INEFFECTIVE AMNESTY: THE LEGAL IMPACT ON NEGOTIATING THE END TO CONFLICT

Scott W. Lyons[*]

INTRODUCTION

For the past two decades, the exhaustive discourse concerning a duty to prosecute crimes against humanity primarily discussed the transition to democracy, replacing authoritarian regimes, and the resultant responsibility of the incoming government to hold the previous government accountable for serious atrocities.[1] As this situation described a predominant international issue in the 1970s, 1980s, and 1990s, the legal focus was appropriate. This issue is less relevant now with the increase in nascent democracies that have

* Democracy Specialist and Anticorruption Advisor, U.S. Agency for International Development ("USAID"), Active Component-Civilian Response Corps; American University, School of International Service (M.A., 2005); American University, Washington College of Law (J.D., 2004). I would like to thank Professor Paul Williams for his feedback and thoughtful discussions. I wish to thank my wife, Michele Rose Lyons, for her love and support in making my writing possible. The opinions expressed herein are those of the author and do not necessarily reflect the views of USAID or any other agency.

1. *See generally* BEN CHIGARA, AMNESTY IN INTERNATIONAL LAW: THE LEGALITY UNDER INTERNATIONAL LAW OF NATIONAL AMNESTY LAWS 2–6 (2002); Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197 (1996); Heinz Klug, *Amnesty, Amnesia and Remembrance: International Obligations and the Need to Prevent the Repetition of Gross Violations of Human Rights*, 92 AM. SOC'Y INT'L L. PROC. 316 (1998); Diane F. Orentlicher, *International Criminal Law and the Cambodian Killing Fields*, 3 ILSA J. INT'L & COMP. L. 705 (1997) [hereinafter Orentlicher, *Cambodian Killing Fields*]; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) [hereinafter Orentlicher, *Settling Accounts*]; Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449 (1990); Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1 (1996); Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857 (1995); *cf.* Antonio F. Perez, *The Perils of Pinochet: Problems for Transitional Justice and a Supranational Governance Solution*, 28 DENV. J. INT'L L. & POL'Y 175 (2000) (discussing the difficulties surrounding potential amnesty in Cuba while trying to encourage a transition towards a more democratic future).

undergone transition[2] and the recent proliferation in the prosecution of former heads of state.[3] Nevertheless, violent conflicts will endure and will continue to be confined predominantly within states.[4] Therefore, it is vital to evaluate one of the challenging questions of the twenty-first century: whether amnesties for non-State actors are still possible for negotiating the end of civil wars and other violent internal threats to States.[5]

In 1999, the Sierra Leone government and the rebel army Revolutionary United Front signed the Lomé Accord peace

2. *See* Gene Shackman et al., *Brief Review of Trends in Political Change: Freedom and Conflict*, INT'L CONSORTIUM ADVANCEMENT ACAD. PUBLICATION (Oct. 2004), http://gsociology.icaap.org/report/polsum.html. By 2000, the majority of the world population lived in democratic-styled countries, and there was a dramatic growth in democracy. *Id.* at tbl.1, fig.1. When China is removed from calculations, almost eighty-five percent of the population lives in democratic nations. *See* ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2010: DEMOCRACY IN RETREAT 2 (2010), *available at* http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf. While there was backsliding in democracies since 2008, the majority of the world still lives in a democracy of some form. *Id.* at 1.

3. *Appendix*, *in* PROSECUTING HEADS OF STATE 295–304 (Ellen L. Lutz & Caitlin Reiger eds., 2009). Since 1990, sixty-seven former heads of state have been legitimately prosecuted for serious human rights abuses or economic crimes in domestic courts. *Id.* In 2009, ex-President Alberto Fujimori of Peru was convicted and sentenced to twenty-five years in prison for human rights abuses committed while in office. *Fujimori Gets Lengthy Jail Time*, BBC (Apr. 7, 2009, 5:55 PM), http://news.bbc.co.uk/2/hi/americas/7986951.stm. Former President Hosni Mubarak of Egypt was sentenced to life after being "convicted of complicity in the killings of some 90 protestors." Hamza Hendawi, *Hosni Mubarak, Egypt's Ousted President, Sentenced to Life in Prison*, HUFFINGTON POST (June 2, 2012, 8:00 PM), http://www.huffingtonpost.com/2012/06/02/hosni-mubarak-egypts-oust_n_1564603.html. Moreover, former Tunisian President Zine El Abidine Ben Ali was tried *in absentia* in 2011. Bouazza Ben Bouazza, *Zine El Abidine Ben Ali, Ex-Tunisia President, Gets 20 Years in Absentia*, HUFFINGTON POST (June 13, 2012, 4:40 PM), http://www.huffingtonpost.com/2012/06/13/zine-el-abidine-ben-ali-20-years-In-absentia_n_1592983.html.

4. Shackman et al., *supra* note 2; *see also* INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, DEMOCRACY AND DEEP-ROOTED CONFLICT: OPTIONS FOR NEGOTIATORS 1 (Peter Harris & Ben Reilly eds., 1998), *available at* http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf (stating that between 1989 and 1996, most major conflicts have not occurred between states, but instead have been confined within states).

5. *See* PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE?: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 24–29 (2002) (discussing that the three approaches for peace building to end conflict are accommodation, economic inducement, and use of force). Accommodation ends conflict by meeting the interests and objectives of adversarial parties, often by appeasement, which excludes justice via amnesty in exchange for a solution to conflict. *Id.* at 24–26. Economic inducement seeks to modify a party's stance through economic incentives or sanctions. *Id.* at 26. Use of force is characterized by military action to affect the behavior of another State or group. *Id.* at 27.

agreement, offering amnesty to rebel leaders and other combatants for crimes against civilians, in order to halt eight years of civil war that caused thousands of deaths and massive human rights abuses.[6] The agreement was rendered invalid for the following reasons: the rebels breached the agreement through continued violence and atrocities; the agreement provided blanket amnesty; and, most importantly, the atrocities were severe enough to warrant the establishment of an international tribunal,[7] which did not view the agreement as barring prosecution.[8]

More recently, Ugandan President Yoweri Museveni repeatedly offered amnesty to Joseph Kony and other leaders of the Lord's Resistance Army to end two decades of violence in Northern Uganda that cost thousands of lives through heinous acts, caused mass chaos, and uprooted millions from their homes.[9] President Museveni previously referred the case of Kony and his fellow commanders for prosecution to the International Criminal Court ("ICC"), which stated that it is under no obligation to honor an amnesty agreement by the Ugandan government.[10] Nonetheless, Museveni announced that he would grant amnesty if they reached a peace agreement where Kony and his followers renounced terrorism.[11] Some Ugandan civil society organizations similarly

6. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999 [hereinafter Lomé Peace Accord], *available at* http://www.sierra-leone.org/lomeaccord.html.

7. Sarah Williams, *Amnesties in International Law: The Experience of the Special Court for Sierra Leone*, 5 HUM. RTS. L. REV. 271, 275–76 (2005).

8. Statute of the Special Court for Sierra Leone, art. 10, Jan. 16, 2002, 2178 U.N.T.S. 145 *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D& ("An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."). Articles 2 through 4 refer to Crimes Against Humanity, Violations of Article 3 Common to the Geneva Convention and of Additional Protocol II, and Other Serious Violations of International Humanitarian Law. *Id.* arts. 2–4.

9. ANDREAS O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 22, 39 (2002); *'Amnesty' for Uganda Rebel Chief*, BBC (July 4, 2006, 5:38 PM), http://news.bbc.co.uk/2/hi/africa/5147882.stm. The amnesty agreement would preclude State investigations into crimes covered by the amnesty, which could possibly cover acts such as rape and pillage. O'SHEA, *supra,* at 41. By 2011, over 12,000 former Lord's Resistance Army members had been granted amnesty under the law; however there is uncertainty regarding the constitutionality of the amnesty law. Simon Jennings, *Ugandan War Crimes Trial Hangs in Balance*, RELIEFWEB (Aug. 25, 2011), http://reliefweb.int/report/uganda/ugandan-war-crimes-trial-hangs-balance.

10. Manisuli Ssenyonjo, *Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court*, 3 J. CONFLICT & SECURITY L. 405, 407–08 (2005).

11. *'Amnesty' for Uganda Rebel Chief*, *supra* note 9.

asked the ICC to withdraw the indictment and allow the popular amnesty proposal to go forward in order to help end the conflict.[12]

While the Lomé Peace Accord did not prevent prosecution in an ad hoc international tribunal, and the commanders of the Lord's Resistance Army are still under indictment by the ICC, the offers of amnesty raise the focal issue of this Article. Can a State create a viable and effective amnesty agreement for potential crimes against humanity to cease internal conflict[13] or induce the end of a civil war? This Article asserts that the recent expansion of the definition of crimes against humanity, the new willingness to assert universal jurisdiction, and the establishment and early indictments of the ICC have rendered any domestic amnesty for crimes against humanity ineffective on the international plane and have thus removed amnesty as a method to achieve peace.

Part I of this Article summarizes the unsettled debate over the duty to punish noninternational crimes against humanity[14] and provides a background of the recent international developments effectively ending domestic amnesty. Part II discusses how the cumulative international changes render domestic amnesty agreements for crimes against humanity ineffective, even if the granting State perceives the amnesty to be valid. Part III suggests that a United Nations Security Council ("Security Council") resolution is the only remaining method for the international community to validate an otherwise ineffective agreement if it is determined to be an absolute necessity, and not just a convenience, to grant amnesty in exchange for peace. The Security Council's recent nonbinding resolution concerning the situation in Yemen was a significant, but legally insufficient, first step towards international validation of an amnesty agreement.[15]

12. Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 216–17 (2008).

13. For the purposes of this Article, "internal conflict" will be defined as any civil war, internal armed conflict, rebellion, insurgency, coup attempt, tribal warfare, territorial struggle, action to create an autonomous region within a state, or other organized action rising to a similar level that seriously threatens the State. For a treaty-based definition of internal "armed conflict," see *infra* note 18.

14. This Article agrees with the principle that leaders of prior authoritarian regimes responsible for human rights abuses should be prosecuted; that topic has been thoroughly discussed. This Article will only discuss amnesty as it relates to resolution of internal conflict and civil wars, particularly for opposition groups that have committed serious offenses.

15. *See infra* notes 254–57 and accompanying text.

I. OVERVIEW: THE UNSETTLED DEBATE AND RECENT DEVELOPMENTS

A. Valid Amnesties to End Conflict

Amnesty is legitimate if it only applies to crimes that a State has no international requirement to prosecute or extradite for prosecution.[16] State authorities have the right to provide amnesty to State opponents since the State is the enforcer of its own penal rules. Hence, a State can make decisions regarding amnesty up to the limits of international law. A State, however, cannot grant amnesty for certain gross violations of international or humanitarian law.[17] Article 6(5) of the Second Additional Protocol to the Geneva Conventions ("Protocol II") explicitly encourages granting, at the conclusion of internal hostilities, "the broadest possible amnesty to persons who have participated in the armed conflict . . . ."[18] This provision demonstrates international support and validity for action to create postconflict reconciliation and normal relations within a divided State.[19] The Protocol II text is unclear as to whether it precludes amnesty for crimes against humanity committed during an internal conflict.[20] Negotiating

16. *See* William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 510–12 (2001) (discussing the validity of the amnesty laws of the Federation of Bosnia and Herzegovina, the Republika of Srpska, and Croatia, and indicating that these agreements comply with international obligations).

17. *See infra* notes 24–26 and accompanying text.

18. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 6(5), June 8, 1977, 1125 U.N.T.S. 609. To be internal "armed conflict," the situation must involve an action greater than internal tension, riots, or isolated and sporadic acts of violence. *See id.* art. 1.

19. Mahnoush H. Arsanjani, *The International Criminal Court and National Amnesty Laws*, 93 AM. SOC'Y INT'L L. PROC. 65, 65 (1999) (indicating that the purpose of Article 6(5) in Protocol II was to encourage "gestures of reconciliation," which can be accomplished through amnesty); Naomi Roht-Arriaza, *Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 57, 59 (Naomi Roht-Arriaza ed., 1995) (reflecting the desirability of integrating past rebels or insurgents into normal national life). Article 6(5) of Protocol II is sufficiently broad enough to encourage amnesty for both insurgents and State officials or agents. *Id.*; *cf.* Cassel, *supra* note 1, at 218 (explaining that combatants in international conflicts receive significant protection against punishment for participating in the hostilities and that Protocol II acts to encourage amnesty for noninternational combatants who do not receive the same legal protection).

20. *See* CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS 263 (2000) (indicating that Protocol II does not impose an obligation to prosecute and scholars are divided on whether it provides a basis for individual criminal responsibility). The International Committee of the Red Cross ("ICRC") has interpreted Article 6(5) narrowly and stated that is does not apply to amnesties for violations of international humanitarian law, but the ICRC is a nonlegal entity, and the wording of Protocol II is still unclear. *Id.* at 265.

parties defeated an attempted provision in Protocol II to exclude protection from prosecution for crimes against humanity.[21] Without a specific indication of excluded crimes, the only invalid amnesties are for crimes where there is an established international requirement to prosecute.[22]

B. The Debates Surrounding Crimes Against Humanity

There are a few types of amnesty for domestic crimes that the international community automatically considers invalid. Self and blanket amnesties are deemed illegitimate as a result of treaty law and jurisprudence.[23] Certain domestic human rights crimes committed outside the spectrum of war or any type of international conflict are exempt from amnesty due to a duty to prosecute. International customary law and specialized treaties prevent a State from issuing amnesty for these types of crimes.[24] Examples of these types of crimes are genocide[25] and torture.[26]

---

21. Roht-Arriaza, *supra* note 19 (discussing the failure of the Soviet bloc States to gain approval for a proposal that would have prevented Protocol II from circumventing prosecution for crimes against humanity).

22. *See* Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 526 (1999).

23. Burke-White, *supra* note 16, at 482 (indicating that blanket amnesties, which are usually broad or all encompassing and traditionally decreed by outgoing dictators for self protection, offer general protection against civil and criminal charges and often do not differentiate between common crimes, political crimes, and international crimes). International legal entities have rejected blanket amnesties, and in recent cases, even domestic courts have declined to enforce these amnesties. *Id.* at 522; Cassel, *supra* note 1, at 215 (commenting on the Inter-American Commission's declaration that self-amnesties are "legal nullities"); Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 616–17 (1998) (stating that only government policy makers may authorize impunity); Roht-Arriaza, *supra* note 19, at 60–62 (discussing the Inter-American Commission on Human Rights rulings concerning Argentina, El Salvador, and Uruguay that continuously found the self-amnesties decreed by Latin American dictators to not be legally enforceable). "Where amnesties are granted through non-legitimate means . . . they may legitimately be denied legal force due to their irregular means of promulgation . . . ." *Id.* at 58; *see also* Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MICH. ST. U.-DCL J. INT'L L. 595, 641–42 (1999) (stating that blanket amnesties are "completely unacceptable and of no legal value").

24. Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT'L L.J. 297, 323 (2000) ("Amnesties granted by States in violation of their conventional duties cannot be considered valid on the international plane and cannot have any effect on the prerogatives of other States."); Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 43 (1996) (stating that Article 27 of the Vienna Convention on the Law of Treaties prevents States from using internal law as a justification for failing to perform

The debate as to whether there is a duty to prosecute noninternational crimes against humanity is not settled due to ambiguity in both treaty law and customary law, two of the main sources of binding international law.[27] As a result, it is difficult to

a duty in a treaty). Scharf also notes that the duty to prosecute under the Geneva Conventions is strictly limited to international armed conflict. *Id.* at 44. Article 2 in each of the four Geneva Conventions states that international armed conflict is declared war or other armed conflict that arises between two or more States. *Id.*; *e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 75 U.N.T.S. 31.

25. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277. The Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") includes specific provisions that "persons committing genocide . . . shall be punished" and persons "shall be tried by a competent tribunal of the State in the territory of which the act was committed." *Id.* arts. 4, 5; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. d (1986) ("A state violates customary law if it practices or encourages genocide, fails to make genocide a crime or to punish persons guilty of it, or otherwise condones genocide."); Orentlicher, *Settling Accounts*, *supra* note 1, at 2562–64 (discussing that almost the entire Genocide Convention is designed to fulfill the purpose of preventing genocide through punishment of the crime and thus any amnesty precluding either domestic or international prosecution is void).

26. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 19, 1984, 1465 U.N.T.S. 85, *modified*, 24 I.L.M. 535 (entered into force June 26, 1987). The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention") expressly requires parties to extradite someone if the State does not "submit the case to its competent authorities for the purpose of prosecution." *Id.* art. 7; *see also* Boed, *supra* note 24, at 311–12, 320–21 (stating that the wording of the Torture Convention requires States to prosecute violations or extradite under the principle of *aut dedere aut judicare* ("extradite or prosecute")); Scharf, *supra* note 24, at 46–47 (indicating that even though the wording of the Torture Convention is slightly different than the Genocide Convention, it still indicates a duty to prosecute); Gwen K. Young, Comment, *Amnesty and Accountability*, 35 U.C. DAVIS L. REV. 427, 450 (2002) (discussing that the European Court for Human Rights ruled that amnesties do not prevent criminal proceedings against those who commit torture). The duty to prosecute is only statutory and not from customary law due to lack of State practice, but there have been trends such as the Committee Against Torture's 1990 statement that the Torture Convention "should oblige" all States to prosecute, which may indicate the principle is rooted in custom. Scharf, *supra* note 24, at 47–48; *cf.* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 118–19 (2d. ed. 2001) (discussing customary law and torture and indicating that the exclusion of amnesty for States party to the convention extends not only to actions by the government, but also to any group acting in an official capacity, including guerrilla groups and insurgent rebels).

27. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1) ("A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major systems of the world.").

determine whether amnesty for these crimes is valid. There is no specific convention for crimes against humanity. Therefore, investigations into a duty to prosecute have revolved around many other aspects of human rights and humanitarian law and have resulted in conflicting determinations.[28]

1. Treaty Law

Some legal commentators use human rights treaties, such as the International Covenant on Civil and Political Rights[29] ("ICCPR"), the American Convention on Human Rights[30] ("American Convention"), and the European Convention for the Protection of Human Rights and Fundamental Freedoms[31] ("European Convention"), to illustrate a duty to prosecute crimes against humanity.[32] These Conventions enumerate specific rights, and yet they are silent about a duty to prosecute violations of the enumerated rights—they only state that they obligate States to "ensure" these rights and to provide a remedy.[33] These legal commentators argue that the duty to "ensure" these rights creates an affirmative obligation to prosecute violators of such rights, and thus is an invalidation of amnesty.[34] The legal commentators further assert that judicial action is a natural extension of a right to

28. *See* Boed, *supra* note 24, at 314 (indicating that a duty must be based in custom and that there is disagreement if custom exists).

29. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

30. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

31. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

32. *E.g.*, Orentlicher, *Settling Accounts*, *supra* note 1, at 2568 ("[P]rosecution and punishment are the most effective—and therefore only adequate—means of ensuring a narrow class of rights that merit special protection."); Roht-Arriaza, *supra* note 1, at 474–83 (noting that the ICCPR, American Convention, and European Convention recognize a right to a remedy, which includes a duty to prosecute); *cf.* Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 LEIDEN J. INT'L L. 5, 15 (1994) (arguing that the treaties, declarations, and practices viewed together show that the international community accepts the obligation to prosecute).

33. *See* Orentlicher, *Settling Accounts*, *supra* note 1, at 2551–52, 2568 (noting that the Conventions require States to respect the enumerated rights and guarantee that people are able to exercise those rights); Roht-Arriaza, *supra* note 1, at 474–83 (discussing the Conventions' requirement to provide a remedy and arguing that the treaties include investigation and prosecution as components of a remedy).

34. *E.g.*, Orentlicher, *Settling Accounts*, *supra* note 1, at 2568 (arguing that authoritative interpretations of these treaties suggest that a party to the treaties fails its duties if it does not investigate the violations and bring to justice those responsible); Roht-Arriaza, *supra* note 1, at 467–68 (arguing that an obligation to "ensure" rights creates an affirmative obligation to prosecute).

a remedy.[35] To support this principle, they rely upon interpretations of the ICCPR by the Human Rights Committee ("HRC")[36] and jurisprudence in the Inter-American[37] and European systems[38] that suggest a duty to punish those responsible for atrocities.

Other commentators counter that the above-mentioned rationale is an "overstretch" with no explicitly stated binding duty to prosecute.[39] They support their contention by arguing the HRC's interpretation of the ICCPR is misguided. The HRC is not a judicial body authorized to render a binding interpretation of law.[40] Moreover, during the negotiations of the ICCPR, the drafters specifically considered and rejected a proposal requiring prosecution of treaty's violators.[41] Thus, reading a requirement into the covenant is inconsistent with the drafters' intent.[42] These commentators also point out that a careful reading of the language reveals that the HRC never specifically concluded there was an obligation to prosecute but instead idealistically "urged" prosecution

35. *E.g.*, Roht-Arriaza, *supra* note 1, at 488. (discussing that a right to a remedy is a common feature of human rights instruments). Roht-Arriaza argues that since a treaty obligation is nonderogable, the rights enumerated in the treaty are nonderogable, and thus amnesty preventing accountability breaches the treaty. *Id.*

36. Orentlicher, *Settling Accounts*, *supra* note 1, at 2571–76 (discussing declarations concerning torture in Zaire, extralegal executions in Suriname, and disappearances in Uruguay, with the HCR declaring that steps must be taken to provide justice and remedies). Even though the drafters of the ICCPR never considered requiring parties to punish violations, nothing in the history of the Convention is inconsistent with a duty to prosecute. *Id.* at 2569–71.

37. *Id.* at 2576–79 (discussing the judgment from the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case, which suggested a duty to punish all violations of the American Convention). Orentlicher also notes that the Chairman of the Inter-American Commission on Human Rights strongly opposed amnesty that prevents prosecution of serious human rights abuses. *Id.* at 2579; *see also* Roht-Arriaza, *supra* note 1, at 469–70 (discussing the *Velasquez Rodriguez* case and contending that the holding implies a duty to prevent, investigate, and punish any violation of the American Convention in addition to restoring rights and paying compensation). *See generally*, Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20 HUM. RTS. Q. 843 (1998) (providing a general overview of Latin American amnesty laws and challenges to them in various courts).

38. Orentlicher, *Settling Accounts*, *supra* note 1, at 2581 (indicating that the European Court indirectly affirmed the principle that punishment is necessary to ensure the rights in the European Convention).

39. *E.g.*, Emily W. Schabacker, *Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses*, 12 N.Y. INT'L L. REV. 1, 25 (1999) (arguing the language from the HRC does not indicate an absolute duty); Scharf, *supra* note 1, at 26 (rejecting the authoritative interpretation rationale based on statements by the HRC).

40. Scharf, *supra* note 1, at 26 (noting that the HRC is only an administrative body to monitor compliance).

41. *Id.*

42. *See id.* at 26–27 (contending the parties to the treaty relied upon a certain meaning when they ratified the ICCPR).

and suggested that violators "should" be brought to justice.[43] Furthermore, though the jurisprudence carries authoritative weight in the respective regions, the Inter-American Court never directed a government to institute criminal proceedings, nor did it specifically refer to prosecution as opposed to other forms of punishment.[44] The decisions suggest only a requirement to investigate and impose some type of punishment but not necessarily to prosecute.[45] Therefore, the ICCPR is being misapplied.

It is important to also note that other legal scholars, including some that advocate a duty to prosecute, opine that there is no treaty obligation to prosecute and that a determination can only be made via customary law.[46]

2. Customary Law

Customary international law exists when there is "a general and consistent" State practice due to a sense of legal obligation, or *opinio juris*.[47] To determine State practice, action or acquiescence is determinative, not verbal statements alone.[48]

Those commentators who advocate that there is a duty to prosecute noninternational crimes against humanity enshrined in customary law look to an array of United Nations ("U.N.") General Assembly resolutions, treaty law, and other factors to show an emerging norm.[49] These commentators suggest that the wide

43. *See, e.g.*, *id.* at 27 (discussing that the HRC left the door open to alternative measures). In 1992, the HRC said amnesties are "generally incompatible" with the ICCPR, indicating that some amnesties are acceptable. *Id.*; Schabacker, *supra* note 39.

44. *E.g.*, Scharf, *supra* note 1, at 27–28 ("The court . . . did not direct the Honduran government to institute criminal proceedings against those responsible for the disappearance of Manfredo Velásquez . . . . [Nor did it] specifically refer to criminal prosecutions as opposed to other forms of disciplinary action or punishment.").

45. *See* Scharf, *supra* note 24, at 51–52 (indicating that it could involve a different form of disciplinary action); *cf.* Schabacker, *supra* note 39, at 31 (citations omitted) (arguing that even though academics cite *Velasquez Rodriguez* as an important case, it only applies to Latin America and has not significantly influenced other international courts since the decision).

46. Boed, *supra* note 24, at 314; *see also* M. Cherif Bassiouni, *"Crimes Against Humanity": The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 473–75 (1994) (describing the failure of legal instruments to indicate rules of enforcement).

47. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) & cmt. c (1986).

48. *Id.* § 102 cmt. b.

49. *E.g.*, Bassiouni, *supra* note 46, at 480–81 (relying upon conventional law and U.N. General Assembly resolutions); Edelenbos, *supra* note 32 (relying upon treaties and the practice of prosecuting crimes against humanity committed during World War II); Orentlicher, *Settling Accounts*, *supra* note 1, at 2583–86 (citing treaties and U.N. resolutions reaffirming the Nuremberg precedents as an indication of a norm); Roht-Arriaza, *supra* note 1, at 489

acceptance and adherence of the various human rights treaties establish a norm.[50] In other words, the treaties, through their mere existence, reflect State practice. As a supposed reflection of State practice, they consequently establish a norm. These commentators also point to the 1971 General Assembly Resolution on War Criminals[51] ("1971 Resolution"), the 1973 Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity[52] ("Principles of Cooperation"), and other U.N. resolutions as international declarations recognizing a State's duty to prosecute.[53] The 1971 Resolution explicitly "urges" States to punish violators of crimes against humanity.[54] Similarly, the Principles of Cooperation insist on detecting, arresting, and bringing to trial persons suspected of committing crimes against humanity.[55]

Besides U.N. resolutions and treaties indicating State practice and *opinio juris*, one of the commentators supporting a duty to prosecute points out that States have never denied an obligation to

(examining the combination of treaty law, judicial decisions, U.N. resolutions, and the law of State responsibility of injury to aliens as proof of a customary duty to prosecute).

50. *See, e.g.*, Roht-Arriaza, *supra* note 1, at 490 (stating both the International Court of Justice and the U.S. Supreme Court held that treaties can create binding obligations on nonparties if they indicate customary law). Treaty provisions can become customary rules of law if participation is widespread and representative of the international community. *Id.* at 490–91; *cf.* Orentlicher, *Settling Accounts*, *supra* note 1, at 2593 n.250, 2594 n.252 (discussing that although the Convention on the Non-Applicability of Statutory Limitations to Certain War Crimes and Crimes Against Humanity did not receive widespread support due to the inclusion of the crime of apartheid and the fact that it did not explicitly require parties to prosecute, it was based upon the perception that international law already required punishment).

51. G.A. Res. 2840 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429, ¶ 1, (Dec. 18, 1971).

52. G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030, ¶ 1 (Dec. 3, 1973).

53. *E.g.*, Bassiouni, *supra* note 46, at 479–81 (listing legal instruments indicating that a duty to prosecute emerged into customary international law); Edelenbos, *supra* note 32, at 14–15 (discussing the 1989 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provision requiring people accused of these acts to be brought to justice); Orentlicher, *Settling Accounts*, *supra* note 1, at 2593 & n.251 (discussing the importance of the 1973 resolution and providing a list of other U.N. resolutions requiring States to ensure prosecution and punishment of crimes against humanity); Roht-Arriaza, *supra* note 1, at 498 (citing the U.N.'s 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power as a resolution calling on all member States to prosecute those guilty of human rights crimes).

54. Boed, *supra* note 24, at 315 (citing G.A. Res. 2840, *supra* note 51).

55. G.A. Res. 3074, *supra* note 52.

prosecute, even when granting amnesty.[56] Instead, States justify the action as an unfortunate necessity.[57] This response shows widespread recognition of the principle of prosecution for crimes against humanity.[58]

Commentators arguing against a customary obligation to prosecute counter that the General Assembly resolutions are not sources of law because they are nonbinding and do not substantially indicate State practice.[59] Moreover, there was a significant amount of abstentions in resolution votes indicating hesitation to support the principles.[60] Further, the drafting record of one of the earliest cited resolutions, the U.N. Declaration on Territorial Asylum[61] ("Asylum Declaration"), stated that "[t]he majority of members stressed that the draft declaration under consideration was not intended to propound legal norms or to change existing rules of international law."[62] This record shows that at least the Asylum Declaration—and likely all the other resolutions—was advisory and not intended to bind States.[63]

In response to the assertion of widespread and uniform State practice of prosecuting of crimes against humanity, commentators additionally counter that the practice of granting amnesty—not

56. *See* Roht-Arriaza, *supra* note 1, at 492, 496 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. c (1986)) (referencing the governments of Uruguay and Chile as examples of nations that tried to provide diplomatic representations of compliance with international law even though they failed in reality to prosecute).

57. *Id.* (contending that, when States have created amnesty laws, they have justified them as required by exigent circumstances that trump their obligations to investigate or prosecute).

58. *Id.* at 496–97.

59. *See, e.g.*, Boed, *supra* note 24, at 315; Scharf, *supra* note 1, at 35. There is an unsettled debate concerning the legal weight of General Assembly resolutions and their effect on international customary law. Most commentators do not suggest that General Assembly resolutions create binding norms of international law but instead suggest that they may possibly be evidence of *opinio juris*. *E.g.*, *id.* (recognizing a State's obligation to prosecute arising from U.N. General Assembly resolutions). The political nature of the U.N., and the knowledge that the resolutions are not binding, reduces even the capacity to evaluate the strength of *opinio juris* shown in the resolutions. *Id.* at 37; *see also* Christoph Schreuer, *Recommendations and the Traditional Sources of Law*, 20 GERMAN Y.B. INT'L L. 103, 107–09 (1977); Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 PROC. AM. SOC'Y INT'L L. 301, 301–03 (1979).

60. *E.g.*, Scharf, *supra* note 1, at 35 n.242 (citing G.A. Res. 3074, *supra* note 52) (noting that the resolution was "adopted by a vote of 94 in favor to none against with 29 abstentions").

61. G.A. Res. 2312 (XXII), U.N. GAOR, 22d Sess., Supp. No. 16, U.N. Doc A/6716, at 81 (Dec. 14, 1967).

62. *Declaration of Territorial Asylum*, 1967 U.N.Y.B. 758, 759, U.N. Sales No. E.68.1.1.

63. Scharf, *supra* note 22, at 521.

prosecution—has been the established international norm.[64] They cite a nonexhaustive list of Algeria, Argentina, Bangladesh, Cambodia, Chile, El Salvador, France, Guatemala, Haiti, India, Panama, the Philippines, Romania, South Africa, Uruguay, Zimbabwe, and post-unification Germany as States that have granted amnesty for atrocities over the last four decades, sometimes with explicit U.N. encouragement and approval.[65] While human rights bodies of the U.N. find there is a clear duty to prosecute, States, the Security Council, and the Secretary-General have practiced a contrary policy toward crimes against humanity.[66]

The conflicting policies of the international community have most recently been revealed in the Middle East. Not only did former Yemeni President Ali Abdullah Saleh grant amnesty for those responsible for "follies" and "errors" during the months of fighting in Yemen, but the international community negotiated his exit with immunity for the killing of opposition protestors.[67] On the other hand, former Egyptian President Hosni Mubarak was prosecuted for the commission of similar crimes in Egypt.[68]

Those commentators opposed to a customary duty to prosecute assert that, even when State practice is contrary to the rule of prosecution, States invoke countervailing interests, which act to confirm acceptance of the principle.[69] The commentators who

64. *See, e.g.*, Schabacker, *supra* note 39, at 39; Scharf, *supra* note 1, at 35–36.

65. Scharf, *supra* note 1, at 36–37 (indicating that the U.N. blocked prosecutions of the Khmer Rouge in Cambodia, encouraged Nelson Mandela to grant unconditional amnesty for apartheid in South Africa, and helped negotiate the much criticized Haitian amnesty agreement); *cf.* Schabacker, *supra* note 39, at 38–39 (stating that State practice is not uniform since nations have employed wide variations of truth commissions and amnesty provisions). Schabacker notes nonprosecution is so common and widespread throughout the world that the U.N. Commissioner for Human Rights convened a special body out of concern. *Id.* at 39.

66. *See* Scharf, *supra* note 1, at 37.

67. Kareem Fahim, *Power Ceded, Yet President of Yemen Declares Amnesty*, N.Y. TIMES, Nov. 28, 2011, at A11.

68. *Arab Spring Justice – but a Free Pass for Yemen's Saleh*, CHRISTIAN SCI. MONITOR (Jan. 9, 2012), http://www.csmonitor.com/Commentary/the-monitors-view/2012/0109/Arab-Spring-justice-but-a-free-pass-for-Yemen-s-Saleh.

69. *E.g.*, Edelenbos, *supra* note 32, at 21 (discussing that invoking the interests of national reconciliation or the instability of the democratic process indicates an emerging *opinio juris*); Roht-Arriaza, *supra* note 1, at 495–96 (noting that, in humanitarian and human rights law, verbal declarations by the government and consent to international instruments are better indicators of State practice and *opinio juris*). The rule comes from a Nicaragua case in the International Court of Justice where the court stated that, when a nation acts in a manner inconsistent with a recognized rule but justifies the action via an exception within the rule, the nation confirms, rather than undermines, the rule. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27).

believe there is no customary duty respond that this basis is factually incorrect because most States never mention an international duty to prosecute, and the countervailing interests argument shows that there is no recognition of an "absolute" duty.[70]

In a final indication of the unsettled debate in international law concerning a duty to prosecute crimes against humanity, a legal scholar notes that the preamble in the Rome Statute of the International Criminal Court[71] ("Rome Statute") proclaims that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[72] This preamble shows that prosecution of crimes against humanity is important to the international community, but at the same time, neither the preamble nor the statute creates a binding obligation for States to prosecute.[73]

The uncertainty of the duty to prosecute creates a dynamic in which States cannot properly evaluate their obligations and options when confronted with potential crimes against humanity. While this uncertainty can lead to a State's willingness to offer amnesty in order to create peace, the State may be in violation of international legal principles, and the amnesty may be overturned by future domestic or regional tribunals. Thus, both the State and the recipient of the amnesty have no legal certainty regarding a negotiated internal agreement.

C. Defining Crimes Against Humanity

Famous legal theorists have suggested that crimes against humanity are as old as humankind itself.[74] The modern concept of crimes against humanity, however, originated in the preamble to the 1907 Hague Convention, in the popularly termed Martens Clause.[75] The first application of this principle occurred soon after as a condemnation of the massive killing of Armenians in Turkey

70. *See, e.g.*, Scharf, *supra* note 1, at 38 (arguing that most States never mention the existence of a duty to prosecute and that the existence of exceptions contained within this duty demonstrate that it is not absolute).

71. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute] (entered into force July 1, 2002).

72. Boed, *supra* note 24, at 316 & n.114 (quoting Rome Statute, *supra* note 71, pmbl.).

73. *Id.*

74. *E.g.*, Jean Graven, *Les Crimes Contre L'Humanité*, *in* 76 RECUEIL DES COURS 427, 433 (1950).

75. Hague Convention IV - Laws and Customs of War on Land, pmbl., Oct. 18, 1907, 36 Stat. 2277 ("[T]he inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, *from the laws of humanity*, and the dictates of the public conscience." (emphasis added)); *see* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 16–17 (1997) (discussing the impact and limitations of the Martens Clause).

during the First World War.[76] The Treaty of Sevres, negotiated between the Allies and Turkey, provided for prosecution of those responsible for "crimes against the laws of humanity."[77]

In 1945, the victorious Allied powers codified crimes against humanity for attacks against a State's own citizens in the International Military Tribunal ("IMT"), which was created to prosecute war criminals from World War II.[78] For the IMT, crimes against humanity was defined as:

> [N]amely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[79]

To be guilty under this provision, there must be a connection to the other jurisdictional crimes of the IMT.[80] Example violations are crimes against peace and war crimes.[81] The International Military Tribunal for the Far East[82] and the Control Council Law No. 10[83]

76. Bassiouni, *supra* note 75, at 14–17 (indicating that the principle was applied by the Commission on the Responsibilities of the Authors of War and Enforcement of Penalties in its investigations into violations of the laws and customs of war).

77. *Id.* at 17 (discussing the treaty signed at the end of World War I). The Treaty of Sevres was never ratified and none of the prosecutorial provisions ever enacted. *Id.*; *see also* Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 457, 459 (1998) (noting that all the later treaties concluding World War I declined to prosecute crimes against humanity).

78. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 288 [hereinafter European Axis Agreement]. *See generally* Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 798–807 (1999) (providing a history of the development and application of crimes against humanity as an offense under the jurisdiction of the IMT Charter).

79. European Axis Agreement, *supra* note 78.

80. *Id.*

81. *See* RATNER & ABRAMS, *supra* note 26, at 47 (indicating that this clause was a serious compromise between the Allied powers).

82. International Military Tribunal for the Far East, art. 5(c), Jan. 19, 1946, amended Apr. 26, 1946, T.I.A.S. No. 1589.

83. Control Council Law No. 10, art. II(c), May 8, 1945, *reprinted in* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 33–34 (2d ed., 1999) (indicating that Control Council Law No. 10 provided for prosecution of crimes against humanity by the occupying powers within their respective zones).

enacted substantially similar definitions of crimes against humanity with only minor exceptions.[84]

In the years soon after World War II, the U.N. International Law Commission ("ILC") attempted to codify international law.[85] In 1954, the ILC adopted the Draft Code of Offenses against Peace and Security of Mankind[86] ("Draft Code"), which defined crimes against humanity as: "Inhuman acts such as murder, extermination, enslavement, deportation, or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the tolerance of such authorities."[87] The Draft Code differs from the IMT in the following ways: removing the war nexus and therefore codifying that crimes against humanity could occur any time; specifically criminalizing acts committed by all individuals; adding "social" grounds as a basis for persecution; and eliminating the connection to other crimes in the code.[88] The codification process was followed in the 1980s by several domestic prosecutions, which used different interpretations of the definition of crimes against humanity.[89]

84. The International Military Tribunal for the Far East ("IMTFE") omitted prosecution based upon religious grounds since it was not necessary and removed the phrase "against any civilian population" to expand the class of victims. Bassiouni, *supra* note 75, at 37. Article II of Control Council Law No. 10 expanded on the list of crimes enumerated in the IMT and the IMTFE to include imprisonment, torture, and rape, and also omitted the nexus of occurring "before or during the war." *Id.* at 38.

85. G.A. Res. 174(II), U.N. GAOR, 2d Sess., U.N. Doc. A/519, at 105 (Nov. 21, 1947) (establishing the ILC); *see also* BASSIOUNI, *supra* note 83, at 179–93 (describing the various ILC attempts to codify crimes against humanity from 1950 to 1996 and indicating the variations of each text); Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 228–32, 260–64 (1997) (providing a history of the Draft Code and discussing developments since the 1950s). The attempts to codify "crimes against humanity" were efforts to affirm and clarify the offenses defined in the IMT Nuremberg Charter that only applied to the defeated nations of World War II. BASSIOUNI, *supra* note 83, at 178.

86. Draft Code of Offences against the Peace and Security of Mankind, U.N. GAOR, 9th Sess., U.N. Doc. A/12693 (1951).

87. *Id.* art. 2, para. 11; *see* Lippman, *supra* note 85, at 232 (discussing how the Draft Code was a substantial departure from the Nuremberg Principles of the IMT by codifying offenses that posed a threat to the security of the international community simply by being severe atrocities against large numbers of people).

88. BASSIOUNI, *supra* note 83, at 186 (contrasting 1954 Draft Code Article 2(11) with IMT Charter Article 6(c)). *But see* Lippman, *supra* note 85, at 231–32 (discussing that the removal of the requirement that the act must be committed in connection with another offense was very controversial because some feared the definition would extend international jurisdiction into purely domestic affairs of States).

89. *See* Hwang, *supra* note 77, at 469–73 (providing an overview of the prosecutions of Klaus Barbie, Paul Touvier, and Imre Finta). For France's

During the 1990s, in response to the atrocities committed in the former Yugoslavia and Rwanda, the Security Council used Chapter VII powers to create ad hoc tribunals to prosecute those responsible for serious violations of international law.[90] The Statutes for the International Criminal Tribunal for the Former Yugoslavia[91] ("ICTY") and the International Criminal Tribunal for Rwanda[92] ("ICTR") employed some of the main components of the IMT statute but differed from each other.[93] The ICTY maintained a required nexus to armed conflict, but crimes could be committed against any part of the civilian population;[94] the ICTR omitted a conflict

prosecution of Klaus Barbie, former head of the Gestapo in Lyon during World War II, crimes against humanity were defined as acts "in the name of a State practicing a hegemonic political ideology, [which] have been committed in a systematic fashion, not only against persons because they belong to a racial or religious group, but also against the adversaries of this [State] policy, whatever the form of their opposition." *Id.* at 470 (second alteration in original) (quoting Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 339 (1994)). For Touvier, the French Court of Appeals established three elements for crimes against humanity: the systematic nature of the crimes, participation in a common plan, and intention to carry out a State policy of political hegemony. *Id.* at 472. In the trial of Finta for atrocities committed in Hungary in 1944, the Supreme Court of Canada applied section 7(3.76) of the Canadian Criminal Code, which defined crimes against humanity as "murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons . . . ." *Id.* at 472 n.106 (quoting Criminal Code, R.S.C. 1985, c. C-46, s. 7(3.76) (Can.) (repealed 2000)).

90. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; S.C. Res. 827,¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

91. U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, annex, U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute]; *see* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), *amended* S.C. Res. 1411, U.N. Doc. S/RES/1411 (May 17, 2002) (adopting the Statute of the ICTY).

92. ICTR Statute, *supra* note 90, annex.

93. BASSIOUNI, *supra* note 83, at 194–96 (giving a textual comparison between the statutes and indicating that the differences emerged because Yugoslavia involved an international conflict while Rwanda's was of a purely internal nature). *See generally* Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237 (2002) (discussing the meaning of the various elements of crimes against humanity as demonstrated in the judgments of the two tribunals); Van Schaack, *supra* note 78, at 826–40 (discussing the adjudication of and commentary on the definition of crimes against humanity by the ad hoc tribunals).

94. ICTY Statute, *supra* note 91, art. 5 ("The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflicts, whether international or internal in character, and directed against any civilian population . . . .").

requirement, but the acts had to be part of an attack based upon national, political, ethnic, racial, or religious grounds.[95]

The result of the evolution of crimes against humanity is that, with no authoritative definition in a treaty and inconsistencies in the precedent, the exact definition in customary law is difficult to ascertain,[96] and a State may be uncertain as to whether it is granting amnesty for a crime against international law.

D. Universal Jurisdiction

The historical origins of universal jurisdiction stem from the crimes of piracy and the slave trade.[97] The slave trade, however, is most relevant to the punishment for domestic violations of crimes against humanity since the slave trade did not threaten the security or relations of foreign nations but instead was an activity "worthy of condemnation and international response."[98] This criminal activity established a new basis for jurisdiction—the international character of the offense—with no nexus needed between the prosecuting State and the party that violated international law.[99] The seriousness of being *hostis humani generis* anywhere in the world became enough to warrant prosecution in any state.[100] The State that exercises

95. ICTR Statute, *supra* note 90, art. 3 ("The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds . . . ."); *see also* David J. Scheffer, *War Crimes and Crimes Against Humanity*, 11 PACE INT'L L. REV. 319, 328–29 (1999) (indicating that in the adjudication of the ICTR, the *Akayesu* decision created new precedent by establishing that rape can stand on its own as a crime against humanity).

96. Orentlicher, *Settling Accounts*, *supra* note 1, at 2585 (indicating that the exact meaning of crimes against humanity is "shrouded in ambiguity"); Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 43 n.4 (1999) (discussing the difficulty in determining a definition at the Rome Conference due to past inconsistencies); Van Schaak, *supra* note 78, at 792 (stating that the definition of crimes against humanity has often been incoherent).

97. Boed, *supra* note 24, at 302–03; Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 791–800 (1988).

98. Randall, *supra* note 97, at 800 (contrasting the international community's perspective and relevant treaty law on piracy and slave trading).

99. *See* BASSIOUNI, *supra* note 83, at 227–28 (differentiating universal jurisdiction from all other types of jurisdiction). The other commonly acknowledged bases for jurisdiction are territorial, active personality or nationality, passive personality, and protective. *Id.* at 227; *see also* Hwang, *supra* note 77, at 469 nn.79–81 (defining the different bases of jurisdiction).

100. *See* BASSIOUNI, *supra* note 83, at 228–29 (stating there are certain crimes so serious in their nature that those who commit them are *hostis humani generis* ("an enemy of all mankind") and thus affect the interests of all States); *see also* CrimC (Jer) 40/61 Attorney General of Israel v. Eichmann, 45 PM 3, Part II, ¶ 12 (1961) ("The abhorrent crimes defined in this Law are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offenses against the

universal jurisdiction acts on behalf of the international community in the capacity of *actio popularis* to preserve world order and harmony.[101]

Even though States owe human rights obligations to every other State,[102] the validity of universal jurisdiction rests upon its recognition as an appropriate way to regulate certain conduct as a crime of universal concern.[103] Since there is no specific convention for internal violations of crimes against humanity, and thus no treaty providing for universal jurisdiction or an *aut dedere aut judicare* tenant, a determination of validity must be made via customary law.[104] Many prominent legal scholars suggest that there is now a customary law principle for exercising universal jurisdiction for internal crimes against humanity.[105] This debate

law of nations itself ('*delicti juris gentium*'). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal.").

101. *See* M. Cheriff Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 88 (2001) (equating modern principles of universal jurisdiction to the ancient Roman concept of *actio popularis*—the community acting for the good of the whole).

102. *See* Boed, *supra* note 24, at 299–300 (explaining the principle of *erga omnes*, which entails States having an obligation not to violate basic human rights).

103. *See id.* at 301–02 (discussing that *erga omnes* obligations do not automatically establish universal jurisdiction for various crimes).

104. *See* BASSIOUNI, *supra* note 83, at 232–34 (examining conventional laws that clearly state principles of universal jurisdiction, such as the Geneva Conventions, the Apartheid Convention, the Convention on the Law of the Sea, the Genocide Convention, and the Hostages Convention); Bassiouni, *supra* note 101, at 119 (indicating that scholarship generally supports the customary law proposition and thus the author continues to evaluate State practice for a determination of customs toward universal jurisdiction); *see also* Scharf, *supra* note 1, at 34 (noting that there is no treaty for crimes against humanity that includes the principle of *aut dedere au judicare* ("extradite or prosecute")).

105. *E.g.*, Boed, *supra* note 24, at 308 (indicating that a State's exercise of jurisdiction for crimes against humanity would likely be valid even when the violation of law is committed by foreign nationals abroad and the State lacked any nexus to the crime); L.C. Green, *Low-Intensity Conflict and the Law*, 3 ILSA J. INT'L & COMP. L. 493, 516 (1997) ("[I]t may probably be said that it is now well established that crimes committed during a low-intensity or non-international armed conflict which amount to crimes against humanity are . . . subject to universal jurisdiction . . . ."); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 569 (1995) ("It is now widely accepted that crimes against humanity . . . are subject to universal jurisdiction."); Orentlicher, *Cambodian Killing Fields*, *supra* note 1, at 705 ("International *legal* responsibility for some offenses is reflected in the fact that genocide, certain war crimes, and crimes against humanity are subject to universal jurisdiction."). *But see* Bassiouni, *supra* note 101, at 136 (contending

has not been firmly settled, as even one of the strongest advocates of universal jurisdiction concedes that "[u]niversal jurisdiction is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations, profess it to be."[106]

There is, at a minimum, permissive universal jurisdiction for crimes against humanity.[107] Permissive jurisdiction enables any State to create domestic law authorizing the right to exercise jurisdiction over specified crimes,[108] a step that several States have recently taken. As of 2011, sixty-two States have legislation criminalizing international crimes against humanity either in whole or in part.[109]

II. STRUCTURAL LIMITS ON AMNESTY FOR CRIMES AGAINST HUMANITY

As discussed previously, amnesty is invalid when there is a duty to prosecute resulting from either treaties or international customary law.[110] Whether this duty exists for noninternational crimes against humanity is unsettled, and it is difficult to positively conclude that there is an absolute obligation of States to prosecute. Therefore, since this principle has not crystallized into law, it may be possible that a State can legitimately provide amnesty for these crimes.[111] The difficulty arises because States cannot use domestic action to preclude international criminal prosecution.[112] A domestic amnesty agreement could legitimately prevent criminal liability

that the fact that a very small number of States have enacted legislation fails to prove there is customary law).

106. Bassiouni, *supra* note 101, at 83. Bassiouni later stated that national legislation and judicial practice is currently insufficient to establish an international customary practice for universal jurisdiction. *Id.* at 150.

107. *See* Scharf, *supra* note 1, at 34–35 (discussing that domestic courts of all nations could punish violators if enabled).

108. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1986) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern . . . .").

109. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY PRACTICE 660–63 (2011).

110. *See supra* notes 24–26 and accompanying text; *see also* O'SHEA, *supra* note 9, at 197–98 (noting that a customary duty for States to prosecute would mean that all States are bound to this obligation and therefore have no other option except for the alternative of extradition).

111. An exception is the crime of torture, which is an enumerated act within crimes against humanity and is also subject to its own convention, which appears to prohibit amnesty. *See* sources cited *supra* note 26.

112. *See* Garth Meintjes, *Domestic Amnesties and International Accountability*, *in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 83, 86 (Dinah Shelton ed., 2000) (discussing that international law would not invalidate a domestic amnesty, but conversely domestic amnesty would not bar international criminal liability).

within the state but be ineffective in deterring prosecution in any of the new constructs in international law.[113] If the ICC or other States are able to disregard a valid domestic amnesty agreement and legitimately prosecute crimes against humanity under international criminal law, the domestic amnesty is rendered irrelevant.

A. The Expansion of the Definition of Crimes Against Humanity

The new definition of crimes against humanity, which is codified for the first time in a multilateral treaty,[114] is a reflection of all the developments in international law since the IMT.[115] It also represents, however, a significant broadening of the definition. This broad interpretation somewhat blurs the lines separating what were purely domestic crimes from international crimes and increases the number of internal acts that give rise to international concern.

Article 7 in the Rome Statute defines crimes against humanity as any one of the enumerated acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[116] The definition includes an explanatory paragraph that attempts to narrow the scope of applicable crimes by stating that an "'[a]ttack directed against any civilian population' means a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[117]

113. This situation would apply to States that employ a "dualist" approach to international law. *Id.* The confusion with crimes against humanity is contrasted with the crimes of genocide or torture, which, due to treaty and customary obligations to prosecute, render domestic amnesty invalid and cannot preclude prosecution either domestically or internationally. *Id.* at 87; *see also* Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 LAW & CONTEMP. PROBS. 93, 100 & n.21 (1996) (suggesting that domestic amnesty would not preclude international prosecution and citing the 1997 Spanish arrest warrant for an Argentine general despite domestic amnesty).

114. *See* Robinson, *supra* note 96, at 43 (indicating that this was the first time the definition of crimes against humanity was not imposed on a population by either the victors in a war or by Security Council mandate). The definition was reached by consensus after negotiations involving 160 States. *Id.*

115. *See* Rep. of the Int'l Law Comm'n, 48th Sess, May 6–July 26, 1996, art. 18, cmt. 2, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10 (1996) (incorporating the definition of crimes against humanity from the IMT Charter with later developments in international law).

116. Rome Statute, *supra* note 71, art. 7(1).

117. *Id.* art. 7(2); *see also* Rep. of the Preparatory Comm. on the Establishment of an Int'l Criminal Court (vol. I), para. 86, U.N. Doc. A/51/22; GAOR, 51st Sess., Supp. No. 22 (1996) [hereinafter Rep. of the Preparatory Comm. (vol. I)] (discussing that "civilian population" is commonly used to refer to situations involving armed conflict in international humanitarian law, but in the current context that distinction is unnecessary since the statute for crimes

During the drafting of Article 7, a significant number of delegates expressed concern about maintaining criteria to distinguish crimes against humanity from crimes under domestic law,[118] with a significant focus on the elements used in the ICTR.[119] One of the ways this distinction was accomplished in the ICTR was by the inclusion of the motivational basis for the attack, such as on racial or religious grounds.[120] The delegates rejected the motivation criterion because it would significantly increase the burden of proof and complicate prosecution.[121] The ICTY required a nexus to armed conflict, instead of a motivational basis, as an element to constitute crimes against humanity, but the drafters reiterated that it is established in customary law that offenses could occur during peacetime.[122] Neither the elements of armed conflict nor discriminatory motive were included in Article 7's definition of crimes against humanity, and so the distinction from domestic crimes had to come from other aspects of Article 7.

The additional element of "with knowledge of the attack" found in Article 7's definition of crimes against humanity could have raised the threshold of a crime against humanity by requiring the perpetrator to have an understanding of the organizational policy or reason behind the attack.[123] The drafters, however, rejected this interpretation and decided not to require proof showing that the perpetrator had knowledge of the characteristics or details of the

against humanity applies to all citizens of a State regardless of the existence of armed conflict).

118. Rape, murder, assault, deprivation of physical liberty/false imprisonment, persecution, etc., as defined by municipal statutes, are only subject to the rules governing internal law. *See generally* Van Schaack, *supra* note 78 (investigating elements to distinguish crimes against humanity from domestic crimes).

119. *See* Rep. of the Preparatory Comm. (vol. I), *supra* note 117, para. 84 (focusing primarily on the criteria in Article 3 of the ICTR Statute).

120. ICTR Statute, *supra* note 90, art. 33 ("The International Tribunal for Rwanda shall have the power to prosecute persons responsible for . . . attack[s] against any civilian population on national, political, ethnic, racial or religious grounds . . . .").

121. Rep. of the Preparatory Comm. (vol. I), *supra* note 117, para. 87.

122. *Id.* paras. 88–89; *see also* Robinson, *supra* note 96, at 45–46 (noting that a minority of delegations felt that crimes against humanity could only be committed in an armed conflict, but a majority of delegations believed that this restriction would be inconsistent with post-IMT developments); *cf.* Hwang, *supra* note 77, at 489 (stating that the failure to include a nexus to armed conflict as an element created concern about how to distinguish domestic crimes from those that are serious crimes of international concern).

123. *See* Preparatory Comm'n for the Int'l Criminal Court, *Finalized Draft Text of the Elements of Crimes*, art. 7, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter *Elements of Crimes Finalized Draft*].

organization's plan.[124] Thus, intent to further the attack meets the mental element by itself.[125]

Article 7's definition does not contain an element requiring State involvement in the crimes or, conversely, action against the State.[126] This design is a divergence from the 1954 Draft Code, which required the acts to be instigated or tolerated by governmental authorities.[127] Though an attack against civilians to gain control of the State would clearly be included within the scope of crimes against humanity, likely too would attacks for nonpolitical reasons, as long as they were organized and resulted in significant human suffering.[128] For example, an attack that would likely bring intertribal conflict and territorial actions by warlords falls within the scope of Article 7.

The drafters struggled with whether to make "widespread" and "systematic" cumulative elements or disjunctive elements, with each being sufficient to meet the threshold of crimes against humanity.[129] In the end, they chose these two conditions to be alternative requirements.[130] "Widespread" requires a large-scale act directed against a multitude of victims,[131] and "systematic" requires some degree of planning or pattern that could result in repeated acts

124. *Id.*

125. *Id.* This may be an application of the principle espoused by the Chamber of the ICTY, which only required the violator to have "knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis." Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, ¶ 659 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

126. Rome Statute, *supra* note 71, art. 7.

127. *See supra* notes 86–88 and accompanying text.

128. *See* Rep. of the Int'l Law Comm'n, *supra* note 115, art. 18, cmt. (5) (indicating that the action may come from a government or from an organization or a group, may or may not be affiliated with a government, and applies to acts by private citizens or agents of a State). The text omits any intention or goal of the attack and states only that it must be organized. *Id.* art. 18, cmt. (3). This would be consistent with the application of crimes against humanity to German industrialists and businessmen who took advantage of slave labor for private gain during World War II. *See* RATNER & ABRAMS, *supra* note 26, at 67.

129. Three draft proposals over three consecutive years all included the wording "systematic [and][or] widespread." Rep. of Preparatory Comm. on the Establishment of an Int'l Criminal Court, Addendum, at 30–31, U.N. Doc. A/Conf.183/2/Add.1 (1998); Decisions Taken by the Preparatory Comm. at Its Session Held from 11 to 21 Feb. 1997, at 3, U.N. Doc. A/AC.249/1997/L.5; GAOR, 52nd Sess. (1997); Rep. of the Preparatory Comm. on the Establishment of an Int'l Criminal Court (vol. II), at 65, U.N. Doc. A/51/22; GAOR, 51st Sess., Supp. No. 22A (1996). The fact that the two options were shown in successive drafts over several years shows debate and inability to decide this wording.

130. Rep. of the Int'l Law Comm'n, *supra* note 115, art. 18 & cmts. (4)–(5).

131. *Id.* art. 18, cmt. (4). The purpose was to exclude an isolated act by an individual acting independently and directing the attack against a single victim. *Id.*

against civilians.[132] "Widespread," however, does not mean that it has caused the death of more than one person.[133] One victim is sufficient to meet this requirement if the crime was meant to intimidate a whole population or if the crime had "the singular effect of an inhumane act of extraordinary magnitude."[134] The result is that the assassination of a head of State or tribal leader could constitute a crime against humanity if intended to destabilize the population,[135] as could a spontaneous attack by one group of the population that devastated a village.[136] A single individual committing an act against a single victim could be a crime against humanity as long as there is a connection to a widespread or systemic context.[137] Even a single act of speech can be regarded as a crime against humanity and meet this threshold.[138]

The modifying paragraph requiring a "commission of multiple acts" was originally a compromise by the Canadian delegation in an

132. *Id.* art. 18, cmt. (3). The purpose of this requirement was to exclude random acts of violence not connected to a broader plan. *Id.*

133. *See Elements of Crimes Finalized Draft*, *supra* note 123, art. 6(a) ("The perpetrator killed *one* or more persons." (emphasis added)).

134. Rep. of the Int'l Law Comm'n, *supra* note 115, art. 18, cmt. (4). This would be consistent with previous ICTY rulings that a single act could constitute a crime against humanity when taken within the context of a widespread systematic attack. Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Trial Chamber Opinion and Judgment, ¶ 545 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, ¶ 649 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

135. *See* U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, ¶ 24, U.N. Doc. S/2006/893 (Nov. 15, 2006) (recognizing the possibility that the assassination of Mr. Rafik Hariri, the former Lebanese prime minister, satisfied the customary requirements for a crime against humanity); *cf.* RATNER & ABRAMS, *supra* note 26, at 61 (suggesting that the execution of Hungarian leader Imre Nagy in 1956 by Soviet authorities was a crime against humanity because the Soviets intended the act to intimidate the entire civilian population).

136. *Cf.* RATNER & ABRAMS, *supra* note 26, at 61–62 (suggesting that "a group of Rwandan Hutus under the influence of drugs ransacking a Tutsi town and massacring its inhabitants" would constitute a crime against humanity).

137. *Tadic*, Case No. IT-94-1-T, ¶ 649 ("Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian *population* and thus '[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution.'" (alteration in original) (citation omitted)).

138. *See* Prosecutor v. Kupreskic, Case No. IT-95-16-T, Trial Chamber Judgment, ¶ 550 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) ("For example, the act of denouncing a Jewish neighbour to the Nazi authorities – if committed against a background of widespread persecution – has been regarded as amounting to a crime against humanity." (citation omitted)).

attempt to alleviate concerns of those States that felt that "widespread" and "systematic" should be cumulative to raise the threshold of crimes that rise to an international level.[139] The "multiple commission" threshold for "systematic," however, only requires there be more than one act.[140]

Most recently, a Pre-Trial Chamber of the ICC started to potentially limit the statutory definition of crimes against humanity but instead further broadened it. Pre-Trial Chamber III reaffirmed that a "State or organizational policy" is a key contextual element for an act as indicated by the Rome Statute.[141] The Appeals Chamber of ICTY had held in *Prosecutor v. Kunarac*[142] that there is no requirement for the existence of either a policy or a plan behind an attack in ICTY's definition.[143]

Pre-Trial Chamber III, however, also held that "deliberate failure to take action" in "exceptional circumstances" may be sufficient and that policies need not be explicitly defined or formalized.[144] The broadening principle of omission, instead of just commission, giving rise to liability was exemplified by the debate regarding whether the Myanmar (Burma) government was potentially liable for crimes against humanity for its initial refusal to accept humanitarian aid after Cyclone Nargis.[145] Article 7(2)(b) of the Rome Statute includes the intentional "deprivation of access to food and medicine" as a crime against humanity, and thus created another possible omission crime.[146] Most importantly, these ICTY

139. Hwang, *supra* note 77, 497 & nn.239–40 (describing from her notes the Canadian proposal at the Rome Conference). Many nongovernmental organizations were concerned this was an attempt to make the elements *de facto* cumulative. *Id.* at 498–99.

140. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1485 (Philip Babcock Gove ed., 1993) (defining "multiple" as "consisting of, including, or involving more than one.").

141. Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, No. ICC-02/11, ¶¶ 28–29 (Oct. 3, 2011) [hereinafter Côte d'Ivoire Investigation].

142. Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jun. 12, 2002).

143. *Id.* ¶ 98.

144. Côte d'Ivoire Investigation, *supra* note 141, ¶¶ 28, 42–43.

145. *See generally* ASIA-PACIFIC CTR. FOR THE RESPONSIBILITY TO PROTECT, CYCLONE NARGIS AND THE RESPONSIBILITY PROJECT: MYANMAR/BURMA BRIEFING NO. 2 (May 16, 2008), *available at* http://www.r2pasiapacific.org /documents/Burma_Brief2.pdf (discussing whether the blocking of humanitarian assistance by the Myanmar (Burma) government constituted crimes against humanity). The French Foreign Minister and Ambassador argued that a refusal to accept aid after an environmental disaster is a crime against humanity if it results in systematic or widespread death. *Id.* at 2.

146. Rome Statute, *supra* note 71, art. 7(2)(b) ("'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to

and ICC decisions, in addition to multiple domestic decisions, have reaffirmed that non-State actors operating without State policy can be liable for crimes against humanity, and many cases have not required any policy at all.[147] With the expansion of crimes against humanity without a State policy or even a premeditation requirement, non-State actors are increasingly potentially liable for actions and omissions that result in substantial harm to civilian populations.[148]

The combined result of the new definition is that many acts that previously would have fallen under only domestic law are now possibly serious crimes of international concern and subject to international mechanisms. Examples of these acts are the assassination of government officials by a citizen of that State, inciting speech, intertribal warfare, suicide bombings, separatist attacks, or attempts by warlords to control more territory, if they result in purposeful harm to civilians. Even deliberate failure to prevent these crimes may be sufficient for individual criminal liability. Furthermore, while the drafters of the Rome Statute did not intend to create customary law,[149] many international entities have recently adopted the ICC definition of "widespread or cumulative" with no other restrictive requirements and have omitted the Canadian compromise requiring more than one act or the ICC language related to policy.[150] Therefore, a broad new definition of crimes against humanity has emerged that has reduced the types of acts that a State can grant amnesty for without the possibility of international concern.

food and medicine, calculated to bring about the destruction of part of a population.").

147. *E.g.*, Mugesera v. Can., [2005] 2 S.C.R. 100 (Can.), ¶¶ 157–58 (stating that there currently does not appear to be any requirement that a policy underlie an attack); The Queen v. Munyaneza, [2009] QCCS 2001 ¶ 114 (Can. Que.) (noting that "international jurisprudence establishes that the attack need not be the result of an official policy of the State or government").

148. BASSIOUNI, *supra* note 109, at xxxiv.

149. Rome Statute, *supra* note 71, art. 10 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.").

150. *E.g.*, Statute of the Special Court for Sierra Leone, *supra* note 8, art. 2 ("The Special court shall have power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population . . . ."); On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, United Nations Transitional Administration in East Timor, sec. 5, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000) ("'Crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack . . . .").

B. The Willingness to Use Universal Jurisdiction

Universal jurisdiction is one of the most effective ways for those who advocate international criminal accountability to ensure punishment for crimes against humanity.[151] The recent willingness to use universal jurisdiction poses a significant threat to the viability of domestic amnesty agreements as an option to end internal conflict.

Regardless of whether universal jurisdiction is a principle enshrined in customary law, there has been an emergence of domestic legislation enabling state courts to exercise jurisdiction over crimes against humanity[152]—these are the first cases to rely entirely on universal jurisdiction.[153] Until recently, the international community almost never used universal jurisdiction as a basis for prosecution.[154] The International Military Tribunals after World War II, the ICTY, and the ICTR all used principles other than universal jurisdiction to prosecute violations of international law, and the ICC was formed by delegated jurisdiction as a result of a treaty.[155] The new impetus to use state statutes

151. *See* Bassiouni, *supra* note 101, at 94–95 (noting that advocates have relied on certain judicial opinions in an attempt to show that "unbridled universal jurisdiction" is established law). This is because "[u]niversal jurisdiction transcends national sovereignty" with no limits of territorial jurisdiction. *Id.* at 96.

152. Boed, *supra* note 24, at 306 (indicating that a recent study found that twenty-four States have passed legislation permitting this type of jurisdiction); David Scheffer, *Opening Address*, 35 NEW ENG. L. REV. 233, 236 (2001) (observing that Canada, France, Germany, the United Kingdom, and other signatories of the ICC have created new legislation to conform their laws to the definition of crime in the Rome Statute). Canada now permits a domestic court to exercise universal jurisdiction for crimes against humanity committed outside of Canada against foreign victims if the perpetrator is present in Canada. Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, arts. 6, 8(b) (Can.).

153. *See* Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 243 (2001) (noting that national courts have increasingly been responsible for the prosecution of foreigners for crimes committed in a different state); *see also* Monica Hans, Comment, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish This Goal?*, 15 TRANSNAT'L LAW. 357, 368–78 (2002) (examining recent legal developments in Belgium and Spain).

154. Scheffer, *supra* note 152, at 233 ("Universal jurisdiction is not a broadly adhered-to standard. Everyone talks about universal jurisdiction, but almost no one practices it. It has been a mostly rhetorical exercise since World War II."). In past years, governments were very reluctant and resisted exercising jurisdiction over Pol Pot, Kurd leader Ocalan, and former Ethiopian leader Mengistu. *Id.* at 235–36.

155. *See* Bassiouni, *supra* note 101, at 91–92. States exercised territorial jurisdiction over the IMT and IMTFE tribunals as occupying powers. *Id.* at 91. The Security Council established ICTY and ICTR based on Chapter VII powers with enforcement established via ad hoc tribunals. *Id.*

permitting the exercise of universal jurisdiction is to effectively nullify domestic amnesties.

The current trend of prosecutions based on universal jurisdiction began with Spain's 1998 extradition warrant issued for General Augusto Pinochet, former military ruler of Chile, for torture, conspiracy to commit torture, and other international crimes.[156] Although the case initially involved crimes of torture against Spanish citizens and descendants of Spanish citizens,[157] the House of Lords of the United Kingdom found that Spain could validly exercise universal jurisdiction over the crime of torture and prosecute Pinochet for violations against citizens of any state.[158] At the same time, the Appeals Chamber of the Spanish Audiencia Nacional held that domestic amnesty laws of other states do not bind Spanish courts and cannot be used to prevent prosecution.[159] The Pinochet case demonstrated that universal jurisdiction can and will be used to prosecute international crimes regardless of domestic amnesty.

In the decade that followed Pinochet's indictment, prosecutors, judges, victims, and human rights organizations initiated over fifty cases based upon universal jurisdiction in European courts alone, further indicating that this manner of prosecution is becoming widespread practice.[160] The most relevant recent expansion of the usage of universal jurisdiction was the case brought in the United Kingdom against Fayaradi Zardad, an Afghani militia leader.

Zardad, a warlord in charge of several checkpoints in Afghanistan in the 1990s, was convicted in 2005 for torture, hostage taking, and other abuses against travelers on the highway.[161] He

156. Regina v. Bartle, [1999] 1 A.C. 147 (H.L.) (appeal taken from U.K.), *reprinted in* 38 I.L.M. 581, 582–83 (1999). *See generally* Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001) (providing background information on *Regina* and its impact on both Argentina and Chile).

157. *See* Roht-Arriaza, *supra* note 156, at 314 (noting that, in the beginning, the case purposefully featured victims from the forum State and, therefore, used a basis of jurisdiction other than universality).

158. *Regina*, 38 I.L.M. at 591.

159. Roht-Arriaza, *supra* note 156, at 313.

160. Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT'L L. 927, 931–32 (2009). There have also been attempted exercises of universal jurisdiction in Africa, such as Senegal's 2000 indictment of Hissene Habre, former dictator of Chad, on charges of torture. Reed Brody, *The Prosecution of Hissène Habré – An "African Pinochet"*, 35 NEW ENG. L. REV. 321, 327–34 (2001) (stating that the case signaled that the "Pinochet precedent" will be used outside of Europe); *Ex-Chad Ruler Is Charged by Senegal with Torture*, N.Y. TIMES, Feb. 4, 2000, at A3 (indicating that the Pinochet arrest inspired the Habre indictment).

161. R v. Zardad, Cent. Crim. Ct. (Old Bailey), Apr. 7, 2004, ¶¶ 13–14 (Eng.) (unpublished), *available at* http://www.redress.org/downloads/news/zardad%207%20apr%202004.pdf.

had fled Afghanistan in 1996 because he was affiliated with a group opposing the Taliban and hid in Britain for almost a decade using a false passport.[162] Zardad was the first foreign national convicted in a British court for crimes committed abroad and was one of Britain's first attempts to prosecute a non-State actor. After *Pinochet*, several British cases were attempted against former and current leaders of other states using universal jurisdiction, some of whom possibly still enjoyed immunity. In 2005, an arrest warrant was issued for retired Israeli Major General Doron Almog before his arrival at Heathrow airport, leading him to refuse to disembark the plane.[163] In 2009 and 2010, arrest warrants were issued for Israel's former Foreign Minister Tzipi Livni and Deputy Prime Minister Dan Meridor, leading them to cancel their trips.[164] The case against Zardad shows that universal jurisdiction can and will be used successfully against non-State actors.

The Special Court for Sierra Leone, in cases involving non-State actors, reiterated that amnesty granted by a State cannot cover crimes that are subject to universal jurisdiction and is "ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes."[165] Further, the amnesty is "ineffective in depriving an international court" of jurisdiction.[166] Due to the grave nature of crimes against humanity, any State can exercise universal jurisdiction despite an existing amnesty agreement, and all States are "entitled to keep alive and remember" the crimes.[167] If a crime reaches the possible reduced threshold of crimes against humanity, there is little to bar prosecution of defendants.

The only main legal limitations on the exercise of universal jurisdiction over crimes against humanity may be implementing enabling legislation, possible presence requirements, and certain immunities from jurisdiction. Only implementing enabling legislation, however, serves as a true barrier for the exercise of universal jurisdiction in cases involving halting civil war, and even that hurdle can easily be overcome.

An exercise of universal jurisdiction is dependent upon the forum State having implemented relevant statutes or treaties in order to comply with the principle of *nulla poena sine lege*, or no

162. *Id.* ¶¶ 11–12.

163. Vikram Dodd, *Terror Police Feared Gun Battle with Israeli General*, GUARDIAN (Feb. 19, 2008, 5:34 PM), http://www.guardian.co.uk/uk/2008/feb/19/uksecurity.israelandthepalestinians.

164. Paisley Dodds, *UK Tightens Rules on Arresting Foreigners*, GUARDIAN (Sept. 15, 2011), http://www.guardian.co.uk/world/feedarticle/9848978.

165. Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶¶ 71, 88 (Mar. 13, 2004) (Spec. Ct. Sierra Leone).

166. *Id.* ¶ 88.

167. *Id.* ¶¶ 67, 70.

penalty without law.[168] Someone cannot be punished for an act that is not prohibited by law, and penal laws cannot be applied retroactively. Since crimes against humanity are not adopted as universal common law, a State must have implemented relevant legislation to prosecute these crimes. The Norwegian universal jurisdiction case against Mirsad Repak, however, shows that States can find creative ways to prosecute.[169] Repak, a former member of a Croatian military unit who later moved to Norway, was charged with committing war crimes and crimes against humanity in the former Yugoslavia in 1992.[170] With regards to the charges of crimes against humanity, Repak was acquitted of the relevant implemented crimes of torture and rape in Section 102 of the Norwegian Criminal Code, because the law was not in effect in 1992 when the crimes were committed.[171] He was found guilty, however, on eleven counts of unlawful "deprivation of liberty," a war crime under Section 223 of the 1902 Penal Code, even though the relevant law for universal jurisdiction for war crimes did not enter into force until 2008.[172] The court held that the law could apply retroactively for the war crimes charge and is not barred because "the new provisions concerning war crimes . . . concern the same acts, the same penalty, the same prescription period, and the penal provisions protect the same interests when applying the new provisions as when applying the 1902 Penal Code that was in force when the acts were committed."[173] Section 223 of the 1902 Penal Code concerns "crimes against personal liberty."[174] Thus, while implementing legislation is required, courts may allow retroactive application under certain circumstances. Finally, Amnesty International has undertaken an enormous project to encourage comprehensive enactment and implementation of legislation for the exercise of universal jurisdiction,[175] meaning that soon there will be few countries without the necessary laws in place.

There are conflicting laws among jurisdictions as to whether the suspect must be present in the forum State for initiation of a formal investigation and issuance of an indictment. For example, in Germany, investigations may begin without the suspect being in the

168. Pub. Prosecuting Auth. v. Repak, Case No. 08-018985MED-OTIR/08, Judgment, ¶¶ 6–11 (Dec. 2, 2008) (Nor.).
169. *Id.* ¶¶ 8, 10.
170. *Id.* ¶ 4.
171. *Id.* ¶ 9.
172. *Id.* ¶¶ 8, 16.
173. *Id.* ¶ 8.
174. *Id.*
175. *See generally* AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION (2001) (campaigning for all States to enact universal jurisdiction legislation).

state, but a trial may not be held *in absentia*;[176] France and the Netherlands, however, permit the trials to be held *in absentia*.[177] Irrespective of this limitation, presence requirements only keep a potential suspect from knowing that he is potentially under investigation and have no impact on whether a suspect is indicted and prosecuted once he enters the borders of the forum State.

In 2000, Belgium took universal jurisdiction an aggressive step beyond the *Pinochet* precedent by attempting to prosecute Yerodia Ndombasi, Congo's then foreign minister, for crimes against humanity and war crimes.[178] While the arrest warrant and attempt to prosecute were found to be invalid due to immunities from jurisdiction enjoyed by certain incumbent high-ranking State officers such as the head of state and minister for foreign affairs, the underlying principles of universal jurisdiction were noted as being lawful, and the immunity only exists while the individual holds office.[179] In a separate opinion, judges of the International Court of Justice indicated that the exercise of universal jurisdiction for certain international crimes, including crimes against humanity, are not precluded under international law.[180] The extensive exercise of universal jurisdiction against former high-ranking government officials after their departure from office indicates the immunity limitations are truly only temporal and that all exoneration or protection quickly dissolves upon change of office.[181] Further, and most importantly, this limitation does not apply to opposition or rebel leaders, since they do not enjoy any official State protections.

Normally, the exercise of jurisdiction by another State must meet a reasonableness standard, with unreasonable prosecutions

176. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT, Teil I [BGBL. I] 1074, as amended, §§ 230(1), 232 (Ger.).

177. Code de Procédure Pénale [C. PR. PÉN] arts. 410, 487 (Fr.); Wetboek van Strafvordering [SV] art. 280 (Neth.).

178. Hans, *supra* note 153, at 381–82 (noting that Belgium has been at the forefront of States using domestic law enabling universal jurisdiction and is especially aggressive in attempting to hold foreign leaders accountable for crimes against humanity). Belgium charged Ndombasi with crimes against humanity and war crimes for inciting racial hatred that resulted in several hundred deaths. *Id.* at 382.

179. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 20–21, 25–26, 32–33 (Feb. 14). Arrest warrants for Zimbabwean President Robert Mugabe and a case against then-President George W. Bush were dropped for the same reason. *See* Kaleck, *supra* note 160, at 936–37, 940.

180. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. at 63–65, 68 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal).

181. *See* Kaleck, *supra* note 160, at 933–35 (indicating that Belgium alone has initiated cases against former Chinese President Jiang Zemin, former U.S. President George H.W. Bush, former Secretary of Defense and Vice President Richard Cheney, and former Chadian Dictator Hissene Habre, and has attempted a case against a former Israeli prime minister).

being unlawful.[182] There is, however, no reasonableness limitation or standard imposed on universal jurisdiction.[183] Additionally, international law permits States to eliminate any temporal limitations, and thus, the domestic courts would not be subject to any statute of limitations for crimes against humanity.[184] There are no other substantial limitations on the exercise of universal jurisdiction over crimes against humanity.[185]

The reduction of State sovereignty due to the doctrine of universal jurisdiction means that States can no longer shield their citizens from prosecution conducted outside their territory.[186] Since a State does not have to apply the laws of foreign governments and is only subject to international and its own municipal laws,[187] a domestic amnesty agreement can be disregarded by a foreign State wishing to exercise universal jurisdiction, even if this action is unreasonable.[188] With States now showing a willingness to exercise universal jurisdiction for crimes against humanity, and possibly no statute of limitations, members of militant organizations, separatist movements, or warring factions who are recipients of domestic amnesty agreements have no guarantees that they will not be prosecuted if they ever leave the confines of their own borders.

C. The Impact of the International Criminal Court

The purpose of the ICC, which entered into force on July 1, 2002, is to ensure accountability for violations of serious

182. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(1) (1986) ("[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.").

183. *See id.* §§ 403–04.

184. *See* RATNER & ABRAMS, *supra* note 26, at 143–44 (discussing that many States showed a willingness to eliminate statutes of limitations for crimes against humanity). On the international level, the international community formed the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to prohibit States from imposing any temporal limitations for these crimes. *Id.* at 143. As of 2000, there were only forty-four parties to the treaty. *Id.*

185. The principle of complementarity between States has also been raised as a potential problem for prosecution. Kaleck, *supra* note 160, at 960. Since this determination is within the sole discretion of the prosecuting State, however, it does not serve as a barrier to the threat of prosecution. *See id.* at 960–61.

186. *See* Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 390 (2001) (discussing that the law rises above the interests of individual States and States no longer have a legitimate interest in shielding their citizens).

187. *See* Sadat, *supra* note 153, at 258–59 (discussing that most international conflicts of laws apply the principle that each State may apply its own law to a problem unless there is a prohibition).

188. *See id.* (indicating that an amnesty for a crime violating an international norm would be ineffective if the defendant travels abroad).

international crimes.[189] The ICC is based upon a system of complementarity,[190] and its jurisdiction only applies to crimes committed in the territory of party States[191] or by nationals of party States.[192] The statute of the ICC does not mention amnesty,[193] and according to the Chairman of the Rome Diplomatic Conference,[194] the issue was never definitively resolved.[195] The ICC, however, explicitly includes crimes against humanity as serious crimes enabling prosecution under its jurisdiction.[196] Thus, the recent establishment of the ICC further erodes the effectiveness of domestic amnesty agreements by removing confidence that perpetrators are safe from prosecution as long as they remain within their own borders. If a State is party to the ICC,[197] the State must cooperate fully in the investigation, the surrender, and the

189. Rome Statute, *supra* note 71, pmbl. (affirming that serious crimes of international law must not go unpunished); *see* Young, *supra* note 26, at 458 (indicating that the language of the Rome Statute establishes a commitment to individual responsibility and ending impunity).

190. Rome Statute, *supra* note 71, art. 1 (The jurisdiction "shall be complementary to national criminal jurisdictions"); Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT'L L. REV. 1, 66–71 (2000) ("ICC jurisdiction is complementary to national courts . . . ."). Complementarity denotes that "national courts have the first right and obligation to prosecute perpetrators of international crimes, and because ICC jurisdiction is complementary to national courts, ICC jurisdiction can only be invoked if the national court is unwilling or unable to prosecute." *Id.* at 66.

191. Rome Statute, *supra* note 71, art. 12(2)(a).

192. *Id.* art. 12(2)(b).

193. Young, *supra* note 26, at 464 (noting that there is no explicit mention of amnesty in the Rome Statute, but the ICC must eventually consider the issue if it is going to act as a substitute for national prosecution); *see also* Arsanjani, *supra* note 19, at 67 (stating that at the preparatory phase of negotiations, the delegates did not seriously discuss how to address domestic amnesties due to pressure from human rights groups).

194. An international conference was held in Rome from June 15 to July 17, 1998 to produce the statute for the establishment of the ICC. *History of the ICC*, COALITION FOR INT'L CRIM. CT., http://www.iccnow.org/?mod=Icchistory (last visited Oct. 1, 2012).

195. *See* Scharf, *supra* note 22, at 521–22 (citing Interview with Philippe Kirsch, Rome Diplomatic Conference Chairman, in Fr. (Nov. 19, 1998)). The adopted provisions reflect "creative ambiguity." *Id.* at 522 (citing Interview with Philippe Kirsch, *supra*).

196. Rome Statute, *supra* note 71, art. 5.

197. As of February 1, 2012, 139 States signed the Rome Statute, and 121 ratified and became party to the ICC. *Ratification Status of the International Criminal Court*, COALITION FOR INT'L CRIM. CT., http://www.iccnow.org/?mod=romeratification (last visited Oct. 1, 2012). Guatemala became the most recent party when its Congress voted to ratify the Rome Statute on January 26, 2012. Press Release, Int'l Criminal Court, Guatemala Becomes the 121st State to Join the ICC's Rome Statute System (Apr. 3, 2012), http://www.icc-cpi.int/NR/exeres/E2BBA18C-A830-4504-B9BE-6F118C3690F7.htm.

prosecution of a person responsible for crimes against humanity if the ICC wishes to exercise jurisdiction.[198]

A literal reading of the Rome Statute shows that domestic amnesties are in direct opposition to the purpose and essence of the ICC.[199] The ICC can exercise jurisdiction over perpetrators of crimes against humanity, regardless of their domestic amnesty agreement, based upon the premise that the domestic courts have failed to punish the violation of crimes against humanity.[200] Further, this is consistent with all previous internationalized tribunals, which have excluded amnesty as barring prosecution.[201]

It is possible that all domestic amnesties for crimes against humanity are invalid with regards to the ICC.[202] It may also be possible for the ICC to recognize an amnesty agreement. Either way, however, there are no assurances that the ICC will not prosecute the perpetrators of these crimes because the discretion to recognize domestic amnesty is completely vested outside of the State.

Articles 17 and 20 of the Rome Statute are commonly discussed as provisions possibly allowing a domestic amnesty agreement.[203]

198. Rome Statute, *supra* note 71, art. 86 (imposing an affirmative duty to cooperate fully with the ICC in its investigation and prosecution of crimes against humanity). States must also comply with requests for arrest and surrender of perpetrators. *Id.* art. 89(1).

199. *Id.* pmbl. (affirming responsibility for effective prosecution and punishment for serious crimes and declaring that all States have a duty to exercise criminal jurisdiction over those liable for international crimes); Arsanjani, *supra* note 19, at 67 (noting that the Rome Statute appears hostile to amnesties for crimes against humanity); Scharf, *supra* note 22, at 522 (citing Rome Statute, *supra* note 71, pmbl.) (indicating that the Preamble suggests that amnesty is incompatible with the purpose of the ICC).

200. *See* discussion of "complementarity" *supra* note 190.

201. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, art. 40, NS/RKM/1004/006 (Oct. 24, 2004) ("The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes . . . . The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."); Statute of the Special Court for Sierra Leone, *supra* note 8 ("An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."); *see also* S.C. Res. 1757, Attachment art. 6, U.N. Doc. S/RES/1757 (May 30, 2007) ("An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution.").

202. *See* Rome Statute, *supra* note 71, pmbl. (noting that the States who became parties to the Rome Statute were "[d]etermined to put an end to impunity for the perpetrators of these crimes").

203. *E.g.*, Scharf, *supra* note 22, at 524–25 (noting that both Articles 17 and 20 prevent the trying of a case if it is already being tried in another court); Young, *supra* note 26, at 465–69 (indicating that Articles 17 and 20 might

Article 17 provides that a case is inadmissible if a State with jurisdiction is investigating or prosecuting the relevant crimes.[204] The investigation, however, cannot be for the purpose of shielding someone from criminal responsibility[205] and cannot be inconsistent with the intent to bring the person to justice.[206] Article 20 provides that no person shall be tried for crimes in the ICC if he or she has already been tried by a domestic court.[207] This provision is also contingent upon the domestic proceedings not being used to shield a person from responsibility or being inconsistent with the intent to bring the person to justice.[208] Since the premise of an amnesty agreement is that the State will voluntarily overlook or ignore the offenses,[209] even superficial investigations to give the impression of compliance with prosecutorial requirements will not prevent the ICC from exercising jurisdiction and prosecuting.[210]

Another discussed way to permit domestic amnesty is by prosecutorial discretion under Article 53.[211] The prosecutor of the ICC can, upon examining all circumstances, choose not to prosecute.[212] The Pre-Trial Chamber, however, can overrule this decision,[213] and Article 53 provides no assurances to someone signing a peace agreement contingent upon amnesty that he or she will not be prosecuted. Further, the Article 53 requirement of "interests of justice" does not necessitate an affirmative finding by

permit amnesty if it is combined with a truth commission or civil proceedings instead of a criminal trial).

204. Rome Statute, *supra* note 71, art. 17(1)(a).

205. *Id.* art. 17(2)(a).

206. *Id.* art. 17(2)(c).

207. *Id.* art. 20(3).

208. *Id.* art. 20(3)(b).

209. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 140, at 71.

210. *Cf.* Young, *supra* note 26, at 464–65 (noting that a literal reading of the Articles indicates that they require an actual trial). Investigation must involve identifying those responsible, imposing sanctions, and providing reparation to victims. *Id.* at 479 n.260 (citing Chanfeau Orayce v. Chile, Cases 11.505 et al., Inter-Am. Comm'n H.R., Report No. 25/98, OEA/ser.L/V/II.98, doc. 7 rev., ¶ 70 (Apr. 7, 1998)).

211. Henrard, *supra* note 23, at 629 (indicating that the prosecutor could refuse to prosecute based upon the belief that an amnesty agreement is acceptable); Scharf, *supra* note 22, at 524 (discussing that the ICC's prosecutor can decide to respect an amnesty-for-peace agreement); Young, *supra* note 26, at 469–70 (noting that the ICC's prosecutor may determine whether amnesty serves the interests of justice).

212. Rome Statute, *supra* note 71, art. 53(1)(c). The prosecutor can decline to initiate an investigation after examining the seriousness of the crime and the interests of the victims and then deciding "there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice." *Id.*

213. *Id.* art. 53(3)(a) ("[T]he Pre-Trial Chamber may review a decision of the Prosecutor . . . not to proceed and may request the Prosecutor to reconsider that decision.").

the court, and the prosecutor does not have to present reasons for why the case is going forward despite countervailing interests.[214] In the end, the final decision is not the State's—even if the State has decided that amnesty is necessary for restoring peace—but instead is dependent upon the determination by an outside international prosecutor who can choose to ignore the amnesty.[215] Finally, there is no statute of limitations for prosecution of crimes against humanity in the ICC,[216] so even if a prosecutor decides not to exercise jurisdiction, a later one always can.

The issue of an ICC restriction on the granting of domestic amnesty was a significant concern for Colombia, a party to the Rome Statute with a protracted internal conflict against the rebel Revolutionary Armed Forces of Colombia. Despite Article 120's provision that "[n]o reservations may be made to this Statute,"[217] Colombia submitted an interpretative declaration with its ratification that attempted to preserve the option of offering amnesty for peace.[218] The interpretive declaration, however, is of questionable legal significance due to the explicit prohibition on reservations[219] and the compulsory jurisdiction of the ICC, subject to limitations that do not include amnesty.

By 2012, the International Criminal Court began investigations into seven situations: Libya; Côte d'Ivoire; the Democratic Republic of Congo; the Central African Republic; Kenya; Uganda; and Darfur, Sudan.[220] This led to fifteen arrest warrants and active cases against individuals, except from Uganda and Libya, where all individuals are either not in the courts' possession, still considered fugitives, or have died before being arrested.[221] The ICC

214. Côte d'Ivoire Investigation, *supra* note 141, ¶ 207.

215. Rome Statute, *supra* note 71, art. 53(3)(a). The choice is up to the Prosecutor whether to recognize societal choices. *Id.*; *see also* Richard J. Goldstone & Nicole Fritz, *'In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers*, 13 LEIDEN J. INT'L L. 655, 659 (2000) (noting that the factors influencing domestic decisions to not prosecute are not necessarily replicated internationally).

216. *See* Rome Statute, *supra* note 71, art. 29 ("The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."); *id.* art. 53(4) ("The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.").

217. *Id.* art. 120.

218. *Id.* Declaration of Colombia, ¶ 1 ("None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia.").

219. *Id.* art. 120 ("No reservations may be made to this Statute.")

220. *All Situations*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/ (last visited Oct. 1, 2012).

221. *All Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/ (last visited Oct. 1, 2012).

indictments concerning the Democratic Republic of Congo, the Central African Republic, and Uganda were issued for rebel group leaders related to protracted conflict.[222]

Since a State may not rely upon the provisions of its own domestic law as justification for not fulfilling international treaty obligations,[223] a State that grants domestic amnesty for crimes against humanity must still comply with requests from the ICC for surrender and prosecution.[224] The result is that someone can possibly receive a valid amnesty for crimes against humanity protecting them from domestic courts, but the ICC can still choose to prosecute them and a State must turn the person over for trial if the State is a party to the Rome Statute. This makes an amnesty agreement for members of militant separatist organizations or oppositional warring factions of little or no value if crimes against humanity have been committed.

D. Implications of Ineffective Domestic Amnesty

The issue of domestic amnesty to end the perpetuation and possible escalation of internal conflict exposes the conundrum of legally and morally reconciling "the right, on the one hand, of the individual victim and of society to demand prosecution, and the need and right, on the other, of ordinary people to live in peace."[225] States have used amnesties for centuries to end internal conflict and to facilitate the transition from war to peace, including the granting of amnesties to participants in the Whiskey Rebellion of 1794 and following the United States Civil War.[226] Sometimes democratic

222. *Id.* The indictments led to the first successful conviction in the ICC on March 14, 2012, which was for rebel leader Thomas Lubanga Dyilo of the Democratic Republic of Congo. Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶¶ 1, 1358 (Mar. 14, 2012).

223. Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

224. Rome Statute, *supra* note 71, art. 59(1) (stating that a State which has received a request for arrest and surrender shall immediately comply with the request); *see also* Vienna Convention on the Law of Treaties, *supra* note 223, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

225. Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 212 (2000).

226. FAUSTIN Z. NTOUBANDI, AMNESTY FOR CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW 12 & n.16, 25 (2007) (discussing amnesties granted by the U.S. government, including to participants in the Whiskey Rebellion and to both U.S. citizens and soldiers after the U.S. Civil War and the Korean War); O'SHEA, *supra* note 9, at 20–21 (discussing that between 1867 to 1872, President Andrew Johnson and the U.S. Congress passed a general amnesty act after the Civil War and the President of Brazil negotiated the end of a war by granting amnesty to the rebels).

governments granted these amnesties for serious atrocities, including crimes against humanity in the name of peace and reconciliation, such as England with the Irish Republican Army.[227] The recent changes in international law, however, may end that practice as an option for many States.

Since the basis of amnesty is that the recipient will not be prosecuted, those who receive amnesty must believe that they are protected from judicial proceedings in exchange for ceasing hostilities and possibly relinquishing their weapons.[228] Now there is a new definition of crimes against humanity encompassing a broader range of crimes committed during internal conflict. States are unable to prevent prosecutions for crimes against humanity in other States or by the ICC, regardless of the possible validity of the domestic amnesty agreement. Further, even subsequent regimes in their own state are not bound by amnesty agreements for crimes violating international law.[229] Therefore, amnesty agreements have become ineffective in accomplishing their purpose.

If international law deems organizations or factions responsible for crimes against humanity during internal conflict, the members of the groups will be subject to possible criminal proceedings and, therefore, have less of an impetus to negotiate with the government.[230] The leaders of the groups no longer have assurances against criminal action, and thus, amnesty would not be a tool available for ending internal conflict even in an intractable

227. 26 Apr. 2001, PARL. DEB., H.C. (2001) (U.K.), *available at* http://www.publications.parliament.uk/pa/cm200001/cmstand/d/st010426/pm/10426s01.htm ("[M]any of the crimes that the IRA and some of the loyalist groups had committed could be categorized as crimes against humanity as set out in the statute of Rome . . . . It is perfectly clear to all of us that it would [be] easy for an international court to argue that those on either side who had been responsible for such atrocities could be hauled before it. People in this country would greatly resent that. Some of us bitterly resent the fact that the Government gave an amnesty to some of those in the IRA who were responsible for the most horrendous terrorist crimes and who murdered friends of ours. Nevertheless, we accept that some leeway had to be given in a spirit of reconciliation if peace was to be secured in Northern Ireland.").

228. *See* BELL, *supra* note 20, at 6 (discussing that peace agreements "embody a set of understandings between some of the protagonists to a conflict" as to exactly how the conflict will be resolved).

229. *E.g.*, Naomi Roht-Arriaza, *Prosecutions of Heads of State In Latin America*, *in* PROSECUTING HEADS OF STATE, *supra* note 3, at 46, 46–76 (discussing that Latin America has seen a significant reversal with previous amnesty laws overturned decades later by domestic courts).

230. *See* WILLIAMS & SCHARF, *supra* note 5, at 30 (noting that officials engaged in negotiating the end of the conflict in the former Yugoslavia contended that assurances of amnesty were necessary as an incentive to end fighting).

situation.[231] The progress of the international community towards assuring accountability has removed the options of States as to how to confront dire situations within their own borders.[232]

III. A NEW ROLE FOR THE SECURITY COUNCIL

In situations where amnesty is an absolute necessity—and not just a convenience—to end internal conflict involving crimes against humanity, Security Council involvement is the only way for the international community to validate an agreement and provide assurances against prosecution.[233] Although this role has not been previously conceived for the Security Council, it may be a positive development for States, and there is recent precedent for this action.

Though the Security Council's mandate is to maintain international peace and security,[234] there is not a limitation preventing intervention in purely internal conflicts. The Security Council has repeatedly used Chapter VII powers, which enable it to determine a threat to peace and decide what measures will be used to restore peace and security,[235] for the resolution of noninternational conflicts.[236] This has included aggressive action such as authorization of measures to prevent a region from seceding and use of force to prevent the occurrence of civil war.[237] The Security Council has affirmed that resolving internal conflict is directly linked to world peace and international cooperation.[238]

231. *Cf.* BELL, *supra* note 20, at 286 (discussing that amnesty is normally a common feature when there is no victory or "overthrow" by any of the parties at the end of the conflict).

232. *Id.* (noting that the move towards accountability affects the mechanisms available for dealing with past conflict and abuses).

233. U.N. Charter art. 24. The Security Council consists of fifteen members of the U.N., with five permanent members. *See Membership in 2012*, U.N. SECURITY COUNCIL, http://www.un.org/sc/members.asp (last visited Oct. 1, 2012). Its purpose is to ensure effective action in the U.N. by having a smaller representative council capable of imposing binding decisions. U.N. Charter arts. 24–26.

234. U.N. Charter art. 24.

235. *Id.* art. 39.

236. *E.g.*, S.C. Res. 918, ¶ 13, U.N. Doc. S/RES/918 (May 17, 1994) (using Chapter VII powers to impose a weapons and parts embargo on Rwanda in an attempt to resolve the conflict); S.C. Res. 873, ¶¶ 1, 4, U.N. Doc. S/RES/873 (Oct. 13, 1993) (permitting the releasing of frozen funds under Chapter VII powers, but confirming the possible imposition of other measures to assist in the negotiations to restore democracy in Haiti).

237. *E.g.*, S.C. Res. 169, ¶¶ 1, 6, U.N. Doc. S/RES/169 (Nov. 24, 1961) (requesting States to refrain from supplying weapons which could be used by secessionist groups in the Congo); S.C. Res. 161, ¶ 1, U.N. Doc. S/RES/161 (Feb. 21, 1961) (permitting the U.N. to use force if necessary to prevent civil war in the Congo).

238. S.C. Res. 161, *supra* note 237 (reiterating that the plight of people suffering under a purely internal conflict in Congo affects both world peace and international cooperation).

The Security Council has wide latitude to determine what measures are appropriate to restore international peace and security.[239] Such a mandate could include recognizing a domestic amnesty agreement, since the Security Council permits itself to consider any actions the domestic parties have already adopted to resolve the dispute.[240] If the Security Council decides via a resolution that respecting an amnesty agreement for crimes against humanity is needed for peace and security, it can use Chapter VII powers to impose a binding obligation to carry out this decision[241] on all 193 member States of the U.N.[242] To have the legal authority to enforce an amnesty agreement, the Security Council must find that there is a threat to peace and security, and the subsequent resolution must be consistent with the purposes and principles of the U.N., which include principles of justice, international law, and human rights, as well as promotion of peace.[243] The binding resolution would effectively prevent States from exercising jurisdiction and provide assurances to the domestic protagonists that they will not be prosecuted in any State if they cease fighting.

The Rome Statute explicitly authorizes the Security Council to use Chapter VII powers to preclude investigation and prosecution by the ICC.[244] The use of a Chapter VII resolution is binding upon the ICC for twelve months, and preclusion from prosecution can be renewed indefinitely.[245] The inclusion of this provision in a multilateral treaty indicates that States desired to have a mechanism to delay and possibly prevent prosecution that would impact all ongoing conflict. A twelve-month delay with possible failure to renew does not provide any permanence that an amnesty provision would need for negotiated peace. However, as Professor Ruth Wedgwood notes, "[i]t is open to question whether the Rome treaty can constitutionally limit the Council's powers, including the Council's right to set the temporal duration of its own mandates."[246]

The Security Council could take several actions to endorse an amnesty agreement. The Security Council arguably could decide that it is not bound by temporal limitations imposed by outside

239. U.N. Charter arts. 39, 41.

240. *Id.* art. 36(2).

241. *See id.* arts. 24, 25.

242. *Member States of the United Nations*, UNITED NATIONS, http://www.un.org/en/members/index.shtml (last visited Oct. 1, 2012).

243. *See* U.N. Charter arts. 1(1), (3), 24(2).

244. Rome Statute, *supra* note 71, art. 16 ("No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.").

245. *Id.*

246. Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93, 98 (1999).

treaty obligations and could bind the ICC because the ICC exercises the delegated territorial and nationality jurisdiction of State parties. Additionally, especially in cases that would have previously been reserved solely for domestic concern, the Security Council could determine that "[t]he case is not of sufficient gravity to justify further action by the Court" and that "an investigation would not serve the interests of justice."[247] While that finding would not be directly binding on the prosecutor or ICC Chambers, the ICC would be taking action in direct contravention of a Security Council resolution for the maintenance of international peace and security.

Most importantly, the Security Council could obligate all members of the U.N. to support the amnesty agreement and therefore preclude handing over to the ICC those potentially responsible for crimes against humanity. While the Rome Statute creates a treaty-based obligation to turn in those indicted to the ICC, the supremacy clause of Article 103 of the U.N. Charter creates a superseding obligation.[248] Under Article 103, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[249] The obligations created by the Security Council using Chapter VII powers would trump the conflicting commitments to the ICC.

While the Security Council endorsement could potentially violate human rights agreements that create a right to redress, these again are superseded by the Charter commitments and the overall purpose of the Security Council to maintain international peace and security. There is a strong argument that the Security Council is bound by *jus cogens* ("compelling law" or "peremptory norm") and cannot override them in any resolution. However, as previously discussed, there is no certain customary duty to prosecute crimes against humanity, and parties to the Rome Statute already envisioned the Security Council interfering with prosecution through delays. A British court in *R v. Secretary of State for Defence* upheld the principle that even Security Council authorizations, as opposed to binding obligations through decisions, are sufficient to trump human rights treaty obligations due to Article 103.[250] While this case lends strength to the argument that Security Council resolutions prevail over the Rome Statute, the case for a resolution endorsing amnesty would be stronger. First a binding decision would create a more certain obligation.[251] Second, in human rights

247. Rome Statute, *supra* note 71, arts. 17(1)(d), 53(1)(c).
248. U.N. Charter art. 103.
249. *Id.*
250. R v. Sec'y of State for Defence, [2007] UKHL 58, 1 A.C. 332 (H.L.) [26–39] (appeal taken from Eng.).
251. *Id.*

treaties, rights are clearly owed to a State's own citizens and other States.[252] With the Rome Statute, the treaty only confers jurisdiction and prosecutorial powers. Thus, a violation of that treaty does not directly infringe on any human rights.

The Security Council can likely decide to recognize a domestic amnesty agreement and make it binding upon both States and the ICC under its same specified legal powers. The recognition of an amnesty agreement would enable protagonists in a conflict to have confidence in the negotiation process and have their agreement validated.

There is precedent for the Security Council implying recognition of amnesty but not to the point of legal impact. In 1993, Haitian leaders agreed to relinquish power in return for amnesty and lifting of economic sanctions imposed by the Security Council.[253] An agreement was signed with the support of the Security Council, which later declared it was the only valid framework for resolving the crisis in Haiti.[254] The Security Council resolution, however, only "welcomed" the agreement without creating obligations.[255] More recently in 2011, the Security Council took a significant step towards actual endorsement of an amnesty agreement. To resolve the internal crisis in Yemen, the Gulf Cooperation Council, with support from the United States, negotiated President Saleh's exit from power with amnesty.[256] The Security Council recognized that the Yemeni authorities committed serious human rights violations but viewed the settlement agreement as being "essential" for a peaceful transition and "*call[ed] on* all parties in Yemen to commit themselves to implementation."[257] Since the peace agreement and Security Council resolution, former President Saleh freely traveled to the United States for medical treatment.[258] The resolution for Yemen did not use the necessary language to create a binding obligation on U.N. member States but represented a foundation that the Security Council will endorse amnesty.[259]

252. *Id.* at [27].

253. *See generally* U.N. Secretary-General, *The Situation of Democracy and Human Rights in Haiti*, U.N. Doc. A/47/975-S/26063 (July 12, 1993).

254. Scharf, *supra* note 1, at 7 (quoting U.N. SCOR, 48th Sess., 3238th mtg. at 120, 126, U.N. Doc. S/INF/49 (1993)).

255. *See generally* S.C. Res. 948, U.N. Doc S/RES/948 (Oct. 15, 1994).

256. *See generally* S.C. Res. 2014, U.N. Doc S/RES/2014 (Oct. 21, 2011).

257. *Id.* ¶ 4.

258. Assia Boundaoui, *Yemeni Americans Protest Against Saleh's US Trip*, WORLD (Feb. 23, 2012), http://www.theworld.org/2012/02/yemeni-americans-protest-against-salehs-us-trip/.

259. *See* U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the *decisions* of the Security Council in accordance with the present Charter." (emphasis added)). Though the Security Council has utilized a variety of terms to indicate binding authority, the clearest usage is when the Security Council states that it "decides" a certain action.

The new role for the Security Council would provide significant benefits for the international community. There would be a mechanism to avoid legal absolutism with regards to intractable conflicts that have been ongoing for decades.[260] Additionally, the international community could ensure that domestic amnesties for crimes against humanity are granted only in exceptional circumstances after the approval of their representatives. This would reduce "back-room, closed-door" negotiations based upon accommodation that have been the common methodology of peacemakers, and instead would bring the discussion concerning justice versus amnesty to the international forum for open debate. Other States, intergovernmental organizations, victims, and human rights advocates would have the opportunity to provide advice on whether, in that specific circumstance, the need for peace and cessation of conflict outweighs the traditional demand for accountability.

Bringing the debate to the international level would also provide an opportunity to examine questions that are unsettled in international law. The Security Council would have to determine if it is bound by human rights law and if the Security Council can permit States to derogate from peremptory norms.[261]

The ability of the five permanent members of the Security Council to exercise veto power over any resolution[262] is also beneficial for States' need to balance peace with accountability. The structure of the U.N. and the Security Council can often render the organization ineffective in addressing threats to international peace and security due to a tendency towards inaction. Since a decision may be vetoed, there must be consensus that an amnesty agreement for crimes against humanity is the appropriate and only method for resolving internal conflict in a specific State.

CONCLUSION

If the 1970s and 1980s could be characterized as decades of impunity for atrocities and the 1990s could be characterized by the emergence of mechanisms for accountability, the first decade of the twenty-first century could be characterized by the struggles of States to end protracted asymmetrical conflicts. Violent internal

260. An example would be Colombia and its multifaceted civil war including widespread atrocities. *See* Villa-Vicencio, *supra* note 225, at 206 (suggesting that legal absolutism is sometimes not helpful and is unrealistic).

261. *See Committee on Economic, Social and Cultural Rights Concludes Session*, SCIENCEBLOG (Dec. 9, 1997), http://scienceblog.com/community/older/archives/L/1997/B/un971881.html (noting that the committee adopted a "General Comment" that began to examine whether the Security Council must determine if human rights suffering is occurring as a result of Chapter VII sanctions).

262. *See* U.N. Charter art. 27(3).

conflict still endures, and States need tools to resolve conflict. States often have used amnesty for potential crimes against humanity to stabilize and reconcile the population. Balancing the need for peace versus the need for accountability was viable, if the State followed certain prescriptions in granting impunity. With the new developments in international law, however, more domestic activity rises to the level of international concern, and finding a method to create amnesty is a difficult task. The international legal changes have rendered amnesty for crimes against humanity ineffective and removed it as a tool to create peace. Without a binding resolution by the Security Council, an amnesty agreement has no legal impact on the international plane and does not function as an inducement for non-State actors. The duty will now fall upon the Security Council to weigh the countervailing interests and decide how to restore peace and security when amnesty is determined to be the only option.