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# Amnesty: Evolving 21<sup>st</sup> Century Constraints Under International Law

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The unresolved question of the international legality of amnesties, one facet of the dilemma of peace versus justice, represents a puzzle for the International Criminal Court (ICC) to solve in the years ahead. States seeking to heal the scars of civil war often consider amnesties as a tool to negotiate peace, convince combatants to permanently disarm, and help societies coexist. Nonetheless, amnesties deprive victims of their right to seek redress before a court of law. Colombia provides a case to examine such a dilemma—an evolving challenge for international lawyers, prosecutors and judges.

The Colombian government has invited guerrillas to end the country's nearly fifty-year armed conflict, in which government troops have fought against the Revolutionary Armed Forces of Colombia (FARC) and multiple non-state actors have fought against one another. In 2012, the Colombian Congress passed a legal framework for peace, which included the suspension of legal proceedings against guerrillas who agreed to demobilize, and military personnel accused of war crimes and crimes against humanity. This legislation entails an indirect amnesty that would lead to impunity, thus trading justice for peace. However, scholars like Martha Minow call for policies “between vengeance and punishment.”<sup>1</sup> Colombia is a State Party to the

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Rome Statute of the International Criminal Court (the Rome Statute or the ICC Statute),<sup>2</sup> a court founded to end impunity regarding “the most serious crimes of concern to the international community.”<sup>3</sup> Amnesties granted

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to war criminals under a peace agreement would give jurisdiction over cases to the ICC because Colombia would have proven its unwillingness to prosecute. Because amnesties are not explicitly outlawed under the ICC, there is a gap in the Rome Statute that should be filled—a crucial unknown for international law as a discipline—but sources of international law come into play to fill the above-mentioned lacuna. While the Lotus<sup>4</sup> precedent determines that under international law, “everything which is not prohibited is permitted” and “every door is open unless it is closed by treaty or by established custom,”<sup>5</sup> the doors of both customary international law and treaty law are now closed to amnesties, in particular for Colombia. This is

because Colombia is doubly bound by the ICC and by a rule of international custom.

Hence, drawing on an examination of treaty and customary international law, jurisprudence from the ad hoc tribunals, and the Inter-American Court of Human Rights, this article argues that a norm has now coalesced that dictates that all states have a legal duty to domestically prosecute international crimes, filling the Rome Statute gap on amnesties. This paper will briefly outline the Colombian legal framework for peace, before discussing how the parties to the Colombian conflict have committed crimes that fall under ICC jurisdiction. The article will then talk about disagreements among scholars on amnesties before the ICC—the critical unknown. Next, it will summarize a duty to prosecute under treaty law. Likewise, the article will address the question of whether there is a duty to prosecute under international custom, including *jus cogens* norms; this section will survey state practice, *opinio juris sive necessitatis*, law and practice of the United Nations, a compendium on international custom governing armed conflicts made by the International Committee of the Red Cross (ICRC) and the persistent objector theory regarding a duty to prosecute. The paper

will conclude by analyzing international jurisprudence to argue that the ICC would not accept amnesties as a criminal defense to challenging ICC prosecutor's investigations *proprio motu*, the jurisdiction of the Court, or the admissibility of cases brought before it. In doing the above, the article aims to shed light on the legality of amnesties, an enigma for international criminal law that must not remain ignored.

### THE LEGAL FRAMEWORK FOR PEACE IN A NUTSHELL

The legal framework for peace is a temporary reform to the Colombian Constitution, which incorporates into the Magna Carta rules of transitional justice that would facilitate a peaceful settlement to the Colombian civil war. This piece of legislation grants the Colombian Congress the power to prioritize and select the types of crimes and individuals to be prosecuted, and to decide which crimes would have reduced or alternative sentences. It also includes the suspension of legal proceedings. These transitional justice rules and benefits would be applied to those non-state actors who agree to demobilize and to members of security forces accused of crimes committed in connection with the conflict. While Colombia's president and attorney general support suspending prosecutions against war criminals for the sake of the peace process, "concerns have been expressed by Human Rights Watch regarding the possibility that the law could be used to provide immunity to military officials involved in the 'false positive' scandal in which Colombian soldiers stand accused of killing thousands of civilians before presenting them as guerrillas shot in combat."<sup>6</sup> Since the legal framework for peace grants Congress the authority to select those who will be prosecuted, state officials will "continue to avoid justice whilst the network of corruption and connections with paramilitary groups remain in place."<sup>7</sup> In particular, concerns can be raised regarding those parliamentarians who have been convicted for colluding with paramilitary units responsible for killing thousands of civilians.

Moreover, the Colombian Commission of Jurists has challenged the constitutionality of the legal framework for peace before the Constitutional Court of Colombia. On August 28, 2013, the Court released a press statement announcing that such a piece of legislation was constitutional. However, the full content of the Court's ruling was not issued. According to Paula Delgado-Kling, "Seven of the nine magistrates of the Constitutional Court gave their blessing to the Legal Framework for Peace as the route to take for peace accords with the FARC. The Constitutional Court said the state cannot allow, for any reason, those who committed grave crimes—extra-

judicial killings, torture, forced disappearances, and child recruitment—to be given impunity.”<sup>8</sup>As a final point here, it is appropriate to mention the following issue: Because the Colombian Congress has, under the legal framework for peace, the power to prioritize the types of crimes and individuals to be prosecuted and to decide which crimes would have reduced or alternatives sentences, it will be critical for the ICC to monitor, under the complementarity clause of the Rome Statute, the content of those statutory bills drafted to that end so as to ensure that such bills will be in compliance with the Rome Statute and Colombia’s international obligations.

### **HAVE THE PARTIES TO THE COLOMBIAN CONFLICT COMMITTED CRIMES THAT FALL UNDER ICC JURISDICTION?**

The parties to the Colombian conflict have conducted their fighting among civilians, who are protected by the 1949 Geneva Conventions and their Additional Protocols. In this fighting, government troops and non-state actors violate *ius in bello* norms, laws, and customs of war, including those prohibiting the use of weapons that cause unnecessary suffering. To date, Colombia, after Afghanistan, shows the second-highest number of landmine victims in the world: 10,189.<sup>9</sup> Both parties to the conflict have failed to discriminate civilians from legitimate targets. For instance, between 1958 and 2012 the Colombian conflict caused the death of 218,094 people. Whereas 81 percent of these victims were civilians, 19 percent were combatants.<sup>10</sup> Likewise, between 1985 and 2012 there were 25,007 victims of enforced disappearance, and 5,712,506 were victims of enforced displacement. The number of people displaced by the fighting represents almost the entire population of Ireland, Costa Rica or Lebanon.<sup>11</sup> Because of these violations of the laws of war, the ICC may exercise jurisdiction over crimes against humanity committed in Colombia since November 1, 2002, the date when the Rome Statute came into force for Colombia.<sup>12</sup> As for war crimes, the Court only has jurisdiction over the country since November 1, 2009 in accordance with Colombia’s declaration under Article 124 of the ICC Statute.

In June 2004, the ICC prosecutor launched a preliminary examination in relation to the situation in the country. In the view of the ICC prosecutor,<sup>13</sup> FARC, the National Liberation Army (ELN),<sup>14</sup> and paramilitary groups have allegedly committed crimes against humanity. They have engaged in acts as part of a widespread or systematic attack directed at civilians prohibited under Article 7 of the Rome Statute, in particular murder, forcible transfer of population, imprisonment, other severe depri-

vation of physical liberty in violation of fundamental norms of international law, torture, rape, and other forms of sexual violence. Likewise, for the ICC prosecutor, FARC and ELN have engaged in the following acts constituting war crimes, in accordance with Article 8 of the Rome Statute: murder, torture and cruel treatment, outrages upon personal dignity, the taking of hostages, rape and other forms of sexual violence, and the use of children as active participants in hostilities.

Military personnel have also committed grave violations of the Geneva Conventions regime. In 2002, the Colombian government launched “The Democratic Security Policy” to tackle terrorism caused by irregular armed groups. Regardless of the threat, counterterrorism measures taken by the Colombian government must comply with international humanitarian law and must respect human rights as recognized by the International Covenant on Civil and Political Rights (ICCPR) or the American Convention on Human Rights (ACHR), both of which Colombia has ratified. Armed forces must differentiate civilians from guerrilla fighters as they plan, conduct, and execute military strikes. Under no circumstances can military officers of any defense department commit torture, extrajudicial execution, or arbitrary arrest. Colombian armed forces have been guilty of gross violations of human rights against civilians such as extrajudicial killings and torture. Military personnel have kidnapped innocent peasants, dressed them up as fighters, and killed them before passing them off as terrorists killed in combat. As the ICC prosecutor claims,

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“Members of the Colombian army have also allegedly deliberately killed thousands of civilians to bolster success rates in the context of the internal armed conflict and to obtain monetary profit from the State’s funds.”<sup>15</sup> The ICC prosecutor alleges that military personnel have performed acts constituting crimes against humanity under Article 7 of the Rome Statute, in particular murder and enforced disappearance.

The ICC prosecutor will continue “to analyze whether there is a reasonable basis to believe that torture was committed in ‘false positive’ cases in a systematic or widespread manner and as part of an organizational

policy.”<sup>16</sup> For now, the government must prosecute these officers without any consideration of their rank and question whether there was such a state policy planned within the highest bureaus of the Defense Ministry. Although Article 28 of the Rome Statute makes chain of command responsibility not only a matter of what someone did know but also what they should have known, Colombia’s Defense Minister and top commanders of the Colombian Army at that time made public statements denying knowledge of the abuses. The ICC prosecutor found that arbitrary detentions, torture, and killings “were committed pursuant to a policy adopted at least at the level of certain brigades within the armed forces, constituting the existence of a State or organizational policy to commit such crimes.”<sup>17</sup> The ICC prosecutor will “analyze information on whether such a policy may have extended to higher levels within the State apparatus.”<sup>18</sup> It is objectionable that the legal framework for peace could “allow state officials to provide themselves with a self-mandated amnesty.”<sup>19</sup>

In its most recent report on preliminary activities, the ICC prosecutor states that its office will continue to evaluate the genuineness of national proceedings against those accused of having committed ICC crimes in Colombia so as to reach conclusions on admissibility.<sup>20</sup> As the ICC prosecutor continues to assess the situation in Colombia, peace talks between the government and FARC will move forward. Amnesties would be granted for war criminals under a peace treaty to convince top FARC commanders to permanently lay down their arms. The next section will discuss disagreements among scholars on amnesties before the ICC, the critical unknown for international law.

#### AMNESTIES BEFORE THE ICC—THE CRITICAL UNKNOWN

There are disagreements among scholars regarding the legality of amnesties before the ICC. International law—consisting of treaties and international custom—focuses on governments’ obligation to domestically prosecute international crimes, making amnesties unlawful. Nevertheless, amnesties are not explicitly outlawed under the Rome Statue regime. Schabas says, “The Statute itself cannot provide answers to every question likely to arise before the Court, and Judges will have to seek guidance elsewhere, just as they do under domestic law when criminal codes leave questions ambiguous or simply unanswered.”<sup>21</sup> This gap represents a crucial unknown for international law that has to be addressed. The ICC can declare a case inadmissible where the state that has jurisdiction has investigated and decided not to prosecute the accused—unless the deci-



sion resulted from the unwillingness or inability of the state to genuinely prosecute. As Eric Blumenson asserts, “The amnesty issue raises, again, three inescapable and extraordinarily difficult issues: A question of justice: Does justice require prosecution, does this obligation outweigh all other considerations? A question of pluralism: As a global institution, how much deference should the ICC afford to diverse state approaches to the previous two questions?”<sup>22</sup> In turn, Priscilla Hayner questions, “Would the Court respect a national amnesty granted through a truth commission’s conditional amnesty regime?”<sup>23</sup> In the same way, Michael Scharf ponders “Could an amnesty like the South African one provide a viable defense for a defendant arguing against admissibility?” Can the ICC prosecutor exercise prosecutorial discretion and not prosecute “individuals covered by a domestic amnesty?”<sup>24</sup> Let us, therefore, discuss the issues raised above.

On one hand, the ICC was established to prosecute those most responsible for serious crimes, and thus, the Court would accept amnesties granted to the vast majority of low-level perpetrators. Under the Rome Statute, the ICC prosecutor would not prosecute if it would not be in “the interest of justice”<sup>25</sup> to do so. Hayner underscores situations in which options to redistributive justice, including conditional amnesties “could be deemed to meet this test and to persuade the ICC prosecutor to stay away.”<sup>26</sup> If conditional amnesties rob victims of their right to seek judicial remedies, would the ICC prosecutor stay away? Cassese also assesses alternative avenues to responding to the commissions of ICC crimes, advocating for the setting of truth commissions with the authority to grant pardons to low or midlevel perpetrators. In particular, he determines that “If the Commissions are satisfied that full disclosure has been made ... they might grant individual pardon to the persons concerned.”<sup>27</sup> In addition, under Article 16 of the Rome Statute, the Security Council, acting under Chapter VII of the UN Charter, has the legal authority to defer proceedings for a period of twelve months if it so decides. Drawing upon that possibility, the ICC can read such a request as an indirect amnesty. For the Peace and Justice Initiative, “Since amnesty laws are often used to help end conflicts and broker peace deals, it has been suggested that Article 16 allows the ICC to give recognition to amnesty laws.”<sup>28</sup>

On the other hand, there is no jurisprudence of the ICC that sheds light on the critical unknown. As Schabas points out “... judicial attitudes are impossible to predict, and judges or prosecutors might well decide that it is precisely in cases like the South African one where a line must be drawn establishing that amnesty for such crimes is unacceptable.”<sup>29</sup> What is more, the main goal of the Rome Statute is to put an end to impunity,

as its preamble establishes that it is “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>30</sup> Haynes argues that truth commissions holding “amnesty-granting powers are unlikely in future truth commissions—or at least unlikely to apply to very serious crimes.”<sup>31</sup> According to the Peace and Justice Initiative:

It is also clear that a national amnesty law would have no binding effect upon the ICC ... States Parties of the ICC would not be able to enact or [recognize] a national amnesty law that conflicted with their obligations to cooperate with the ICC ... States are under a duty to prosecute genocide and grave breaches of international humanitarian law under both treaty law and customary law ... customary international law entitles all States to prosecute perpetrators of other serious violations of the laws and customs of war and crimes against humanity, making amnesty laws covering such atrocities of questionable legality.<sup>32</sup>

In spite of the disagreement among scholars on the above-mentioned crucial unknown, governments cannot grant amnesties because *jus cogens* norms, international custom, and treaties have closed the door for amnesties regarding international crimes. The next section will discuss the prosecution of international crimes under treaty law, so as to demonstrate that numerous treaties which Colombia has ratified have made this the case in relation to ICC crimes.

### PROSECUTING INTERNATIONAL CRIMES UNDER TREATY LAW

Article 21 of the Rome Statute set forth sources of law to be applied by the ICC, as the Court adjudicates cases brought before it. The ICC can seek guidance, firstly, within the Rome Statute, Elements of Crimes, and its Rules of Procedure and Evidence. As stated previously, the Rome Statute regime is silent on the issue of amnesties. The ICC can accordingly seek guidance “in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.” Let us discuss the treaties that impose a duty to prosecute international crimes and that Colombia has ratified. In particular, let us talk about the following conventions: The Genocide Convention (GC), the Geneva Conventions and the Additional Protocols, the ICCPR, the ACHR, the Convention Against Torture (CAT), and the Rome Statute.

Under the GC, which came into force in Colombia on October 27, 1959, people charged with genocide shall be tried by a competent tribunal of the state within which genocide was committed, or by “such international



penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”<sup>33</sup> Under the Geneva Conventions and the Additional Protocols, High Contracting Parties undertake a duty to prosecute those who violate the Conventions and the Protocols. The Geneva Conventions, which came into force in Colombia in 1961, and the three Additional Protocols, which entered into force in the country in 1993, 1995 and 1996 respectively, protect civilians in times of conflict, both international and internal. The ICCPR came into force for Colombia on October 29, 1969. The Covenant guarantees victims the right to legal recourse. Orentlicher says, “The Human Rights Committee established to monitor compliance with the Covenant has, in fact, repeatedly asserted that State Parties must investigate summary executions, torture and unresolved disappearances ... and provide compensation to victims.”<sup>34</sup> Likewise, Colombia is a State Party to ACHR, which entered into force for the country on May 28, 1973. As such, the country has affirmative obligations to ensure the protection of those rights set forth within it. To fulfill the right to judicial protection, Colombia must investigate and punish violations of fundamental rights recognized by ACHR.

Notwithstanding Colombia’s membership to CAT, which came into force for the country in December 1987, the crime of torture has constantly been committed in Colombia for years by FARC and armed forces acting in conspiracy with paramilitary units to defeat guerrillas. The ICC prosecutor indicates, “The UN OHCHR reported that in 2010 the FARC continued to hold civilians and members of public security forces in cruel and inhuman conditions, in some cases for over 13 years, such as the Army sergeant Jose Libio Martínez, deprived of his freedom for reasons relating to the conflict since 21 December 1997.”<sup>35</sup> Security forces have been accused of committing extrajudicial executions, which often have been preceded by torture as well as other forms of severe varieties of physical and psychological pain. The crime of torture must be prosecuted by Colombia or any state pursuant to CAT and under the *aut dedere, aut judicare* principle, which means to extradite or prosecute those accused of having committed the crime of torture.<sup>36</sup>

The Rome Statute, which entered into force in Colombia on November 1, 2002, emphasizes the obligation to domestically enforce international obligations; its preamble establishes that “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.” Unlike previous international criminal tribunals, the ICC focuses not only on prosecutions, but also on victims. The Rome Statute represents a combination of redistributive and restorative justice.

Amnesties deprive victims of their right to seek redress before a court of law. Wierda states, “It is at the domestic level that permanent solutions to impunity must be found.”<sup>37</sup> But, what if domestic courts do not prosecute? Schabas stresses that “Article 17 of the Statute prescribes that the Court may take on a prosecution only when national justice systems are ‘unwilling or unable genuinely’ to proceed.”<sup>38</sup> Moreover, the Rome Statute is an international treaty and Articles 31 and 32 of the Vienna Convention of the Law of Treaties (VCLT)—rules governing legal interpretation of treaties—apply to the Rome Statute. The Rome Statute should be interpreted “in good faith”<sup>39</sup> pursuant to the “ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>40</sup> Colombia must fulfill its obligations under the ICC Statute in good faith, including its duty of exercising its criminal jurisdiction over those responsible for international crimes. Colombia, in the light of the object and purpose of the Rome Statute, has affirmed that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”<sup>41</sup>

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Statute, has affirmed that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”<sup>41</sup>

These treaties denote a step forward in the codification of a duty to prosecute international crimes, making amnesties unlawful under international law. Does international custom require the same?

#### **DOES INTERNATIONAL LAW CUSTOMARILY ESTABLISH A DUTY TO PROSECUTE INTERNATIONAL CRIMES?**

Although scholars such as Hannum, Anaya, and Shelton have only acknowledged that there is a “limited international obligation to prosecute,”<sup>42</sup> international custom helps fill the gap on amnesties left by the Rome Statute. This section will examine *jus cogens* norms, state practice, *opinio juris sive necessitates*, and the codification of customary international humanitarian law gathered by the International Committee of the Red Cross (ICRC) to prove that, under a coalesced norm of customary international law, states, including Colombia, have a duty to domestically prosecute international crimes.

### *The Nature and the Scope of Jus Cogens Norms*

Article 53 of the VCLT establishes that *jus cogens* rules are norms “from which no derogation is permitted.”<sup>43</sup> Scholars think about peremptory norms “as ‘super’ customary international law—law so fundamental to the inter-relationship of states that a state cannot, through its treaty practice or otherwise, deviate from the law.”<sup>44</sup> Treaties may codify pre-existing *jus cogens* norms, or help in their formation. The prohibition of the use of force set forth in the Charter of the United Nations and the principle of *pacta sunt servanda*—treaties are to be kept— are peremptory norms. The *pacta sunt servanda* clause is set forth in VCLT (Article 26). In turn, the prohibition against torture is set forth in CAT. British Judges refer to the crime of torture as “*jus cogens* crime.”<sup>45</sup> In *Questions Relating to the Obligation to Prosecute Or Extradite*, the ICJ held that, “In the Court’s opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).”<sup>46</sup> Further, Luban, O’Sullivan, and Stewart argue that there are certain “immovable bedrock”<sup>47</sup> rules of international law or “fundamental human rights norms”<sup>48</sup> as *jus cogens*, including genocide, which is prohibited in the Genocide Convention and the ICC Statute, and slavery, a crime under Article 7 (1) (c) of the Rome Statute. Treaties, accordingly, codify pre-existing *jus cogens* norms or contribute to their genesis.

*Jus cogens* norms also entitle *erga omnes* effects. Luban, O’Sullivan and Stewart indicate that *erga omnes* effects refer “to obligations that fall on all states *erga omnes* (toward all) obligations.”<sup>49</sup> In *Barcelona Traction, Light and Power Company Limited*, the ICJ, declared that,

In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law.<sup>50</sup>

Likewise, the ICJ, in *Questions Relating to the Obligation to Prosecute Or Extradite*, recently has ruled that any state party to CAT “may invoke the responsibility of another state party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.”<sup>51</sup> As a result, *jus cogens* norms are enforceable against anyone violating them.

Furthermore, the range of *jus cogens* has expanded in recent years. Jurists “have sometimes given *jus cogens* norms—especially fundamental human rights norms—an almost natural law status. In the words of the International Law Commission, ‘it is not the form of a general rule of international law

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..... but the particular nature of the subject matter with which it deals that may ... give it the character of *jus cogens*.”<sup>52</sup> The Rome Statute has codified and criminalized pre-existing peremptory rules of international law. Several scholars, including Cassese, have agreed upon the above, discerning that the notion of crimes against humanity set forth in Article 7 of the Rome Statute was elaborated upon pre-existing customary international law at the time the Rome Statute was adopted. If the international community of states broadly considers the rules against launching aggressive war or the prohibitions against genocide and torture, slavery, forced disappearance and racial discrimination as *jus cogens* norms—offenses that are criminalized in accordance with the ICC Statute—one can argue that, *mutatis mutandis*, all acts constituting crimes against humanity, when committed as part of a widespread or systematic attack against civilians,<sup>53</sup> and war crimes, when committed only as part of a state or organizational policy,<sup>54</sup> were pre-existing *jus cogens* norms at the time the final draft of the Rome Statute was agreed.

### ***The Colombian Legal Framework for Peace and Colombia’s Duty to Prosecute under Jus Cogens Norms***

The suspension of legal proceedings against war criminals cannot be considered legal under international law. Cassese argues that when “national laws take precedence over the international rules, the State may incur international responsibility for a breach of those rules.”<sup>55</sup> States cannot adopt treaty law nor contribute to international custom contravening *jus cogens* norms; similarly, neither domestic legislative bodies nor

national courts are entitled to enact legislation, even constitutional amendments, or render jurisprudence to invalidating *jus cogens*. The principle of *a maiore ad minus*, meaning what holds for all also holds for one, sheds light because what holds for all states at the international level, as they adopt treaties or consent to international custom that must comply with *jus cogens*, also holds for a state within its own domestic jurisdiction. States must enact national legislation or render judgments in compliance with peremptory norms. Further, *jus cogens*, pursuant to Article 53 of the VCLT, “can be modified only by a subsequent norm of general international law having the same character.” In short, no Colombian legislation can override the requirements of *jus cogens* norms.

Colombia’s attorney general must prosecute state and non-state actors who have allegedly breached *jus cogens* norms, which are embedded within the corpus of international law. Peremptory norms preexist and give the impression of being part of a universal notion of justice in which derogation is not permitted. If state and non-state actors are found to be in breach of *jus cogens* norms, they must be held accountable before domestic courts. If Colombia proves unwilling to prosecute *jus cogens* crimes, international jurisdiction would be triggered. In *Prosecutor v. Tadić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) ruled that, “the violation of the rule [of international humanitarian law] must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.”<sup>56</sup> Because *jus cogens* norms are super international-custom entitling *erga omnes* rights, any violation of *jus cogens* must involve, as the ICTY declared, the individual criminal responsibility of the person violating them, making amnesties unlawful under international law. It follows that Colombia’s attorney general must take action against those who have violated *jus cogens* norms, which prevail over any national legislation.

### ***Prosecuting International Crimes Under Customary International Law: Whose Duty?***

In addition to being mandated by *jus cogens norms*, there is compelling evidence that, under customary international law, a norm has coalesced that mandates domestic prosecution of international crimes. Cassese understands international custom as one of the primary sources (treaties, customary law),<sup>57</sup> which judges may draw upon to decide cases brought before them. State practice, *opinion juris*, law and practice of the United Nations, and the codification of international custom governing armed

conflicts made by the ICRC all provide compelling evidence for the existence of this rule of customary international law. Let us discuss each of these topics, and the persistent objector theory.

### *International Custom*

Pursuant to Article 38(b) of the ICJ Statute, “International custom, as evidence of state practice accepted as law,” is a source of international law. International custom may evolve as a rule of international law when that has been accepted as such by the international community of states. As Murphy argues, “There is no single place to look for the rules on formation of customary international law; there is no ‘Vienna Convention on Customary International Law.’ Rather, states through their practice, and international lawyers through writings and judicial decisions, have agreed that customary international law exists whenever two key requirements are met: (1) a relatively uniform and consistent state practice regarding a particular matter; and (2) a belief among states that such practice is legally compelled.”<sup>58</sup> For international custom to be considered a source of international law, it therefore must come into existence from practice of states accepted as law.

### *State Practice*

Decisions of branches of government constitute state practice. As for the legislative and judicial organs, approval of legislation from the former and judicial decisions from the latter constitutes state practice. Within the executive branch, some acts constitute state practice, including military manuals and pleadings before international forums. Treaties also lead to the creation of international custom because the drafting, negotiation, signature, and ratification of treaties constitute state practice. Some treaties are intended for general adherence by all states and are almost universally accepted. This widespread adherence turns these treaties into international custom, even for non-signatories. The Geneva Conventions and their Additional Protocols are extensively accepted by all states and intended for adherence by all of them.

Some questions arise when considering state practice and international law. For instance, does instantaneous international custom really exist? Although some scholars point to the *Paquete Habana* case to argue that “ideally, it should be evident over some extended period of time, rather than a very short period of time,”<sup>59</sup> the answer is positive. ICJ jurisprudence has declared that a short period of time does not prevent the formation of a new rule of customary international law. Secondly, can state practice



be regional? Murphy asserts, “The International Court accepted that there could exist a customary rule of international law special to the states of Latin America regarding the right of a state to issue a unilateral and definitive grant of political asylum.”<sup>60</sup> It has accepted as well that a regional rule of international custom has already crystallized, imposing a duty to prosecute gross violations of human rights upon those states of Latin America, including Colombia,<sup>61</sup> that have joined the Inter-American Court of Human Rights.<sup>62</sup>

### *Opinio Juris Sive Necessitatis*

State practice must be backed by *opinio juris sive necessitates*, actions that are consummated because they were believed to be part of a legal obligation, to become customary international law. Many scholars agree that “states engage in their practice out of a belief that they are compelled or permitted by international law.”<sup>63</sup> Some claim that states believe they are compelled to prosecute international crimes, making amnesties unlawful. *Opinio juris* on the prohibition against torture demonstrates the above. The ICJ, in *Questions Relating to the Obligation to Prosecute Or Extradite*, has recently held that that prohibition against torture is “grounded in a widespread international practice and on the *opinio juris* of states. It appears in numerous international instruments of universal application.”<sup>64</sup> Government positions on resolutions adopted by international organizations represent state practice leading to *opinio juris*. Though such resolutions are regarded as soft law, they could be incorporated into treaties and may become customary in international law. What is more, the UN Security Council (UNSC)—in the case of Yugoslavia and Rwanda—sent a signal to the whole global community that amnesties could not apply to war crimes. Under Chapter VII of the UN Charter, the UNSC passed resolutions enacting statutes for international criminal tribunals to prosecute war crimes in Yugoslavia<sup>65</sup> and genocide in Rwanda<sup>66</sup> to “restore international peace and security.”<sup>67</sup> The affirmative voting of UNSC members on these resolutions represents one of the most compelling exhibits of both state practice and *opinio juris* that proves a duty to prosecute international crimes, since members of the United Nations must carry out the decisions of the Security Council in accordance with the Charter of the United Nations.

### *Law and Practice of the United Nations*

The laws and practices of the UN have also led to the formation of a norm of international custom that obligates a state to prosecute war crimi-



nals when they are found in the territory of such a state. United Nations General Assembly (UNGA) issued Resolution 44/162 (1989), establishing a duty to bring perpetrators to court either by prosecuting or extraditing them. UNGA Resolution 37/185, 1982 urged the judiciary of the Republic of El Salvador to prosecute and punish assassins, murderers, and those responsible for acts of torture and other forms of cruel, inhuman, or degrading treatment. Similarly, “a wide range of activities of the United Nations and other intergovernmental organizations (encompassing reports made by Working Groups, Special Representatives or UN Rapporteurs) reinforce the view that punishments play a necessary part in states’ duty under customary law to ensure the rights to life, freedom from torture, and freedom from involuntary disappearance,” Orentlicher says.<sup>68</sup> By the same token, several international instruments from the UN mention the duty to prosecute serious violations of human rights, including the Draft Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances (drafted under UN leadership) and Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, supported by UNGA. Thus, international custom—state practice and *opinio juris*—mandates prosecution for international crimes.

### *The Codification of Customary International Law Governing Armed Conflicts and the ICRC*

Furthermore, in 2005 the ICRC, “the guardian of the Geneva Conventions,”<sup>69</sup> published a paramount compendium<sup>70</sup> on customary international humanitarian law governing armed conflicts that illustrate abundant state practices on the field. ICRC has been a restless sponsor and developer of the corpus of international humanitarian law. Over the years, “The International Committee has labored unremittingly for the greater protection in International Law of the individual against the hardships of war.”<sup>71</sup> This work, which is made up of a set of rules, represents a fundamental contribution to the codification of customary international law, in particular in the field of international humanitarian law governing cases of civil conflict. One of those rules is Rule 159, which establishes that amnesties cannot be granted for persons suspected of war crimes or sentenced for them. Overall, the ICRC highlights,

The study thus clarifies the protection that is legally due to people affected by internal conflicts, such as those in Colombia, the

Democratic Republic of the Congo, Nepal and Sudan. It is relevant in this respect to underline that in such internal conflicts, both governmental armed forces and rebel forces are bound by these customary rules and can be held accountable in case of non-compliance.<sup>72</sup>

### *Colombia and the Persistent Objector Theory*

Can international custom be challenged? Addressing this question is crucial to understanding whether states are capable of challenging a rule of customary international law that imposes a duty to prosecute international crimes. Generally speaking, states can be persistent objectors to international custom, even if the two requirements to confirm the existence of a norm of customary international law—state practice and *opinio juris*—are met.

Scholars have not reached consensus regarding the validity of the “persistent objector” theory. While pointing out how this rule affirms the centrality of the state, Murphy emphasizes, “Yet, if most states agree on the emergence of a norm, a few ‘hold out’ states will not prevent the norm from coming into existence, but the objector states will not be bound by the norm.”<sup>73</sup> Conversely, Luban, O’Sullivan and Stewart somehow oppose Murphy, pointing out that “A state that persistently objects to a rule of CIL, throughout the period in which the rule is being formed will not be bound by the rule. However, if the state has not persistently objected, it may be bound by the rule whether it likes it or not.”<sup>74</sup> The question now is, whether or not Colombia has been a persistent objector against the emerging international custom that imposes a duty to prosecute international crimes.

Colombia has not been a persistent objector to such an emerging rule of international custom for three reasons. Firstly, the negotiation and ratification of treaties bring about state practice. As mentioned previously, Colombia has negotiated, consented, signed and ratified the Geneva Conventions and the Additional Protocols, the ICCPR, the ACHR and CAT. These treaties signify a step forward in the codification of a duty to prosecute international crimes, making amnesties unlawful under international law. As for the ICC Statute, it is appropriate to underscore that under Article 124 of the Rome Statute, a State Party, in joining the Statute, may make a declaration to it. Upon ratification and pursuant to Article 124, Colombia declared that “None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian state from granting amnesties, reprieves or judicial

pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia.<sup>75</sup> Accordingly, the government of Colombia may grant amnesties to those accused of political crimes such as rebellion, treason, espionage and conspiracy. In contrast, Colombia, in making such a declaration, acknowledged that it is prohibited to grant amnesties to the crimes that fall upon the jurisdiction of the ICC.

Secondly, the Colombian Constitutional Court has developed the concept of “constitutionality block,”<sup>76</sup> in which public international law is part of the constitution, prevailing over national legislation. The Court held that, although some essential rules of public international law do not appear within the normative part of the constitution, *jus cogens* norms on torture, genocide, and crimes against humanity are part of it, prevailing over national legislation. The Court has established that the following international treaties are part of the constitution: The Geneva Conventions and their two Additional Protocols, under which High Contracting Parties undertake a duty to prosecute those who violate the Conventions and the Protocols; the Inter-American Convention on Forced Disappearance of Persons; and those international human rights treaties that protect the rights of the child, to which Colombia is a signatory. The duty to prosecute those who violate the Geneva Conventions and their two Additional Protocols is part of the Colombian constitutionality block and therefore prevails over national legislation.

Thirdly, the same Court has ruled that the government of Colombia can grant amnesties and pardons for rebellion without violating the country’s international obligations. In other words, the constitutional order of Colombia only admits amnesties for political crimes with the payment of indemnities to victims. The Court, nevertheless, has stated that international law recognizes the non-derogability of peremptory norms since international law punishes the most serious crimes, which are important for the international community of states. For the Court, those norms of international law accepted by Colombia, including the Rome Statute, do not permit the adoption of “self-amnesties, blanket amnesties, laws or other instruments that impede victims’ effective access to judicial remedies.”<sup>77</sup>

It is therefore safe to infer that Colombia has not, neither by its practice of negotiating and ratifying treaties nor by case law made in its domestic courts, been a persistent objector to the rule of international custom that impose a duty to prosecute international crimes. By enacting a legal framework for peace through an amendment to the Constitution, Colombia cannot appeal to the persistent objector theory to giving up

criminal prosecutions against war criminals. Instead, the government is in breach of its international obligations. The evidence presented in this section makes a clear case that international custom prohibits ICC crimes and mandates prosecution, making amnesties unlawful. Now, let us survey international jurisprudence so as to reinforce this argument.

### **CAN AMNESTIES BE USED AS A DEFENSE BEFORE INTERNATIONAL CRIMINALS TRIBUNALS?**

Schabas says, “A defence is an answer to a criminal charge.”<sup>78</sup> Under the Rome Statute, insanity, intoxication, self-defense, duress, mistake of fact and law, superior orders, official capacity, alibi, military necessity, consent, reprisal, prescription of law, and abuse of process can be taken into account by the Court as grounds for excluding criminal responsibility.<sup>79</sup> The above is not an exhaustive list; the accused have a right to raise defenses, including amnesties. In cases brought before ad hoc tribunals, defendants attempted unsuccessfully to use amnesties granted domestically to bar prosecution.

Can amnesties be used as a defense before the ICC? The ICC has reasoned that case law of the ad hoc tribunals cannot per se constitute a precedent for the ICC, because the ICC must assess any case against the provisions governing the law applicable before the Court, in particular Article 21 of the Rome Statute.<sup>80</sup> In spite of this caveat, it is worthy to examine jurisprudence of the ad hoc tribunals because they assessed whether amnesties are lawful under international law, finding them to be in violation of principles of justice, such as the right of victims to have their claims adjudicated by a court of law. The ICC may take into consideration such jurisprudence to rule on the issue in potential cases (Colombia) that can be brought before it. Let us examine jurisprudence from the ad hoc tribunals, and the Inter-American Court of Human Rights to argue that any amnesty granted locally would be ultimately unenforceable internationally.

#### ***The International Criminal Tribunal for the Former Yugoslavia***

In *Prosecutor v. Furundžija*, the ICTY Trial Chamber<sup>81</sup> shed light on the question of whether customary international law imposes on all states a duty to prosecute international crimes. The Trial Chamber stated that it

does not need to determine whether the Geneva Conventions and the Additional Protocols passed into customary international law in their entirety, as was recently held by the Constitutional Court

of Colombia, or whether, as seems more plausible, only the most important provisions of these treaties have acquired the status of general international law. In any case, the proposition is warranted that a general prohibition against torture has evolved in customary international law. This prohibition has gradually crystallised from the Lieber Code and the Hague Convention.<sup>82</sup>

The Chamber took into account the following factors to make such an argument. Firstly, the Geneva Conventions and the Additional Protocols were ratified by nearly all nations of the world. This membership indicates the attitude of states toward the prohibition of torture, because “no State has ever claimed that it was [authorized] to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture.”<sup>83</sup> Secondly, the ICTY Trial Chamber reasoned that, “Common Article 3 of the 1949 Geneva Conventions, which *inter alia* prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and

*If those who engage in international crimes are criminally responsible for their actions or omissions, an amnesty for them violates international law.*

..... internal armed conflicts.”<sup>84</sup> Thirdly, the ICTY Trial Chamber claimed that “Those who engage in torture are personally accountable at the criminal level for such acts ... Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers.”<sup>85</sup> If those who engage in international crimes are criminally responsible for their actions or omissions, an amnesty for them violates international law. Finally, the ICTY Trial Chamber established that war criminals must be prosecuted for torture following an amnesty in the following jurisdiction: international tribunals, foreign states, and before their own jurisdiction under a new regime.

### ***Special Court of Sierra Leone: A Precedent?***

The Court ruled that amnesties granted under the Lomé Agreement<sup>86</sup> were invalid. Two defendants, Morris Kallon and Brima Bazzy Kamara, filed a preliminary motion to challenge the jurisdiction of the Special Court of Sierra Leone.<sup>87</sup> In *Prosecutor v. Kallon*, The Appeals Chamber of the Court held that

Counsel for Kallon submitted that there is, as yet, no universal acceptance that amnesties are unlawful under international law, but ... Even if the opinion is held that Sierra Leone may not have breached customary law in granting an amnesty, this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity.<sup>88</sup>

### *Inter-American Court of Human Rights*

The Inter-American Court of Human Rights was asked to decide if Chile, in keeping legislation that permitted amnesties,<sup>89</sup> was in compliance with its obligations under Articles 1.1 and 2 of the ACHR. In *Almonacid Arellano and Others v. Chile*, the Court<sup>90</sup> held that

The State has violated its obligation to modify its domestic legislation in order to guarantee the rights embodied in the American Convention because it has enforced and still keeps in force Decree Law No. 2.191, which does not exclude crimes against humanity from the general amnesty it grants ... the State has violated the right to a fair trial and the right to judicial protection and has not complied with its obligation to respect guarantees in detriment of the next of kin of Mr. Almonacid-Arellano, given the fact that it applied Decree Law No. 2.191 to the instant case.<sup>91</sup>

In this judgment, the Court reasoned that State Parties to the ACHR could not enact amnesty laws to be applied to crimes against humanity, because they prevent them from fulfilling their obligations under the Convention. The Court ruled that there is a duty under international law to prosecute crimes against humanity, because such crimes violate a series of non-derogable rights protected by the Convention. In particular, the Court stated that

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity [161] clearly states that 'no statutory limitation shall apply to [said internationally wrongful acts], irrespective of the date of their commission.' ... Even though the Chilean State has not ratified said Convention, the Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (*jus cogens*), which is not created by said Convention, but it is acknowledged by it. Hence, the Chilean State must comply with this imperative rule.<sup>92</sup>

It is lastly relevant to summarize other conclusions of the Court in the case of Mr. Almonacid-Arellano. For the Court and pursuant to Article 2 to the ACHR, State Parties must abolish all laws that violate the Convention, including amnesty laws. The Court went further when it ruled that state parties to the ACHR must set up policies and practices to observe the guarantees of the ACHR. Finally, the Court mandated that Chile's judiciary be obligated to guarantee the rights set forth in the ACHR, even in the case the Chilean Congress failed to suppress the amnesty law.

To conclude, ad hoc tribunals and the Inter-American Court of Human Rights, through their jurisprudence, have indicated that the evolving duty to prosecute international crimes has crystallized as a norm of customary international law, making amnesties useless as a defense before international fora.

## CONCLUSION

While the question of whether amnesties granted for war criminals would be accepted as a defense in proceedings before the ICC will not be definitely resolved until the Court settles it by its own jurisprudence, any domestically-granted amnesty is ultimately unenforceable internationally. To make this argument, it was necessary to demonstrate that the legal framework for peace passed by the Colombian Congress in June 2012 contains an indirect amnesty, as it includes the suspension of legal proceedings against war criminals. One can thus outline the following conclusions:

First, while the Lotus principle determines that, under international law, "Everything which is not prohibited is permitted" and "every door is open unless it is closed by treaty or by established custom,"<sup>93</sup> the doors of both customary international law, and, for many states, including Colombia, treaty law are now closed to amnesties. *Jus cogens* norms, state practice, *opinio juris sive necessitates*, and the codification of customary international humanitarian law completed by the ICRC together demonstrate that under a coalesced norm of customary international law, states also have a duty to domestically prosecute international crimes. Though amnesties are not explicitly forbidden in the Rome Statute regime, states under contemporary international law must prosecute international crimes.

Second, a careful examination of jurisprudence from the ICTY and the Special Court of Sierra Leone lead to the conclusion that any amnesty granted domestically is ultimately unenforceable internationally. These judicial decisions established that defendants could not use amnesty granted under national peace accords as a defense to challenge the jurisdic-



tion of international tribunals. For the Inter-American Court of Human Rights, State Parties to ACHR must abolish all amnesties laws because they violate international law. The ICC may accordingly consider such jurisprudence for the determination of rules of law on the amnesty issue, as the Court would prosecute and adjudicate cases involving war criminals and peace accords, including possible amnesties that would be granted under a peace agreement between the government of Colombia and FARC.

The article therefore concludes that the evolving duty to prosecute international crimes has crystallized, as a norm of customary international law, meaning amnesties cannot be used as a defense before international criminal fora. In the case of Colombia, a suspension of legal proceedings against war criminals can be honored domestically. Such an indirect amnesty, however, would give jurisdiction over cases to the ICC, as Colombia would have proven itself “unwilling” to prosecute.

Amnesty deprives victims of their right to seek justice and redress before a court of law. Unlike the ICTY and the Special Court of Sierra Leone, the ICC focuses not only on prosecutions but also on the victims of conflicts. The Rome Statute represents a combination of redistributive and restorative justice, an approach representing a step forward in the evolution of international criminal law. By using the case of Colombia to illustrate the evolving duty to prosecute, the article aims to shed light on the unresolved question of the international legality of amnesties—one facet of the dilemma of peace versus justice. *f*

*The Rome Statute represents a combination of redistributive and restorative justice, an approach representing a step forward in the evolution of international criminal law.*

## ENDNOTES

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- 2 UN Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/Conf. 183/9<sup>th</sup> (2002) [hereinafter Rome Statute or ICC Statute].
- 3 See Rome Statute preamble.
- 4 This paramount principle of international law came to be following the *Lotus* case, a judicial controversy involving France and Turkey following a collision in 1926 between the French mail steamer *Lotus* and the Turkish collier *Boz-Kour*. The case was heard before the Permanent Court of Justice.
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- 9 *Basta Ya! Colombia: Memorias de Guerra y Dignidad*, Grupo de Memoria Histórica document, July 24, 2013.
- 10 Ibid.
- 11 Ibid.
- 12 The Court has jurisdiction over crimes against humanity committed in Colombia or by its nationals after Colombia's ratification of The Rome Statute on November 1, 2002. As for war crimes, the Court has jurisdiction after November 1, 2009, pursuant to Colombia's declaration under article 124 of the ICC Statute.
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- 21 William A. Schabas, *An Introduction To The International Criminal Court* (New York: Cambridge University Press, 2007), 195.
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- 25 See Rome Statute art. 53 (1) (c).
- 26 Hayner, 115.
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- 28 Yasmin Naqvi, "Amnesties and the ICC," *The Peace and Justice Initiative*, <<http://www.peaceandjusticeinitiative.org/implementation-resources/amnesties-and-the-icc>> (accessed April 24, 2013).
- 29 Schabas, 186.
- 30 Rome Statute preamble.

- 31 Hayner, 115.
- 32 Yasmin Naqvi, "Amnesties and the ICC."
- 33 See Genocide Convention art. 6.
- 34 Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *The Yale Law Journal*, 100 (8) (June 1991): 2537-2615, 2571.
- 35 The Office of the Prosecutor *op. cit.*, p. 43.
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- 37 Marieke Wierda, *Stocktaking: Complementary*. The Rome Statute Review Conference document, June 2010, 1.
- 38 Schabas, 171.
- 39 See United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, art. 31, para. 1 [hereafter VCLT].
- 40 See VCLT art. 31, para. 1.
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- 45 David Luban, Julie R. O'Sullivan and David P. Stewart, *International And Transnational Criminal Law* (New York: Wolters Kluwer et al, 2010), 48.
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- 47 Luban, O'Sullivan & Stewart, 47.
- 48 Ibid, 47.
- 49 Luban, O'Sullivan, and Stewart, 48.
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- 53 See Rome Statute art. 7.
- 54 See Rome Statute art. 8.
- 55 Cassese, 25-26.
- 56 Prosecutor v. Tadić. Case No. IT94-1-T, Opinion and Judgment. (May 2, 1997), at para. 649.
- 57 Cassese, 26.
- 58 Murphy, 92-93.
- 59 Murphy, 93.
- 60 Ibid, 94.
- 61 Colombia, on 21 June 1985, presented an instrument of acceptance by which recognizes the jurisdiction of the Court, for cases involving the interpretation or application of the American Convention on Human Rights.
- 62 The article will examine in section VII jurisprudence of the Inter-American Court of Human Rights that shed light on the issue.

- 63 Murphy, 94-95
- 64 Questions Relating To The Obligation to Prosecute Or Extradite (Belgium v. Senegal), 2012. I.C.J. 33 (July 20).
- 65 See S.C. Res. 827 (May 25, 1993).
- 66 See S.C. Res. 955 (Nov 8 1994).
- 67 See UN Charter art. 39.
- 68 Orentlicher, 2583.
- 69 See the Statutes of the ICRC and Red Crescent Movement.
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- 71 International Committee of the Red Cross, *The Geneva Conventions Of 12 August 1949* (Geneva: International Committee of the Red Cross, 2010), 19.
- 72 Henckaerts & Doswald-Beck, 56.
- 73 Ibid, 95.
- 74 Luban, O'Sullivan & Stewart, 40.
- 75 Schabas, 471.
- 76 Constitutional Court, *Constitutional Case No. C- 225/95*, (May 1995).
- 77 Constitutional Court, *Constitutional Case No. C-578/02*, (July 30, 2002).
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- 79 See Rome Statute art. 31.
- 80 *Situation in Uganda* (ICC-02/04-01/05), October 28, 2005, para. 19.
- 81 The ICTY has jurisdiction to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.
- 82 Prosecutor v. Anto Furundžija. Case No.: IT-95-17/1-T, Judgment (December 10, 1998), para 137.
- 83 Ibid, para 138.
- 84 Ibid, para 138.
- 85 Ibid, para 140.
- 86 A peace accord signed between the government of Sierra Leone and the Revolutionary Armed Front (RUF).
- 87 The UNSC assessed that the situation in Sierra Leone constituted a threat to international peace and security in the region. Through Resolution 1315 (August 14, 2000), the Security Council instructed the UN Secretary-General to negotiate an agreement with the government of Sierra Leone to create an independent special court to prosecute persons bearing the greatest responsibility for serious violations of international humanitarian law committed in the territory of Sierra Leone since November 30, 1996.
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- 91 *Almonacid Arellano and Others v. Chile*, Inter-Am. Ct. H.R., Ser. C, No. 154 (September 26, 2006) at para 129.
- 92 Ibid., at para, 152-153.
- 93 Luban, O'Sullivan & Stewart, 183.