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## Neither Justice, Nor Oasis: Algeria's Amnesty Law

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## NEITHER JUSTICE, NOR OASIS: ALGERIA'S AMNESTY LAW

### INTRODUCTION

The notion that justice shall be done, regardless of its looming real world effects, is not a recent phenomenon: It is ancient. As early as 43 B.C., the statesman Lucius Calpurnius Piso Caesoninus is attributed as having stated, *fiat justitia ruat cœlum*—"let justice be done, though heaven should fall."<sup>1</sup> Setting aside this maxim as outdated, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") instead drew from Hegel's maxim, *fiat justitia ne pereat mundus*—"let justice be done lest the world should perish."<sup>2</sup> The critical responses to and tension between these two Latin phrases largely informs the debate this Note treats, namely, whether there can be amnesties for international crimes, and more particularly, whether Algeria's 2006 amnesty law conflicts with a duty to prosecute such grave violations.

Humanitarian and human rights law is presently struggling through an enforcement crisis. After the Nuremberg Trials, the world witnessed a sprawling gap in accountability that has only more recently been broken with the landmark formation of the ICTY, International Criminal Tribunal for Rwanda ("ICTR"), Special Court for Sierra Leone ("SCSL"), and International Criminal Court ("ICC"), among other significant developments.<sup>3</sup> Nevertheless, amnesty laws<sup>4</sup> have been and

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1. "Let justice be done, though the world perish," The Columbia World of Quotations, no. 21998, 1996, available at <http://www.bartleby.com/66/98/21998.html>. This maxim was later adopted as the motto of Ferdinand I (1558–1564) in the permutation, *fiat justitia et pereat mundus, id.*, and also invoked by Lord Mansfield in his historic 1772 judgment declaring the unlawfulness of slavery. STEVEN M. WISE, *THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY* 173 (2005).

2. See Antonio Cassese, The Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, para. 18, Nov. 14, 1994, <http://www.un.org/icty/rapportan/first-94.htm>.

3. In addition, the Iraqi Higher Criminal Court is active. The Ad-Hoc Court for East Timor and Special Tribunal for Cambodia have also been set up. Although, the former has been highly criticized by human rights advocates as a diversionary front. Ad-Hoc Court for East Timor, Global Policy Forum, <http://www.globalpolicy.org/intljustice/eti/morindx.htm> (last visited Mar. 16, 2008). The latter body issued its first indictment in July 2007. Nic Dunlop, *Cambodia's Trial by Fire*, L.A. TIMES, Aug. 21, 2007. There have been serious issues with the tribunal, however, which has prompted the U.N. to threaten withdrawal of support. Guy De Launey, *UN Warning on Cambodia Tribunal*, BBC, Oct. 2, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/7023303.stm>.

4. BLACK'S LAW DICTIONARY 92–93 (8th ed. 2004). Generally defined, amnesty is a "forgetfulness, oblivion; an intentional overlooking" and is etymologically related to the

continue to be passed in countries with serious records of human rights crimes,<sup>5</sup> reducing or eliminating punishment for perpetrators of these abuses. Supporters of amnesty laws maintain that retributive justice may not be required because “the heavens” will otherwise fall even further: Such laws may be necessary to end recurrent violence within a state. Amnesties then function strategically to aide the state’s transition, theoretically to a more just and prosperous society. On the other hand, opponents argue that amnesties threaten “the world” to the extent that they spawn a widespread deficit of justice and undermine the essence of humanity.

From 1992 to 1998,<sup>6</sup> Algeria experienced a “dirty war”<sup>7</sup> that claimed the lives of between 100,000 to 200,000 people, and in which tens of thousands more were brutalized. In 2006, fourteen years after the initiation of the conflict, the controversial Charter for Peace and National Reconciliation (“the Charter”) was put into effect. Introduced by President Abdelaziz Boutiflika, the Charter granted broad amnesty for select universal crimes committed during the war.<sup>8</sup> A Draft Charter, released six months prior, explicitly justified this measure as vital, if not necessary to lead Algeria permanently out of chaos.<sup>9</sup>

The present Note seeks to address meaningfully whether this legislation is legally valid to the extent that it shields prosecutions.<sup>10</sup>

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Greek word for oblivion or not remembering. OXFORD ENGLISH DICTIONARY (2d ed. 1989). Contrastingly, a pardon is legally defined as “[t]he act or an instance of officially nullifying punishment or other legal consequences of a crime. A pardon is usu[ally] granted by the chief executive of a government.” BLACK’S LAW DICTIONARY 1144 (8th ed. 2004).

5. See *infra* Part III(f).

6. While these are the years that witnessed the worst of the violence, arguably Algeria’s conflict has not completely ceased. See *infra* Part IV and Conclusion.

7. “Dirty war” most accurately describes what the country underwent. This term has been defined as “an offensive conducted by secret police or the military of a regime against revolutionary and terrorist insurgents and marked by the use of kidnapping and torture and murder with civilians often being the victims.” The Free Online Dictionary, <http://www.thefreedictionary.com/dirty+war> (last visited Mar. 16, 2008). For an analysis concerning why Algeria’s conflict should not be considered a “civil war,” see HUGH ROBERTS, ALGERIA’S VEILED DRAMA, reprinted in THE BATTLEFIELD ALGERIA 1988–2002: STUDIES IN A BROKEN POLITY 250, 254–59 (Verso) (2003).

8. See *infra* notes 67–69 and accompanying text.

9. See *infra* note 59, pmb1.

10. At least two scholars have concluded that the Charter should not be recognized, however they have done so after analysis based on non-legal criteria. See Valerie Arnould, *Amnesty, Peace and Reconciliation in Algeria*, 227 CONFLICT, SECURITY & DEV. 253 (2007); Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT’L L. 283 (2007).

Part I provides essential background on Algeria, its political and social history leading up to adoption of the Charter as well as the context and substance of the Charter itself. Focusing on the particular violations the Charter amnesties, Part II analyzes whether a duty to prosecute these crimes exists under the international and multilateral treaties to which Algeria is a party. After establishing the incompatibility of the Charter and these agreements, Part III then scrutinizes the present status of customary law to find that states have an obligation to prosecute the most serious war crimes as well as crimes against humanity. Addressing several of the most prevalent policy issues, this section also argues in favor of a broad customary duty to prosecute. Finally, Part IV begins with an analysis of whether the Charter can be considered to amnesty grave war crimes and crimes against humanity committed during the Dirty War, and concludes by suggesting that a duty to prosecute should be and is consistent with the wishes of many of Algeria's victims.

#### I. ALGERIA: THROUGH TURMOIL TO THE PRESENT

##### *A. Pre-Independence Algeria: A Brief Historical Account*

Algeria's struggle for independence has profoundly shaped Algerian politics and society. France occupied Algeria from 1830 until 1962 when it was forced to give up its departments after eight years of one of the bitterest conflicts within its formerly colonized lands.<sup>11</sup> Faced with a colonial regime that relegated Algerians to second-class status<sup>12</sup> and trampled over the native population's sense of culture and tradition, in late 1954, support for an independent Algerian state coalesced into active

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11. According to official Algerian estimates, the war resulted in 300,000 orphans, 400,000 refugees, 700,000 migrants, and 3 million displaced people. BENJAMIN STORA, *ALGERIA 1830-2000: A SHORT HISTORY*, 110-11 (Jane Marie Todd trans., Cornell U. Press 2001). Although the most reliable assessment of total casualties during the war, both French and Algerian, civil and military, is approximately 500,000, most of whom were Algerian, *id.*, the ruling party's figure of 1 million Algerian deaths became widely accepted. This figure became so central to the country's reputation, for example, that Algeria is commonly referred to in Arabic as *balad milyūn mujāhidīn*, "country of a million freedom fighters."

12. "The colons enjoyed full rights; the colonized were 'subjects' not 'citizens,' liable to special provisions: tallage, corvée, and detention . . . without due process. In 1881, a Code de l'Indigénat (Native Code) was established, regularizing these repressive measures." *Id.* at 6. By 1955, for example, and according to French statistics, only 8 out of the 2000 workers in the general state government were native Algerians. For every 15,342 indigenous Algerians, only 1 attended school, as opposed to 1 for every 227 Europeans living in the country. An Algerian made twenty-eight times less in gross income than a European resident. *Id.* at 39.

resistance, led by the *Front de Libération Nationale* ("FLN").<sup>13</sup> The fight for independence eventually came to a close in a ceasefire in March 1962. This ceasefire was followed by a referendum on July 1, 1962, in which 6 million people voted in favor of Algeria becoming an independent state, with 16,534 objecting.<sup>14</sup> Soon after, a sequence of decrees was issued, amnestying grave offenses carried out by Algerian and French forces in Algeria.<sup>15</sup>

In keeping with popular revolutionary sentiment, though it was initially mobilized to overthrow French colonial rule, the Algerian army proved to endure in strength, dominating Algerian politics to date with a power difficult to underestimate. Similarly, the FLN emerged to become the sole ruling party in post-independence Algeria, building its legitimacy upon a constructed legacy that it exclusively liberated the Algerian people from colonial domination and founded the modern Algerian state.<sup>16</sup> This narrative long held immense appeal among not only Algerians outraged by pervasive economic, political, and cultural subjugation, but also other states of the global South, with which Algeria

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13. Insurrection began in November 1954 in a series of well-organized, concurrent attacks by the FLN. *Id.* at 35–36. Riots in over two-dozen villages and towns followed in August 1955. *Id.* at 43–44. France responded by sending in troops, strengthening its security forces, and in March 1956, voting into effect a law providing for "special powers," which forebodingly set aside the majority of safeguards for individual liberties in Algeria. *Id.* at 44, 46. The FLN subsequently began a string of attacks in the capital, in what infamously became known as the Battle of Algiers. While the FLN engaged in guerilla warfare tactics, including bombings of European civilians, French paratroopers struggled to put down the insurgency, which it succeeded in doing by September 1957, however not without practicing routine torture and disappearing approximately 3000 people. *Id.* at 47, 49, 50–52. The French also placed tens of thousands of Algerians in detention camps without due process. *Id.* at 53. Violence continued to be exchanged not only between the French and Algerian forces, but also between Algerian political factions. *Id.* at 59. In August 1956, though, other active parties and groups were assimilated into the FLN, persuaded by the party that a single, greater unity was necessary if Algeria was to overcome the strength of the French forces. *Id.* at 60–61. A revamped armed branch of the FLN then spread throughout the country, fighting under daunting conditions. *Id.* at 61–62.

14. *Id.* at 97–98, 104.

15. *Id.* at 113. For translated text of some of the key decrees as well as an account of the strained evolution of French-Algerian relations vis-à-vis Algeria's War of Independence, see Shiva Eftekhari, Note, *France and the Algerian War: From a Policy of "Forgetting" to a Framework for Accountability*, 34 COLUM. HUM. RTS. L. REV. 413, 424–26 (2003).

16. The accuracy of this nationalist "myth" put forth by the FLN is questionable, as other key players were also influential. ROBERT MALLEY, *THE CALL FROM ALGERIA: THIRD WORLDISM, REVOLUTION AND THE TURN TO ISLAM*, 34–35 (1996).

actively aligned itself.<sup>17</sup> Over time, however, the perpetual commemoration of and struggle for greater freedom from external oppression was unable to overcome hardships within the Algerian state.

### *B. Algeria's Dirty War*

In the mid-1980s the revolutionary socialist government began to face mounting discontent, brought about by a combination of economic troubles<sup>18</sup> and general estrangement from an ossified and corrupt regime.<sup>19</sup> In October 1988, this discontent erupted across the country in riots and demonstrations against state power. After nearly a week, the army was called in: More than 500 people, mostly youths, were killed.<sup>20</sup> The regime also retaliated by torturing people on a widespread basis, a fact the government itself later admitted.<sup>21</sup> President Chadli Benjedid's response astounded many. Benjedid introduced a series of reforms, the most notable of which was a new constitution in 1989 that secured essential freedoms and granted the right to form political associations.<sup>22</sup> Algeria then witnessed a swell of civil society participation that called into question post-independence power dynamics. Numerous political opposition parties, both secular and Islamist, were registered.<sup>23</sup>

In June 1990, free multiparty local elections took place for the first time in Algeria's history, elections in which the *Front Islamique du Salut* ("FIS"), a party with an Islamist platform, won a majority.<sup>24</sup> With

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17. *Id.* at 141–49, 210.

18. By 1986, oil prices had dropped dramatically, which, in a non-diversified economy, meant that the Algerian state could not continue its program of social welfare as it had in its prime. *Id.* at 208–09.

19. For example, in 1991, "the former prime minister, Abdelhamid Brahimi, claimed that government officials had siphoned off [twenty-six] billion dollars, [a sum] equivalent to the amount of Algeria's foreign debt." MARTIN STONE, *THE AGONY OF ALGERIA*, 108 (1997).

20. Human Rights in Algeria, Testimony by Tom Malinowski to the U.S. House of Representatives, Human Rights Watch, Mar. 4, 2005, <http://hrw.org/english/docs/2005/03/04/algeri10260.htm>.

21. Algeria: Human Rights Developments 1992, Human Rights Watch, [http://www.hrw.org/reports/1993/WR93/Mew-01.htm#P71\\_39546](http://www.hrw.org/reports/1993/WR93/Mew-01.htm#P71_39546) (last visited Mar. 12, 2008).

22. MICHAEL WILLIS, *THE ISLAMIST CHALLENGE IN ALGERIA: A POLITICAL HISTORY*, 111–12 (1996). This move should not necessarily be construed as the initiation of a genuine democratic transition. Instead, it was likely pushed by the army, which arguably viewed political reforms as a strategy to fragment dissent, thereby preserving its dominance. See, e.g., Rolf Schwarz, *Human Rights Discourse and Practice as Crisis Management: Insights from the Algerian Case*, 7 J. N. AFR. STUD. 57, 66–67 (2002).

23. STORA, *supra* note 11, at 198–99.

24. For a thorough history of the development of Islamist politics in Algeria, see WILLIS, *supra* note 22. While treatment of the FIS's popularity is beyond the scope of

parliamentary elections approaching, the FIS held demonstrations against the regime's manipulation of the process. This prompted the army to impose martial law and imprison FIS leadership in June 1991.<sup>25</sup> The first round of parliamentary elections was nevertheless held in December 1991 and the FIS secured a majority of seats. Justified on the basis of "saving" the country from Islamist politics,<sup>26</sup> the army generals staged a *coup d'état* the following month, marking the end of Algeria's democratic bout.<sup>27</sup> Benjedid was ousted and a provisional governing body was erected in lieu of a presidency, the *Haut Conseil d'Etat* ("HCE"), comprised of a quintet of men who were to rule the country until Boutiflika's election in 1999.<sup>28</sup> The FIS was banned and a state of emergency was declared.<sup>29</sup>

Algeria then experienced a gradual descent into chaos. One of the historic leaders of the FLN and the then chairman of the HCE, Mohammed Boudiaf, was shot dead by one of his bodyguards during a speech.<sup>30</sup> Armed Islamist factions drawing from the FIS's support base soon emerged and carried out guerilla attacks. The army, then, employing "torture, humiliations and deadly reprisals," not only sought to uproot the fighters, but also embarked on a "policy of terror against the people to dissuade them from supporting the armed struggle groups."<sup>31</sup> The actions of security forces provoked increasing anger

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this Note, it should be emphasized that there were various and complex factors, especially socio-economic, contributing to the party's success. For an account of the Dirty War and its roots, see LUIS MARTINEZ, *THE ALGERIAN CIVIL WAR: 1990–1998* (Jonathan Derrick trans., Colum. U. Press 2000).

25. STORA, *supra* note 11, at 209.

26. See, e.g., *The Junta in Court*, Algeria-Watch, Sept. 2002, [http://www.algeria-watch.org/en/aw/junta\\_court.htm](http://www.algeria-watch.org/en/aw/junta_court.htm).

27. The legitimacy of the overthrow was and remains immensely controversial. Debate largely centers upon the relation "between" Islamist politics and democracy, and more particularly, the nature of the FIS. For a closer examination of these issues, see for example Peter A. Samuelson, *Pluralism Betrayed: The Battle Between Secularism and Islam in Algeria's Quest for Democracy*, 20 YALE J. INT'L L. 309 (1995) (arguing that the regime's coup was unjustified, the threat of the FIS overestimated, and the takeover worse than honoring the majority election results).

28. On the composition of the HCE, see for example WILLIS, *supra* note 22, at 250–52.

29. *Id.* at 256–57.

30. The circumstances surrounding his death are both suspicious and contested. It is probable that his reluctance to cooperate with the army generals caused his assassination by regime insiders. See, e.g., MARTIN EVANS & JOHN PHILLIPS, *ALGERIA: ANGER OF THE DISPOSSESSED* 177–80 (2007); WILLIS, *supra* note 22, at 263–66; *Operation Boudiaf*, Mouvement Algérien des Officiers Libres, <http://www.anp.org/affaireboudiaf/engaffboudiaf.html> (last visited Mar. 16, 2008).

31. MARTINEZ, *supra* note 24, at 21–22.

among certain FIS sympathizers, who until 1993 had remained passive.<sup>32</sup> While this rage spurred Islamist armed forces to mobilize against the security forces, it also led to attacks against civilians,<sup>33</sup> whom they perceived to be against them, as they were not actively championing their cause.<sup>34</sup>

This abbreviated narration of the opening events of the Dirty War illustrates the basic patterns of violence that were to continue at a heightened level until the late 1990s, when the scale of the conflict began to decrease. Numerous massacres took place.<sup>35</sup> Bomb attacks, often in public places, were frequent. In addition to security forces victimizing women, including by rape,<sup>36</sup> opposition groups raped and abducted women,<sup>37</sup> sometimes torturing them and sometimes murdering them.<sup>38</sup> Security forces joined by state-armed militias and Islamist groups killed each other and civilians alike.<sup>39</sup> It is estimated that tens of thousands of people were tortured at the hands of state security forces<sup>40</sup> after the practice became institutionalized in the early 1990s, mostly taking place

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32. *Id.* at 48, 60–61.

33. STORA, *supra* note 11, at 214.

34. MARTINEZ, *supra* note 24, at 72, 76–77.

35. There are serious concerns that the state security forces were behind the massacres. HABIB SOUAÏDIA, *LA SALE GUERRE: LE TÉMOIGNAGE D'UN ANCIEN OFFICIER DES FORCES DE L'ARMÉE ALGÉRIENNE 88–90* (Découverte 2001). *See also, e.g.*, NESROULAH YOUS, *QUI A TUÉ À BENTALHA?: CHRONIQUE D'UN MASSACRE ANNONCÉ* (Découverte 2000). For an overview of both of these books as well as an appraisal of the credibility of their accounts, see HUGH ROBERTS, *FRANCE AND THE LOST HONOUR OF ALGERIA'S ARMY, reprinted in THE BATTLEFIELD ALGERIA 1988–2002: STUDIES IN A BROKEN POLITY* 305, 309–13 (Verso) (2003). *See also, generally*, AN INQUIRY INTO THE ALGERIAN MASSACRES (Youcef Bedjaoui, Abbas Aroua, & Meziane Aït-Larbi eds., Hoggar 1999), available at [http://www.hoggar.org/index.php?option=com\\_content&task=view&id=102&Itemid=3&limit=1&limitstart=2](http://www.hoggar.org/index.php?option=com_content&task=view&id=102&Itemid=3&limit=1&limitstart=2) (providing a history of and perspectives on the massacres).

36. *E.g.*, Algeria: Human Rights Developments 1995, Human Rights Watch, [http://www.hrw.org/reports/1996/WR96/MIDEAST-01.htm#P137\\_26320](http://www.hrw.org/reports/1996/WR96/MIDEAST-01.htm#P137_26320) (last visited Mar. 12, 2008).

37. For an exploration of women and gender identity in Algerian history and society from pre-colonial times to the present, see generally MARNIA LAZREG, *THE ELOQUENCE OF SILENCE: ALGERIAN WOMEN IN QUESTION* (1994).

38. *E.g.*, *Algeria: Fear and Silence: A Hidden Human Rights Crisis*, Amnesty International, Nov. 19, 1996, at 32, [http://asiapacific.amnesty.org/library/pdf/MDE280111996ENGLISH/\\$File/MDE2801196.pdf](http://asiapacific.amnesty.org/library/pdf/MDE280111996ENGLISH/$File/MDE2801196.pdf) [hereinafter *Fear and Silence*].

39. *E.g.*, *Extrajudicial Killings*, Algeria-Watch, Apr. 1999, [http://www.algeria-watch.org/en/aw/extrajudicial\\_killings.htm](http://www.algeria-watch.org/en/aw/extrajudicial_killings.htm).

40. *E.g.*, *January 1992–January 2007: Fifteen Years of Atrocities and Impunity in Algeria*, Algeria-Watch, Jan. 11, 2007, [http://www.algeria-watch.org/en/aw/15\\_years.htm](http://www.algeria-watch.org/en/aw/15_years.htm) [hereinafter *Fifteen Years of Atrocities*].

at secret detention sites.<sup>41</sup> Between 1992 and 1998 alone, state security forces disappeared approximately 7000 Algerians.<sup>42</sup>

*C. Attempts at National "Reconciliation": 1999–2008*

Efforts responding to the violence have not been limited to the Charter. In January 1995, under the auspices of the Sant'Edigio Community in Rome, six key opposition parties, including the FIS, signed the Platform for a Peaceful Resolution of Algeria's Crisis, an agreement the Algerian government vehemently rejected.<sup>43</sup> In February 1995, however, the state adopted a clemency law, *Qānūn al-raḥma*, "aimed at repentant terrorists."<sup>44</sup> An estimated 250 to 300 militants took advantage.<sup>45</sup> The

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41. *E.g.*, *Fear and Silence*, *supra* note 38, at 41. The most frequent torture techniques include:

[T]he 'chiffon' method (the detainee is tied in a horizontal position to a bench and cloth is inserted in his mouth, then his nose is held closed and a mixture of dirty water and chemicals is poured in his mouth in large quantities causing choking and swelling of the stomach); the 'chalumeau' (blowtorch, which is used to burn the face and parts of the detainee's body); electric shocks applied to the ears, genitals, anus and other sensitive parts of the detainee's body; tying a rope around the detainee's penis and/or testicles causing swelling of the genitals; and beatings all over the body, especially on the sensitive parts. Others methods reported are burnings on the body with cigarettes; insertion of bottles, sticks and other objects, including firearms, in the anus; putting glue in the detainee's anus; placing the detainee's penis in open drawers and shutting the drawer; and suspending the detainee in contorted positions.

*Id.* at 44. Additional forms of torture involve castration, amputating fingers, and gauging out eyes with forks and knives. *La République Torture*, Movement Algérien des Officiers Libres, <http://www.anp.org/frenindex/torture.html> (last visited Mar. 16, 2008).

42. This is the highest number of known disappearances in any state during or subsequent to this timeframe, second only to Bosnia. *Time for Reckoning: Enforced Disappearances and Abductions in Algeria*, Human Rights Watch (2003) at 3, <http://www.hrw.org/reports/2003/algeria0203/algeria0203.pdf> [hereinafter *Time for Reckoning*]. Algeria-Watch puts forth the figure of 20,000 disappeared between January 1992 and January 2007. *Fifteen Years of Atrocities*, *supra* note 40.

43. HUGH ROBERTS, ALGERIA'S RUINOUS IMPASSE AND THE HONOURABLE WAY OUT, reprinted in *THE BATTLEFIELD ALGERIA 1988–2002: STUDIES IN A BROKEN POLITY* 160, 171–75 (Verso) (2003) (elaborating upon the significance of the agreement).

44. Among other measures, the law prohibited prosecution for individuals who belonged to certain groups and did not perpetrate offenses "leading to loss of human life, permanent disability, breach of the moral or physical integrity of citizens or destruction of public property." U.N. Committee Against Torture, Second Periodic Reports of States Parties Due in 1994: Algeria, para. 33, U.N. Doc. CAT/C/25/Add.8 (May 30, 1996) [hereinafter CAT Report].

Ministry of the Interior declared in August 1998 that offices were being opened in each *wilāya*<sup>46</sup> to process complaints of disappearances,<sup>47</sup> which the National Human Rights Observatory, set up in February 1992,<sup>48</sup> oversaw. In March 2001, this body was replaced with the ad hoc National Consultative Commission for the Promotion and Protection of Human Rights,<sup>49</sup> charged with handling the issue of the disappeared.<sup>50</sup> Based on the commission's report completed four years later, though never released, the human rights commissioner admitted that state security forces disappeared 6146 people.<sup>51</sup> In July 1999, three months after becoming president, Boutiflika introduced the "Law of Civil Harmony."<sup>52</sup> After being passed by Parliament, this initiative allegedly received broad backing in a referendum,<sup>53</sup> but it was widely criticized in

45. Tobias Schumacher, *The EU and Algeria: A Forgotten Case?*, EuroMeSCo Research Seminar "Democratization and Human Rights," July/Aug. 2006, at 3, [http://www.euromesco.net/images/enews\\_9\\_en.pdf](http://www.euromesco.net/images/enews_9_en.pdf).

46. *Wilāya* is the Algerian-Arabic word for "state," of which there are forty-eight in the country.

47. *Time for Reckoning*, *supra* note 42, at 40. "Questions were quickly raised about this initiative, first because these bureaus were part of the same ministry whose forces were suspected in many of the 'disappearances,' and second because their working methods and powers to collect information were never made public." *Id.*

48. CAT Report, *supra* at 44, para. 34.

49. Executive decree No. 03-299 (11 Sept. 2003) art. 3 (Alg.). "Décret présidentiel n° 03-299 du 14 Rajab 1424 correspondant au 11 septembre 2003 complétant le décret présidentiel n° 01-71 du 30 Dhou El Hidja 1421 correspondant au 25 mars 2001 portant création de la commission nationale consultative de promotion et de protection des droits de l'Homme (CNCPPDH)."

50. *Id.*

51. "Reconciliation" at the Price of Truth and Justice?, Algeria Watch, Aug. 26, 2005, [http://www.algeria-watch.org/en/aw/truth\\_justice.htm](http://www.algeria-watch.org/en/aw/truth_justice.htm). Associations for families of the disappeared, however, maintain that they have more than 8000 files documenting disappearances. *Chronology (Part Two)*, Algeria-Watch, Sept. 10, 2006, [http://www.algeria-watch.org/en/policy/chronology\\_2.htm](http://www.algeria-watch.org/en/policy/chronology_2.htm).

52. The stated purpose was "to se[t] up . . . particular measures aimed at offering suitable solutions for those persons involved in acts of terrorism and subversion." *Law of Civil Harmony*, Website of International Humanitarian Law, July 13, 1999, <http://www.wihl.nl/finals/Algeria/AL.LIM.LAW%20OF%20CIVIL%20HARMONY.1999.pdf>.

53. *Algeria: Attacks on Justice 2000*, International Commission of Jurists, Aug. 13, 2001, [http://www.icj.org/news.php3?id\\_article=2549&lang=en](http://www.icj.org/news.php3?id_article=2549&lang=en) [hereinafter *Attacks on Justice 2000*]. Reduced sentences were allowed for persons who did not commit massacres or bomb public places. Granting the option of creating special Probation Committees in each *wilāya* to decide applications for probation, the law permitted this relief to those who neither committed or participated in the aforementioned crimes, nor those "that have led to the death of people" or involved rape. Exoneration from prosecution was afforded to the same class of persons as probation, except the additional

public opinion, the press, as well as by secular political movements.<sup>54</sup> According to government figures, approximately 5500 persons surrendered.<sup>55</sup> And building upon the Law of Civil Harmony, in January 2000, Boutiflika extended a general amnesty<sup>56</sup> to members of two Islamist groups,<sup>57</sup> but its precise terms were not revealed.<sup>58</sup>

The Charter is thus the most recent in a series of attempts at securing lasting peace. Although a Draft Charter was revealed on August 15, 2005,<sup>59</sup> the actual Charter was not disclosed prior to its adoption.<sup>60</sup> The

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bar of “permanent disabling of a person” was included. This law did not apply to state security forces. *Law of Civil Harmony*, *supra* note 52, art. 1–3, 7, 11–17, 27.

54. These forces “led a campaign against this law arguing that it constituted an arbitrary impunity procedure for the abuses and crimes committed and a voluntary silence regarding the conditions in which terrorism and repression developed and ceased.” Hidouci, *infra* note 287, at 3. *See also, e.g.*, EVANS & PHILLIPS, *supra* note 30, at 267 (“[Grassroots civilian pressure groups] wanted to express their pain and anger and believed that, in denying truth and justice, Bouteflika’s transition process was fundamentally flawed.”). A domestic opinion poll also suggested that less than half the population supported the law. *Id.* at 270.

55. *Algeria: Attacks on Justice 2002*, International Commission of Jurists, Aug. 26, 2002, [http://www.icj.org/news.php3?id\\_article=2648&lang=en](http://www.icj.org/news.php3?id_article=2648&lang=en) [hereinafter *Attacks on Justice 2002*]. Even though the Law of Civil Harmony appeared specific enough to further reconciliation, there have been criticisms that it was applied arbitrarily and without meaningful investigation, thereby largely undermining its supposed value. *See, e.g., Attacks on Justice 2000*, *supra* note 53; *Truth and Justice on Hold: The New State Commission on ‘Disappearances*, Human Rights Watch, Dec. 2003, at 8, <http://www.hrw.org/reports/2003/algeria1203/algeria1203.pdf>. More importantly, this amnesty violated international law for the same reasons that the Charter is legally invalid. *See infra* Part II, III. *But see* Nina H.B. Jørgensen, *The Scope and Effect of the Algerian Law Relating to the Reestablishment of Civil Concord*, 13 LEIDEN J. INT’L L. 681, 688 (2000). While violence by armed groups noticeably lowered in the beginning of 2000, it swelled at the year’s end, for example, leaving 250 dead in the month of October. EVANS & PHILLIPS, *supra* note 30, at 265.

56. Executive decree No. 2000-03 (10 Jan. 2000) art. 3 (Alg.). “Décret présidentiel n° 2000-03 du 4 Chaoual 1420 correspondant au 10 janvier 2000 portant grâce amnistiante.”

57. *Algeria, New Amnesty Law Will Ensure Atrocities Go Unpunished: Muzzles Discussion of Civil Conflict: Joint Statement by Amnesty International, Human Rights Watch, the International Center for Transitional Justice, and the International Federation of Human Rights*, Human Rights Watch, Mar. 1, 2006, <http://hrw.org/english/docs/2006/03/01/algeri12743.htm> [hereinafter *Atrocities Go Unpunished*].

58. *Attacks on Justice 2000*, *supra* note 53. Killings by armed groups escalated by 20% in 2000 relative to the prior year. *Attacks on Justice 2002*, *supra* note 55.

59. Executive decree No. 05-278 (14 Aug. 2005) Annex (Alg.). “Décret présidentiel n° 05-278 du 9 Rajab 1426 correspondant au 14 août 2005 portant convocation du corps électoral pour le référendum du jeudi 29 septembre 2005 relatif à la réconciliation nationale.” For an English translation of the Draft Charter, see Ministry of Foreign Affairs, Embassy of Algeria, London, Charter for Peace and National Reconciliation,

former does not explicitly provide for the amnestying of security forces and does not mention the jail sentences and fines that are to be imposed for voicing criticism concerning the handling of the “National Tragedy.”<sup>61</sup> Nevertheless, forty-five days later, Boutiflika’s initiative was put to a referendum on September 29, 2005. According to official figures, 97.36% of the Algerian populace approved the Charter,<sup>62</sup> with an average voter turnout of 79.76%<sup>63</sup> among approximately 18.3 million registered voters.<sup>64</sup> There was no independent monitoring of the voting.<sup>65</sup> Algeria’s full cabinet approved the final version on February 27, 2006, but Parliament was not in session and did not debate the Charter.<sup>66</sup>

Among its most important provisions, the Charter extends amnesty to persons who did not commit or participate in massacres, public bombings, and rape.<sup>67</sup> Those who have already been imprisoned and

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[http://www.algerianembassy.org.uk/charter\\_for\\_peace\\_and\\_national\\_r.htm](http://www.algerianembassy.org.uk/charter_for_peace_and_national_r.htm) (last visited Mar. 16, 2008) [hereinafter Draft Charter].

60. *Joint NGO Letter on the Occasion of the EU-Algeria Association Council on 20–21st March 2006: Human Rights Concerns at the EU-Algeria Association Council*, Human Rights Watch, Mar. 14, 2006, <http://hrw.org/english/docs/2006/03/14/algeri13024.htm>.

61. Compare Draft Charter, *supra* note 59, with Charte pour la paix, *infra* note 67, art. 45.

62. The deceptively simple question posed to voters was, “Do you agree with the Draft Charter for Peace and National Reconciliation, which is proposed to you?” Executive decree No. 05-278 (14 Aug. 2005) art. 2 (Alg.). “Décret présidentiel n° 05-278 du 9 Rajab 1426 correspondant au 14 août 2005 portant convocation du corps électoral pour le référendum du jeudi 29 septembre 2005 relatif à la réconciliation nationale.” (author’s translation).

63. Some areas called for a boycott of the referendum, and the reported voter turnout in the capital was 32% lower than its usual levels. See *Algerians Overwhelmingly OK National Peace Charter*, ARAB NEWS, Oct. 1, 2005, <http://www.arabnews.com>.

64. *Algeria Today: Algerians Voted Massively for a Peaceful Future*, Embassy of the People’s Democratic Republic of Algeria, Washington, Sept. 30, 2005, at 1, [http://www.algeria-us.org/ALGERIA%20TODAY/ALGERIA\\_TODAY%20SEP%2032%202005.pdf](http://www.algeria-us.org/ALGERIA%20TODAY/ALGERIA_TODAY%20SEP%2032%202005.pdf) [hereinafter *Algeria Today*].

65. Michael Slackman, *Algerian Voters Said to Approve President’s Postwar Plan*, N.Y. TIMES, Oct. 1, 2005.

66. *Atrocities Go Unpunished*, *supra* note 57.

67. Legislative decree No. 06-01 (27 Feb. 2006) art. 5–6, 10 (Alg.). “Ordonnance n° 06-01 du 28 Moharram 1427 correspondant au 27 février 2006 portant mise en œuvre de la Charte pour la paix et la réconciliation nationale” [hereinafter Charte pour la paix]. Given Algeria’s history with prosecutions and its judiciary troubles, it is extremely unlikely the state will meaningfully prosecute these crimes in the near future. To date, Algeria has failed to offer substantial evidence of prosecutions for any gross human rights violations. See, e.g., HRC Observations finales, *infra* note 114, para 7.

sentenced and who did not engage in the aforementioned crimes are pardoned.<sup>68</sup> Articles 45 and 46 provide:

No legal proceedings may be initiated against an individual or a collective entity, belonging to any component whatsoever of the defense and security forces of the Republic, for actions conducted for the purpose of protecting persons and property, safeguarding the nation or preserving the institutions of the Democratic and Popular Republic of Algeria. The competent judicial authorities are to summarily dismiss all accusations or complaints.<sup>69</sup>

Anyone who, by speech, writing, or any other act, uses or exploits the wounds of the National Tragedy to harm the institutions of the Democratic and Popular Republic of Algeria, to weaken the state, or to undermine the good reputation of its agents who honorably served it, or to tarnish the image of Algeria internationally, shall be punished by three to five years in prison and a fine of 250,000 to 500,000 dinars.<sup>70</sup>

In two separate decrees published alongside the Charter, under specified measures, the Algerian State offers compensation to the “victims of the national tragedy,” including the families of those who

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68. Charte pour la paix, *supra* note 67, art. 8–10.

69. *Id.* art. 45. The translation of this article is from *Atrocities Go Unpunished*, *supra* note 57. Implicitly, this provision tracks the non-amnestied crimes for members of armed groups. It would be absurd to argue that massacres, public bombings, or rapes were committed for “the purpose of protecting persons or property, [or] safeguarding the nation.” (Although rape can be a form of torture, it is not “typically” justified on the basis of extracting information.) In contrast, according to warfare tactics, it is logically consistent, albeit unsound, to maintain that state forces tortured, disappeared, and murdered people in furtherance of this specified end. Apparently, the state carefully worded this article to allow room for such interpretation. The Human Rights Committee criticized this ambiguity when it considered the Charter and implored the state to amend it. See HRC Observations finales, *infra* note 114. See also CAT Observations finales, *infra* note 100.

70. Charte pour la paix, *supra* note note 67, art. 46. The translation used can be found at *Atrocities Go Unpunished*, *supra* note 57. This fine is approximately \$3812–\$7625 USD as of October 6, 2007. The 2007 Algerian per capita GDP was estimated to be \$8100. Algeria Country Profile, CIA World Fact Book, available at <https://www.cia.gov/library/publications/the-world-factbook/print/ag.html> (last visited Mar. 16, 2008) [hereinafter Algeria Country Profile]. The Human Rights Committee has called for the abrogation of this provision. HRC Observations finales, *infra* note 114, para. 8. See also CAT Observations finales, *infra* note 100, para. 17 (noting that the Algerian state “should amend” article 46 in order to ensure an “effective remedy”) (author’s translation).

have been disappeared,<sup>71</sup> as well as those who have participated in “terrorism.”<sup>72</sup>

## II. ALGERIA'S TREATY OBLIGATIONS

Given the history of the Dirty War, the systematic human rights violations that the amnesty law shields are torture, extrajudicial executions, and disappearances. Under humanitarian treaties, the Charter's amnestying of these crimes is not invalidated, as a perverse result of Algeria's conflict having been internal. On the other hand, each of the multilateral and regional human rights treaties Algeria has ratified<sup>73</sup> undermines the legal soundness of the Charter with regard to the duty to prosecute.

### A. *The Geneva Conventions and Common Article 3*

How Common Article 3 relates to “grave breaches” under the Geneva Conventions is crucial, as this article explicitly addresses internal armed conflicts.<sup>74</sup> The distinction between international and internal conflicts in

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71. Executive decree No. 06-93 (28 Feb. 2006) art. 1–2 (Alg.). “Décret présidentiel n° 06-93 du 29 Moharram 1427 correspondant au 28 février 2006 relatif à l'indemnisation des victimes de la tragédie nationale.” The Algerian state has conditioned this indemnification upon families declaring the death of their disappeared loved one. Charte pour la paix, *supra* note note 67, art. 30. Troubled by this requirement, the Human Rights Committee has recommended its abolishment. HRC Observations finales, *infra* note 114, para. 13. See also CAT Observations finales, *infra* note 100, para. 13 (calling for the removal of this stipulation and asserting that it constitutes “a form of inhumane and degrading treatment”) (author's translation).

72. Executive decree No. 06-94 (28 Feb. 2006) (Alg.). “Décret présidentiel n° 06-94 du 29 Moharram 1427 correspondant au 28 février 2006 relatif à l'aide de l'Etat aux familles démunies éprouvées par l'implication d'un de leurs proches dans le terrorisme.”

73. Algeria entered a Euro-Mediterranean Agreement with the European Community, which went into force in September 2005. EUROPA, European Commission, External Relations, Treaties Office, Association Agreements, The Euro-Mediterranean Partnership, Algeria, <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=821> (last visited Mar. 17, 2008). While this agreement contains a provision on human rights, it is very general and therefore does not warrant much discussion. See Euro-Mediterranean Agreement Establishing an Association between the European Community and its Member States, of the One Part, and the People's Democratic Republic of Algeria, of the Other Part, art. 2, Oct. 10, 2005, O.J.E.U. L265/2 (2005).

74. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75

humanitarian law has serious repercussions, as the duties and rights following from each may not be equal.<sup>75</sup> Scholars have long been critical of this division, arguing that it has not only become unwieldy particularly for “internationalized” armed conflicts,<sup>76</sup> but also frustrated the very justice this body of law was meant to advance.<sup>77</sup> States have a duty to extradite or prosecute instances of grave breaches defined in the Geneva Conventions, however it is not expressly provided for in internal conflicts.

The prevailing opinion maintains that the *aut dedere aut judicare*<sup>78</sup> obligation for grave breaches only applies to international conflicts.<sup>79</sup> Nevertheless, at least one scholar has demonstrated how internal conflicts can be consistently subsumed within the grave breaches regime.<sup>80</sup> Even if this regime applies only to international conflicts, there

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U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

75. See, e.g., M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 223–24 (1998).

76. See James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313 (2003).

77. See Bassiouni, *supra* note 75, at 224.

78. Latin for “extradite or prosecute.”

79. ANDREAS O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 143–44 (2002). One key argument supporting this view relies upon common article 2 to the Geneva Conventions, which states: “[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Geneva Convention I, *supra* note 74, art. 2; Geneva Convention II, *supra* note 74, art. 2; Geneva Convention III, *supra* note 74, art. 2; Geneva Convention IV, *supra* note 74, art. 2. As the extradite or prosecute duty belongs to the “present Convention[s],” article 2 limits this obligation to international conflicts, “between two or more High Contracting Parties.” See, e.g., Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 341 (1998). In addition, as neither common article 3 nor Protocol II mentions penal sanctions, it is maintained that their application to internal conflicts is excluded. O'SHEA, *supra* note 79, at 144–45 (summarizing the arguments typically given for the non-applicability of the grave breaches regime to internal conflicts).

80. In each of the Geneva Conventions, the provisions establishing the duty to extradite or prosecute refer to “any of the grave breaches of the present Convention.” Geneva Convention I, *supra* note 74, art. 49; Geneva Convention II, *supra* note 74, at art. 50; Geneva Convention III, *supra* note 74, art. 129; Geneva Convention IV, *supra* note 74, art. 146. The inclusion of the wording, “the present Convention,” suggests the *aut dedere aut judicare* provision applies to the entire treaty, which contains article 3 treating internal conflicts. The articles defining grave breaches that directly follow those establishing this duty verify that they are “defining the nature of breaches of the other

is a growing trend to blur the division between international and internal conflicts and apply certain rules of war to the latter.<sup>81</sup> In the meantime, the *aut dedere aut judicare* duty does not reach amnesty laws such as Algeria's. Like countless other states, if Algeria can be considered fortunate not to have had its war further complicated by outside state actors, it is tragically ironic that the consequences of this non-involvement under the Geneva Conventions means the difference between furthering accountability and allowing for impunity.

### B. Protocol II

Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II")<sup>82</sup> not only governs Algeria's Dirty War, but also directly addresses amnesties in article 6(5). Ostensibly, this provision seems troublesome for a duty to prosecute:

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articles . . . rather than giving a complete definition of the norms that might be breached." O'SHEA, *supra* note 79, at 146. They provide: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts." Geneva Convention I, *supra* note 74, art. 50; Geneva Convention II, *supra* note 74, art. 51; Geneva Convention III, *supra* note 74, art. 130; Geneva Convention IV, *supra* note 74, art. 147. It is further argued that this reading is bolstered by the *travaux préparatoires* and succeeding practice, demonstrating a purpose not to exclude internal conflicts from the grave breaches regime. O'SHEA, *supra* note 79, at 147–51.

Given the general consensus supporting the former analysis, a reading to the contrary might seem superfluous at this point: Internal armed conflicts have "lost the battle" for inclusion in the grave breaches regime! Nonetheless, it is important to recall that the Trial and Appellate Chambers in *Tadic* differed when considering whether article 2 of the ICTY statute, which encompassed grave breaches under the Geneva Conventions, covered non-international conflicts. Compare Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion on Jurisdiction, para. 50 (Aug. 10, 1995), with Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 78 (Oct. 2, 1995) (noting, however, that "contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict.") In a separate opinion, Judge Abi-Saab agreed with the Trial Chamber, finding no international conflict requirement to article 2 of the ICTY statute. See Prosecutor v. Tadic, Case No. IT-94-1, Separate Opinion of Judge Abi-Saab on the Defense Motion for Interlocutory Appeal on Jurisdiction, sec. 4 (Oct. 2, 1995).

81. See Bassiouni, *supra* note 75, at 224; Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 312–13 (1999); Stewart, *supra* note 76, at 344.

82. Algeria ratified this instrument in August 1989. Secretary General, Status of the Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, U.N. Doc. A/53/287 (Aug. 26, 1998).

At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.<sup>83</sup>

While there have been a handful of decisions treating this article as sanctioning amnesty laws following a civil conflict,<sup>84</sup> this position is dubious. Structurally, the provision on amnesty is nestled at the bottom of a section devoted to penal prosecutions.<sup>85</sup> In keeping with this observation, the International Committee of the Red Cross offered:

The 'travaux préparatoires' of [article] 6(5) indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international humanitarian law.<sup>86</sup>

The sounder interpretation, therefore, is that Protocol II considers the permissibility of amnesty for general criminal sanctions after civil strife, not for serious violations of humanitarian law.<sup>87</sup>

### C. *Convention Against Torture*

There is a very strong basis for finding that the Charter breaches the Convention Against Torture and Other Cruel, Inhuman or Degrading

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83. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 6(5), S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609 [hereinafter Protocol II].

84. The most prominent example is the *AZAPO* case analyzing the validity of South Africa's amnesty law. *Azanian People's Organization (AZAPO) v. President of the Republic of South Africa* 1996 (4) SA 671 (CC) at para. 30 (S. Afr.). At least one commentator has argued that this interpretation is sound based on the plenary meeting notes for Protocol II. See Karen Gallagher, Note, *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149, 176-78 (2000).

85. This implies that "the drafters were primarily interested in reintegrating insurgents into national life." Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 LAW & CONTEMP. PROB. 93, 97 (1996).

86. Letter from Dr. Toni Pfanner, Head of the Legal Division, ICRC Geneva, to The Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Apr. 15, 1997, cited in Douglass Cassel, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROB. 197, 218 (1996).

87. See, e.g. Cassel, *supra* note 86.

Treatment or Punishment (“CAT”)<sup>88</sup> to the extent that it precludes Algeria’s obligation<sup>89</sup> to prosecute those among the security forces and state-militias who carried out acts of torture.<sup>90</sup> Article 7 sets forth that a state party “shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”<sup>91</sup>

Some scholars have read this provision as “not explicitly requir[ing] that a prosecution take place, let alone that punishment be imposed and served,” article 7 only specifying that the state party must “submit the case.”<sup>92</sup> This particular wording may have been chosen, though, in order to “respect the independence of national courts and the procedural rights of defendants by avoiding language that suggested that a particular outcome of prosecutions was required.”<sup>93</sup> Similarly, it has further been noted that the *aut dedere aut judicare* obligation is also included in such fundamental conventions<sup>94</sup> as the Convention on the Prevention and

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88. Algerian ratified CAT on October 10, 1989. Office of the U.N. High Commissioner for Human Rights, Algeria’s Homepage, Status of Ratifications, <http://www.unhcr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=3#3> (last visited Mar. 16, 2008) [hereinafter UNHCHR Algeria].

89. For a well-informed overview of approaches under Islamic law to the (im)permissibility of torture, see Sadiq Reza, *Torture and Islamic Law*, 8 CHI. J. INT’L L. 21 (2007) (calling into doubt a relation between Islamic law and the practice of torture in “Muslim-majority countries”).

90. CAT’s definition of “torture” restricts the scope of the Convention’s application to Algerian security forces and state-armed civil militias. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art.1(1), U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

91. *Id.* art. 7.

92. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2604 (1991). See also Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1020 (2006) (noting CAT is “unclear” regarding scope of duty to prosecute, “leav[ing] a certain degree of discretion to national legal systems in [its] implementation”).

93. Orentlicher, *supra* note 92, at 2604, n.306. See also Michael Scharf, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: The Letter of Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROB. 41, 46–47 (1997) (Such language was intended “to reflect the developments in international standards of due process that had occurred in the nearly forty years since the Genocide Convention was drafted in 1948.”).

94. Naomi Roht-Arriaza, Comment, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451, 463–66 (1990).

Punishment of the Crime of Genocide,<sup>95</sup> and the Geneva Conventions.<sup>96</sup> Seventeen additional international treaties feature this provision, many of which deal with terrorism.<sup>97</sup>

A recent Preliminary Report before the General Assembly offers a current interpretation of CAT's *aut dedere aut judicare* provision:

It seems that the existing treaty practice . . . has already created a sufficient basis for considering the extent to which the obligation to extradite or prosecute, so important as a matter of international criminal policy, has become a matter of concrete legal obligation . . . [S]everal treaties (for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) compel [s]tates parties to introduce rules to enforce the *aut dedere aut judicare* principle, according to which the State which does not order extradition is obliged to prosecute . . . . States will therefore have to set up appropriate mechanisms to ensure the effective enforcement of this principle.<sup>98</sup>

This statement suggests that whether or not a conviction and sentence is ultimately imposed, “submit[ting] the case to [a state party’s] competent authorities” in accordance with article 7 means that at minimum a prosecution must be brought. And fittingly, according to a general comment the Committee Against Torture recently issued: “[A]mnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.”<sup>99</sup>

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95. Convention on the Prevention and Punishment of the Crime of Genocide art. 6, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

96. Geneva Convention I, *supra* note 74, art. 49; Geneva Convention II, *supra* note 74, art. 50; Geneva Convention III, *supra* note 74, art. 129; Geneva Convention IV, *supra* note 74, art. 146.

97. This has led one scholar to observe that “the purpose of the principle is to ensure that those who commit crimes under international law are not granted safe haven anywhere in the world.” Roht-Arriaza, *supra* note 94, at 463–66. For a complete list of these treaties, see *Universal Jurisdiction: The Duty to Enact and Enforce Jurisdiction*, Amnesty International, (2001) at 21, [http://web.amnesty.org/library/pdf/IOR530182001ENGLISH/\\$File/IOR5301801.pdf](http://web.amnesty.org/library/pdf/IOR530182001ENGLISH/$File/IOR5301801.pdf). A recent overview of the issues involved in the *aut dedere aut judicare* principle can be found at Report of the Int’l Law Commission, 394–99, U.N. GAOR, 61st Sess., Supp. No. 10, U.N. Doc. A/61/10 (2006).

98. Special Rapporteur, Int’l Law Commission, *Preliminary Report on the Obligation to Extradite or Prosecute (“Aut Dedere Aut Judicare”)*, para. 38–39, delivered to the General Assembly, U.N. Doc. A/CN.4/571 (June 7, 2006) (prepared by Zdzislaw Galicki) [hereinafter *Extradite or Prosecute Report*].

99. U.N. Comm. Against Torture, General Comment No. 2, Implementation of Article 2 by State Parties, para. 5, U.N. Doc. CAT/C/GC/2 (2008).

The committee invoked this declaration in its May 2008 concluding observations on Algeria's compliance with CAT.<sup>100</sup> Offering strong criticisms, the Committee Against Torture observed that the Charter's provisions amnestying armed groups and state forces "do not conform to the obligation of every state party . . . to pursue the authors of [torture] . . ."<sup>101</sup> After instructing the Algerian state to amend the Charter to clarify that it does not amnesty acts of torture,<sup>102</sup> the committee asserted: "The state party should take without delay all necessary measures to guarantee that . . . the authors of [torture, past or recent, including rape and forced disappearances] are pursued and punished in a manner proportionate to the gravity of acts committed . . ."<sup>103</sup> CAT therefore grounds a clear duty to prosecute perpetrators of torture, which amnesty laws like Algeria's transgress.

#### *D. International Covenant on Civil and Political Rights*

Under the International Covenant on Civil and Political Rights ("International Covenant"),<sup>104</sup> an effective remedy imposes duties upon the Algerian state that conflict with the Charter. This fundamental instrument establishes a states party's commitment to "respect" and "ensure" certain rights<sup>105</sup> as well as provide an "effective remedy" when these rights are violated, "notwithstanding that the violation has been committed by persons acting in an official capacity."<sup>106</sup> Emphasis has been placed on the drafting history, which has been argued to express the need for "ensuring accountability of government authorities for violations, especially by ruling out the defenses of sovereign immunity or following superior orders," a purpose explicitly shown, for example, in the above quoted clause.<sup>107</sup>

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100. U.N. Comm. Against Torture, Examen des Rapports Présentés par les États Parties en Application de l'Article 19 de la Convention, Observations finales du Comité contre la torture, Version Non Editee, para. 11, U.N. Doc. CAT/C/DZA/CO/3 (2008) [hereinafter CAT Observations finales].

101. *Id.* para. 11 (author's translation).

102. *Id.*

103. *Id.* (author's translation).

104. In December 1989, Algeria became a state party to the International Covenant as well as the Optional Protocol to the International Covenant on Civil and Political Rights. UNHCHR Algeria, *supra* note 88.

105. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) art. 2(1), 21st Sess., U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter International Covenant].

106. *Id.* art. 2(3)(a).

107. Roht-Arriaza, *supra* note 94, at 475–76.

Legal scholars have pointed to numerous decisions by the Human Rights Committee (“HRC”) interpreting the right to an effective remedy as requiring a state’s duty to investigate and prosecute breaches,<sup>108</sup> particularly those involving torture and disappearances.<sup>109</sup> Key decisions date back as early as the mid-1980s.<sup>110</sup> While it is accurate that in earlier communications the committee acted more to encourage than assert a duty to prosecute, leaving some discretion to the state,<sup>111</sup> the language it has employed has remarkably strengthened over the years to support an unambiguous obligation. For example, in the case of Algeria alone, the HRC has issued no fewer than six communications concerning torture and disappearances that expressly declare that the Algerian state has a duty to prosecute and punish perpetrators.<sup>112</sup>

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108. Although the International Covenant provides for derogation “in time of public emergency which threatens the life of the nation,” it is not permitted for “articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18.” International Covenant, *supra* note 105, art. 4(1)–(2). A state party may derogate from neither the prohibition on torture contained in article 7, nor articles 6 and 16, which respectively ground the right not to be disappeared or extrajudicially killed. *Id.* art. 6, 16. The derivative rights of nonderogable provisions that follow from article 2(3) are likewise nonderogable, even though this provision is not expressly mentioned in article 4. *See* U.N. Human Rights Comm., General Comment No. 29, State of Emergency (Article 4), para. 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

109. *See, e.g.*, Orentlicher, *supra* note 92, at 2569–71; Roht-Arriaza, *supra* note 94, at 477–78.

110. *See, e.g.*, U.N. Human Rights Comm., Quinteros v. Uruguay, Communication No. 107/1981, para. 15–16, U.N. Doc. CCPR/C/OP/2/107/1981 (1990); U.N. Human Rights Comm., Bleier v. Uruguay, Communication No. 30/1978, para. 13(3), 15, U.N. Doc. CCPR/C/OP/1/30/1978 (1985); U.N. Human Rights Comm., Muteba v. Zaire, Communication No. 124/1982, para. 13, U.N. Doc. A/39/40/124/1982 (1984). These communications did not involve discussion of amnesty laws. Nonetheless, in Rodriguez v. Uruguay, considering Uruguay’s amnesty law, the HRC stated that “amnesties for gross violations of human rights and legislation such as . . . [its] *Ley de Caducidad de la Pretension Punitiva del Estado* are incompatible with the obligations of the State party under the Covenant” and “urge[d]” Uruguay to investigate the allegations of torture and provide for civil redress as well as compensation. U.N. Human Rights Comm., Rodriguez v. Uruguay, Communications No. 322/1988, para. 12(4), 14 U.N. Doc. CCPR/2/3/A/322/1988 (1994).

111. *See* Scharf, *supra* note 93, at 48–52.

112. The following pronouncement is typical of that contained in each of these communications:

[T]he State party is *under an obligation* to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author’s son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author’s son. The State party

Consistent with these communications, the committee considered Algeria in October 2007<sup>113</sup> and picked apart the Charter, stating that the Algerian state should:

Take all appropriate measures to guarantee that grave human rights violations brought to its attention, such as massacres, torture, rape, and disappearances, are made the object of investigations, and that those responsible for such violations, including state agents and members of armed groups, are pursued and respond for their acts.<sup>114</sup>

Engage in a complete and independent investigation into every allegation of disappearance, and after identification, pursue and punish the guilty.<sup>115</sup>

Guarantee that all allegations of torture and cruel, inhumane and degrading treatment are made the object of investigations brought by an independent authority and that those responsible for such acts are pursued and punished in a consequential manner.<sup>116</sup>

In addition, in paragraph 7(a) of its concluding observations, the committee asserted: “[A]rticle 45 should be amended in order to clarify that crimes such as torture, murder, and abductions are exempt from [its]

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*is also under a duty to prosecute criminally, try and punish those held responsible for such violations. The State party is also under an obligation to take measures to prevent similar violations in the future.*

U.N. Human Rights Comm., *Boucherf v. Algeria*, Communication No. 1196/2003, para. 11, U.N. Doc. CCPR/C/86/D/1196/2003 (2006) (emphasis added). *See also*, U.N. Human Rights Comm., *Aber v. Algeria*, Communication No. 1439/2005, para. 9, U.N. Doc. CCPR/C/90/D/1439/2005 (2007); U.N. Human Rights Comm., *Grioua v. Algeria*, Communication No. 1327/2004, para. 9, U.N. Doc. CCPR/C/90/D/1327/2004 (2007); U.N. Human Rights Comm., *Cheraitia v. Algeria*, Communication No. 1328/2004, para. 9, U.N. Doc. CCPR/C/90/D/1328/2004 (2007); U.N. Human Rights Comm., *Medjnoune v. Algeria*, Communication No. 1297/2004, para. 10, U.N. Doc. CCPR/C/87/1297/2004 (2006); U.N. Human Rights Comm., *Bousroual v. Algeria*, Communication No. 992/2001, para. 11, U.N. Doc. CCPR/C/86/992/2001 (2006).

113. The committee probed the state with an extensive list of twenty-seven issues, five of which were directly related to the Charter. U.N. Human Rights Comm., *List of Issues to be Taken up in Connection with the Consideration of the Third Periodic Report of Algeria*, para. 3, 13, 22–23, 25, U.N. Doc. CCPR/C/DZA/Q/3 (2007).

114. U.N. Human Rights Comm., *Examen des Rapports Présentés par les États Parties Conformément à l’Article 40 du Pacte, Observations finales du Comité des droits de l’Homme, Version Non Editee*, para. 7(b), U.N. Doc. CCPR/C/DZA/CO/3/CRP.1 (2007) (author’s translation) [hereinafter HRC Observations finales].

115. *Id.* para. 12(d) (author’s translation).

116. *Id.* para. 15(a) (author’s translation).

application.”<sup>117</sup> Although the HRC’s recommendations were not couched in mandatory language, this does not detract from their legal force, as the committee’s purpose is not to dictate, but rather to approach states in a non-combative manner. These statements concerning the Charter are remarkable in both number and degree of specificity. Given the Charter’s central purpose to extinguish criminal actions<sup>118</sup> as well as the HRC’s statement in paragraph 7(a), the above-quoted references to “pursue and respond” and “pursue and punish” indicate that perpetrators of gross human rights violations are to be held criminally responsible. Thus, in accordance with the International Covenant, Algeria, *inter alia*, must prosecute and punish for the crimes it amnesties, namely, torture, extrajudicial murders and disappearances.

#### *E. African Charter on Human and Peoples’ Rights*

Article 7(1) of the African Charter on Human and Peoples’ Rights (“African Charter”)<sup>119</sup> provides that “[e]very individual shall have the right to . . . an appeal to competent national organs against acts of violating his fundamental rights . . . .”<sup>120</sup> Article 5 expressly prohibits torture, article 6 establishes a right to liberty and security, and article 26

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117. “Moreover, the State party should make sure to inform the public that article 45 does not apply to declarations or proceedings for torture, extrajudicial executions, and disappearances.” *Id.* para. 7(a) (author’s translation).

118. Within a paragraph on criminal punishments, the HRC noted: “[It] believes that [the Charter], which bans all proceedings against units of the defense and security forces, also appears to promote impunity and undermine the right to an effective remedy (articles 2, 6, 7, and 14 of the Covenant).” *Id.* para. 7 (author’s translation). At first glance, the word “appear” may seem at odds with the committee’s strong recommendations. However, the Algerian state vaguely referenced having criminally pursued and punished perpetrators of abuses. U.N. Human Rights Comm., Summary Record of the 2495th Meeting, para. 10, U.N. Doc. CCPR/C/SR.2495 (2007); U.N. Human Rights Comm., Replies of the Government of the Algerian Republic to the List of Issues to be Taken up in Connection with Consideration of the Third Periodic Report of Algeria, U.N. Doc. CCPR/C/DZA/Q/3/Add.1 (2007) (noting prosecutions and convictions for members of “legitimate defense groups,” but for “ordinary offenses”). Moreover, the right to an effective remedy also imposes upon states the duty to investigate and disclose pertinent information, which the Charter does not explicitly bar. If the committee used “appear” instead of simply declaring that the Charter spawns impunity and violates the right to an effective remedy, it was only giving the state the benefit of the doubt.

119. Algeria became a state party in March 1987. African Union, List of Countries Which Have Signed, Ratified / Acceded to the African Union Convention on African Charter on Human and Peoples’ Rights, [http://www.achpr.org/english/ratifications/ratification\\_charter\\_en.pdf](http://www.achpr.org/english/ratifications/ratification_charter_en.pdf) [hereinafter Parties to African Charter].

120. African Charter on Human and Peoples’ Rights art. 7(1), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (June, 27, 1981) [hereinafter African Charter].

sets forth a state's "duty to guarantee the independence of the Courts . . . ."<sup>121</sup> With these particular articles in consideration, the African Commission on Human and Peoples' Rights ("African Commission") issued a set of Principles and Guidelines ("Guidelines"),<sup>122</sup> in which it set forth: "The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy."<sup>123</sup>

Prior to the Guidelines, the commission expressed this principle against such amnesties in consideration of communications submitted against Mauritania.<sup>124</sup> The communications involved claims of "grave or massive violations of human rights," including torture and disappearances.<sup>125</sup> In 1993, the Mauritanian parliament adopted an amnesty law covering these violations, a law that the African Commission noted: "[H]ad the effect of annulling the penal nature of the precise facts and violations . . . [and] leading to the foreclosure of any judicial actions . . . ."<sup>126</sup> The commission declared that the state "has the duty to adjust its legislation to harmonise it with its international obligations,"<sup>127</sup> which, read with the preceding observation, implies a duty to prosecute. Confirming this obligation, the commission instructed Mauritania to "identify and *bring to book* the authors of the violations . . . ."<sup>128</sup>

Given not only the Guidelines' pronouncement on the irreconcilability of general amnesty laws with the African Charter, but also the African Commission's identification of a duty for Mauritania to reframe its amnesty law, the African Charter prohibits amnesty laws for grave human rights violations. This forbiddance includes amnestying violations of torture and disappearances, as in the case of Mauritania, and

121. *Id.* art. 5–6, 26.

122. Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, pmbi., OAU Doc. DOC/OS(XXX)247 (adopted 2001).

123. *Id.* para. C(d). An effective remedy entails "access to justice," "reparation for the harm suffered," and "access to the factual information concerning the violations." *Id.* para. C(b). Furthermore, "[e]very State has an obligation to ensure that . . . any persons whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body[.]" and a claim to a right to a remedy must be "determined by competent judicial, administrative or legislative authorities." *Id.* para. C(c)(1)–(2).

124. 13<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples' Rights, 1999–2000, 150, OAU Doc. AHG/222(XXXVI).

125. *Id.* para. 115–14.

126. *Id.* para. 81–82.

127. *Id.* para. 84.

128. *Id.* at 161 (emphasis added).

extrajudicial killings,<sup>129</sup> all three of which the Charter shields from prosecution.

### III. CUSTOMARY INTERNATIONAL LAW

If the legal invalidity of the Charter is established under Algeria's treaty obligations, academic literature reveals that a duty to prosecute under customary international law is highly controversial, scholars remaining near evenly split.<sup>130</sup> Nevertheless, after examining a wide

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129. See African Charter, *supra*, note 120, art. 4-7.

130. There are those who adopt the position that there is some form of an obligation to prosecute under customary international law. See M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROB. 9, 17-18 (1996) (asserting that the *aut dedere aut judicare* provision applies to crimes against humanity, genocide, war crimes, and torture); Sadat, *supra* note 92, at 1014-22 (suggesting that a custom against amnesties for *jus cogens* crimes may now have come to fruition); Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?* 5 LEIDEN J. INT'L L. 21, 13, 15-16 (1994) (pointing to an emerging norm to prosecute war crimes and crimes against humanity, and possibly disappearances and extrajudicial murders as well, despite "inconclusive" state practice); Orentlicher, *supra* note 92, at 2582-85 (maintaining that a custom requiring punishment of torture, extra-judicial killings, and disappearances exists or is budding); O'SHEA, *supra* note 79, at 228-65 (arguing that state practice and *opinio juris* support an obligation to prosecute extra-legal killings, genocide, torture, customary crimes, and those crimes under the jurisdiction of the ICC); Roht-Arriaza, *supra* note 94, at 489-505 (stating that there is a crystallizing duty to investigate and "take action against" grave human rights violations and advocating for an obligation to prosecute and investigate); Milena Sterio, *Rethinking Amnesty*, 34 DENV. J. INT'L L. & POL'Y 373, 391-94 (2006); William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 529-30 (2001) (noting that amnesty laws are legally invalid where they encompass war crimes, crimes against humanity, genocide, and torture).

Contrastingly, there is a sizeable group of scholars who maintain that a custom requiring prosecution is either lacking and / or too unclear. See Roman Boed, *The Effect of Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT'L L.J. 297, 314-18 (2000) (concluding that although there is likely sufficient *opinio juris*, state practice prevents the assertion that there is a customary duty to prosecute crimes against humanity); Kristin Henard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. INT'L L. 595, 626-28, 648 (1999) (acknowledging that while "international law does seem to be moving the direction of prohibiting the grant of amnesty for international crimes," if certain measures are sufficiently provided for in the context of democratic transition, even amnesty provisions covering international crimes might be acceptable); Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293, 306-15 (2005) (holding that despite "some trends in the progress of duties to prosecute . . . sources do not support the

variety of sources, this section argues that such a duty does in fact exist for the gravest of war crimes as well as crimes against humanity.

#### *A. International Tribunals*

According to the ICTY in the *Furundzija* case, torture's *jus cogens*<sup>131</sup> status has certain consequences, namely, that interstate acknowledgment of national amnesty laws that protect perpetrators of torture "would not be accorded international legal recognition."<sup>132</sup> This non-recognition is based on the inconsistency of maintaining that "treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law."<sup>133</sup>

In "The Lomé Amnesty Decision," the SCSL considered whether the broad amnesty in the Lomé Agreement barred its jurisdiction over international crimes.<sup>134</sup> The SCSL found that it did have universal jurisdiction based on the reasoning that "a state cannot sweep such crimes into oblivion and forgetfulness . . . [as] the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."<sup>135</sup> However, the SCSL noted that a custom prohibiting amnesty for international crimes "is developing," rather than

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incorporation of a generalized duty"); Steven R. Ratner, *New Democracies, Old Atrocities*, 87 GEO. L.J. 707, 726–29 (1999); Scharf, *supra* note 93, at 52–61 (arguing that there is no custom requiring states to refrain from granting amnesty for crimes against humanity); Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 191 (2002) (maintaining that "existing international law is vague about the specifics of a state's obligation to prosecute or punish," but some type of accountability is necessary for grave human rights violations); Trumbull, *supra* note 10, at 290–303 (finding no custom legally invalidating amnesty laws, and asserting that even though blanket amnesty laws might breach certain obligations, the scope of these obligations is uncertain).

131. *Jus cogens* is "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." BLACK'S LAW DICTIONARY 876 (8th ed. 2004)

132. Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, para. 155 (Dec. 10, 1998).

133. *Id.*

134. Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Case No. SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, para 1, 65 (Mar. 13, 2004).

135. *Id.* para. 69, 71–72.

fully formed.<sup>136</sup> In the subsequent *Kondewa* case, contrastingly, Justice Robertson addressed the customary status of amnesties at length in a separate opinion, concluding that a rule does exist that “invalidates amnesties offered under any circumstances to persons most responsible for crimes against humanity (genocide and widespread torture) and the worst war crimes (namely those in Common Article 3 of the Geneva Conventions).”<sup>137</sup>

### *B. Inter-American System*

The Inter-American Court of Human Rights (“Inter-American Court”) has long been at the forefront in framing the duties of states vis-à-vis massive human rights violations. In its seminal case, *Velásquez Rodríguez*, the court interpreted in now famous dicta the “respect” and “ensure” language of the American Convention on Human Rights (“American Convention”)<sup>138</sup> to require states to “prevent, investigate and punish any violation of the rights recognized by the Convention.”<sup>139</sup>

With countless cases of human rights abuses brought before the Inter-American System, amnesty laws have also come into consideration. Not only the Inter-American Commission on Human Rights (“Inter-American Commission”), but also the Inter-American Court have consistently declared the incompatibility of amnesty laws with obligations under the American Convention. For example, in ruling on Peru’s grant of amnesty to security forces and civilians for human rights violations committed between 1980 and 1995, in the *Barrios Altos Case*, the Inter-American Court asserted the following:

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136. *Id.* para. 82. Duties *erga omnes* have been defined as “obligations of a State towards the international community as a whole. By their very nature [they] are the concern of all States. In view of the importance of the right involved, all States can be held to have a legal interest in their protection.” *Barcelona Traction, Light and Power Co., Ltd. (Belg. V. Spain)*, 46 I.L.R. 178, 206 (I.C.J. 1970).

137. *Prosecutor v. Kondewa*, Case No. SCSL-2004-14-AR72(E), Separate Opinion of Justice Robertson on the Decision on Lack of Jurisdiction / Abuse of Process: Amnesty Provided by the Lomé Accord, para. 51 (May 25, 2004). Referring to Protocol II, Justice Robertson reasoned, its amnesty provision “would apply to rank and file participants, but not to authors of [armed] conflicts.” *Id.* para. 32. Acknowledging the existence of state practice undermining a customary rule, Justice Robertson noted that this is at least partially offset by “a hand-wringing quality about the excuses for amnesty by states which grant them.” *Id.* para. 47.

138. American Convention on Human Rights art. 1, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123 (Nov. 22, 1969) reprinted in OAS/Ser.L/V/I.4 rev.12.

139. *Velásquez Rodríguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at para. 166 (July 29, 1988).

All amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance.<sup>140</sup>

Likewise, the Inter-American Commission found amnesty laws in Argentina, Chile, El Salvador as well as Uruguay to be in violation of the American Convention, and reiterated a state's duty to investigate, prosecute and punish.<sup>141</sup>

### C. National Courts

Granting amnesty for acts and omissions "associated with political objectives" provided that an applicant fully discloses relevant facts, South Africa's Promotion of National Unity and Reconciliation Act 34 of 1995 was reviewed by the Constitutional Court of South Africa ("South

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140. Barrios Altos Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at para. 41 (Mar. 14, 2001). At least one scholar has suggested that this case does not establish a duty to prosecute based on the Inter-American Court's subsequent judgment in the case on reparations. See Trumbull, *supra* note 10, at 301, n.96. It is important to note that Peru stated in the initial decision before the Court that it would concede the violation of a right to fair trial and judicial guarantees in failing to punish the crimes in question as well as consider "the viability of criminal and administrative punishments." Barrios Altos Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at para. 35 (Mar. 14, 2001). Moreover, the Inter-American Commission recommended that Peru "punish those responsible for these grave crimes, through the corresponding criminal procedure." *Id.* para. 17. The Court's judgment on reparations actually does reference a duty to prosecute. With regard to non-monetary reparations, the Inter-American Court unanimously ordered the application of its judgment on the merits, which expressly set forth an obligation to "punish those responsible." In addition, in its original judgment, the Court found that Peru violated the right to fair trial and judicial protection, "as a consequence of the enactment and enforcement of [its two amnesty laws]." Barrios Altos Case, Judgement of November 30, 2001 Inter-Am. Ct. H.R. (ser. C) No. 87, at para. 50(5)(a), 3(2)(c), 3(5) (Nov. 30, 2001). And, both amnesty laws were passed in the middle of criminal court proceedings against the perpetrators of the massacre in question. *Id.* para. 2(g)-(m).

141. *E.g.* Argentina, Cases 10.147, 10.181, 10.240, 10.262, 10.309 & 10.311, Inter-Am. C.H.R. Report No. 28/92, OEA/ser. L/V/II.82, doc. 24, para. 40-41 (1992); Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R. Report No. 133/99, OEA/Ser.L/V/II.106, doc. 6 rev. para. 64-67 (1999); Las Hojas v. El Salvador, Case 10.287, 1993 Inter-Am. C.H.R. Report No. 26/92, OEA/Ser.L/V/II.83, doc. 14 (1992); Mendoza v. Uruguay, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, & 10.375, Inter-Am. C.H.R. Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14, para. 46, 50 (1992); Romero y Galdámez, Case 11.481, Inter-Am. C.H.R. Report No. 37/00, OEA/ser.L/V/II.106, doc. 3, rev. at 671, para. 4, 126, 129-31, 141, 158-59 (1999).

African Court”) in the *AZAPO Case*.<sup>142</sup> This body considered international law only for the purposes of interpreting the South African Constitution, which contained the Act in question, and deemed “irrelevant” any duty to the contrary established by international law.<sup>143</sup> Turning to the Geneva Conventions, the court found that the duty to prosecute grave violations therein enshrined was inapplicable based on the distinction between international and internal conflicts, South Africa’s case belonging to the latter type.<sup>144</sup> The court then bolstered this presumption by arguably misinterpreting Protocol II as encouraging national amnesties.<sup>145</sup> And thus, the right to criminal prosecutions was swiftly rejected.<sup>146</sup>

In contrast, in a 2004 decision, the supreme court of Chile denied the application of Chile’s amnesty law to forced disappearances and affirmed prison sentences for defendants found guilty of disappearing persons in 1975.<sup>147</sup> The court relied on the Inter-American Convention of Forced Disappearances of Persons, even though this treaty was not ratified by the country’s parliament, and unanimously declared that forced disappearances constitute a crime against humanity to which no statute of limitations applies.<sup>148</sup> As the crime of disappearing individuals is a continuing violation, the court found that the country’s amnesty law shielding crimes perpetrated between 1973 and 1978 was inapplicable.<sup>149</sup> Significantly, what the court did find binding were principles established

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142. *Azanian People’s Organization (AZAPO) v. President of the Republic of South Africa* 1996 (4) SA 671 (CC) (S. Afr.).

143. *Id.* para. 26.

144. *Id.* para. 29–30.

145. *Id.* para. 30–31. *See supra* Part II(b).

146. For criticism of South Africa’s decision not to prosecute and its Truth and Reconciliation Commission, see for example Ziyad Motala, *The Use of the Truth Commission in South Africa as an Alternative Dispute Resolution Mechanism Versus the International Law Obligations*, 45 SANTA CLARA L. REV. 913 (2005). *See also, e.g.*, Olivia Lin, *Demythologizing Restorative Justice: South Africa’s Truth and Reconciliation Commission and Rwanda’s Gacaca Courts in Context*, 12 ISLA J. INT’L & COMP L. 41 (2005) (questioning the uncompromising acceptance of restorative justice).

147. *Supreme Court of Chile: Case of Miguel Angel Sandoval Rodriguez (November 17, 2004)*, American Society of International Law, International Law in Brief, Oct. 30, 2004, <http://www.asil.org/ilib/2004/11/ilib041119.htm#j2> [hereinafter *Rodriguez Case*].

148. *Id.* Chile is not a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Office of the U.N. High Commissioner for Human Rights, Ratifications and Reservations, <http://www.ohchr.org/english/bodies/ratification/6.htm> (last visited Mar. 16, 2008).

149. *Rodriguez Case*, *supra* note 147.

by the United Nations International Law Commission and given effect by the Nuremberg Tribunal as well as the ICTY.<sup>150</sup>

The supreme court of Argentina went even further in its 2005 landmark decision that struck down the country's two amnesty laws as unconstitutional.<sup>151</sup> The court deemed disappearances a crime against humanity with *jus cogens* status, thereby invalidating any statutory limitations.<sup>152</sup> Furthermore, even though Argentina ratified the American Convention after the amnesty laws, the court established that the amnesty laws prevented the state from satisfying its obligations under the treaty as well as under established principles of international law, as both the purpose and the effect of the amnesty laws were to bar prosecution.<sup>153</sup> In reaching this conclusion, the court closely drew from the jurisprudence of the Inter-American Court, particularly the *Barrios Altos Case*.<sup>154</sup>

#### D. Regional Agreements

The monitoring bodies of the African Charter and the American Convention have interpreted their instruments to establish a duty to prosecute human rights violations<sup>155</sup> and both are widely ratified.<sup>156</sup> In addi-

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150. *Id.* As of December 2006, Chile has found more than 100 people guilty of crimes including disappearances, murders, and torture, and 35 former generals are either sentenced or to stand trial. Larry Rohter, *Chile's Leader Attacks Amnesty Law*, N.Y. TIMES, Dec. 24, 2006.

151. *Supreme Court of Argentina: Case of Julio Héctor Simon (Decision declaring Argentina's Amnesty Laws Unconstitutional) (June 14, 2005)*, American Society of International Law, International Law in Brief, June 28, 2005, available at <http://www.asil.org/ilib/2005/06/ilib050628.htm>.

152. *Id.*

153. *Id.*

154. *Id.* In June 2006, the first prosecution of a former official took place since the invalidation of the amnesty laws. Two months later, the first conviction was issued; a former police officer received twenty-five years for his participation in disappearing a couple and their infant daughter. Joe Shaulis, *Argentina Ex-President Testifies Now-Annulled 'Dirty War' Amnesty Laws Needed*, JURIST, Aug. 31, 2006, <http://jurist.law.pitt.edu/paperchase/2006/08/argentina-ex-president-testifies-now.php>.

155. See *supra* Part II(e), Part III(b).

156. All fifty-three members of the African Union have ratified the African Charter. Parties to African Charter, *supra* note 120. Twenty-five states are parties to the American Convention. Basic Documents Pertaining to Human Rights in the Inter-American System, American Convention, Signatures and Current Status of Ratifications, OAS/Ser.L/V/I.4 rev.12 (Jan. 31, 2007). Nine states have yet to ratify this instrument, including the United States, but, unlike international treaties, support for human rights principles at a regional level does not require near unanimity. See RESTATEMENT OF THE LAW (THIRD): FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(c), cmt. 11 [hereinafter RESTATEMENT].

tion, while the European Court of Human Rights has read article 1<sup>157</sup> of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>158</sup> as grounding a duty to prevent or remedy transgressions of the treaty, the European Commission on Human Rights has construed it as an obligation to prosecute criminally where suitable.<sup>159</sup>

*E. U.N. Resolutions and Activities*

In a 1973 General Assembly resolution, the following principle was framed in obligatory language: "War crimes and crimes against humanity . . . shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment."<sup>160</sup>

Resolutions on specific human rights crimes have also framed the duty to prosecute and punish in mandatory terms. Regarding extra-judicial killings, the Economic and Social Council passed a resolution in 1989 stating: "[I]n no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions."<sup>161</sup> According to the Declaration on the Protection of All Persons from Enforced Disappearances adopted by the General Assembly in 1992, alleged perpetrators of disappearances "shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction."<sup>162</sup> And concerning torture, in a 1999 resolution, the Commission on Human Rights declared: "[T]hose who encourage, order,

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157. Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, 213 U.N.T.S. 221 (Nov. 4, 1950).

158. There are forty-six parties to this instrument. European Court of Human Rights, Basic Texts, Dates of Ratification of the European Convention on Human Rights and Additional Protocols, <http://www.echr.coe.int> (last visited Oct. 18, 2007).

159. Yasmin Naqvi, *Amnesty for War Crimes: Defining the Limits of International Recognition*, 85 INT'L REV. RED CROSS 583, 607 (2003).

160. Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 78 para. 1, U.N. Doc. A/9030 (1973) (adopted with ninety-four in favor, none against, and twenty-nine abstentions) [hereinafter Principles of International Co-operation].

161. Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Econ. & Soc. Council Res. 1989/65, para. 19, U.N. ESCOR Supp. No. 1 at 52, U.N. Doc. E/1989/89 (May 24, 1989).

162. Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, art. 18, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/47/49 (Dec. 18, 1992) (adopted without a vote).

tolerate or perpetrate [torture] must be held responsible and severely punished.”<sup>163</sup>

Furthermore, the 1997 final report prepared by the Special Rapporteur on Amnesty provided that “[e]ven when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds,” which provide, *inter alia*, “perpetrators of serious crimes under international law may not benefit from such measures until”<sup>164</sup> the state has “prosecuted, tried, and duly punished [them]”.<sup>165</sup> Over the past few decades, numerous other resolutions and statements have been made to the same effect.<sup>166</sup>

163. Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, Commission on Human Rights [CHR] Res. 1999/32, para. 4, CHR, 55th Sess., U.N. Doc. E/CN.4/RES/1999/32 (Apr. 23, 1999).

164. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119, CHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 49th Sess., princ. 25(a), U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997).

165. *Id.* princ. 18.

166. Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2712 (XXV), U.N. GAOR, 25th Sess., Supp. No. at 78, para. 2, U.N. Doc. A/8028 (1970) (“[c]all[ing] upon all states to take measures . . . to arrest such persons and extradite them . . . so that they can be brought to trial and punished”) (adopted with fifty-five in favor, four against, and thirty-three abstentions); RESTATEMENT, § 702, cmt. b (asserting that a state violates customary international law “if [the enumerated *jus cogens* human rights violations], especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators”); S.C. Res. 827, para. 2, U.N. Doc. S/RES/827 (May 25, 1993) (unanimously founding the ICTY “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law”); Vienna Declaration and Programme of Action, para. 60, 62, U.N. Doc. A/Conf.157/23 (July 12, 1993) (“States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations . . . [I]t is the duty of all States, under any circumstances . . . if allegations are confirmed [that an enforced disappearance has taken place], to prosecute its perpetrators.”); S.C. Res. 955, para 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the ICTR towards the same end as that of the ICTY); Rome Statute, *infra* note 204, at pmb. (“[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”); Impunity, U.N. Commission on Human Rights, Res. 2002/79, para. 11, U.N. CHR, 58th Sess., U.N. Doc. E/CN.4/RES/2002/79 (Apr. 25, 2002) (“urg[ing] all States to take effective measures to implement their obligations to prosecute or extradite perpetrators of [crimes such as genocide, crimes against humanity, war crimes and torture]”).

Recent statements by U.N. officials adopt the same position against such amnesties. In addition to truth and reconciliation commissions, according to the

While these positions against amnesties for war crimes and crimes against humanity are highly significant, the U.N. has at times either assisted in negotiating such amnesties or offered tacit approval. Examples of the former include peace agreements in Haiti (1993) and South Africa (1994), and an instance of the latter involves a response to El Salvador's amnesty law (1993).<sup>167</sup> It is important to note, however,

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Under-Secretary-General for Peacekeeping Operations: "[W]e must also ensure that any amnesty clauses in peace agreements exclude amnesties for war crimes, genocide, crimes against humanity and other serious violations of international human rights and humanitarian law." Press Release, Working Justice Systems Vital for UN Peacekeeping Success, Security Council Told (Sept. 30, 2003). The Secretary-General also asserted that resolutions and mandates should "[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity." The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 64(c), delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004). Addressing the Security Council, the U.N. Legal Counsel maintained: "Justice should never be sacrificed by granting amnesty in ending conflicts . . . [A]mnesty for international crimes [is] now considered unacceptable in international practice." Press Release, Justice Must Not Be Sacrificed to End Conflicts, Security Council Told (June 22, 2006).

167. Trumbull, *supra* note 10, at 293–94. Although Trumbull also cites a U.N. implicit endorsement of Guatemala's amnesty law, this case should be excluded from the above category, as Guatemala's law was not designed to encompass war crimes, crimes against humanity, or torture. See Annual Report, Guatemala, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc. 7 rev., para. 30 (1996).

The 1996 Abidjan Accord amnestied the acts of the Revolutionary United Front of Sierra Leone. Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. 14 (Nov. 30, 1996). Nonetheless, the case of Sierra Leone ultimately warrants exclusion, as the Special Representative of the Secretary-General added a statement to his signature of the Lomé Accord, asserting "that the UN holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law." S.C. Res. 1315, pmb., U.N. Doc. S/Res/1315 (Aug. 14, 2000) (affirming unanimously). The Security Council itself then "*reaffirm[ed] further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations." *Id.* Pursuant to this resolution, the amended Statute of the SCSL expressly provides: "[A]n 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." Statute of the Special Court for Sierra Leone, art. 10, Jan. 16, 2002, 2178 U.N.T.S. 145.

Finally, U.N. involvement in Liberia should not be so easily construed in favor of amnesties. Signed by a U.N. representative, the 2003 Comprehensive Peace Agreement ending hostilities in Liberia included a vague provision leaving open the possibility of a general amnesty. Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, art. 34, signed Aug. 18, 2003,

that these U.N. endorsements took place over a decade ago, and more recent positions should also be considered, which suggest greater continuity between U.N. principles and practice regarding amnesties.<sup>168</sup> In March 2007, in a report delivered to the Security Council, the Secretary General reminded President Hamid Karzai that his Action Plan on Peace, Justice and Reconciliation must not bar from prosecution genocide, war crimes, crimes against humanity, or gross human rights violations.<sup>169</sup> Similarly, the High Commissioner for Human Rights, in May 2007, advised the Ugandan government and the Lord's Resistance Army to ground their peace agreement in international legal standards, relaying: "[T]here can be no amnesty for war crimes, crimes against humanity, genocide, and gross violations of human rights."<sup>170</sup> And as recently as July 2007, the U.N. stated that it would boycott East Timor's Commission of Truth and Friendship if the body did not amend its terms of reference to exclude amnesty for genocide, war crimes, crimes against humanity, and gross human rights violations.<sup>171</sup>

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available at [http://www.usip.org/library/pa/liberia/liberia\\_08182003\\_cpa.html](http://www.usip.org/library/pa/liberia/liberia_08182003_cpa.html). Despite this, the United Nations Mission in Liberia ("UNMIL") was subsequently established via a Security Council resolution, which "stresse[d] the need to bring to justice those responsible [for human rights violations and atrocities]." S.C. Res. 1509, para. 10, U.N. Doc. S/Res/1509 (Sept. 19, 2003) (adopted unanimously). In November 2005, the Security Council passed an additional resolution that, in the event of Charles Taylor's return to Liberia, UNMIL was mandated to "transfer him or facilitate his transfer to Sierra Leone for prosecution." S.C. Res. 1638, para. 1, U.N. Doc. S/Res/1638 (Nov. 11, 2005) (adopted unanimously).

168. See also Acte d'Engagement, *infra* note 192.

169. The Secretary-General, *Report of the Secretary-General on the Situation in Afghanistan and its Implications for International Peace and Security*, para. 79, delivered to the Security Council and the General Assembly, U.N. Doc. S/2007/152, A/61/799 (Mar. 15, 2007).

170. Press Release, UN Official Urges Ugandan Parties to Put Human Rights at Centre of Talks (May 11, 2007).

171. Press Release, Secretary-General, Secretary-General Says U.N. Officials Will Not Testify at Timor-Leste Commission, As Terms of Reference Include Possible Amnesty for Human Rights Violations, U.N. Doc. SG/SM/11101 (July 26, 2007).

Regarding Algeria specifically, the Special Rapporteur on Violence Against Women, Yakin Ertürk, issued a recent report on women in Algeria that recommended "adopt[ing] a zero tolerance policy towards all forms of violence against women and girls and diligently record, investigate and prosecute all cases." *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Yakin Ertürk*, U.N. Human Rights Council, 70th Sess., Agenda Item 3, para. 104(a), U.N. Doc. A/HRC/7/6/Add.2 (2008). The report specified that "all identified perpetrators of sexual violence should be exempted from amnesty and brought to justice." *Id.* para. 104(b).

*F. State Practice*

Against this abundance of judicial decisions, treaties, resolutions, and statements supporting a duty to prosecute war crimes, crimes against humanity, gross human rights violations, genocide and torture, in the past twenty-five years, numerous countries have issued amnesties for such crimes, including: Afghanistan,<sup>172</sup> Argentina,<sup>173</sup> Cambodia,<sup>174</sup> Chile,<sup>175</sup> Colombia,<sup>176</sup> El Salvador,<sup>177</sup> Haiti,<sup>178</sup> Honduras,<sup>179</sup> Lebanon,<sup>180</sup> Mauritania,<sup>181</sup> Peru,<sup>182</sup> Sierra Leone,<sup>183</sup> South Africa,<sup>184</sup> Uganda,<sup>185</sup> and Uruguay.<sup>186</sup> Some of the provisions of these laws, though, are more tailored in procedure and scope.<sup>187</sup> Nevertheless, what these cases share

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172. Ron Synovitz, *Afghanistan: Amnesty Law Draws Criticism, Praise*, Eurasia Insight, Mar. 17, 2007, <http://www.eurasianet.org/departments/insight/articles/pp0317.7.shtml>.

173. *Supra* Part III(b)–(c).

174. Ronald C. Slye, *The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights*, 22 WIS. INT'L L.J. 99, 101–03 (2004).

175. *Supra* Part III(b)–(c).

176. Juan Forero, *New Colombia Law Grants Concession to Paramilitaries*, N.Y. TIMES, June 23, 2005.

177. *Supra* Part III(b).

178. *Haitians Vote Amnesty But Terms Are Vague*, N.Y. TIMES, Oct. 7, 1994.

179. Honduras: Continued Struggle Against Impunity, Amnesty International, Mar. 27, 1996, 4, [http://web.amnesty.org/library/pdf/AMR370011996ENGLISH/\\$File/AMR3700196.pdf](http://web.amnesty.org/library/pdf/AMR370011996ENGLISH/$File/AMR3700196.pdf) [hereinafter *Struggle Against Impunity*].

180. *Amnesty Ratified in Lebanon*, N.Y. TIMES, Aug. 27, 1991.

181. 13<sup>th</sup> Activity Report of the ACHPR, *supra* note 124.

182. *Supra* Part III(b).

183. *Supra* Part III(a).

184. *Supra* Part III(a).

185. The Amnesty Act, 2000, art. 3, Conciliation Resources, *Our Work, Accord*, Northern Uganda, Additional Keytexts, [www.c-r.org](http://www.c-r.org) (last visited Mar. 16, 2008). In February 2008, the Ugandan government and Lord's Resistance Army / Movement signed an annex agreement that provides for the creation of a special domestic court to prosecute "serious crimes" perpetrated during Uganda's conflict. How this agreement will affect the Amnesty Act and the extent to which "traditional justice mechanisms" will influence or supplement the court's proceedings remains to be seen. Annexure to the Agreement on Accountability and Reconciliation art. 7, 9–14, 23, Feb. 19, 2008, [http://mediacentre.go.ug/uploads/Signed%20Annexure%20to%20Agreement%20on%20Accountability%20and%20Reconciliation.19.02.08%20\\_1\\_.pdf](http://mediacentre.go.ug/uploads/Signed%20Annexure%20to%20Agreement%20on%20Accountability%20and%20Reconciliation.19.02.08%20_1_.pdf).

186. *Supra* Part III(b).

187. For example, the amnesty law adopted in February 2007 in Afghanistan bars the state from bringing prosecutions for war crimes on its own initiative, but acknowledges victims' legal right to seek justice by allowing them to bring complaints against parties. Synovitz, *supra* note 172. The "Justice and Peace Law" in Colombia offers reduced sentences to crimes committed by armed groups, which encompass gross human rights

is a dearth of *opinio juris*, from which state practice must stem.<sup>188</sup> A key question is whether states adopting amnesty laws can be considered to have done so out of a sense of legal obligation when the driving force behind their passage is a fraught or forced attempt to secure public order.<sup>189</sup> These situations have been likened to duress, undermining the relative value of this practice as a manifestation of state-perceived rights and duties.<sup>190</sup> This observation holds true for most, if not all of these amnesty laws.<sup>191</sup>

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violations. Annual Report, Columbia, Inter-Am. C.H.R., OEA/Ser.L/V/II.127, doc. 4 rev. 1, para. 14 (2006); Annual Report, Colombia, Inter-Am. C.H.R., OEA/Ser.L/V/II.124, doc. 5, para. 14, 17 (2005).

188. *Opinio juris*, short for *opinio juris sive necessitates*, signifies “from a sense of legal obligations.” RESTATEMENT § 102, cmt. c.

189. Illustratively, in response to the HRC’s appraisal of the Charter, the Algerian government stated that the Charter “is a political text and should not, therefore, elicit comment from a legal body.” Characterizing the Charter as an expression of “the unanimous will of the Algerian people,” the government then asserted that the Charter and accompanying decrees do not “favour impunity or amnesty.” U.N. Human Rights Comm., Comments by the Government of the People’s Democratic Republic of Algeria to the Concluding Observations of the Human Rights Committee, para. 1, U.N. Doc. CCPR/C/DZA/CO/3/Add.1 (2007).

190. See, e.g., O’SHEA, *supra* note 79, at 262–63. For evidence that Uruguay, Chile, El Salvador, and the United States have acknowledged the importance of prosecuting human rights violations, see Roht-Arriaza, *supra* note 94, at 496–98. *But see* Scharf, *supra* note 93, at 58–59.

191. O’SHEA, *supra* note 79, at 262–63. States have diplomatically recognized other countries’ amnesty laws. For example, the United States, France and the European Union backed the Charter based ostensibly on its accompanying referendum. *Infra* note 268. However, one encounters the same problem in assessing whether this recognition follows from *opinio juris*, a problem that is especially attenuated given that policy considerations, not a legal understanding of humanitarian and human rights principles, may be the overriding factor in issuing approval. See, e.g., *id.* Guidelines for assessing customary human rights law serve to downplay the importance of this particular evidence of custom. According to the Restatement: “[O]ther states are only occasionally involved in monitoring [international human rights] law through ordinary diplomatic practice. Therefore, the practice of states that is accepted as building customary international law of human rights includes some forms of conduct different from those that build customary international law generally.” RESTATEMENT § 701, note 2. The Restatement then proceeds to elaborate upon forms of conduct specific to human rights law. Importantly, the consequence of diplomatic practice towards other states is limited to the following: “invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states.” *Id. Compare, id., with id.* § 102, cmt. b. In the case of Algeria, for example, neither of the above affirmations of the Charter holds weight, as they respectively invoked principles of democracy, not those of human rights, and affirmed rather than criticized the state’s practice.

Furthermore, two recent instances of state practice demonstrate a commitment to respecting a duty to prosecute when amnesty laws are negotiated and ratified. In January 2008, the Democratic Republic of Congo and several armed groups within the country signed a peace agreement that expressly excludes from a prospective amnesty law war crimes, crimes against humanity, and genocide committed from June 2003 to the present.<sup>192</sup> Additionally, Iraq's parliament passed a U.S.-backed amnesty law in February 2008 that precludes its application to persons convicted of crimes against humanity, war crimes, and genocide.<sup>193</sup>

There is also a closely related trend of amnesty laws functioning as stopgaps, where amnestied violations are prosecuted years later at less harrowing junctures. In 1996, the Special Prosecutor for Human Rights in Honduras indicted ten military officers for the 1982 attempted murder and unlawful detention of six students. The officers argued that they were immune from prosecution under the 1991 amnesty law, an argument the country's supreme court unanimously rejected.<sup>194</sup> Beginning in the late 1990s, courts in Chile exploited loopholes in the

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192. Acte d'Engagement art., 4(1), Jan. 23, 2008, [http://www.rfi.fr/radiofr/images/097/Actedengagement\\_Goma080123.pdf](http://www.rfi.fr/radiofr/images/097/Actedengagement_Goma080123.pdf). Significantly, this act was negotiated by the United Nations, International Conference on the Great Lakes Region, United States, African Union, and European Union, and all five parties emphasized article 4, which provides for the exclusion in question. *Id.* pmbl.

193. Qānūn al-'afū al-'ām, art. 2(a), Feb. 17, 2008, [http://parliament.iq/Iraqi\\_Council\\_of\\_Representatives.php?name=articles\\_ajsyawqwqjdasdba46s7a98das6dasda7das4da6d8asdsawewqeqw465e4qweq4wq6e4qw8eqwe4qw6eqwe4sadj&file=showdetails&sid=431](http://parliament.iq/Iraqi_Council_of_Representatives.php?name=articles_ajsyawqwqjdasdba46s7a98das6dasda7das4da6d8asdsawewqeqw465e4qweq4wq6e4qw8eqwe4qw6eqwe4sadj&file=showdetails&sid=431); Statute of the Iraqi Higher Criminal Court, art.1(2), Oct. 18, 2005. For an English translation of the "General Amnesty Law," see Travis Sharp, *Full Text of Iraq's Recently Passed Amnesty Law*, Iraq Insider, Mar. 7, 2008, <http://theiraqinsider.blogspot.com/2008/03/full-text-of-iraqs-recently-passed.html>.

Albeit more modest, regarding impunity more generally, another example of state practice indirectly supporting a duty to prosecute is President Jose Ramos Horta of Timor Leste's request that the East Timor Court of Appeals issue an opinion on whether a pardon passed by East Timor's parliament is constitutional and violates the state's international obligations. This law could shield perpetrators of a range of crimes, such as firearms offenses, crimes against security, and larceny, committed between April 2006 and April 2007. *Timor Crime Law Goes to Court*, THE AGE, July 4, 2007, <http://www.theage.com>; Anselmo Lee, *Open Letter to President Jose Ramos-Horta on Impunity and Rights Violations*, Action in Solidarity with Asia and the Pacific, June 21, 2007, [http://www.asia-pacific-action.org/statements/2007/forumasia\\_openletter\\_tojoseramos-horta\\_210607.htm](http://www.asia-pacific-action.org/statements/2007/forumasia_openletter_tojoseramos-horta_210607.htm).

194. Struggle Against Impunity, *supra* note 179, at 5–6. It appears, however, that subsequent threats from the military thwarted these efforts towards accountability. See SRIRAM, *infra* note 209, at 42.

state's amnesty law in order to prosecute disappearances.<sup>195</sup> Argentina has been fully active in its prosecutions since 2005.<sup>196</sup> In 2005, a Peruvian judge ordered the arrest of more than 100 military officers implicated in a 1988 massacre, and historically, in September 2007, Peru's ex-president Alberto Fujimori was transferred from Chile to Peru, where he will stand trial before the country's supreme court for authorizing murders.<sup>197</sup> Likewise, in late 2006, a Uruguayan court charged eight former police and military officers with kidnapping and conspiracy related to disappearances and overturned as unconstitutional pardons for two of the accused.<sup>198</sup>

### G. A Customary Duty to Prosecute

To synthesize the evidence analyzed, robust *opinio juris* against amnesties for universal crimes is found in international, regional, national judicial decisions<sup>199</sup> as well as administrative opinions, with the

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195. Rohter, *supra* note 150.

196. Most recently, for example, the courts are poised to criminally try the country's ex-president for human rights violations during the Dirty War. James M. Yoch, Jr., *Argentina Ex-President to Face Trial for Alleged 'Dirty War' Rights Abuses*, JURIST, Mar. 22, 2007, <http://jurist.law.pitt.edu/paperchase/2007/03/argentina-ex-president-to-face-trial.php>.

197. Howard Kline, *Peru Ex-President Fujimori Facing Four Trials Starting in November*, JURIST, Oct. 6, 2007, <http://jurist.law.pitt.edu/paperchase/2007/10/peru-ex-president-fujimori-facing-four.php>.

198. Lisl Brunner, *Uruguay Indicts 8 for Operation Condor Disappearances*, JURIST, Sept. 12, 2006, <http://jurist.law.pitt.edu/paperchase/2006/09/uruguay-indicts-8-for-operation-condor.php>.

After or during periods of transition, within the last few decades, countries without amnesty laws have also prosecuted international crimes in their national courts. For example, in 1975, Greece commenced criminal trials against the junta, which overthrew the government in 1967 and carried out torture and arbitrary arrests. (Greece pronounced an "amnesty," however it covered political crimes and did not apply to crimes of the junta.) SRIRAM, *infra* note 209, at 49–50. After the Bolivian congress brought charges in 1986 against members of the security forces, military, and junta, as well as General Luis Garcia Meza, who ruled from 1980–1981, the supreme court ultimately convicted defendants of torture, arbitrary detention, and murder. Though the general became a fugitive, eleven of the guilty were imprisoned. *Id.* at 47. Border guards were convicted in the early nineties for shooting at East Germans who attempted to flee the country, and in 1997 several ex-officials were found guilty on similar charges. *Id.* at 55–56. Also, a number of convictions were issued against members of security forces in Sri Lanka for disappearances. *Id.* at 70.

199. "In determining whether a rule has become international law, substantial weight is accorded to: (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals." RESTATEMENT § 103(2).

limited exception of the South African Court.<sup>200</sup> These are matched by widely supported General Assembly resolutions<sup>201</sup> and plentiful U.N. reports and official statements. With regard to state practice, numerous states have passed amnesty laws for serious international crimes, but this pattern is largely undercut by a lack of requisite *opinio juris*. And states have either repealed, in whole or in part, amnesty laws covering such breaches, and several have begun or attempted to prosecute amnestied crimes.

It is important to confront the bugaboo of this operation: State practice.<sup>202</sup> Based on its relative frailty, critics have often dismissed the argument that a duty to prosecute exists as merely aspirational. Nevertheless, these dismissals fail to take into account the very nature of public humanitarian law and human rights law, which have traditionally relied upon *opinio juris* in order to accommodate normative concerns unique to these bodies of law.<sup>203</sup> Even though a practice of prosecuting

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200. The Lomé Amnesty Decision is complex, as the SCSL generally rejected amnesties for international crimes, but maintained that the amnesty in question did not serve as a bar primarily based upon the jurisdiction expressly conferred upon it by statute, leaving it up to the national court to decide whether to accept the amnesty for jurisdictional purposes. Thus, when the SCSL noted that a customary norm against such amnesties was crystallizing, this should not be construed as *opinio juris* against these laws per se. Rather, it was more a reluctant declaration on the general status of custom. *See supra* Part III(a).

201. For example, General Assembly resolution 3074 was passed by a unanimous vote of ninety-four, with twenty-nine abstentions. Principles of International Co-operation, *supra* note 160. Those abstaining could have openly voted against the resolution, but chose not to, which suggests an extreme uneasiness towards not supporting an affirmative duty to prosecute and punish war crimes and crimes against humanity. Moreover, as backing for U.N. resolutions requires “general support,” RESTATEMENT § 701, note 2., this vote satisfies the threshold for inclusion as custom.

202. There has been significant tension between what has been identified as “modern” and “traditional” custom. If the former prioritizes *opinio juris*, thereby allowing custom to come into being more rapidly, the latter prioritizes state practice, thereby retarding the speed at which custom is realized. *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758–60 (2001). This Note relies upon the Restatement, which exhibits greater sensitivity to human rights and is widely supported in its more flexible approach. *See, e.g.*, Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 8–14, n.72 (1995).

203. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Military and Paramilitary Activities (Nicar. v. U.S.)*, para. 183–209, 1986 I.C.J. 14 (June 27). *See, e.g.*, Frederic J. Kirgis, Jr., *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 146, 149 (1987) (maintaining that while a customary analysis favoring *opinio juris* might seem incoherent with the more traditional emphasis on state practice, this discrepancy can be explained by reference to a sliding scale, positing that the relative weight of either element is based upon “the activity in question and on the

international crimes is modest, it is nonetheless existent and the tendency of states to pass amnesty laws should not outweigh near unanimous *opinio juris*. It is therefore wholly appropriate to assert a duty to prosecute the most serious war crimes<sup>204</sup> and crimes against humanity, which represent the severest classes of violations.

Turning to policy issues, it has been argued that the sheer scale of potential prosecutions to be brought after armed conflicts makes any duty to prosecute unmanageable, especially given the limited strength and independence of the judiciaries in many if not most of the states experiencing such struggles.<sup>205</sup> This position, however, spawns an intolerable paradox: The more pervasive the atrocities, the less accountability may be demanded. If a state does not have sufficient capacity to handle prosecutions, it is all the more reason to support the development of appropriate mechanisms,<sup>206</sup> not to make concessions to a fundamentally deficient status quo. Likewise, allowing states to excuse

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reasonableness of the asserted customary rule”); Joshua Ratner, *Back to the Future: Why a Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act*, 35 COLUM. J.L. & SOC. PROBS. 83, 117-119 (supporting the *Filartiga* approach, and asserting that the decision “implied that, at least in terms of the [customary international law] of human rights, official state pronouncements were of greater evidentiary significance than reports of contrary state practice”); John Tasioulas, *In Defense of Normative Relativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. OF LEGAL STUD. 85 (1996) (arguing in support of the *Nicaragua* approach and noting that “a clearly demonstrated *opinio juris* may establish a norm despite a lack of general state practice consistent with the putative norm”). *But see* Anthony D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L L. 101 (1987) (criticizing *Nicaragua*). *See also, e.g.*, THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 113 (1991) (“The burden of proof to be discharged in establishing custom in the field of human or humanitarian rights is . . . less onerous than in other fields of international law.”).

204. Namely, these are found in Common Article 3 of the Geneva Conventions. As accordingly set forth in the Rome Statute, such crimes include the following: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”; “committing outrages upon personal dignity, in particular humiliating and degrading treatment”; “taking of hostages”; “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.” Rome Statute of the International Criminal Court, art. 8(2)(c), U.N. Doc. A/CONF.83/9 (July 17, 1998) [hereinafter Rome Statute]. For concision, “war crimes” will hereinafter be used to refer to these violations only.

205. Ratner, *supra* note 130, at 719–20. To an extent, prosecutorial discretion will provide relief by limiting judicial scope. There is the danger that this discretion will be used to accomplish victors’ justice, but this may be offset by the principle that those most responsible for the abuses should be prosecuted. *See, e.g.*, Orentlicher, *supra* note 92, at 2601–03.

206. *See Extradite or Prosecute Report, supra* note 98.

themselves based on scarce state resources<sup>207</sup> and the expense of criminal trials is a failure to invest in the rule of law in cases where it matters most.

A duty to prosecute must also confront situations in which an amnesty law is considered the only viable way of ending violence.<sup>208</sup> Based on this dilemma, it has been proposed that in order to form a more nuanced customary rule towards amnesties, striking a balance “between” justice and peace,<sup>209</sup> recognition of an amnesty law should be partially determined by whether the legislation “is reasonably necessary to end the hostilities.”<sup>210</sup> This criterion is quite fair. If a general rule accommodated this factor, however, what will prevent states from timing the legislation of amnesty laws to coincide with what appear to be alleviating circumstances giving rise to an exception? Hopefully, there will also come a time when the state enjoys relative stability within the same generation. Is it then appropriate to maintain support for an active amnesty law when it is no longer justified on this initial prescribed basis?

This question closely relates to the further quandary that prosecutions will shatter a fragile peace, destabilizing a country, as those in power or those who have relinquished power but still exert extreme pressure on the government are more often than not implicated in the crimes to be

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207. See *Azanian People’s Organization (AZAPO) v. President of the Republic of South Africa* 1996 (4) SA 671 (CC) at para. 42–49 (S. Afr.) (including this argument in its section on civil remedies).

208. It is not wholly clear whether a general duty to prosecute is necessarily disadvantageous in this context. A state might be able to drive a hard bargaining line by offering insurgents a choice between a possible commuting of punishment and a maximum sentence, rather than between criminal impunity and continued battle. This would hinge on whether those fighting prefer the risk of maintaining the struggle to the near certainty of some criminal punishment. Also, there would then arise the issue of to what extent a state could commute a given sentence, as in principle punishment must appropriately reflect the gravity of the offense committed. While there are difficulties surrounding the compatibility of prosecutions and ending recurrent violence, there are also hurdles involved in brokering a peace deal that amnesties war crimes and crimes against humanity, as any peace process relies on the assumption that those involved favor peace to sustaining conflict. Favoring the latter is tragically all too easy; this choice follows from entrenched convictions rooted in the very causes giving rise to violence in the first place. See *infra* Conclusion.

209. See Bassiouni, *supra* note 130, at 11–13 (calling into question justice and peace being framed as a dichotomy). For a valuable case study that closely examines states in transition in order to analyze patterns affecting the capacity for accountability and that maintains peace and justice are not opposed, but rather exist along a continuum, see CHANDRA LEKHA SRIRAM, *CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE AND PEACE IN TIMES OF TRANSITION* (2004).

210. See Trumbull, *supra* note 10, at 316–19, 325–27 (arguing for a three-part balancing test, involving process, substance and circumstances).

prosecuted. Considering the balance of power to assist in the determination of whether an amnesty law should be supported is reasonable,<sup>211</sup> but it is not unproblematic. Incorporation of this factor into a legal rule would persistently stamp out state practice.<sup>212</sup> Virtually all states that have amnestied war crimes or crimes against humanity have suffered from political and civil instability when these laws were passed. And again, must it be accepted that the right to demand accountability is forever denied because an amnesty law coincided with a transition towards general welfare, even if power has since shifted to offer the opportunity for fair prosecutions?

The two criteria referenced above—whether amnesty laws are reasonably required to stop conflicts, and whether state balance of power necessitates their adoption—are essentially dilutions of the necessity defense in international law.<sup>213</sup> Although such elements can certainly be incorporated into the content of the rule itself, this would thereby preclude the application of this tailored extraordinary defense,<sup>214</sup> which raises cause for concern. The purpose of the necessity defense's "strict limitations [is] to safeguard against possible abuse,"<sup>215</sup> which, it has been suggested, is precisely the danger these two propositions present.

If ending impunity is to be considered a fundamental universal interest worthy of being furthered, it is crucial to have a strong rule, rather than a

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211. See Arnould, *supra* note 10, at 230–31 (setting aside legal considerations to analyze whether the Charter is justified on the basis of two factors taken from Sriram's study). Sriram, however, identifies these factors to inform whether accountability can be achieved, not whether it should be sought. SRIRAM, *supra* note 209, at 20–33, 203.

212. While this might seem circular, skeptics of a general duty to prosecute do not generally base their objections on the normative desirability of such a rule, but rather on its practical ramifications for developing nations. See, e.g., Trumbull, *supra* note 10 (formulating criteria towards channeling possibly emergent state practice against amnesty laws).

213. To invoke a successful necessity defense in international law, a state must prove that the wrongful act "is the only way for the State to safeguard an essential interest against a grave and imminent peril" and "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole." And necessity may not be invoked where the wrongful act violates a *jus cogens* norm, or where "the State has contributed to the situation of necessity." International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts With Commentaries, art. 25, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles]. For a recent appraisal, see Sarah F. Hill, *The "Necessity Defense" and the Emerging Arbitral Conflict in its Application to the U.S.-Argentina Bilateral Investment Treaty*, 13 LAW & BUS. REV. AM. 547, 549–57 (2007) (supporting the Draft Articles while acknowledging criticisms).

214. The examples provided in the Draft Articles include humanitarian intervention and military necessity. See Draft Articles, *supra* note 213, art. 25, cmt. 20.

215. *Id.* art. 25, cmt. 2.

more specific norm that creates loopholes from its very inception. Where a state explicitly or tacitly uses criminal immunity as an indispensable political bargaining chip in negotiating peace agreements or beneficial transfers of power, a near inevitable reality, and then enshrines this immunity in an amnesty law covering war crimes or crimes against humanity, such law should be treated as a breach, not a customary exception based on expediency.<sup>216</sup> Otherwise, a legal basis for exerting pressure on states to prosecute and supporting those within a state who do seek justice will be continually lost,<sup>217</sup> which is especially troublesome when the arguable “costs” of justice no longer outweigh any “benefits” of peace. This rule is neither radical nor novel. It essentially parallels the approach of the CAT and HRC,<sup>218</sup> African Commission,<sup>219</sup> and Inter-American System.<sup>220</sup>

Although it could be maintained that the presence of a clear obligation will undermine any leverage criminal immunity may possess, this is an overstatement in the majority of cases. A general duty to prosecute is unlikely to pose much of a new threat to perpetrators. When national prosecutions for amnestied international crimes have actually taken place, it is only years later, and only after extremely persistent efforts are paired with opportune circumstances. Also, given the flexibility prosecutorial discretion provides a state, those who stand to lose might be correct in assessing the chances of a criminal suit being brought as slim. Lastly, even without an obligation to prosecute, there is always some menace of accountability. National amnesty laws in certain circumstances do not bar jurisdiction in foreign state courts over crimes against humanity, genocide, and torture,<sup>221</sup> and the ICC prosecutor may choose not to accept a state’s amnesty law.<sup>222</sup> More importantly, the fear among perpetrators that states might not forever abide by their amnesty laws may always remain to some degree, given the frequent unpopularity of these laws and their groundings on power balances, which are subject to shift.

The peace agreements in question, admittedly, present some further difficulty. If foreign states or the U.N. participate in negotiations leading to an amnesty for war crimes or crimes against humanity, there is the

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216. See M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability Over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191 (2003).

217. See Orentlicher, *supra* note 92, at 2547–48.

218. See *supra* Part II(c)–(d).

219. See *supra* Part II(e).

220. See *supra* Part III(b).

221. Boed, *supra* note 130.

222. See Rome Statute, *supra* note 204, art. 17(1)(b), 17(2)(a).

danger of losing credibility. Parties to peace agreements may require arbiters to commit on paper to such legally compromising terms. One option is to concede the illegal provisions, when absolutely necessary, but append a disclaimer, as the U.N. official did in the case of the Lomé Accords. This might be considered a superficial response, but the danger of realpolitik is precisely why international law is formed not only by what states do and say, but also by *opinio juris*.

#### IV. ALGERIA AND THE DUTY TO PROSECUTE

Algeria is thus confronted with two sets of legal obligations. While the Charter breaches those established by treaty,<sup>223</sup> does it amnesty war crimes and crimes against humanity, thereby contravening the general duty to prosecute? This section suggests that the Charter extinguishes liability for both categories of crimes. Furthermore, prosecuting these violations would be in keeping with the desires of a considerable number of Algerians whose lives these violations have affected.

##### *A. The Charter: Amnestying War Crimes and Crimes Against Humanity*

The Charter unquestionably amnesties war crimes.<sup>224</sup> Encompassing disappearances, torture, and extrajudicial killings,<sup>225</sup> war crimes must

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223. In Algeria, international and regional agreements are accorded a higher status than domestic law: "Treaties ratified by the President of the Republic in accordance with the conditions provided for by the Constitution are superior to the law." CONSTITUTION DE LA RÉPUBLIQUE ALGÉRIENNE DÉMOCRATIQUE ET POPULAIRE [Constitution] ch. 2, art. 132 (Alg.). The country's Constitutional Council embraced this provision in a 1989 decision, which stated: "[A]fter its ratification and publication, every convention is integrated into national law and through application of article 123 [sic] of the constitution, acquires a superior authority to the law, allowing every Algerian citizen to claim it in front of the courts." Décision n° 1-D-L-CC-89 of 20 août 1989 relative au code électoral, available at <http://www.conseil-constitutionnel.dz/indexFR.htm> (author's translation).

224. War crimes and crimes against humanity may take place within an internal armed conflict, and thus non-state actors are responsible. William A. Schabas, *Theoretical and International Framework: Punishment of Non-State Actors in Non-International Armed Conflict*, 26 *FORDHAM INT'L L.J.* 907, 918–22 (2003). See also, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391, art. 2, U.N. GAOR Supp. No. 18, 23d Sess., U.N. Doc. A/7218 (Nov. 26, 1968); *Kadic v. Karadzic*, 70 F.3d 232, 240 (1995) (setting forth that non-state actors may violate war crimes and genocide).

The armed groups in Algeria satisfy the non-state actor requirements of Protocol II, as "under responsible command, [they] exercise[d] such control over a part of [Algeria's] territory as to enable them to carry out sustained and concerted military operations[.]" Protocol II, *supra* note 83, art. 1. They also fall under the less stringent

have been carried out against civilians.<sup>226</sup> In addition, they must have taken place within the context of an “armed conflict,” which has been defined by the ICTY in *Tadic* as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>227</sup> As violence by armed groups broke out in Algeria towards the end of 1992 and the regime was soon after unable to put a stop to their daily attacks,<sup>228</sup> by definition, armed conflict began at this juncture. The point of commencement appears clear enough, but has the armed conflict ended, and if so, when? Again, according to the ICTY: “[I]nternational humanitarian law . . . extends beyond the cessation of hostilities until . . . a peaceful settlement is achieved.”<sup>229</sup> While violence between the regime and insurgency noticeably declined by 1999<sup>230</sup> and many members of armed groups have laid down their weapons, it is quite difficult to conclude that a “peaceful settlement” has in fact occurred when fatal clashes and bomb attacks have persisted.<sup>231</sup> Thus, war crimes involve the period from late 1992 through the present. Post-1992, particular Islamist factions at different times abducted, tortured,<sup>232</sup> and murdered civilians.<sup>233</sup> And it has been extensively documented that state security forces committed all three of the above crimes against non-combatants.<sup>234</sup>

Considerably more complex by definition, crimes against humanity introduce a series of necessary elements, ensuring that their intended superlative severity is preserved.<sup>235</sup> This category of crimes has been

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definition of non-state actors in the Rome Statute. *See* Rome Statute, *supra* note 204, art. 8(2)(f).

225. *See* Rome Statute, *supra* note 204, art. 8(2)(c).

226. These are “persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted.” Protocol II, *supra* note 83, art. 4(1). The term “civilian” will hereinafter be referred to in this sense.

227. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

228. EVANS & PHILLIPS, *supra* note 30, at 186–88.

229. Prosecutor v. Tadic, Case No. IT-94-1, Defense Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

230. EVANS & PHILLIPS, *supra* note 30, at 261.

231. *See infra* notes 302–306 and accompanying text.

232. *Fear and Silence*, *supra* note 38, at 24; Smith, *infra* note 294.

233. *See infra* Part IV(a).

234. *See infra* Part IV(a).

235. This class of crimes appears in various permutations in the Nuremberg Charter as well as the Statutes of the ICTY, ICTR, ICC, SCSL, and Iraqi Higher Criminal Court (“IHCC”). *Compare* Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of

most recently set forth in the Rome Statute,<sup>236</sup> and may include the acts amnestied by the Charter.<sup>237</sup> Crimes against humanity are defined in the Rome Statute as any of the enumerated acts when (1) “committed as part of a widespread or systematic,” (2) “attack directed against any civilian population,” (3) “with knowledge of the attack.”<sup>238</sup> The second factor further requires a state or organizational policy.<sup>239</sup>

Enforced disappearances are inherently such crimes when committed on a widespread or systematic basis.<sup>240</sup> As this requirement is framed in the disjunctive, “widespread” alone is sufficient<sup>241</sup> and has been defined as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of

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Soviet Socialist Republics 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, 82 U.N.T.S. 279; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, S.C. Res. 827 (May 25, 1993); Statute of the International Criminal Tribunal For Rwanda, art. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Rome Statute, *supra* note 204, art. 7; Statute of the Special Court for Sierra Leone, art. 10, Jan. 16, 2002, 2178 U.N.T.S. 145; Statute of the Iraqi Higher Criminal Court, art. 12, Dec. 10, 2003. For exploration of the development of crimes against humanity, see Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT'L L.J. 73, 77–91 (2004); Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307, 308–14 (2000); Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 457 (1998); Darryl Robinson, *Developments in International Criminal Law: Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT'L L. 43, 44–45 (1999).

236. The definition of crimes against humanity is near identical in the ICC and IHCC statutes. Compare Rome Statute, *supra* note 204, art. 7, with Statute of the Iraqi Higher Criminal Court, art. 12, Dec. 10, 2003.

237. Rome Statute, *supra* note 204, art. 7(1)(a), 7(1)(f), 7(1)(i) (murder, torture, and enforced disappearances, respectively).

238. *Id.* art. 7(1).

239. An “attack directed against any civilian population” is defined as a “course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” Rome Statute, *supra* note 204, art. (7)(2)(a).

240. See International Convention for the Protection of All Persons from Enforced Disappearance art. 5, U.N. Doc. E/CN.4/2005/WG.22/WP.1/REV.4 (Sept. 23, 2005) [hereinafter Convention on Disappearance].

241. “Systematic basis” is presently harder to demonstrate in this case. It must be “pursuant to a preconceived plan or policy.” Draft Code of Crimes Against the Peace and Security of Mankind With Commentaries, art. 18, cmt. 3, in Report of the International Law Commission on the Work of Its Forty-Eight Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 14, UN Doc. A/51/10 (1996).

victims.”<sup>242</sup> With no less than 6146 Algerians disappeared by the state,<sup>243</sup> the scale of the missing was one of the worst in the last decade of the twentieth century.<sup>244</sup> These acts were widespread, and therefore are crimes against humanity. Concerning armed groups, it is unlikely that the many abductions they carried out<sup>245</sup> fit the definition of “enforced disappearances”<sup>246</sup> because these groups were not “political organizations” in the usual sense of the term; rather, they were highly fractured entities composed of various informal cells that worked under distinct local leadership.<sup>247</sup> Quite probably, most victims who were abducted were shortly thereafter murdered. There were, however, cases of armed groups holding women captive in their camps and later releasing them, at least sometimes after raping them. While such instances could fit the definition of other enumerated crimes against humanity,<sup>248</sup> approximately how many women lived through this type of experience is unknown.<sup>249</sup>

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242. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 580 (Sept. 2, 1999). See also Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, para. 649. (May 7, 1997); Prosecutor v. Mile Msksic, Miroslav Radic, and Veselin Sljivancanin, (Case No. IT-95-13-R 61) Review of the Indictment Pursuant to Rule 61 of the Rules and Procedure and Evidence, April 3, 1996, at para. 29, *quoted in* Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para. 643 (May 7, 1997).

243. See *supra* note 51 and accompanying text.

244. *Time for Reckoning*, *supra* note 42.

245. Algeria: Human Rights Developments 1999, Human Rights Watch, <http://www.hrw.org/wr2k/Mena-01.htm> (last visited Mar. 16, 2008).

246. Rome Statute, *supra* note 204, art. 7(2)(i).

247. EVANS & PHILLIPS, *supra* note 30, at 183, 221, 231; Algeria: Human Rights Developments 1995, *supra* note 36. While the FIS was certainly a political organization, generally, it does not appear that those who committed violent acts against civilians were directly connected to the party. Algeria: Human Rights Developments 1993, Human Rights Watch, [http://www.hrw.org/reports/1994/WR94/Middle-01.htm#P63\\_37797](http://www.hrw.org/reports/1994/WR94/Middle-01.htm#P63_37797) (last visited Mar. 16, 2008); Algeria: Human Rights Developments 1996, Human Rights Watch, [http://www.hrw.org/reports/1997/WR97/ME-01.htm#P89\\_36462](http://www.hrw.org/reports/1997/WR97/ME-01.htm#P89_36462) (last visited Mar. 16, 2008). See also *supra* Part I(b). Moreover, despite some ambiguous statements made by the FIS early on in the conflict, representatives came to clearly condemn and disassociate the party from abuses on civilians. ROBERTS, *supra* note 43, at 172; Algeria: Human Rights Developments 1992, Human Rights Watch, [http://www.hrw.org/reports/1993/WR93/Mew-01.htm#P71\\_39546](http://www.hrw.org/reports/1993/WR93/Mew-01.htm#P71_39546) (last visited Mar. 16, 2008); Algeria: Human Rights Developments 1993, *supra* note 247; Algeria: Human Rights Developments 1994, Human Rights Watch, [http://www.hrw.org/reports/1995/WR95/MIDEAST-01.htm#P90\\_29860](http://www.hrw.org/reports/1995/WR95/MIDEAST-01.htm#P90_29860) (last visited Mar. 16, 2008); Algeria: Human Rights Developments 1995, *supra* note 36.

248. See Rome Statute, *supra* note 204, art. 7(1)(e), 7(1)(h).

249. EVANS & PHILLIPS, *supra* note 30, at 219–20.

Regarding torture, tens of thousands of Algerians have suffered this abuse.<sup>250</sup> In all likelihood, state forces were responsible for the vast majority of these violations,<sup>251</sup> thereby establishing a widespread practice. The second factor for crimes against humanity, “attack directed against any civilian population,” is also satisfied. State-led torture was directed against civilians, its victims having protected status whether or not they actively participated in the hostilities, as they were necessarily detained at the time they were tortured.<sup>252</sup> These well-orchestrated<sup>253</sup> acts of torture carried out at numerous secret detention facilities<sup>254</sup> fulfill the state policy requirement, which is informal and may be deduced from the acts in question.<sup>255</sup> The last requirement, “knowledge of the attack,” refers to the perpetrator “understand[ing] the overall context of his act,”<sup>256</sup> a relatively low threshold that is easily satisfied. Thus, state forces committed crimes against humanity when they tortured.

Lastly, extrajudicial killings perpetrated by both security forces and armed groups also constitute crimes against humanity. It is first

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250. See *supra* Part I(b). For testimonies of Algerians who were tortured, see *Algérie, La machine de mort: Témoignages de victimes de la torture*, Algeria-Watch (Oct. 2003), [http://www.algeria-watch.org/pdf/pdf\\_fr/machine\\_mort\\_temoignages.pdf](http://www.algeria-watch.org/pdf/pdf_fr/machine_mort_temoignages.pdf).

251. Based on information culled from a wide variety of sources, a detailed chart of 300 Algerians who were tortured can be found at *Algérie, La machine de mort: 300 cas de tortures*, Algeria-Watch (Oct. 2003), [http://www.algeria-watch.org/pdf/pdf\\_fr/machine\\_mort\\_300\\_cas.pdf](http://www.algeria-watch.org/pdf/pdf_fr/machine_mort_300_cas.pdf). 296 people were abducted by state agents and the remaining 4 were the victims of civil militias. *Id.* at 28, 42, 44–45.

One occasionally encounters reported instances of torture by armed guerrillas. *Fear and Silence*, *supra* note 38, at 24; Smith, *infra* note 294. Although it is possible that this practice was frequent enough to be widespread, at present, the available evidence does not seem to suggest it.

252. Rome Statute, *supra* note 204, art. 7(2)(e); Protocol II, *supra* note 83, art. 4(1).

253. *Algérie, La Machine de mort: Un rapport sur la torture, les centres de détentions secrets et l'organisation de la machine de mort*, Algeria-Watch (Oct. 2003), [http://www.algeria-watch.org/pdf/pdf\\_fr/machine\\_mort\\_rapport.pdf](http://www.algeria-watch.org/pdf/pdf_fr/machine_mort_rapport.pdf).

254. *Fear and Silence*, *supra* note 38.

255. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, para. 653 (May 7, 1997). As an illustration of just how commonplace torture was in Algeria, consider what one local policeman is reported to have told a mother seeking information about her disappeared son, “Of course we torture people: they always have something to confess. You’re all terrorists. You gave birth to terrorists. So everything that’s happening is normal.” Kristianasen, *infra* note 293.

256. *Prosecutor v. Kayishema*, Case No. ICTR-95-1, Judgment, para. 133 (May 21, 1999). See also *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, para. 659 (May 7, 1997) (stating “the perpetrator must know that there is an attack on the civilian population, know that his act fits with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict,” where knowledge may be actual or constructive).

important to acknowledge that identifying which murders were directed against civilians is inherently fact specific.<sup>257</sup> Analysis is further complicated by the widely held suspicion that the regime infiltrated certain armed groups and incited or recruited members to perpetrate barbarous acts for the purpose of justifying the 1992 coup and shifting public opinion in its favor.<sup>258</sup> Similarly, the regime carried out indiscriminate attacks and then sought to attribute them to Islamist

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257. In deciding whether an attack was “directed against any civil population,” the ICTY set forth the following criteria:

*[I]nter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.

Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, para. 91 (June 12, 2002) (stating that “the civilian population is the primary object of the attack.”). *See also* Prosecutor v. Musema, Case No. ICTR-96-13-A, para. 207 (Jan. 27, 2000) (“[T]he fact that there are certain individuals among the civilian population who are not civilians does not deprive the population of its civilian character.”).

258. *See generally*, e.g., MOHAMMED SAMRAOUI, CHRONIQUE DES ANNÉES DE SANG, ALGÉRIE: COMMENT LES SERVICES SECRETS ONT MANIPULÉ LES GROUPES ISLAMISTES (Denoe 2003). Such activities are infamously well known among scholars on Algeria:

[Senior military officers have] been linked to such high-profile incidents as kidnapping of three officials from the French embassy in Algiers in October 1993; the high-jacking of an Air France Airbus in 1994; bombings of France’s public transport system, including the Paris Metro, in 1995; the kidnapping and murder of the Tibhirine monks in 1996, and a number of other such incidents.

Jeremy Keenan, *Waging War on Terror: The Implications of America’s ‘New Imperialism’ for Saharan Peoples*, 10 J. N. AFR. STUD. 619, 625 (2005) (describing the regime’s alleged staging of “terrorist” activities in the Sahara-Sahel region beginning in 2002). Regarding the junta’s orchestration of the 1995 Paris bomb attacks, which were blamed on Algerian fanatics, one former Algerian secret police agent, for example, testified that he was instructed to bribe European officials, who were complicit, and personally delivered \$90,000 in hush money to a member of the French parliament. John Sweeney & Leonard Doyle, *Algeria Regime ‘Was Behind Paris Bombs,’* Manchester Guardian, Nov. 16, 1997, <http://desip.igc.org/Algerian.html>. *See also*, e.g., EVANS & PHILLIPS, *supra* note 30, at 221–24, 287–88; SOUAÏDIA, *supra* note 35, at 56–59; YOUS, *supra* note 35; *The Junta In Court*, *supra* note 26 (quoting testimony from the former Chief of Special Units, who relayed that a colonel, referring to a leader of an armed group known for slaughtering women and children, told him, “[H]e is our man, you will work together with him”).

factions.<sup>259</sup> These tactics ultimately led to a commonly asked question among Algerians, *qui tue qui*—“who’s killing whom”?

Notwithstanding these challenges, certain reasonable appraisals can be made. Extrajudicial killings by the regime were widespread. Based only on the most reliable and sufficiently specific estimates, hundreds of extrajudicial killings were committed by security forces in 1995, 1997, and 1998,<sup>260</sup> Such acts were also reported in 1994,<sup>261</sup> 1995, 1999, 2000, and 2002, although in lesser general numbers.<sup>262</sup> In December 2004, an investigator authorized by the government even confessed that security forces are thought to have killed a total of 5200 civilians in “illegal acts.”<sup>263</sup> State forces will again inevitably fall within the two additional requirements, organizational policy<sup>264</sup> and “knowledge of the attack.”

259. For example, one family reported that after security forces killed five of their immediate male relatives in front of them in their home, the security forces asked them to sign a statement that “terrorists” committed the murders. Annual Report for Algeria 1997, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=C31D660257EB53E080256A0F005BEA9E&c=DZA> (last visited Mar. 16, 2008). See also, e.g., EVANS & PHILLIPS, *supra* note 30, at 194–98, 225, 229–31, 246, 249–50, 261–62, 287, 296.

260. Annual Report for Algeria 1995, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=DC29278C303A801680256A0F005BB4B1&c=DZA> (last visited Mar. 16, 2008); Annual Report for Algeria 1997, *supra* note 259; Annual Report for Algeria 1998, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=C91D0197E237ADDE80256A0F005C025D&c=DZA> (last visited Mar. 16, 2008).

261. For a list of over 100 reported instances of murder(s) carried out by state security forces, the majority of which occurred in 1994, see COMITÉ ALGÉRIEN DES MILITANTS LIBRES DE LA DIGNITÉ HUMAINE ET DES DROITS DE L’HOMME, LIVRE BLANC SUR LA RÉPRESSION EN ALGÉRIE (1991–1994) (OU L’HISTOIRE DE LA TRAGÉDIE D’UN PEUPLE) TOME I 63–77 (Hoggar 1995).

262. Algeria: Human Rights Developments 1995, *supra* note 36; Algeria: Human Rights Developments 1994, *supra* note 247; Annual Report for Algeria 1999, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=A0729B516A6823B080256A0F005C1B25&c=DZA> (last visited Mar. 16, 2008); Annual Report for Algeria 2000, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=CCCFC26F04013D12802568E400729EC9&c=DZA> (last visited Mar. 16, 2008); Annual Report for Algeria 2002, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=2709795C610F55D980256BAE0056CA88&c=DZA> (last visited Mar. 16, 2008).

263. ROBERT FISK, THE GREAT WAR FOR CIVILIZATION: THE CONQUEST OF THE MIDDLE EAST 584 (2005).

264. As an illustration of this policy, consider what signs placed on the corpses in one city read: “[T]his is the fate reserved for those who encourage the terrorists.” Some of the murdered had shattered skulls. Some had had their organs removed. One man’s face was beyond recognition due to torture. Firemen told the Algerian Committee of Free Activists for Human Dignity and Human Rights that “they had received orders ‘from the top’ not to remove the cadavers before eight in the morning so that the population could see them in the meantime.” COMITÉ ALGÉRIEN DES MILITANTS LIBRES DE LA DIGNITÉ HUMAINE ET DES DROITS DE L’HOMME, *supra* note 261, at 75–76 (author’s translation).

Armed groups also murdered civilians. Scores of these deaths, frequently estimated to run into the hundreds, were reported each year between 1993 and 2004. Given the clandestine nature of the conflict, however, these approximate death tolls differentiate between neither causes of death—whether death was due to a massacre, bomb attack, or individual assault—nor groups of non-state actors.<sup>265</sup> Even if only a fraction of these deaths were due to murder and correctly attributed to a given faction, they would almost certainly satisfy the widespread requirement. Inferring the remaining two factors should prove unproblematic. Thus, murders by opposition forces amount to crimes against humanity, and each of the three amnestied abuses perpetrated by the regime likewise fit within this category.

*B. Legitimacy by “Democratic” Referendum?*

Under Algeria’s treaty obligations as well as the customary duty to prosecute, a referendum on the amnestying of grave human rights violations,<sup>266</sup> war crimes, or crimes against humanity is *ipso facto* void. Nevertheless, the legal unsoundness of the Charter established in Parts II and III of this Note may seem troubling, as the official vote tally for the

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265. Algeria: Human Rights Developments 1993, Human Rights Watch, [http://www.hrw.org/reports/1994/WR94/Middle-01.htm#P63\\_37797](http://www.hrw.org/reports/1994/WR94/Middle-01.htm#P63_37797) (last visited Mar. 17, 2008); Algeria: Human Rights Developments 1994, Human Rights Watch, [http://www.hrw.org/reports/1995/WR95/MIDEAST-01.htm#P90\\_29860](http://www.hrw.org/reports/1995/WR95/MIDEAST-01.htm#P90_29860) (last visited Mar. 17, 2008); Algeria: Human Rights Developments 1995, Human Rights Watch, [http://www.hrw.org/reports/1996/WR96/MIDEAST-01.htm#P137\\_26320](http://www.hrw.org/reports/1996/WR96/MIDEAST-01.htm#P137_26320) (last visited Mar. 17, 2008); Algeria: Human Rights Developments 1996, Human Rights Watch, [http://www.hrw.org/reports/1997/WR97/ME-01.htm#P89\\_36462](http://www.hrw.org/reports/1997/WR97/ME-01.htm#P89_36462) (last visited Mar. 17, 2008); Algeria: Human Rights Developments 1997, Human Rights Watch, [http://www.hrw.org/worldreport/Mideast-01.htm#P207\\_37583](http://www.hrw.org/worldreport/Mideast-01.htm#P207_37583) (last visited Mar. 17, 2008); Algeria: Human Rights Developments 1998, Human Rights Watch, <http://hrw.org/worldreport99/mideast/algeria.html> (last visited Mar. 17, 2008); Annual Report for Algeria 1997, *supra* note 259; Annual Report for Algeria 1998, *supra* note 260; Annual Report for Algeria 1999, *supra* note 262; Annual Report for Algeria 2000, *supra* note 262; Annual Report for Algeria 2001, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=426DF7C05D7F48A580256A16004BE7EE&c=DZA> (last visited Mar. 17, 2008); Annual Report for Algeria 2002, *supra* note 262; Annual Report for Algeria 2003, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=2A0BB2E9CC487AEC80256D24003790E9&c=DZA> (last visited Mar. 17, 2008); Annual Report for Algeria 2004, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=29F1B4B25091AC9980256E9E005A99AC&c=DZA> (last visited Mar. 17, 2008).

266. See, e.g., *Mendoza*, *supra* note 141, para. 32 (referring to Uruguay’s plebiscite on its amnesty law and stating that “[a] *fortiori*, a country cannot by internal legislation evade its international obligations”).

Charter referendum might suggest wide support.<sup>267</sup> On this assumption, representatives of the United States, France, and the European Union formally endorsed the Charter.<sup>268</sup> These officials were apparently undisturbed by the following question: Does democracy support the proposition that a majority vote can be taken on the *denial* of citizens' rights?<sup>269</sup> The paramount issue, though, is whether the referendum accurately reflects the wishes of the victims, which presents difficult and divisive issues. Virtually all of Algeria suffered, but are all Algerians victims, as the state maintains?<sup>270</sup> While the capacity for human compassion towards the pain of others should not be denied, is vicarious the same as personally endured suffering?

Even if one responds to this question in the affirmative—deeming the overwhelming majority of the Algerian people to be the victims—there is still good reason to be highly skeptical of the referendum as an expression of broad backing for the Charter. Unverified by any independent audit,<sup>271</sup> the plebiscite took place in a police state where

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267. See *Algeria Today*, *supra* note 64.

268. *U.S. Respects Algeria Reconciliation Charter*, State Welch Says, U.S. International Information Programs, Mar. 20, 2006, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=March&x=20060320160211ndyblehs0.1067469>; Press Release, Ministry of Foreign Affairs Spokesperson, Paris, Algeria / Referendum (Sept. 30, 2005); Press Release, European Union, Declaration by the Presidency on Behalf of the European Union on Algeria's Referendum on a Charter for Peace and National Reconciliation (Oct. 10, 2005).

269. U.S. and French interests are not limited to significant investment ties with Algeria. Both American and French intelligence services have long been suspected of collaborating with Algerian secret services during the Dirty War and beyond. See, e.g., Keenan, *supra* note 258, at 628. For an in depth look at France's support for and complicity with Algeria's mafia-like insiders in their staging of violence and manipulations of public opinion, see generally LOUNIS AGGOUN & JEAN-BAPTISTE RIVOIRE, *FRANÇALGÉRIE, CRIMES ET MENSONGES D'ÉTATS: HISTOIRE SECRÈTE, DE LA GUERRE D'INDÉPENDANCE À LA "TROISIÈME GUERRE" D'ALGÉRIE* (Découverte 2004). An overview of this book in English can be found at *Françalgérie: On the Secret War in Algeria and French Machinations*, Algeria-Watch, July 2004, <http://www.algeria-watch.org/en/aw/francalgerie.htm>.

After September 11th, the United States closely allied itself with Algiers, President Bush offering unwavering approval of the regime's strategy in response to "terrorism." E.g. EVANS & PHILLIPS, *supra* note 30, at 278–79, 287–89, 292. In a display characteristic of the Bush administration's "dead on" understanding of the Middle East and North Africa, the Assistant Secretary of State for Near Eastern and North African Affairs told the *New York Times*: "Washington has much to learn from Algeria on ways to fight terrorism." Steven R. Weisman, *U.S. to Sell Military Gear to Algeria to Help it Fight Militants*, N.Y. TIMES, Dec. 10, 2002.

270. See Draft Charter, *supra* note 59.

271. Slackman, *supra* note 65.

electoral deceit has been a recurrent allegation.<sup>272</sup> There were likewise serious charges of fraud surrounding the referendum in question.<sup>273</sup> Moreover, voters might not have fully appreciated the significance of the text they were actually given. Those who did vote had only forty-five days to consider the Draft Charter, which differed from the final legislation in key aspects.<sup>274</sup> Freedom of the press is quite poor in Algeria.<sup>275</sup> Journalists have often been harassed and sacked with heavy defamation charges under strict press laws.<sup>276</sup> State security forces, for example, “savagely attacked” one French journalist who attempted to cover the amnesty campaign in September 2005.<sup>277</sup> Radio and television, the two chief media outlets, are primarily government controlled.<sup>278</sup> No viewpoint critical of the amnesty was expressed on television.<sup>279</sup> Fittingly, it has been reported that there was little if any debate on the Charter leading up to the referendum,<sup>280</sup> critics of the law were swiftly

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272. See *Observations du Collectif des Familles de Disparu(e)s en Algérie sur le respect par l'Algérie de ses obligations découlant du Pacte international relatif aux droits civils et politiques, Rapport alternatif à l'attention du Comité des droits de l'Homme, 90ème session du Comité de droits de l'Homme, Examen du rapport de l'Algérie le 23 juillet 2007*, at 8, 63–64, 74, [http://www.ohchr.org/english/bodies/hrc/docs/ngos/fidh\\_algeria.pdf](http://www.ohchr.org/english/bodies/hrc/docs/ngos/fidh_algeria.pdf) [hereinafter CFDA Rapport]. Even a top Algerian official in charge of voting has voiced concern. In a letter dated May 17, 2007 and addressed to Boutiflika, Saïd Bouachaïr, the Coordinator of the National Political Commission for the Monitoring of Legislative Elections, requested intervention after finding widespread fraud in the 2007 parliamentary and regional elections. According to Bouachaïr, non-FLN observers were not permitted to monitor polling stations. Voting boxes arrived at polling stations pre-filled with pro-FLN votes and some were even stolen after votes were cast. Similarly, lists of the candidates running were left incomplete. Letter from Saïd Bouachaïr, Al-Lajna al-Siyāsiyya al-Waṭaniyya li-Murāqabat al-Intikhābāt al-Tashrī'yya, 'uḏū al-Lajna, Al-munassiq, to Ra'īs al-Jumhūriyya (May 17, 2007), reproduced in *id.* at 77–78.

273. See CFDA Rapport, *supra* note 272, at 63–64.

274. See *supra* Part I(c).

275. Algeria was rated “not free” by the World Audit Organization, landing a score of 62 out of 100. World Audit Organization, Freedom of the Press Report, Algeria, <http://www.worldaudit.org/presstable.html> (last visited Nov. 8, 2007) [hereinafter World Audit Report]. Similarly, in the 2006 World Press Freedom Index, Algeria ranked 126 out of 168 countries. Reporters Without Borders For Press Freedom, World Press Freedom Index 2006, [http://www.rsf.org/article.php3?id\\_article=19385](http://www.rsf.org/article.php3?id_article=19385) (last visited Nov. 8, 2007).

276. In 2005, for example, there were 114 documented cases of press harassment. U.S. Dept. of State, Country Reports of Human Rights Practices, Algeria, Mar. 6, 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78849.htm>.

277. CFDA Rapport, *supra* note 272, at 49 (author's translation).

278. World Audit Report, *supra* note 275.

279. CFDA Rapport, *supra* note 272, at 49.

280. Hidouci, *infra* note 287, at 4.

silenced, and “police arrested those who collected signatures” against it.<sup>281</sup> Those who disfavored the amnesty were harassed, threatened with death, and sometimes imprisoned.”<sup>282</sup> Freedom of association fails no better.<sup>283</sup> No less than three demonstrations against the Charter held by families of the disappeared were aggressively dispersed.<sup>284</sup> Among numerous other restrictions and bans, the Algerian authorities would not locate a room for a public gathering to discuss the Charter, a meeting which resultantly could not take place.<sup>285</sup> Although one can find opinions from within Algeria both for and against the amnesty law,<sup>286</sup> at present, there is little reliable evidence that determines just how representative these opinions are<sup>287</sup> given the socio-political climate in Algeria as well as the specific context of the referendum.

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281. Al Karama for Human Rights and Algeria-Watch, *Observations on the Periodic Report to the Human Rights Committee*, Algeria-Watch, July 23, 2007, [http://en.al-karama.org/index.php?option=com\\_content&task=view&id=45&Itemid=37](http://en.al-karama.org/index.php?option=com_content&task=view&id=45&Itemid=37).

282. CFDA Rapport, *supra* note 272, at 6, 53.

283. For a recent analysis of the Algerian law on associations, see Chafika Kahina Bouagache, *The Algerian Law on Associations Within Its Historical Context*, *The International Journal of Not-For-Profit Law*, vol. 8, issue 2, Apr. 2007, [http://www.icnl.org/knowledge/ijnl/vol9iss2/special\\_3.htm#\\_edn1](http://www.icnl.org/knowledge/ijnl/vol9iss2/special_3.htm#_edn1).

284. Relatives were questioned and threatened. More ominously, after the authorities failed to investigate ten complaints filed by his family, one man whose father was disappeared was sued for defamation by the two alleged perpetrators after he made public accusations. Belkacem Rachedi was fined and sentenced as a result of at least one of the suits. Annual Report for Algeria 2006, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2006&c=DZA> (last visited Mar. 12, 2008).

285. Al Karama, *supra* note 281.

286. See, e.g., Daho Djerbal, *Algeria: Amnesty and Oligarchy*, Carnegie Endowment for International Peace, Arab Reform Bulletin: October 2005, vol. 3 issue 8, <http://www.carnegieendowment.org/files/Djerbal.pdf>; Louisa Hanoune, *On the Eve of the September 29 Referendum*, *Fraternité*, The Newspaper of the Workers Party of Algeria, Sept. 11, 2005, <http://www.eit-ilc.org/us/articles.php?Ing=en&pg=455>. For a collection of articles addressing the “reconciliation” process, the majority of which were authored by Algerians, see QUELLE RÉCONCILIATION POUR ALGÉRIE (2005), available at <http://www.hoggar.org/books/Reconciliation/Reconciliation.pdf>. Twenty of the twenty-seven contributors signed an appended list of recommendations that, among other things, calls for “instructing and judging those most responsible for the most serious crimes (massacres, forced disappearances, rapes, and torture)” as well as “excluding serious crimes with respect to international law” from an amnesty. *Id.* at 228 (author’s translation).

287. Echoing the overall suspiciousness of the referendum, the former Algerian Minister of Economics and Finances (1989–1991), Ghazi Hidouci, has asserted that the government strategically employed voting in order to bypass public debate and use “the will of the people” as a buffer against conflicting international law. Ghazi Hidouci, “*Charter for Peace and National Reconciliation*” in *Algeria: Threatening Contradictions*, 9 Arab Reform Brief, Arab Reform Initiative,

On the other hand, if one considers the victims to be those who were massacred, killed in bomb attacks, executed, raped, tortured, and forcibly disappeared, as well as the families of these direct victims,<sup>288</sup> the legal obligations in question are all too appropriate.<sup>289</sup> There are victims who affirmatively reject the amnesty law.<sup>290</sup> As noted above, the families of the disappeared attempted to demonstrate against the Charter prior to the referendum.<sup>291</sup> On the day of the referendum, in one suburb of the capital victims and families who lost their loved ones buried their ballots at a

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July 15, 2006, [http://www.arab-reform.net/IMG/pdf/Papier\\_No9\\_Algerie\\_anglais\\_final\\_ghazi\\_hidouci.pdf](http://www.arab-reform.net/IMG/pdf/Papier_No9_Algerie_anglais_final_ghazi_hidouci.pdf).

288. The word, "victims," henceforth will be used in this sense, unless otherwise indicated.

289. Even accepting the government's figures, statistically, the referendum cannot be said to account for their wishes with any accuracy. The population of Algeria is currently estimated at 33.3 million. Algeria Country Profile, *supra* note 70. 18.3 million Algerians are registered to vote and purportedly the referendum had a 79.76% voter turnout, which calculates to approximately 14.6 million who "actually" voted. If 97.36% voted for the Charter, then roughly 14.2 million supported it. *See Algeria Today*, *supra* note 64. This last figure is about 42.6% of the entire population. Compare this with an estimate of the number of victims, for which purposes we will assume the worst likely figures. 200,000 Algerians lost their lives and 8000 were disappeared. *Chronology (Part Two)*, *supra* note 51. Women's rights advocates estimate that approximately 5,000 women were raped. Algeria: Human Rights Developments 2000, Human Rights Watch, <http://www.hrw.org/wr2k1/mideast/algeria.html> (last viewed Mar. 12, 2008). The author has not encountered narrowly estimated figures for tortures. Let us consider that 50,000 citizens were tortured. The total number of direct victims then morbidly reaches 263,000. Concerning their immediate family members, choosing the year from which to pull the average household size in Algeria is problematic, as the ages of the victims vary widely. Some victims had families of their own, others were too young. Assuming the former, we will factor by not only the average family size from 1966, 5.9 members, but also the more recent demographic from 1987, 7 members. Encyclopedia of Nations, Social and Humanitarian Assistance, The Family—Society's Building Block, <http://www.nationsencyclopedia.com/United-Nations/Social-and-Humanitarian-Assistance-THE-FAMILY-SOCIETY-S-BUILDING-BLOCK.html> (last visited Mar. 12, 2008). Thus, there are approximately 3.4 million victims, which constitute 10.1% of the Algerian populace.

290. Although reference to statistics has been made in order to disprove the contention that the referendum represents the wishes of the victims, this Note does *not* advocate their use in deciding whether justice should be pursued. In addition to violating established legal principles, deferring to majority opinion among victims would present deeply problematic moral dilemmas. For example, would a simple majority vote among the victims suffice, even if 60% favored amnesty and 40% rejected it, or 70% and 30%, respectively? There are victims who support the Charter. *See, e.g.,* Daikha Dridi, *Victims Groups Question Algeria Amnesty*, AL JAZEERA, Sept. 30, 2005, <http://english.aljazeera.net/English/archive/archive?ArchiveId=14563>. However, this should not be determinative.

291. Annual Report for Algeria 2006, *supra* note 284.

local cemetery in protest.<sup>292</sup> And three days after the Charter's passage six groups that support the victims held a shared press conference to denounce the amnesty.<sup>293</sup> Direct statements from victims and organizers of associations express a desire for truth and accountability.<sup>294</sup> Formal manifestations of dissent have also been articulated. In April 2007, four Algerian human rights groups that represent the victims were among the organizations that signed an open letter to the Council of the European Union, demanding the abrogation of the Charter, and asserting that the legislation constitutes a denial of truth and justice for victims of the amnestied crimes.<sup>295</sup> In addition, the *Collectif des Familles de Disparu(e)s en Algérie* submitted an extensive shadow report before the HRC, in which the group requested the body to instruct the Algerian government to rescind the Charter.<sup>296</sup> The report also asked for "a processing of the cases of the disappeared that allows for the effective exercise of the right of the families of the disappeared to truth and justice, the two existing as an integral part of their right to redress."<sup>297</sup>

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292. *Id.*

293. Wendy Kristianasen, *Algeria: The Women Speak*, LE MONDE DIPLOMATIQUE, Apr. 11, 2006, <http://mondediplo.com/2006/04/07algeria>.

294. For example, leader of the *Şumūd* Association of the Families of Victims Abducted by Islamist Armed Groups, Ali Merabet lost his two brothers, Aziz, twenty-eight years old, and Merzak, fourteen; an Islamist group kidnapped, murdered and buried them in a farmyard. While leaving open the possibility for genuine forgiveness among victims, Merabet stated: "We are not against a national reconciliation, but we do say "no" to an amnesty decided in a hurry without going through a process that will recover truth and justice." Dridi, *supra* note 290. Similarly, founder of the *Collectif des Familles de Disparu(e)s en Algérie*, Nacéra Dutour, whose son, Amin, was forcibly disappeared, voiced her rejection of the Charter: "[It] ended the dreams of truth and justice for thousands of families of the disappeared." Kristianasen, *supra* note 293. Cherifa Kheddar witnessed armed militants haul away her brother and sister. After torturing her brother, they murdered both in the family's home in 1996. Kheddar protests every Sunday with other victims in front of the government palace. She reiterated her demands: "[O]ur position has always been that justice must work first and that those found guilty can be pardoned later on . . . [b]ut the national reconciliation gives impunity even to those people who have killed hundreds of times." Craig S. Smith, *Many Algerians Are Not Reconciled by Amnesty Law*, N.Y. TIMES, June 28, 2006.

295. This statement was supported by the *Ligue Algérienne des Droits de l'Homme*, *Ligue Algérienne de Défense des Droits de l'Homme*, *SOS Disparu*, and *Collectif des Familles de Disparu(e)s en Algérie*. *Open Letter at the Occasion of the EU-Algeria Association Council*, Euro-Mediterranean Human Rights Network, Apr. 24, 2007, <http://www.euromedrights.net/pages/348/news/focus/28989>.

296. CFDA Rapport, *supra* note 272, at 15, 72, 74.

297. *Id.* at 15 (author's translation). In referencing the Charter's violation of the right to justice, the *Collectif des Familles de Disparu(e)s en Algérie* cited article 6 of the

Prior to the Charter, Algerians sought accountability in overseas courts.<sup>298</sup> And in lieu of access to courts, Algerian women staged mock trials against Islamist opposition groups and figures as well as former president Benjedid for crimes against humanity.<sup>299</sup>

Thus, the claim that the referendum widely represents the wishes of the “victims” is doubtful at best, whether the victims are understood to be the Algerian people or those who have suffered crimes and their families. The possible concern—or perhaps hypocritical assertion of cultural relativism—that a duty to prosecute is yet another patriarchal, colonial

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Convention on Disappearance, which requires a state party to hold perpetrators criminally responsible.” *Id.* at 14.

298. In April 2001, an Algerian family who lost their son to torture as well as two detainees subjected to this abuse filed civil complaints in France against General Khaled Nezzar. EVANS & PHILLIPS, *supra* note 30, at 280–81. Alleging liability for crimes committed under his direction, including deaths, acts of torture, internments, and disappearances, in July 2002, victims again lodged complaints against Nezzar in a Paris criminal court. Press Release, Justitia Universalis, Algérie: Justitia Universalis dépose une plainte contre le général Khaled Nezzar (July 1, 2002). And Abderrahmane El Mehdi Mosbah, an asylee from Algeria, brought a complaint in December 2003 with the Paris public prosecutor against General Larbi Belkheir for the acts of torture he endured for forty days in the winter of 2003, charging Belkheir’s responsibility in instigating and erecting a policy of torture. Press Release, Justitia Universalis, Algérie: M. A. El Mehdi Mosbah et Justitia Universalis déposent plainte contre le général Larbi Belkheir (Communiqué de Maître Willian Bourdon, avocat à Paris) (Dec. 10, 2003). *See also, e.g., Criminal Lawsuits Against Algeria’s Generals*, Algeria-Watch, Jan. 2004, [http://www.algeria-watch.org/en/aw/criminal\\_lawsuits.htm](http://www.algeria-watch.org/en/aw/criminal_lawsuits.htm).

A civil action in the United States was also brought. Algerian citizens and the *Rassemblement Algérien des Femmes Démocrates* (“RAFD”) brought suit in federal district court under the Alien Tort Claims Act and Torture Victims Protection Act against the FIS and one of its members for war crimes, crimes against humanity, and additional breaches of international and domestic law. Plaintiffs included family members of the murdered. RAFD sued on behalf of those targeted by Islamist groups. *Doe v. Islamic Salvation Front*, 257 F. Supp. 115, 117–18 (D.C. 2003) (granting summary judgment for the defendant).

299. RANJANA KHANNA, *ALGERIA CUTS: WOMEN & REPRESENTATION, 1830 TO THE PRESENT* 68–70 (2008). For a theoretical reading of “virtual justice” within an Algerian context, see *id.* at 68–99.

imposition on Algeria is misplaced.<sup>300</sup> Many victims desire truth and justice,<sup>301</sup> and they believe the Charter extinguishes both.

#### CONCLUSION

Since the Algerian state passed the Charter in February 2006, the country's fourth grant of amnesty, has Algeria enjoyed peace? December 10, 2006: A bomb goes off on a bus with foreign oil workers, killing two people. February 13, 2007: Seven bombs explode, killing six people. April 10, 2007: Bombs explode in Algiers, killing thirty-three people. July 11, 2007: A suicide bomb blows up a vehicle close to an army barrack, killing eight people. September 6, 2007: A suicide bomb detonates before a presidential visit, killing twenty. September 8, 2007: A car bomb goes off at a coastguard barracks, killing thirty people.<sup>302</sup>

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300. While acknowledging that the universality of human rights norms can be challenged, for purposes of this Note, it is sufficient to point out that this particular issue does not seem to be a preoccupation for the majority of Algerians. For an interesting analysis of Islamic law's emphasis on duties and their relation to human rights, see Jason Morgan-Foster, Note, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE HUM. RTS. & DEV. L.J. 67 (2005).

301. At minimum, under the International Covenant, Algeria has a duty to investigate and reveal sufficient information to victims and their families. *Supra* note 105. A customary right to truth appears to be budding. See Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?* 88 INT'L REV. RED CROSS 245, 254–67 (2006). For a sketching of the parameters of this right, see *id.* at 262–63.

The relation “between” truth and justice is hotly contested. *Id.* at 269–72. At least one scholar has suggested, for example, that the process of communally approaching “the truth” may be an adequate form of justice itself. See Slye, *supra* note 130, at 246–47. This is the often-touted model of “restorative justice,” which South Africa's Truth and Reconciliation Commission is supposed to represent. Some have championed restorative justice to the exclusion of criminal accountability in transitional states emerging from turmoil, frequently engaging in an ironic tug of war over perceptions of victims' needs, which they argue are better honored by the former of the two models. Aside from having a polarizing effect, choosing truth over justice or vice versa is unnecessary. A balanced approach is possible and should be supported. For a collection of works on the topic, see TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH (William A. Schabas & Shane Darcy eds., 2004). A strong illustration of the two's co-existence can be found in Sierra Leone's experience. See William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, in TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH 3 (William A. Schabas & Shane Darcy eds., 2004) (“The real lesson of the Sierra Leone experiment is that truth commissions and courts can work productively together, even if they only work in parallel.”).

302. *Chronology—Armed Attacks and Bombings in Maghreb States*, Reuters, Jan. 29, 2008. The September 6th attack was carried out by a boy only fifteen years old. Salima Tlemçaci, *Attentat suicide contre la caserne de Dellys (Boumerdes)*, EL WATAN, Sept. 10,

December 11, 2007: Two bombs explode in the capital near the Constitutional Council and offices of the U.N., killing an estimated sixty.<sup>303</sup> Meanwhile, state security forces have continued to detain and torture people.<sup>304</sup> As a result of ongoing fighting, 400 people, including many civilians, were killed in 2006,<sup>305</sup> and the following year witnessed the deaths of 300 people, at least seventy of whom were civilians.<sup>306</sup> In assessing the causes of the recent bombings, analysts have drawn attention to poverty, pervasive unemployment, and broad alienation from politics in Algeria.<sup>307</sup> These deeper causes of violence serve as a reminder that amnesty is not the panacea for meaningful peace,<sup>308</sup> an observation at least some Algerians appear to support.<sup>309</sup>

A shrewd politician, Boutiflika has been mindful of the complex host of issues confronting Algeria, seeking to revamp the country politically and economically<sup>310</sup> and strengthening the presidency<sup>311</sup> at the expense of

2007, <http://www.elwatan.com>. There is one main lingering group that is suspected to be responsible, the al-Qaeda Organization in the Islamic Maghreb, which changed its name from the *Groupe Salafiste pour la Prédication et le Combat* in early 2007.

303. "Dozens killed" in Algeria Blasts, BBC, Dec. 11, 2007, <http://news.bbc.co.uk/2/hi/africa/7137997.stm>.

304. Algeria: Briefing to the Human Rights Committee, Amnesty International, Sept. 2007, 1–2, <http://www.ohchr.org/english/bodies/hrc/docs/ngos/AI-Algeria.pdf>.

305. Annual Report for Algeria 2006, *supra* note 284.

306. Annual Report for Algeria 2007, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2007&c=DZA> (last visited Mar. 12, 2008).

307. William McLean, *Algeria Rebel Attacks Test Government Security Policy*, Reuters, Sept. 23, 2007.

308. In keeping with this insight, a prominent scholar on Algeria stated:

Turning the page on this decade without seeking to understand the mechanisms which pushed the society of this young state into self-destruction would constitute a headlong rush toward unforeseeable political consequences. The mourning process of Algerian society can be brought to closure only by acknowledging the drama that has taken place, and by a political willingness to bring justice to all those who have been its victims.

Luis Martinez, *Why the Violence in Algeria?* J. N. AFR. STUD. 14, 26 (2004) (arguing that "the failure of democratic transition" is the central factor in explaining what gave rise to the violence).

309. Concerning Algerians' reactions to the bombings, a survey conducted by the independent daily newspaper, *El Khabar*, revealed that 76% of the 10,016 questioned "do [not] think that national reconciliation is sufficient to confront the recent terrorist outbreak." Djalel Bouâti, *La réconciliation ne peut pas, à elle seule, venir à bout du terrorisme*, AL KHABAR, Sept. 23, 2007, <http://www.elkhabar.com> (author's translation).

310. For a look at Boutiflika's efforts to improve Algeria's foreign relations and prospects for foreign investments, see Yahia H. Zoubir, *The Resurgence of Algeria's Foreign Policy in the Twenty-First Century* 9 J. N. AFR. STUD. 169 (2004).

the army. Engaging in a power struggle with this historically dominant faction,<sup>312</sup> Boutiflika was able to use the disclosures of its tactics during the Dirty War in order to leverage not only the army's retreat from politics and a rearrangement of its command, but also the retirement of the generals who waged the 1992 coup and subsequent campaign of terror.<sup>313</sup> However, this balance of power is precarious, as the generals have sought to develop their own influential networks, especially with those sympathetic to the "war on terror."<sup>314</sup> Efforts at overhauling a profoundly defective judiciary have also been initiated.<sup>315</sup> In January 2000, Boutiflika created the National Commission for Judicial Reform, which produced a report that included recommendations he vowed to follow. After its release, Boutiflika dismissed several judges on corruption charges and the majority of magistrates. The President identified three key relevant phases, improving prison conditions, the quality of magistrates, and the independence of the courts.<sup>316</sup>

While these initiatives are positive, Algeria undeniably has a long and daunting path ahead towards establishing truth as well as justice for the crimes committed during its conflict. Regardless of the barriers to be faced, however, international law, both in treaty and custom, requires that justice be served after certain occurrences. Algeria's treaty obligations establish the invalidity of the Charter, as perpetrators of gross violations of human rights must be prosecuted and punished under the Convention Against Torture, International Covenant, and African Charter. Similarly, grave war crimes and crimes against humanity may

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311. An early assessment, optimistic of Boutiflika's strengthening of the presidency can be located at Robert Mortimer, *Boutiflika and Algeria's Path from Revolt to Reconciliation* 99 CURRENT HIST. 10 (2000).

312. Ulla Holm, *Algeria: President Bouteflika's Second Presidential Term*, Dansk Institut for International Studier (November 2004).

313. After serving as Minister of Foreign Affairs during what most Algerians consider to have been the country's golden era, the Houari Boumedienne years (1965–1978), Boutiflika lived in exile from 1981 until 1987 and then ran as an independent candidate backed by the military in the 1999 presidential elections. Boutiflika's apparent lack of involvement in the regime's violence was partly perceived as a source of legitimacy. EVANS & PHILLIPS, *supra* note 30, at 255–56; STORA, *supra* note 11, at 145, 259–61.

314. Hugh Roberts, *Demilitarizing Algeria*, 12–18, Carnegie Papers No. 86, Middle East Program (May 2007).

315. For perspectives on the Algerian judiciary and the challenges it faces from two American judges who visited Algeria as part of independent reform efforts, see Hon. James G. Glazebrook, *Judicial Independence in the Democratic Republic of Algeria*, 43 No. 1 JUDGES' J. 44 (2004); Joseph P. Nadeau, *Algeria 2001: Quest for Democracy*, 40 No. 3 JUDGES' J. 38 (2004).

316. Youcef Bouandel, *Bouteflika's Reforms and the Question of Human Rights in Algeria*, 7 J. N. AFR. STUD. 23, 32–36 (2002).

not be amnestied under general international law. Concerns that the customary duty to prosecute will perpetuate conflict and destabilize societies should not dictate exceptions to the rule. Permitting legal concessions to political expediency fails to account for the slackening over the long-term of any apparent tensions between peace and justice, and the effects of this norm are far less drastic than are sometimes assumed.

In passing the Charter, Algeria breached the customary obligation to prosecute, as the crimes it amnestied were not only war crimes, but also crimes against humanity. Disappearances, torture, and extrajudicial killings committed by state forces, and murder perpetrated by armed groups are within this latter class of crimes. Concerning Algerians' response to the amnestying of these crimes, even if it were legal to hold a referendum on this issue—and it is not—the results of the plebiscite on the Charter are not genuinely representative of domestic opinion. More importantly, consideration should be given to the voices of those who have more directly suffered, Algerians who were tortured or raped, Algerians whose family members were disappeared, killed or massacred.

The Charter for Peace and National Reconciliation has brought neither peace, nor reconciliation. When will the Algerian state seek peace *with* its people? When will it reconcile *itself* with the law?

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