that were less than what is proportionate to the crime and the circumstances of the individual might be justified.[415] This might be the case if non-punitive aspects of sentencing of the accused were also introduced, such as acknowledgment of wrongdoing, demobilization, guarantees of non-recurrence, and full participation in truth commission activities.[416] For alternative sentencing, including non-custodial sentences, the important considerations according to him were whether such sentencing serves appropriate: sentencing goals; condemnation of the conduct; recognition of suffering of victims; and deterrence of future criminality.[417]

The OTP has since focused on the effectiveness of restrictions to liberty as the main factor for Colombia meeting sentencing objectives.[418] The term "effective

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[412] Weiner, *supra* note 137, at 233.
[413] Prosecutor v. Al Mahdi, ICC-01/12-01/15-171, Judgment and Sentence, ¶ 109, (Sept. 27, 2016).
[414] Prosecutor v. Ntaganda, ICC-01/04-02/06-2667-Red, Judgment on the appeal of Mr. Bosco Ntaganda, ¶¶ 7, 284 (Mar. 30, 2021).
[415] Stewart, *supra* note 228, at 12.
[416] *Id*. Deputy Prosecutor Stewart also referred to a "possible temporary ban from taking part in public affairs" but this was not included in the CPA.
[417] Stewart, *supra* note 228, at 11, 13.
[418] OFFICE OF THE PROSECUTOR 2019, supra note 302 ¶ 257.

restrictions of freedom and rights" has a nature and scope that is not defined. This has fueled concern by the OTP of a risk that the sentencing will not "adequately serve sentencing objectives and provide redress for the victims."[419] Further, the use of truth mechanisms, acknowledgment and reparations, and the restorative nature of the sanctions for communities serve the goals described by the Deputy Prosecutor and some victim-centric aims of the ICC.[420]

For the OTP, if a minimum restriction of liberty is present, the indication is that the question of whether sentencing is appropriate is to a significant degree contextual, reflecting the values of the affected communities as well as the exigencies of the socio-political landscape.[421] Some discretion is afforded to States parties, and it is arguably desirable that guiding principles and minimum standards allow for practical solutions to conflict.[422] Despite some issues and assuming it is well implemented, it is submitted that the CPA is a "good faith balance" between different retributive and restorative goals when considered alongside the apparent end to the conflict.[423]

In ratifying the Rome Statute, States parties have arguably ceded power to the ICC in determining whether its responses to atrocities are sufficient to avoid ICC involvement.[424] Some argue the jurisdiction of the ICC is complementary; rather than being superior to that of State Parties, the ICC might in some cases respect amnesty for

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[419] OFFICE OF THE PROSECUTOR 2017, *supra* note 273, at ¶ 148.
[420] AKSENOVA, *supra* note 35, at 153.
[421] Kelly, *supra* note 7, at 827.
[422] Seibert-Fohr, *supra* note 100, at 286.
[423] DI SARSINA, *supra* note 103, at 161.
[424] Samson, *supra* note 103, at 166.

international crimes.[425] This view would be consistent with the *travaux préparatoires* and article 80 of the Rome Statute, which indicate that State Parties enjoy some deference in implementing sanctions for international crimes under the complementarity regime.[426]

Further, it is suggested compellingly, that an undue focus on prosecutorial and custodial approaches to justice may undermine the mission of the ICC to end impunity.[427] This might be because of practical limitations, including the risk of pursuing what will be perceived as politically-motivated prosecutions, and the inability to bring traditional incarceration to every perpetrator of international crimes.[428] In Colombia, crimes were perpetrated over decades, implicating thousands of actors, which might overload traditional criminal justice systems.[429] Fact-finding for violations is difficult, and inducing cooperation of perpetrators might be essential for a cost-effective and therefore widespread system of accountability.[430] The alternative might be selective prosecution, which introduces an element of arbitrariness.[431]

Impunity may not be an end in itself, but a means by which the rights and dignities of victims are realized.[432] Nevertheless, it is questionable whether the need to "vindicate the rights of victims" features prominently in the legal goals of the ICC specifically, as the rights of victims

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[425] Majzub, *supra* note 203, at 265.
[426] Mayans-Hermida & Holá, *supra* note 342, at 1107.
[427] *Id.* at 1127-28; Elena Maculan & Alicia Gil, *The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts*, 40 OXFORD J. OF L. STUD. 132, 135 (2020).
[428] Samson, *supra* note 103, at 167-68.
[429] Savini, *supra* note 146, at 150.
[430] Weiner, *supra* note 137, at 219; BAKINER, *supra* note 6, at 238.
[431] Kingsley N. Ogbaegbe & David Ike, *International Crimes: Prosecutions and Punishment*, 4 AFR. J. CONST. ADM. L. 88, 90 (2020).
[432] Samson, *supra* note 103, at 169-70.

in the Rome Statute are given much less prominence than in the ACHR. International criminal law has always been much more concerned with retribution and deterrence than the interests of victims.[433]

When analyzing the degree to which the national proceedings in Colombia are genuine, one can find scant judicial commentary on the issue of alternative sentences. The OTP has given positive indications in respect of alternative sentencing which has a measure of restriction of liberty, as long as it is combined with other victim-centric practices such as truth-telling and reparations.[434] Further, it is posited that the considerations under the preamble of the Rome Statute, including a concern to eliminate impunity, support the proposition that alternative measures which achieve quasi-prosecution of a very large number of alleged perpetrators are permissible, where more traditional criminal mechanisms would only produce a small fraction of hearings into the conduct of perpetrators.[435] This is especially so where alternative mechanisms embody a display of remorse by perpetrators, where they are a result

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[433] SILVIA FERNÁNDEZ DE GURMENDI, WHY PUNISH PERPETRATORS OF MASS ATROCITIES? PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 12-13 (Florian Jeßberger & Julia Geneuss eds., 2020). *See also* Kai Ambos, *Not Much, but Better than Nothing – Purposes of Punishment in International Criminal Law* 103, 106, 112 in the same edited volume.

[434] *See* Stewart, *supra* note 228; Sedacca, *supra* note 276, at 331; Eskauriatza, *supra* note 189, at 9-12; AKSENOVA, *supra* note 35, 149-50.

[435] Allan, *supra* note 99, at 293-94; Seibert-Fohr, *supra* note 100, at 574-75. As Di Sarsina points out, "even where no *de jure* amnesty is passed, the scale of past criminality often leads in the end to *de facto* impunity." This is because of the scale of offending, the scarcity of resources often available for prosecution and the political cost of prosecutions of opponents in the post-conflict context. *See* DI SARSINA, *supra* note 103, at 117.

of a surrender of arms by perpetrators, and where some possibility of individualized criminal sanction remains.[436]

Flexibility within and beyond traditional modes of punishment is necessary in cases of mass atrocity.[437] As an accountability mechanism, the JEP must demonstrate the absence of special treatment, making clear the reasons for the alternative sanctions and ensuring conditions imposed are stringently enforced.[438] As long as the alternative sentencing measures are meaningfully implemented, they are unlikely to be considered as shielding perpetrators from accountability.[439] It is submitted that this makes a compelling argument that the alternative sentencing regime of the JEP is compliant with the Rome Statute.

Consistent with this, the OTP in its 2020 Report on Preliminary Examination Activities stated that Colombia has "taken meaningful steps" in addressing ICC crimes, referring to the work of the JEP.[440] Further, on 28 October 2021, the OTP concluded an agreement with Colombia to close its investigation and maintain a cooperative relationship with Colombia, citing the "demonstrated ability and willingness of Colombia to date to genuinely administer justice related to crimes under the jurisdiction of the International Criminal Court."[441] This amounted to a decision that it could not presently exercise jurisdiction

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[436] Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 JICJ 695, 704, 710 (2005).
[437] Mark A. Drumbl, *Policy through complementarity: the atrocity trial as justice*, *in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 197 (Carsten Stahn & Mohamed M El Zeidy eds., 2014).
[438] Sedacca, *supra* note 276, at 332.
[439] Josi, *supra* note 5, at 418.
[440] OFFICE OF THE PROSECUTOR 2017, *supra* note 9, at ¶¶ 152-53.
[441] Cooperation Agreement Between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia, art. 3 (Oct. 2, 2021), https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia.

over crimes perpetrated in Colombia under the complementarity principle.[442] Thus, it is an affirmation of the appropriateness under the Rome Statute of the alternative sentencing model advanced by Colombia. The agreement committed the government of Colombia to, *inter alia*, adequate budgeting of and non-interference with the JEP.[443] It allowed for the OTP to reconsider this decision to close its investigation, where it believed there was "any significant change in circumstances."[444]

3. Regional Law and Sentencing

The issue of alternative sentencing has not yet been directly adjudicated in the Inter-American Court of Human Rights. However, this Court has made a number of rulings that are highly relevant to the issue of whether such a regime would comply with regional law.

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[442] *Id.* Art. 6 stated that the OTP "may reconsider its assessment of complementarity in light of any significant change in circumstances." Further, a press release of the OTP affirmed that "the Prosecutor is satisfied that complementarity is working today in Colombia" and that "the Prosecutor has determined that the preliminary examination must be closed." *see* Office of the Prosecutor of the ICC, *ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice*, ICC-CPI-20211028-PR1623 (October 28, 2021),<https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia>.

[443] Cooperation Agreement, *supra* note 441, at art. 1.

[444] *Id* at art. 6. The illustrative examples of a significant change in circumstance included: "any measures that might significantly hamper the progress and/or genuineness of relevant proceedings and the *enforcement of effective and proportionate penal sanctions of a retributive and restorative nature*; initiatives resulting in major obstructions to the mandate and/or proper functioning of relevant jurisdictions; or any suspension or revision of the judicial scheme set forth in the peace agreement in a manner that might delay or obstruct the conduct of genuine national proceedings" (emphasis added).

The Inter-American Court of Human Rights has been "strongly orientated" toward criminal responses to human rights violations.[445] The Court has repeatedly formulated the obligations of a State party to "investigate, prosecute, *and eventually punish* those responsible."[446] In other words, it is necessary but not sufficient to initiate prosecution in respect of serious human rights violations. The Court found that a failure to punish a violation fails to restore the victims of their rights; a trial conducted to completion was the "clearest signal of zero tolerance for grave human rights violations" and demonstrates to society that justice was done.[447] This obligation to punish was derived from the right enshrined in Article 1(1) of the ACHR.[448]

Nevertheless, the word "punish" is frequently unaccompanied by a definition.[449] The Court has offered

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[445] Sedacca, *supra* note 276, at 318.

[446] *See e.g.*, Gomes Lund, *supra* note 249, at ¶ 256 (emphasis added).

[447] El Mozote, *supra* note 186, at ¶ 249.

[448] This article requires a State party to "ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [contained in the Convention]." In Velásquez-Rodriguez v. Honduras, Judgment: Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 133 (July 29, 1988), the Court ruled: "As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."

[449] For example, in Velásquez-Rodriguez, *supra* note 458, at ¶ 174, 178, the Court determined that it was the State's duty to "impose the appropriate punishment and to ensure the victim adequate compensation" for a rights violation. However, Felipe Basch observes that in its formal concluding decision binding Honduras, the Court did not decide that Honduras was required to criminally punish the offenders, merely pronouncing that "fair compensation" must be paid to victims: *see* Basch, *supra* note 239, at 201. Nevertheless, at 206-07, he observes that later decisions by the Court determined that the State was required to not only pay compensation to victims but also to initiate criminal proceedings. Felipe Basch also sets out some troubling features of the duty to punish as formulated by the ACtHR, that are important but periphery to the purposes of this article. They are that the duty to punish has the potential to impinge on the ability of the alleged

"basic guidelines" when it comes to punishment.[450] One such guideline is that punishment that is illusory and punishment that only appears to meet the legal requirements for punishment is not compatible with an obligation to ensure Convention rights.[451] Further, the Court has introduced a requirement that the State party's response to the violation must be proportionate to the conduct of the perpetrator and the legal right affected by the violation.[452] Proportionality is required to ensure that punishment is not arbitrary and therefore not "a type of *de facto* impunity."[453] However, with respect to sentencing, it has until recently been the role of the national jurisdiction to identify an appropriate penalty for a rights violation.[454]

This changed when the issue of sentencing in response to mass violations came to be considered in the 2007 case of *La Rochela v. Colombia*.[455] This case concerned compliance of the Colombian Justice and Peace Law of

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perpetrator to mount a defence and for them to obtain due process rights, *see id*. at 213-21.

[450] JO M PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 226 (2013).

[451] Heliodoro Portugal, *infra* note 454, at ¶ 203.

[452] Manuel Cepeda Vargas v. Colombia, Judgment: Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 213 (May 26, 2010) ¶ 150 [hereinafter "Cepada"]. The "conduct of the perpetrator" appears to include the culpability "as a function of the nature and gravity of the events." La Rochela v. Colombia, Judgment: Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007) ¶ 196 [hereinafter "La Rochela"].

[453] *Id.* at ¶ 153.

[454] Vargas Areco v. Paraguay, Judgment: Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 155 (Sept. 26, 2006) ¶ 108; Heliodoro Portugal v. Panama, Judgment: Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 203 (Aug. 12, 2008).

[455] As the case Bulacio v. Argentina, 2003 Inter-Am. Ct. H.R. (sec. C) No. 100 (Sept. 18, 2003) demonstrates, the duty to punish does not exist *only* for mass violations, but also to all human rights violations under the Convention. See Basch, *supra* note 239, at 207.

2005 with the ACHR. The Justice and Peace Law provided for reductions in sentences of paramilitary forces, to five to eight years imprisonment, contingent on demobilization, collaboration with justice, and reparations.[456] The circumstances are not dissimilar to cases currently before the JEP. As the 2005 law was in its infancy and its scope was unclear, the Inter-American Court of Human Rights set out principles for its implementation, which included those set out above.[457] It stated that for serious violations of human rights: (1) sanctions must be of a criminal nature; and (2) disciplinary procedures can "complement but not entirely substitute" criminal sanctions.[458] The punishment must be proportional to the rights violated, and the culpability of the accused, established with reference to the nature and gravity of events. Further, criminal punishment must not be illusory, and every element of the punishment must correspond with a clearly identifiable objective.[459] Nevertheless, in dealing with the particular case before it, the IACtHR summarized the ruling of the Colombian Constitutional Court.[460] This Constitutional Court ruling had indicated approval for the alternative sentencing regime on the basis that it did not prevent ongoing prosecutions from continuing, it imposed some penalties, and its conferral of "juridical benefits" was "in order [to] achieve peace."[461]

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[456] La Rochela, *supra* note 452, at ¶ 182.
[457] *Id.* at ¶ 192.
[458] *Id.* at ¶ 215.
[459] *Id.* at ¶ 196.
[460] *Id.* at ¶ 183.
[461] *Id*. In relation to the meaning of "juridical benefits," the Inter-American Court of Human Rights quoted article 13 of the relevant law at ¶ 181, which provided "pursuant to the law, those who formed part of illegal armed organizations who demobilize will have the right to a pardon, conditional suspension of the execution of sentence, cessation of proceedings, preclusion of the investigation, or a writ of prohibition, according to the stage of the proceedings […]."

A further example of flexibility in the interpretation of this duty to punish may be found in *Afro-Descendant Communities v. Colombia*.[462] In a passage that warrants being quoted in full, the Court stated:

> International law establishes the individual entitlement of the right to reparation. Despite this, the Court indicates that, in scenarios of transitional justice in which States must assume their obligations to make reparation on a massive scale to numerous victims, which significantly exceeds the capacities and possibilities of the domestic courts, *administrative programs of reparation constitute one of the legitimate ways of satisfying the right to reparation*. In these circumstances, *such measures of reparation must be understood in conjunction with other measures of truth and justice, provided that they meet a series of related requirements*, including their legitimacy […].[463]

In this passage, the Court drew attention to a unique feature in the case before it which might modify the duty of Colombia to punish human rights violators. This was that in the transitional context, the scale of rights violations was

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[462] Afro-Descendant Communities v. Colombia, Judgment: Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 270 (Nov. 20 2013) [hereinafter 'Afro-Descendant Communities'].
[463] *Id.* at ¶ 470 (emphasis added). The Court went to provide some considerations which were important in assessing whether a mechanism satisfied the "related requirements." "Especially, based on the consultation with and participation of the victims; their adoption in good faith; the degree of social inclusion they allow; the reasonableness and proportionality of the pecuniary measures; the type of reasons given to provide reparations by family group and not individually; the distribution criteria among members of a family (succession order or percentages); parameters for a fair distribution that take into account the position of the women among the members of the family or other differentiated aspects, such as whether the land and other means of production are owned collectively.

such that full criminal proceedings would likely overwhelm the capacities of regular domestic criminal courts. In this circumstance, it *could* be permissible for Colombia to implement "administrative programs of reparation" in conjunction with "other measures of truth and justice," instead of regular criminal prosecutions.

Meanwhile, in *El Mozote v. El Salvador*, the Court for the first time heard a case in which amnesty was issued for human rights violations committed in internal conflict, where this amnesty was issued purportedly to end conflict.[464] The Court considered that the obligation to investigate has increased importance in contexts of "massive, systematic or generalized attacks on any sector of the population" because of the need to prevent recurrence and to eliminate impunity.[465] This is a duty of "means and not of results."[466] Whatever the political process was for the establishment of peace, there was an obligation to investigate and punish "at least the grave human rights violations […] so they did not remain unpunished and to avoid their repetition."[467] The establishment of a truth commission could have fulfilled obligations to investigate violations but did not fulfill requirements to punish perpetrators.[468] Thus, while the Court appeared to recognize the challenges of transitional contexts, it still considered that punishment of grave human rights violations was essential to meeting ACHR obligations, and it refused to allow a State to avoid this

[464] El Mozote, *supra* note 186, at ¶ 284. As Judge García-Sayán notes, none of the previous amnesty laws before the Court were "created in the context of a process aimed at ending, through negotiations, a non-international armed conflict": *see id*. at ¶ 9 (Judge García-Sayán). Most were enacted during or after authoritarian regimes.
[465] *Id*. at ¶ 244.
[466] *Id.* at ¶ 248.
[467] *Id.* at ¶ 288.
[468] *Id.* at ¶ 287-88.

obligation to punish by merely implementing a truth commission.

At first glance, the CPA appears to run afoul of these requirements. For the IACtHR, there is a clear requirement for States to impose criminal punishment that is proportionate to the harm inflicted,[469] but under the CPA, perpetrators of multiple core crimes may cooperate and receive at maximum an eight-year non-custodial sentence.[470] The IACHR case law has been very unforgiving of administrative sanctions for core crimes, and it demands systematic criminal sanctions; from this one can argue that there is a demand for proportional punishment without exception.[471] For the IACHR, the purpose of requiring criminal sanctions rather than restorative penalties or reparations is to punish.[472]

However, criminal sanctions by obligations to "investigate, prosecute and punish" serious human rights violations are not express rights under the ACHR.[473] Rather, they are implied from the general requirement to ensure rights in article 1(1), as well as implied from a combination of articles 8 and 25: the former protects the right to a fair trial and due process, and the latter protects the right to judicial protection and recourse for remedy in

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[469] Nicolás Carrillo-Santarelli, *The Pragmatism of Justice: On The International Lawfulness and Legitimacy of Alternative Sanctions*, 44(3) DPCE ONLINE 3117, 3137 (2020); Seibert-Fohr, *supra* note 100, at 77.
[470] CPA art. 5.1.2.60.
[471] Hillebrecht et al., *supra* note 8, at 323.
[472] Seibert-Fohr, *supra* note 100, at 75.
[473] Clara Sandoval, Hobeth Martínez-Carrillo, & Michael Cruz-Rodríguez, *The Challenges of Implementing Special Sanctions (Sanciones Propias) in Colombia and Providing Retribution, Reparation, Participation and Reincorporation*, J. OF HUM. RTS. PRAC. 478, 485 (2022).

respect of human rights violations.[474] The IACtHR thus derives these obligations from the rights of the victim.

The Court justified these obligations to investigate, prosecute and punish by both the need to curb impunity, and by the right of victims to know the truth of the violations and to receive reparations for those violations.[475] The formulations of these rights have been criticized for creating "new rights" not provided for in the Convention, for paying insufficient regard to the rights of the accused, and for reflecting a "punitivist tendency."[476] Alternative forms sentencing that shores protections of victims from future violations, and ensures that they receive the truth about violations and reparations for them, may also fulfill these conditions.[477] The Court wanted to ensure that "vicious circles of unpunished criminal acts" are broken.[478] There are indications that for transition states, international legal institutions may broadly interpret flexibility in duties

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[474] BURGORGUE-LARSEN & ÚBEDA DE TORRES, *supra* note 251, at 705 ¶ 27.14. *See also* PASQUALUCCI, *supra* note 450, at 226. Similarly, the European Court of Human Rights has found a failure to impose criminal sanction for torture is a violation of the right to remedy, derived from the rights of the victim to life: *see* Gäfgen v. Germany, Judgment, Application no. 22978/05, European Court of Human Rights Grand Chamber (Jun. 1, 2010) for a conceptualisation of a victim's right to punishment of the perpetrator as a part of the right to effective remedy. For an analysis of similar decisions, *see* ROCÍO QUINTERO M., COLOMBIA: THE SPECIAL JURISDICTION FOR PEACE, ANALYSIS ONE YEAR AND A HALF AFTER ITS ENTRY INTO OPERATION, 19 n.71 (Leslie Carmichael trans., 2019).

[475] Barrios Altos, *supra* note 244, at ¶ 43.

[476] Ezequiel Malarino, *Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights*, 12(4) INT'L CRIM. L. REV. 665, 681–2 (2012). Malarino considers the examples of *res judicata* which prevents defendants from being subject to a new trial for the same offence, and *ne bis in idem* which prevents conviction for acts that were not criminal at the time that they were committed. *See also* Felipe Basch, *supra* note 240.

[477] Carrillo-Santarelli, *supra* note 479, at 3136.

[478] Burgorgue-Larsen, *supra* note 251, at 709 ¶ 27.20.

to punish and enforce penal sanctions. If the basis for a duty to prosecute is the realization of the rights of the victim to judicial protection and an effective remedy, Colombia's alternative sentencing with restorative and reparative components may achieve the fulfilment of these rights.[479]

In a separate opinion authored by the President of the Court, the proposition that certain forms of alternative sentencing may discharge a state's obligations to investigate, prosecute and punish in certain circumstances has found a judicial voice. Judge García-Sayán in *La Rochela* issued a separate opinion that provides apparent legal support for alternative sentencing. He considered that the context of non-international armed conflict had implications for the "analysis and legal characterization of the facts."[480] He observed that in peace negotiations, enormous legal and ethical challenges arise, and in this process, regional law can only prescribe guidelines.[481] Non-international armed conflict involves thousands of offenders and victims and an imperative on a government to end the conflict. In this context, Judge García-Sayán opined that a State is required to give the "greatest simultaneous attention" to interdependent rights of victims to truth, justice and reparation by way of a "method of assessment."[482] However, he recognized that "the *state* must weigh the effect of pursuing criminal justice both on the rights of the victims and on the need to end the conflict."[483] There is a legal obligation to address rights of victims but also, he contended, an obligation of "the same

[479] Hillebrecht, *supra* note 9, at 324.
[480] El Mozote, *supra* note 187, at ¶ 9 (Judge García-Sayán).
[481] *Id.* at ¶ 20.
[482] *Id.* at ¶ 22-23.
[483] *Id.* at ¶ 27 (emphasis added).

intensity" to prevent further acts of violence and achieve peace.[484]

Judge García-Sayán's view was that alternative or suspended sentences "could" be permissible, so long as sentences "vary substantially" according to responsibility, and according to the degree of acknowledgment of responsibility and disclosure of information.[485] Alternative sentencing paired with direct reparation to victims and public acknowledgment of responsibility by perpetrators might be permissible.[486] However, international core crimes should be "processed specifically and with priority."[487] Judge García-Sayán did not say "prosecuted," and indeed, he considered that in the aftermath of widespread conflict, mere criminal sanctions would be insufficient without concurrent victim-centric measures of truth and reparations.[488]

The majority opinion in *La Rochela* did not rule on the legality of reduced sanctions, a silence which Mallinder believes may indicate its permissibility.[489] Certainly, the scope of the law scrutinized in *La Rochela* was not then clear and it had not been implemented, meaning the Court's rulings were necessarily circumscribed and its rulings on the point of alternative sentencing lack full legal force. Nevertheless, this separate opinion is striking because as set out above, the Inter-American Court of Human Rights has been unremittingly ruthless in invalidating amnesty and in insisting on prosecutorial responses to serious human rights violations. Judge García-Sayán's opinion was *obiter dicta* and expressed in general and permissive rather than

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[484] *Id.* at ¶ 37. The original Spanish language judgment contained the formulation: "la misma intensidad."
[485] *Id.* at ¶ 30.
[486] *Id.* at ¶ 31.
[487] *Id.* at ¶ 24.
[488] *Id.* at ¶ 23.
[489] Mallinder, *supra* note 136, at 667.

prescriptive terms. However, it was "adhered to" by the other four judges of that case, and provides a judicial opening for interpretative flexibility as to obligations to punish and sentence perpetrators of international core crimes, under regional law.

C. The CPA and the requirements for sentencing: flexibility in transitional contexts?

Sentencing is arguably equally important as prosecution in the fight against impunity, yet an analysis reveals that treaties and customary international law offer only very limited guidance with respect to obligations of punishment and sanctions. This scant attention makes it very difficult to interpret an obligation for States to punish, except in a way that is proportionate to the gravity of the wrong and the individual circumstances of the perpetrator. Meanwhile, the Rome Statute and the ACHR have traditionally been viewed as advancing a requirement to criminally punish perpetrators in a proportionate manner. However, non-authoritative comment and more recent jurisprudence respectively have appeared to relax this requirement if it exists, provided there is some form of justice for past wrongs, that operates in tandem with other measures such as truth commission and reparations.

The Colombian conflict was characterized by its intractability: six peace talks preceded the successful 2016 discussions.[490] Not being militarily defeated, the surrender of the FARC-EP was necessary.[491] The FARC-EP stated it would not surrender if the Colombian judiciary judged the actions of its members: apart from concerns about long-

[490] Guzman & Holá, *supra* note 3, at 143.
[491] Weiner, *supra* note 137, at 220.

term imprisonment,[492] it distrusted the Colombian judiciary because of historic weakness and corruption.[493] Any continuation of conflict results in further loss of life and suffering. This has led some to argue that if the standards of international criminal law require criminal prosecution, then its standards "must be balanced with encouraging demobilization."[494] The CPA did assist in obtaining the surrender of the FARC-EP.

Further, alleged crimes in the Colombian conflict were perpetrated over a long period of time by many individuals. Punishment was only one feature of the agreement along with truth and reparations, and punishment was modified into a form that would aim to achieve broader societal goals of rebuilding communities and reintegrating combatants into civilian life.[495] The cost of prosecutions of international crimes is infamous, and the CPA seeks to provide a cost-effective way of achieving this for rank-and-file combatants. Drawing an analogy from the *Afro-Descendant Communities* case, a non-traditional system of

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[492] Josi, *supra* note 5, at 415.

[493] HAYNER, *supra* note 5, at 205. For a study of Colombian judicial corruption, *see* ELVIRA MARÍA RESTREPO, COLOMBIAN CRIMINAL JUSTICE IN CRISIS FEAR AND DISTRUST (2003). María Restrepo studied reports of judicial corruption and public perceptions of corruption. She found that the Colombian judiciary was corrupt but not systemically so. The Colombian population perceived it as highly susceptible to coercion (threats of violence followed by offers of benefit), partial to parties occupying higher economic or political positions, and incapable of reform due to a lack of political will: *see* especially *id*. at 117-36. These concerns were heightened where allegations of drug production and trafficking were involved: *id*. at 125-26. Illustratively, Acero and Thomson demonstrate that Colombian coca growers perceived state counter-narcotic operations to be characteristic of "lawfare," in which law is weaponized by law enforcement to justify oppression and state violence rather than used to protect the public: *see* Camilo Acero & Frances Thomson, *'Everything peasants do is illegal': Colombian coca growers' everyday experiences of law enforcement and its impacts on state legitimacy*, THIRD WORLD Q. (2021).

[494] Sedacca, *supra* note 276, at 327.

[495] Guzman & Holá, *supra* note 3, at 150.

punishment may be needed to address the sheer scale of violations.

The alternative sentences must work to fulfill the rights of the Colombian people and to restore their dignity.[496] The American Convention standards are rooted in the rights of victims to judicial recourse, reparations, and truth. This is why the truth mechanism of the JEP reinforces the legitimacy of amnesty and alternative sentences.[497] Truth-telling plays an essential role in the inclusivity of peace processes as a whole.[498] Access to special and alternative sanctions, without which offenders face substantial imprisonment, requires reparations and full participation in the truth process. In these senses, to access non-retributive forms of punishment, offenders must engage with the rights of victims discussed by the Inter-American Court of Human Rights.

Punishment was one feature of the agreement, but it was adapted into a form that would realize broader societal goals of reparations and reintegration of guerrilla fighters.[499] Community works programs are aimed to fulfill the requirements of giving victims a public display of punishment that, some hope, materially benefits them.[500] Rebuilding projects that are informed by community consultation are a genuine attempt to reconcile parties that have been warring for decades, and to attenuate social disharmony. Meanwhile, further policy goals of the JEP include an expression of social condemnation and hope of rehabilitation of offenders, allowing them to show they

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[496] Savini, *supra* note 146, at 154.
[497] Jean-Baptiste, *supra* note 24, at 63.
[498] Nicole Maier, *Queering Colombia's peace process: a case study of LGBTI inclusion*, 24 INT'L J. HUM. RTS. 377, 389 (2020).
[499] Guzman & Holá, *supra* note 3, at 150.
[500] Sedacca, *supra* note 276, at 332.

"understand the harm caused by their criminal activities and they accept the shared values of Colombian society."[501]

Finally, the CPA is careful to ensure that the JEP is quasi-judicial in character. Sentences, whether special, alternative or ordinary sanctions, are graded according to clearly expressed principles relating to the crime and the individual. Legal professionals submit cases for review, and judges adjudicate any disputed questions in adversarial structures.

On the other hand, some measure of criminal justice is important in ensuring victims' rights. One-sixth of the population was victimized in some way by the conflict.[502] As has been argued, many victims were strongly interested in the punishment of wrongdoers, especially in relation to international core crimes.[503] This could be an acknowledgment of wrong by both the perpetrator and by the State. It is also important in transition as judiciaries must demonstrate improved human rights records.[504] A study found that South African reconciliation was greatly undermined by prevalent perceptions that the transitional mechanisms had disproportionately favored the perpetrators in blanket amnesties.[505] The legitimacy of the transition for victims is essential, as it acknowledges their needs and can signal greater social inclusion.[506] A successful transition requires that the lack of special treatment of perpetrators be demonstrated.[507] Indeed, although there are multiple theories on the origins of the FARC-EP, are some have argued that political violence

[501] Seils, *supra* note 42, at 15.
[502] BAKINER, *supra* note 6, at 244.
[503] Weiner, *supra* note 137, at 215.
[504] García-Godos, *supra* note 242, at 416-17.
[505] Jean-Baptiste, *supra* note 24, at 47.
[506] Garcia-Godos, *supra* note 242, at 405, 407.
[507] Sedacca, *supra* note 276, at 332.

between 1920 and 1950 and the failure of the State to equally provide justice led to its formation.[508]

Notwithstanding, the realization of victims' rights by the criminal process may be overstated, as prosecution may not be able to meet expectations and victim roles are necessarily circumscribed by the rights of the accused.[509] The emphasis of the criminal trial on neutrality and impartiality arguably makes it a poor vehicle for realizing victims' rights.[510] The criminal law response to mass atrocity has been criticized as constructed with little reflection on the aims of criminal law and how such aims might undermine peace processes or even be self-contradictory.[511] For example, in individualizing the perpetration of wrongs, punitive responses to mass atrocity might obscure structural violence in which crimes are rooted.[512] Oko points out that the causes of violence in African conflicts are usually very different to the causes of criminal behavior in more developed societies, and he criticizes the argument that imprisonment will "reconcile mutually distrustful" social groups as overstating the

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[508] Fabio Andrés Díaz Pabón, *Conflict and peace in the making: Colombia from 1948–2010*, in TRUTH, JUSTICE AND RECONCILIATION IN COLOMBIA: TRANSITIONING FROM VIOLENCE 15, 16 (Fabio Andrés Díaz Pabón ed., 2018).

[509] Mirjan Damaška, *The International Criminal Court between Aspiration and Achievement*, 14UCLA J. INT'L L. & FOREIGN AFF. 19, 28, 35 (2009).

[510] Carolyn Hoyle & Leila Ullrich, *New Courts, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court*, 12 J. INT'L CRIM. JUST. 681, 689-90 (2014).

[511] Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1071 (2015).

[512] Manuel Iturralde, *Colombian Transitional Justice and the Political Economy of the Anti-Impunity Transnational Legal Order*, *in* TRANSNAT'L LEGAL ORDERING OF CRIM. JUST. 234, 249 (Gregory Shaffer and Ely Aaronson eds., 2020).

potential of criminal law.[513] Retributive criminal law may also limit the potential for "alternative, more inclusive, and far-reaching forms of justice" to shape Colombia's future.[514] Reparative goals of transitional movements, including restoring social cohesion and cultures of peaceful resolution of conflict, are political goals which conflict with "neutral and non-political" missions of criminal law.[515]

The CPA balances these competing considerations.[516] If a crime that is unpunished wrongs a victim,[517] then the CPA best ensures that the maximum number of wrongs receive some measure of accountability, although perhaps not as much as some victims would like.

Judge García-Sayán's opinion was very likely written with Colombia's contemporaneous peace negotiations in mind.[518] Although it is unclear if other courts will adopt it, it demonstrates that international law can be the product of dialogue between values and on-the-ground political complexities.[519] Mani has observed that if standards of justice are imposed by outside actors, that in the particular domestic context lack "internal resonance," they will not take root notwithstanding any claims of universality that such standards possess.[520]

CONCLUSION

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[513] Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31(2) FORDHAM INT'L L. J. 343, 349-53 (2008).
[514] Iturralde, *supra* note 120, at 254.
[515] Hoyle & Ullrich, *supra* note 510, at 696.
[516] Sandoval, Martínez-Carrillo, & Cruz-Rodríguez, *supra* note 473, at 480; *see also* Maculan, *supra* note 427.
[517] Ogbaegbe & Ike, *supra* note 431, at 90.
[518] Hillebrecht et al., *supra* note 8, at 319.
[519] *Id.* at 329.
[520] Matthew Saul & James Sweeney, *Introduction*, in INTERNATIONAL LAW AND POST-CONFLICT RECONSTRUCTION POLICY 1, 16 (Matthew Saul & James A. Sweeney eds., 2015).

Agreeing to peace with a strong guerrilla force while constructing accountability mechanisms is an "extraordinarily difficult" process.[521] An "unpopular balance" between prosecutions and negotiated settlement of conflict may have to be reached.[522] Whether the JEP mechanism within the CPA is compliant with international law, including the Rome Statute and regional obligations, is important in whether it serves as an appropriate model for other States facing similar political complexities.[523]

An analysis of the CPA and a comparison of its mechanisms for accountability against Colombia's international legal obligations illustrates two points. First, with some specific exceptions, the CPA is a highly developed instrument from the perspective of international legal obligations as to prosecution and punishment. It shows an acute awareness of these obligations and appears to provide for greater action against international core crimes than is required. Second, international law is underdeveloped with respect to certain issues, most notably the requirements to punish and sentence perpetrators of international crimes. These obligations need significant development and formulation to effectively guide State action.

It is submitted that in implementing the JEP regime as part of the CPA, Colombia exceeds its general international legal obligations, and this model is a contribution to an emerging practice of prohibiting amnesty for and prosecuting core crimes. Even under an expansive reading

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[521] Martinez, *supra* note 45, at 635.

[522] Geoff Dancy, *Achieving an Unpopular Balance: Post-Conflict Justice and Amnesties in Comparative Perspective*, in AS WAR ENDS: WHAT COLOMBIA CAN TELL US ABOUT THE SUSTAINABILITY OF PEACE AND TRANSITIONAL JUSTICE 325, 327 (James Meernik, Jacqueiline H.R. DeMeritt & Mauricio Uribe-López eds., 2019).

[523] Kelly, *supra* note 7, at 838.

of its treaty obligations, Colombia achieves a practical solution to competing principles and political realities. Further, its alternative sentencing model is an innovative meeting of the need for proportionality, and arguably not only follows but contributes to the development of flexibility of international law with respect to transitions.

Bell has observed that in a post-conflict context, one can observe a "dialectic interaction between international law and peace-making practice."[524] Indeed, in these contexts it is not a case of international law imposing requirements and domestic authorities choosing to ignore or comply with these requirements, not the least because the interpretation of international law for a particular context may be contested.[525] In this vein, Dunkell highlights the Colombian example as a form of "selective decoupling," in which global norms have multiple dimensions to them, and State governments are able to maneuver and interpret these norms, and selectively adopt aspects of them to demonstrate some commitment to them and reject other aspects due to national pressures.[526] She theorizes that States which are more "embedded" in international organizations are able to "contest and transform how global models are enacted."[527] Such decouplings may facilitate creative political solutions to intractable political problems, but may also leave victims of crime aggrieved.[528] Similarly, Hillebrecht and colleagues argue that the Colombian peace negotiations were not simply guided by a top-down imposition of "pre-set constraints" imposed by international law. Rather such

[524] Saul & Sweeney, *supra* note 520, at 6.
[525] *Id.* at 8.
[526] Saskia Nauenberg Dunkell, *From global norms to national politics: decoupling transitional justice in Colombia*, 9(2) PEACEBUILDING 190, 203 (2021).
[527] *Id*. at 204.
[528] *Id*.

negotiations reflected a dialogue between international organizations, courts, governments and non-government actors in which the parties to the conflict were able to build a "less punitive" understanding of transitional justice and mold their own solution to legal and political problems, reflecting the input of these different actors.[529] In a transitional context like Colombia which has a "deeply rooted legalist culture" and which favors the use of "legal instruments and judicial processes to regulate most aspects of social, political, and institutional life," this intense engagement with international and regional law in delivering accountability for conflict harms might not be surprising.[530]

The legality of alternative punishment in post-conflict contexts by the Inter-American Court of Human Rights, and the OTP's retreat in Colombia after the imposition of the alternative sentencing regime may be considered as deference to a "situation specific" approach to mass atrocity.[531] As a real world example of response to mass atrocity that reveals gaps in the international legal framework, that is highly attuned to the practical challenges of bringing an end to a longstanding conflict, the CPA reveals much about the state of international law with respect to prosecution and punishment, even as the law

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[529] Hillebrecht et al., *supra* note 8, at 329. *See also* Jennifer L. McCoy, Jelena Subotic, & Ryan E. Carlin, *Transforming transitional justice from below: Colombia's pioneering peace proposal*, in THE COLOMBIAN PEACE AGREEMENT: A MULTIDISCIPLINARY ASSESSMENT 93 (Jorge Luis Fabra-Zamora, Andrés Molina-Ochoa & Nancy C Doubleday eds., 2021).

[530] Nelson Camilo Sánchez León, Jemima García-Godos, & Catalina Vallejo, *Colombia: Transitional justice before transition*, in TRANSITIONAL JUSTICE IN LATIN AMERICA: THE UNEVEN ROAD FROM IMPUNITY TOWARDS ACCOUNTABILITY 252, 254 (Elin Skaar, Jemima Garcia-Godos, & Cath Collins eds., 2016).

[531] Saul & Sweeney, *supra* note 520, at 16.

reveals much about the CPA. To the extent that the legal norms stipulated in the agreement adapt the applicable international legal norms and are unchallenged by the international community, it may bring about an evolution of international legal norms that are relevant to the cessation of conflict.[532]

Overall, the JEP provides for some fulfillment of the victims' rights to truth, justice and reparation as expressed by Judge García-Sayán, while also providing a solution that was accepted by the FARC-EP and the ICC Office of the Prosecutor.[533]

The CPA is not without problems. The overly restrictive drafting for command responsibility continues an unfortunate trend of commander impunity in transitions. Non-custodial sentences for core crimes will exacerbate the pain of many victims, who could compose up to one-sixth of the Colombian population.[534] In transitional justice mechanisms, processes of implementation and legal drafting can be undermined by domestic political compromises.[535]

The Colombian Peace Agreement is posited by some as symptomatic of a shift in State responses to violence, in which it is no longer questioned that some mechanism in response to mass violence is necessary to implement.[536] However, it is important to see the Colombian achievement in context. In circumstances where resistance fighters are militarily defeated, the record of establishing and executing post-conflict mechanisms, particularly mechanisms that go further than criminally punishing the losing rebel groups, is

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[532] McCoy, Subotic, & Carlin, *supra* note 529, at 93, 106.
[533] Iturralde, *supra* note 120, at 244.
[534] BAKINER, *supra* note 6, at 244.
[535] AKSENOVA, *supra* note 35, at 147.
[536] Dunkell, *supra* note 526, at 191.

more meager.[537] Where there is negotiated settlement to conflict, restorative justice measures are more likely to take root than retributive justice mechanisms.[538]

Of course, the effectiveness of the CPA mechanisms will be lost if there is low compliance with them, or if their reasoning and stringency is not made clear to Colombian society.[539] The OTP notes that fulfilment of the sentencing objectives requires effective implementation and rigorous verification system.[540] Even if it is acceptable from an international law standpoint, they will be for naught if they are not acceptable to victims of the innumerable serious human rights violations that occurred during the conflict.[541]

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[537] *See e.g.*, Isabelle Lassée, *The Sri Lankan Transitional Justice Process: Too Little, Too Late?*, 108 CJIA 709 (2019); VALÉRIE ARNOULD, SECURITY FORCES' STRATEGIES OF RESISTANCE TO TRANSITIONAL JUSTICE, REPORT NO 27, ROYAL INST. FOR INT'L RELS. (Oct. 10, 2019).

[538] Meghan M. DeTommaso, Mario Schulz, & Steve B Lem, *Choices of Justice: Effects of Civil War Termination on Postconflict Justice Mechanisms Implemented by the State*, 11 INT'L J. TRANSITIONAL JUST. 218, 236-37 (2017).

[539] Sedacca, *supra* note 276, at 330-32.

[540] OFFICE OF THE PROSECUTOR 2017, *supra* note 9, at ¶ 148.

[541] Savini, *supra* note 146, at 154.