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A FORGIVENESS LAW: THE PATH TO SOLVE THE PEACE VERSUS JUSTICE DILEMMA

JUAN CARLOS PORTILLA *

Abstract: The peace process between the Colombian government and the Colombian guerrillas provides a case study to examine the operation of a forgiveness law under international law. In 2012, the Colombian Congress passed a legal framework for peace, which essentially provided amnesty for those accused of international crimes. While amnesty trades justice for peace, the forgiveness law proposal for Colombia would secure justice and peace together. Unlike amnesty, the forgiveness law proposal is lawful under international law, for it guarantees prosecution of international crimes, discovery of the truth, a fair trial, adjudication of individual criminal responsibility, redress for victims, guarantees of non-repetition, and mercy for perpetrators. Under the proposal, victims—through a forgiveness and reconciliation commission—actively participate in the legal proceedings that lead to the granting of a pardon because the act of forgiveness is an individual prerogative that only victims enjoy.

INTRODUCTION

Governments of societies in situations of internal armed conflict have often used amnesty as a policy tool to negotiate peace with those accused of committing international crimes,¹ thus trading justice for peace. Yet, amnesties granted to those accused of international crimes are unlawful under international law² and exemplify one feature of the “peace versus justice” dilemma.

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¹ International crimes are war crimes, crimes against humanity, genocide, and other violations of international humanitarian law. These crimes fall upon the jurisdiction of the International Criminal Court (“ICC”) and are known as ICC crimes.

² See Juan Carlos Portilla, *Amnesty: Evolving 21st Century Constraints Under International Law*, 38 FLETCHER F. WORLD AFF. 169, 170–71 (2014); see also Almonacid-Arellano et al. v.

ma—a topic of international law that remains unsettled among scholars.³ Nevertheless, societies emerging from a civil war must debate public policies upon which a solid transition from conflict into peace can be constructed without contravening international law.⁴ One of the facets of such a transition must be a forgiveness law,⁵ which can help these societies achieve reconciliation without impunity, and which provides a permanent solution to the dilemma of peace versus justice.

The peace process between the Colombian government and the Revolutionary Forces of Colombia—People's Army ("FARC")⁶ offers an opportunity to examine the lawfulness of a forgiveness law under international law, and to show how such a law could better service the dual goals of peace and justice. To facilitate the commencement of such peace talks, the Colombian Congress passed a legal framework for peace in July 2012, which grants Congress the power to select the individuals to be prosecuted and to determine whether legal proceedings should be suspended for those non-state actors accused of international crimes who consent to demobilize as well as for those members of armed forces accused of international crimes.⁷ The powers that the legal framework for peace granted to Congress, however, essentially provided for an indirect amnesty, which contravenes international law, impedes criminal prosecution, compromises the truth, deprives victims of the opportunity to seek redress, and endangers the guarantee of non-repetition value.

Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 129 (Sept. 26, 2006) (stating that Chile, "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").

³ See, e.g., Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 801–04 (2005).

⁴ See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 451 (2003) (advocating establishments of truth commissions with powers to issue pardons to low- or mid-level perpetrators accused of international crimes).

⁵ A definition of a forgiveness law will be given in Part II of this Article.

⁶ The government of Colombia invited FARC to negotiate peace in order to end the country's armed conflict. Negotiations started in Cuba in November in 2012. FARC is one of the non-state actor parties to the Colombian conflict, which, according to the Office of the Prosecutor of International Criminal Court, is believed to have committed crimes against humanity and war crimes in Colombia. See Situation in Colombia, Interim Report, 2012 I.C.J. 2–3, ¶ 2–9 (Nov.), available at http://www.iccnw.org/documents/otp_-_colombia_-_public_interim_report_-_november_2012.pdf.

⁷ FELIPE GÓMEZ ISA, NORWEGIAN PEACEBUILDING RES. CTR., JUSTICE, TRUTH AND REPARATION IN THE COLOMBIAN PEACE PROCESS 2 (2013), available at http://peacebuilding.no/var/ezflow_site/storage/original/application/5e7c839d7cf77846086b6065c72d13c5.pdf.

Unlike amnesty laws, the forgiveness law proposal for international crimes discussed throughout this Article complies with international law,⁸ for it guarantees the prosecution of such crimes,⁹ the discovery of truth,¹⁰ a fair trial,¹¹ redress for victims,¹² and guarantees of non-repetition.¹³ Therefore,

⁸ This is true in particular, with *jus cogens* norms of international law, treaty, and customary international law, all of which are considered the principal sources of international law under Article 38 of the Statute of the International Court of Justice (“ICJ”), Article 53 of the Vienna Convention on the Law of the Treaties, and Article 21 of the Rome Statute of the International Criminal Court (“ICC Statute”). Judicial decisions of international courts, which have shed light on the unlawfulness of amnesties, are part of the corpus of international law as subsidiary sources for the determination of the rules of international law. See Rome Statute of the International Criminal Court art. 21, July 1, 2002, 2187 U.N.T.S. 91 [hereinafter Rome Statute]; Vienna Convention on the Law of Treaties art. 53, Jan. 27, 1980, 1155 U.N.T.S. 331; Statute of the International Court of Justice art. 38, ¶ 1(a), (b), (d), Jun. 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

⁹ There is a duty to prosecute international crimes under international treaty law. Pursuant to the Genocide Convention, “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish,” and those accused of the crime of genocide must be prosecuted by a competent tribunal of the state within which genocide was perpetrated or by “such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” See Convention on the Prevention and Punishment of the Crime of Genocide arts. 1, 6, Dec. 9, 1948, 78 U.N.T.S. 1, 2. In accordance with the Geneva Conventions and their Additional Protocols, the High Contracting Parties undertake a duty to prosecute those who violate the Geneva Conventions’ regime and its Additional Protocols. See Geneva Convention Relative to the Protection of Civilians in Time of War art. 146, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; see also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 49, Aug. 12, 1949, 75 U.N.T.S. 34 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] [collectively referred to as Geneva Conventions]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 85, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. The preamble of the Rome Statute states, “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . .” See Rome Statute, *supra* note 8. In addition to treaty law, the ICJ has recognized the principle of extraditing or prosecuting those accused of having committed the crime of torture. See Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment [hereinafter Questions], 2012 I.C.J. 39–40 (July 20).

¹⁰ See Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, 88 INT’L REV. RED CROSS 245, 245 (2006) (stating that the right to the truth “relates to the obligation of the state to provide information to victims or to their families or even society as a whole about the circumstances surrounding serious violations of human rights”).

¹¹ International human rights treaties protect the right to a fair trial. See International Covenant on Civil and Political Rights art. 14, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966) (Mar. 23, 1976) [hereinafter ICCPR]; Organization of American States, American Convention on Human Rights art. 8, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights]; European Convention on Human Rights art. 6, Sept. 3, 1953, 213 U.N.T.S. 221.

¹² Human rights treaties recognize the right to an effective remedy and redress. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14,

Colombia should instead adopt this method of dealing with post-conflict crimes. As governments grant pardons in order to provide a second opportunity to those convicted of ordinary crimes,¹⁴ governments, in the aftermath of an internal armed conflict, could similarly issue “pardons as peace” to afford a second opportunity for those involved in the war and convicted of international crimes.¹⁵ The advantages of a forgiveness law proposal are many, and in the future, international organizations such as the United Nations should recommend the enactment of a forgiveness law in countries seeking peace and reconciliation at the culmination of an internal armed conflict.

Part I of this Article briefly discusses the background of post-conflict societies and the modes of dealing with post-conflict crimes, chiefly international crimes. Part II then provides the moral and legal underpinnings of the forgiveness law proposal, puts forward the peace and justice equation, and suggests the scope and definition of the proposal. Part III makes the case of forgiveness over amnesty by evaluating the lawfulness of a forgiveness law under international law, and by identifying the advantages of the forgiveness law proposal over amnesty. Finally, Part IV examines the possible application of the proposal to Colombia by providing background information of the Colombian conflict, suggesting the establishment of a forgiveness and reconciliation commission, providing the structure and power of such a commission, and discussing the advantages of the forgiveness and reconciliation proposal over the disadvantages of truth commissions with amnesty granting power.

I. POST-CONFLICT SOCIETIES AND THE MODES OF DEALING WITH POST-CONFLICT CRIMES, CHIEFLY INTERNATIONAL CRIMES

Post-conflict societies are those societies “emerg[ing] from a period of mass violence,”¹⁶ such as a civil war or a non-international armed conflict (“NIAC”),¹⁷ in which hostilities occurred between “governmental authorities

G.A. Res. 39/46, annex, UN Doc. A/39/551 (Dec. 10, 1984) [hereinafter CAT]; ICCPR, *supra* note 11, art. 2; *see also* American Convention on Human Rights, *supra* note 11, at art. 10.

¹³ *See* Christian J. Tams, *Recognizing Guarantees and Assurances of Non-Repetition: LaGrand and the Law of State Responsibility*, 27 YALE J. INT'L LAW 441, 441–42 (2002).

¹⁴ *See* U.S. CONST. art. II, § 2 (granting the President power to grant pardons for federal crimes in the United States); CONSTITUCIÓN ESPAÑOLA [CONSTITUTION], pt. II, § 62(I) (Spain) (granting the King of Spain authority to exercise the right to clemency); Criminal Records Act, R.S.C. 1985, c. C-47, § 2.1 (Can.) (granting Parole Boards power to decide pardons in Canada).

¹⁵ *See* Linda Ross Meyer, *The Merciful State*, in FORGIVENESS, MERCY, AND CLEMENCY 64, 68 (Austin Sarat & Nasser Hussain eds., 2007).

¹⁶ *See* Richard J. Goldstone, *Foreword to* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE, at ix, ix (1998).

¹⁷ A non-international armed conflict is one which occurs in the “territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” *See*

and organized armed groups or between such groups within a State.”¹⁸ Throughout the twentieth century, the world witnessed the occurrence of mass atrocities in all of today’s post-conflict societies. Violence and the perpetration of international crimes took place all over the world, but in particular, in Africa (the Rwandan Genocide,¹⁹ the apartheid in South Africa,²⁰ war crimes during the civil war of Sierra Leone²¹), in Latin America (Argentina’s Dirty War²² and its policy of forced disappearance, the Pinochet torture policy era in Chile,²³ or the kidnapping and extrajudicial killings policies committed in the armed conflict between guerrillas, paramilitary units, and armed forces in Colombia,²⁴ which has not yet come to an end), in Southeast Asia (Cambodia²⁵), or in Southeast Europe (the Bosnia and Kosovo Wars in the former Yugoslavia²⁶).

Furthermore, post-conflict societies are viewed as societies moving forward from an era of NIAC into an era of healing, national reconstruction, and the rebuilding of national identity.²⁷ These societies confront challenges and dilemmas between justice for victims and the achievement of reconciliation without impunity. One aspect of these challenges is the mode of dealing with post-conflict perpetrators, chiefly perpetrators of international crimes. Judge Richard J. Goldstone²⁸ captured the impunity issue that post-conflict societies encounter in the aftermath of a NIAC. He stated that:

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict art. 1, Jun. 8 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

¹⁸ See *Prosecutor v. Tadic*, Case No. IT-94-I-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

¹⁹ For further reading of the background on the Rwandan genocide, see DAVID LUBAN ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 100–04 (2010).

²⁰ See MINOW, *supra* note 16, at 54–55.

²¹ See LUBAN ET AL., *supra* note 19, at 111–18.

²² See HURST HANNUM ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 794 (5th ed. 2011).

²³ See LUBAN ET AL., *supra* note 19, at 268–79.

²⁴ See INFORME GENERAL GRUPO DE MEMORIA HISTÓRICA, CENTRO NACIONAL DE MEMORIA HISTÓRICA, ¡BASTA YA! COLOMBIA: MEMORIAS DE GUERRA Y DIGNIDAD 33 (2013), available at <http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/BYColombiaMemoriasGuerraDignidadAgosto2014.pdf>.

²⁵ See LUBAN ET AL., *supra* note 19, at 122–23.

²⁶ See *id.* at 87–90 (providing background on the Balkan Wars).

²⁷ See Uwimana Basaninyenzi, *From Kigali to Kabul: The Role of Art in Post-Conflict Reconciliation*, PEOPLE, SPACES, DELIBERATION, WORLD BANK (Oct. 18, 2012), <http://blogs.worldbank.org/publicsphere/kigali-kabul-role-art-post-conflict-reconciliation> (describing national reconstruction efforts of Afghanistan).

²⁸ Judge Richard J. Goldstone is a former Judge of the South African Constitutional Court and former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

[i]t should be recognized that in a perfect society victims are entitled to full justice, namely [a] trial of the perpetrator and, if found guilty, adequate punishment. That ideal is not possible in the aftermath of massive violence. There are simply too many victims and too many perpetrators. Even the most sophisticated criminal justice system would be completely overwhelmed.²⁹

Although Goldstone gets to the heart of the matter by arguing that justice for victims of international crimes “is not possible in the aftermath of massive violence,”³⁰ there have been voices suggesting otherwise. For example, Antonio Cassese has discussed several modes of dealing with international crimes in post-conflict societies and has outlined options, such as national courts exercising jurisdiction on the basis of principles of territoriality and nationality, local judicial systems exercising universal jurisdiction to prosecute international crimes committed abroad, and establishing international criminal tribunals and truth commissions with amnesty-granting power.³¹

The options that Cassese outlines, however, have weaknesses. There are two major flaws in the normal mode of dealing with international crimes in post-conflict societies, which consist of bringing alleged perpetrators before either the national criminal courts of the state where the atrocities occurred or before the national criminal system of the nationality of the accused.³² Firstly, criminal prosecutions against perpetrators of international crimes entitle only redistributive justice. The approach to deal with such perpetrators in post-conflict societies must focus not only on criminal prosecutions (redistributive justice), but also on compensation for victims for all damages suffered by the atrocities (restorative justice). Secondly, history has shown that senior state officials have been involved in the atrocities that occurred in today’s post-conflict societies. Therefore, national governments could be tempted not to prosecute their own officers by granting them amnesty (self-amnesty), as would be the case under the Colombian framework for peace.³³

Although the establishment of universal criminal jurisdiction by national governments to prosecute international crimes committed abroad “on behalf

²⁹ See Goldstone, *supra* note 16, at ix–x.

³⁰ See *id.* at ix.

³¹ See CASSESE, *supra* note 4, at 6–10.

³² See *id.* at 6.

³³ Human rights advocates indicate that the Colombian legal framework for peace could be used by the Colombian Congress to provide immunity to government officials, in particular parliamentarians and military officials, involved in the killing of thousands of civilians. See Hasan Dodwell, *Analysis: Legal Framework for Peace*, JUST. FOR COLOM., (July 28, 2012), <http://www.justiceforcolombia.org/news/article/1274/analysis-legal-framework-for-peace>.

of the international community at large³⁴ has been vividly discussed among scholars³⁵ and has been pursued by some states,³⁶ it is not clear if that option is totally grounded under international law. Firstly, the prosecutorial state “has no links of territory with the offense, or of nationality with the offender (or even the victim).”³⁷ And secondly, universal jurisdiction represents “a unilateral assertion of domestic jurisdiction subject to no established rules or principles (including the particular offenses to which it can be applied).”³⁸

The United Nations Security Council under Chapter VII of the UN Charter has established international criminal tribunals as “[a]nother way of reacting to atrocities”³⁹ Chiefly, the UN Security Council issued resolutions to adopt statutes for international criminal tribunals for Yugoslavia⁴⁰ and Rwanda.⁴¹ Although the creation of these tribunals by UN Security Council resolutions have represented an important step forward in the development of international criminal law, there have been critiques to such a response to mass violence. For example, these tribunals were not created by treaty, and a major issue on the establishment of the tribunals concerned the basis on which the Security Council had “the authority to establish an international tribunal.”⁴² In addition, voices have indicated that the tribunals have spent millions of dollars “prosecuting a small number of offenders,” and that they have cost too much.⁴³ Finally, because of the advent of the ICC, it is unlikely that in the future, the UN Security Council will establish international criminal tribunals to deal with international crimes perpetrators from post-conflict societies.

Cassese also contemplates the option of truth commissions with amnesty granting power “as a way of reacting to atrocities,” and as “an important alternative option to the ignominy and jeopardy of criminal proceedings.”⁴⁴ The driving force behind truth commission options is, for Cassese, that such bod-

³⁴ See CASSESE, *supra* note 4, at 8.

³⁵ See, e.g., SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 281–83 (2006); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 136–51 (2001).

³⁶ See MURPHY, *supra* note 35, at 247. Murphy discusses Belgium’s Law Relative to the Repression of Serious Violations of the International Conventions of Geneva of August 12, 1949, and of the Protocols I and II of June 8, 1997. *Id.* He states that “[t]he law allowed an individual (whether Belgian or not) to file a criminal complaint in a Belgium court against any person for international crimes” *Id.* (footnote omitted).

³⁷ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 404 cmt. (1987).

³⁸ See LUBAN ET AL., *supra* note 19, at 212.

³⁹ CASSESE, *supra* note 4, at 11.

⁴⁰ See generally S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

⁴¹ See generally S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

⁴² See LUBAN ET AL., *supra* note 19, at 102.

⁴³ See *id.* at 101.

⁴⁴ CASSESE, *supra* note 4, at 10.

ies can help the process of promoting national reconciliation in post-conflict societies. Nevertheless, amnesty for international crimes is unlawful under international law and deprives victims of their right to seek redress before a court of law.

In contrast to Goldstone, who claims that the ideal of justice is not possible in the aftermath of an NIAC, and Cassese, who advocates for, among other avenues, truth commissions with amnesty granting power, this Article instead argues that peace and justice are achievable together in the aftermath of an NIAC, and it proposes a forgiveness law for international crimes as an alternative legal approach to amnesty upon which a solid transition from conflict into peace can be accomplished without impunity and without contravening international law.

II. THE FORGIVENESS LAW PROPOSAL: SCOPE, DEFINITION, AND UNDERPINNINGS, INCLUDING THE PEACE AND JUSTICE EQUATION

A. Scope of the Forgiveness Law Proposal for International Crimes

In order to sketch out the scope of the forgiveness law proposal for international crimes, it is relevant to delineate, in a nutshell, some aspects of forgiveness for ordinary crimes. The Supreme Court of the United States, for example, has shed some light on the issue. In particular, in *Burdick v. United States*, the Court considered whether acceptance, as well as delivery, of a pardon was essential to its validity, whether the President of the United States could exercise pardoning power before conviction, and whether there was a distinction between amnesty and pardon.⁴⁵

In the *Burdick* case, a grand jury investigated whether an employee of the U.S. Treasury Department leaked information to the press.⁴⁶ George Burdick, city editor of the New York Tribune, appeared before the grand jury where he was questioned about the leaks, but he refused to reveal the source of his information.⁴⁷ President Woodrow Wilson granted Burdick a pardon, but Burdick rejected the pardon and refused to testify.⁴⁸ Burdick eventually was fined and jailed.⁴⁹ In holding that accepting a pardon is an admission of guilt, and that while amnesty overlooks offense, pardon remits punishment, the Court reasoned that pardons are “act[s] of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual,

⁴⁵ See *Burdick v. United States*, 236 U.S. 79, 85 (1915).

⁴⁶ *Id.*

⁴⁷ *Id.* at 86.

⁴⁸ *Id.*

⁴⁹ *Id.*

on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”⁵⁰

Drawing on *Burdick*, it is reasonable to state that granting a pardon to a perpetrator of an international crime, as an act of grace, which “exempts the individual, on whom it is bestowed from the punishment the law inflicts for a crime he has committed,”⁵¹ requires prosecution⁵² conviction, and punishment of the crime.⁵³ Pardons under *Burdick* can be given to both those who have committed a crime and those who have been convicted, for a pardon “carries an imputation of guilt.”⁵⁴ Likewise, under *Burdick* there are differences between amnesty and pardon.⁵⁵ The Court reasoned that unlike amnesty, a pardon “remits punishment . . . [and] condones infractions of the peace of the State,”⁵⁶ does not “overlook[] the offense and the offender,”⁵⁷ and does not leave the offense and the offender “in oblivion.”⁵⁸

What is more, a pardon is defined as an “act or an instance of officially nullifying punishment or other legal consequences of a crime.”⁵⁹ To be granted a pardon for an ordinary crime requires punishment, and to secure punishment a government must prosecute, and the perpetrator must be found guilty in accordance with the law. Martha Minow seems to endorse the above approach, as she says, “forgiveness does not and should not take the place of justice or punishment.”⁶⁰ Accountability is necessary, since “[a]dvocating punishment for a wrongdoer one has forgiven in fact is well supported by reference to the impersonal processes of a justice system . . .”⁶¹ In other words, “[f]orgiveness in this sense need not be a substitute for punishment.”⁶²

From the statements above, it can be deduced that forgiveness of an international crime must be granted only after the prosecution and conviction of a perpetrator of such a crime. Forgiveness of an international crime carries an imputation of guilt, and such acts of forgiveness must be accepted, since accepting implies an admission of guilt. Amnesty leaves an international crime

⁵⁰ *Id.* at 89–90 (quoting *United States v. Wilson*, 7 Pet. 150 (1833)).

⁵¹ *See id.*

⁵² *See id.* at 94; *see also supra* note 9 and accompanying text.

⁵³ Even though *Burdick* deals with the commission of an ordinary crime case in the United States, the reasoning of the U.S. Supreme Court can help in the discussion of a forgiveness law for international crimes committed in countries confronting the peace versus justice dilemma in the wake of an internal armed conflict.

⁵⁴ *See Burdick*, 236 U.S. at 94.

⁵⁵ *See id.*

⁵⁶ *See id.* at 95.

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

⁶⁰ *See MINOW, supra* note 16, at 15.

⁶¹ *See id.*

⁶² *See id.*

and the offender in oblivion, and forgiveness must not be a substitute for punishment of an international crime.

Furthermore, the act of forgiveness must be an individual prerogative that a victim of international crimes enjoys. Aryeh Neier claims that “public forgiveness in particular runs the risk of signaling to everyone the need to forget,” and governments, through their representatives, may end up “usurp[ing] the victim’s exclusive right to forgive his oppressor”⁶³ Consequently, governments can “fail to respect fully those who have suffered.”⁶⁴ Under any forgiveness law proposal for international crimes, a victim of these crimes must actively participate in the legal proceedings that lead to the granting of a pardon for these types of crimes. Thus, a written statement of a victim—in which the victim acknowledges the application for a pardon made by his or her perpetrator, forgives the offense, accepts the apology, reparation, and the guarantee of non-repetition offered—must be a necessary condition that any forgiveness law must include in its regime.

B. Definition of the Forgiveness Law Proposal

From all of the statements provided above, this Article suggests the following definition of a forgiveness law for international crimes: a statute enacted by a legislative branch of government to legally empower victims of international crimes with the option of deciding on an act of forgiveness request made by their perpetrators,⁶⁵ to provide them with opportunities to seek reparation⁶⁶ and guarantees of non-repetition,⁶⁷ as well as to afford perpetrators of international crimes an opportunity to seek forgiveness, treatment, healing, and a second opportunity to guarantee peaceful co-existence between victims and perpetrators in the aftermath of an armed conflict. In this context, collective bodies of forgiveness and reconciliation for Colombia must be given legal authority to grant pardons under a forgiveness law, once prosecution,⁶⁸ the telling of the truth,⁶⁹ conviction, sentencing, reparation,⁷⁰ and guarantees of non-repetition⁷¹ are secured, thus securing peace in post-conflict societies without contravening international law.

⁶³ See *id.* at 17 (internal quotations omitted) (quoting human rights activist Aryeh Neier).

⁶⁴ See *id.*

⁶⁵ See *id.* (“Forgiveness is a power held by the victimized, not a right to be claimed.”).

⁶⁶ See *supra* note 12 and accompanying text.

⁶⁷ See Tams, *supra* note 13, at 441–42.

⁶⁸ See *supra* note 9 and accompanying text.

⁶⁹ See *supra* note 10 and accompanying text.

⁷⁰ See *supra* note 12 and accompanying text.

⁷¹ See Tams, *supra* note 13, at 441–42.

C. Moral Underpinnings

Any forgiveness law proposal enacted to facilitate peace and justice among warring factions of any society in transition from conflict into peace must be based on moral values such as mercy, grace, forgiveness, accountability, reparation, and guarantees of non-repetition. These moral values have the support of a wide range of mainstream spiritual teachings, as well as of secular moral sources.

Should vengeance be the moral response to torture, genocide, forced disappearance, sexual enslavement, mass killings of civilians, indefinite detention, and other international crimes? Should it be part of the equation for solving the peace versus justice dilemma? *Lex talionis*, rooted in the Code of Hammurabi, commands an “eye for [an] eye, tooth for [a] tooth.”⁷² Under Hammurabi, punishments must literally match the crime committed. One of the laws of the Code of Hammurabi, for example, states, “If a man bring an accusation against a man, and charge him with a [capital] crime, but cannot prove it, he, the accuser, shall be put to death.”⁷³ In contrast, Minow asserts that, “revenge simply reverses the roles of perpetrator and victim, continuing to imprison the victim in horror, degradation, and the bounds of the perpetrator’s violence.”⁷⁴

Should grace and forgiveness be the moral response to violence and historic grievances instead of *lex talionis*? Grace and forgiveness seem to be the answer, for they are rooted in the moral teachings of numerous religions of the world, all of which emphasize forgiveness—which in turn paves the way to peace—instead of *lex talionis*—which calls for revenge that leads to conflict. John Knight, a physician from the Center for Adolescent Substance Abuse Research, Children’s Hospital Boston, and Gordon Hugenberger, Seminary Professor and Senior Pastor of Park Street Church, say that, “[a]s a universal construct, forgiveness is a tenet of many of the world’s great religions.”⁷⁵ Christianity provides moral teachings on grace and forgiveness, rather than *lex talionis*. For example, Jesus, in answering to the apostle Peter’s question of how many times he had to forgive his brothers, said to Peter, “I tell you, not seven times, but seventy-seven times . . .”⁷⁶ Judaism also “instructs ‘When asked by an offender for forgiveness, one should forgive with a sincere mind and a willing spirit . . . forgiveness is natural to the seed of Israel.’”⁷⁷ Forgiveness heals the scars of conflict, for Rabbi Harold Kushner ar-

⁷² See J. Dyneley Prince, *The Code of Hammurabi*, 8 AM. J. THEOLOGY 601, 606 (1904).

⁷³ WORLD HISTORY IN DOCUMENTS: A COMPARATIVE READER 27 (Peter N. Stearns ed., 2d ed. 2008).

⁷⁴ See MINOW, *supra* note 16, at 13.

⁷⁵ John R. Knight & Gordon P. Hugenberger, *On Forgiveness*, 100 S. MED. J. 420, 420 (2007).

⁷⁶ *Matthew* 18:22 (King James).

⁷⁷ Knight & Hugenberger, *supra* note 75, at 420 (quoting *Mishneh Torah, Teshuvah* 2:10).

gues that, “victims should forgive not because the other deserves it but because the victim does not want to turn into a bitter resentful person,”⁷⁸ as it is the case under *lex talionis*, in which the victim chooses revenge that leads to resentment and bitterness.

East Asian religions, such as Confucianism, also encourage forgiveness rather than *lex talionis*. Confucius once said, “The three hundred poems are summed up in the one line, [t]hink no evil.”⁷⁹ Indian religions, in particular Buddhism, teach that “[h]olding on to anger is like grasping a hot coal with the intention of throwing it at someone else; you are the one that gets burned.”⁸⁰ In turn, Islam “promises ‘[b]ut if you pardon, and forbear, and forgive—then, behold, Allah is Forgiving, Merciful.’”⁸¹ Given that the world’s great religions hold forgiveness as a governing principle and that these religions guide many of the great powers and developing societies, the forgiveness law begins from the premise that society must be built on peace, and peace comes through forgiveness. Revenge, therefore, cannot be the answer to the dilemma of peace versus justice that post-conflict societies confront. Rather, forgiveness must be part of the solution and an essential element of the peace and justice equation.

In addition, there are non-religious sources in support of mercy and forgiveness as a policy tool to achieve peace. In analyzing Seneca’s conception of cruelty, Boston College Law Professor Paulo Barrozo suggests that mercy is like “an unconditional virtue. No matter how atrocious the deed to be punished, its agent is to be treated mercifully by the punitive powers.”⁸² Similarly, Linda Ross Meyer, a Professor of Law, suggests that forgiveness can be viewed as “pardons as peace.”⁸³ She suggests that, “Lincoln’s and Johnson’s post-Civil War pardons were classic examples of executive pardons as peace,” and notes that, Washington, Adams, and Jefferson all used pardon power to settle instances of rebellion and to re-form the national community.”⁸⁴ In turn, Minow claims that victims “should not seek revenge and become a new victimizer but instead should forgive the offender and end the cycle of offense,” because not a moment should be wasted in grudges or hatred toward the perpetrators.⁸⁵ It can be inferred from such statements that mercy leads to forgiveness, forgiveness leads to individual and collective

⁷⁸ See MINOW, *supra* note 16, at 19 (citing Rabbi Harold Kushner).

⁷⁹ CONFUCIUS, *THE SAYINGS OF CONFUCIUS* 4 (Leonard A. Lyall trans., 2d ed. 1925).

⁸⁰ Knight & Hugenberger, *supra* note 75, at 420.

⁸¹ *Id.* (quoting *Qur’an* 64:14).

⁸² Paulo D. Barrozo, *The Jurisprudence of Cruelty in Criminal Law*, 1 CRIM. L. & PHIL. 2, 13 (2007).

⁸³ See Meyer, *supra* note 15, at 68.

⁸⁴ *Id.*

⁸⁵ See MINOW, *supra* note 16, at 14.

healing, and individual and collective healing leads to individual and collective peace.

Although some scholars claim that “[t]he state must be lawful, not merciful,”⁸⁶ forgiveness can be used as a policy tool to achieve justice. Meyer argues that, “pardons are grounded precisely in the connectedness, embeddedness, and finitude that undergird community and government and that come before reason and serve as the basis and touchstone for judgments about justice that are abstracted in law.”⁸⁷ Yet, it is important to bring into the discussion the variable of accountability. Minow says that, “[e]ven the traditional Christian call to forgive rather than avenge accompanies faith that vengeance will come—through the Divine.”⁸⁸ But what can be pursued to achieve reconciliation instead of waiting for divine justice? According to Minow, contrition and the telling of the truth can “join the effort for reconciliation.”⁸⁹

Finally, the value of reparation and the guarantee of non-repetition play critical roles in the effort to achieve both peace and justice. Minow advocates that one of the responses to mass atrocities must include “securing reparations and apologies for victims.”⁹⁰ She also states that public policies drafted to address reconciliation in societies in conflict must “communicate the aspiration [of] ‘never again.’”⁹¹ Acceptance of guilt leads to repentance, and repentance leads to the confession of the truth. The truth leads to reparation and the guarantee of “never again,” which in turn pave the way to mercy, grace, forgiveness, healing, and peace. The values of mercy, grace, forgiveness, accountability, reparation, and the guarantee of non-repetition that lead to peace and justice must thus be embedded in any forgiveness law proposal for post-conflict societies.

D. Legal Underpinnings

Grounded in its moral underpinnings, the act of forgiveness that can lead to the granting of a pardon is also deeply rooted in the legal regimes practiced around the world on ordinary crimes. The values of mercy, grace, repentance, forgiveness, accountability, reparation, and guarantees of non-repetition are embedded in the pardon regimes of the major legal systems of the world, such as the common law and the civil law systems. Reparation⁹² and guaran-

⁸⁶ See Meyer, *supra* note 15, at 64.

⁸⁷ *Id.* at 65.

⁸⁸ See MINOW, *supra* note 16, at 15.

⁸⁹ See *id.* at 20.

⁹⁰ *Id.* at 23.

⁹¹ *Id.*

⁹² See *supra* note 12 and accompanying text.

tees of non-repetition⁹³ are also rooted in the international legal order, including jurisprudence from international judicial bodies and the international treaties.⁹⁴ Hence, pardoning regimes on ordinary crimes that are rooted in the legal systems of the world, as well as the values of reparation and guarantees of non-repetition embedded in the international legal order, can guide the discussion about the legal underpinnings of the proposal for a forgiveness law regarding international crimes, which includes the option for victims to carry out an act of forgiveness once the prosecution and conviction of their perpetrators are accomplished.

1. The Common Law and Pardons

The common law system includes a mechanism for pardons once culpability is established and a guilty individual is convicted. This legal system embodies the moral underpinnings previously discussed. In England, a country that follows the common law system, pardoning power for ordinary crimes⁹⁵ is based on mercy and has a royal prerogative genesis.⁹⁶ In the 1790s, the governor in the common law country of Australia had the power to grant absolute pardons as he, through mercy, emancipated and “discharge[d] from servitude and . . . provide[d] a grant of land to some of those prisoners whose conduct and work records justified such measures of reward and rehabilitation.”⁹⁷ This policy evolved into a conditional pardon called a “ticket-of-leave,” which is believed to be the genesis of the parole regimes.⁹⁸ In the common law regime of Canada, while the power of pardon rests with the Parole Board of Canada,⁹⁹ the power of clemency, or the power to grant complete or partial remittance of a sentence, rests solely with the Governor-General of Canada or the Governor in Council.¹⁰⁰ The power of clemency is directly derived from the crown and the royal prerogative of mercy.¹⁰¹

⁹³ See Tams, *supra* note 13, at 441–42.

⁹⁴ See Rome Statute, *supra* note 8, at preamble (embracing regime of redistributive and restorative justice); ICCPR, *supra* note 11, art. 9 (guaranteeing victims’ right to legal recourse); American Convention of Human Rights, *supra* note 11, art. 25.

⁹⁵ Although the forgiveness law proposal discussed in the Article is intended to apply to cases of international crimes, such as genocide, crimes against humanity, and war crimes, it is a worthy exercise to examine pardon regimes, which are intended to be applied to cases of ordinary crimes such as personal crimes, property crimes, inchoate crimes, and statutory crimes.

⁹⁶ See PAUL W. TAPPAN, CRIME, JUSTICE AND CORRECTION 715 (1960).

⁹⁷ See *id.* at 711.

⁹⁸ See *id.*

⁹⁹ See Criminal Records Act, R.S.C. 1985, c. C-47, § 2.1 (Can.).

¹⁰⁰ Under the Canadian Criminal Code, “[t]he Governor in Council may order the remission, in whole or in part, of a fine or forfeiture imposed under an Act of Parliament, whoever the person may be to whom it is payable or however it may be recoverable.” See *id.* at c. C-46, § 748.1.

¹⁰¹ See *id.*

In the United States, another common law country, pardon regimes embrace the values of grace, repentance, and the confession of guilt. At the federal level, the President of the United States, under Article II, Section 2 of the U.S. Constitution, “shall have [p]ower to grant [r]eprieves and [p]ardons for [o]ffences against the United States, except in [c]ases of [i]mpeachment.”¹⁰² As previously noted, the U.S. Supreme Court has reasoned that pardons are “act[s] of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”¹⁰³

Drawing upon *Burdick*, it can be said that pardon regimes in the United States embrace the value of repentance and acceptance of guilt. The U.S. Supreme Court has explained that acknowledgement of guilt is inferred from the acceptance of a pardon.¹⁰⁴ Acceptance of a pardon carries with it the admission of guilt, for an individual may deny a pardon, “preferring to be the victim of the law rather than its acknowledged transgressor—preferring death even to such certain infamy.”¹⁰⁵ If a convicted criminal is willing to seek or accept a pardon, then it follows that such a perpetrator could have gone through a mental and spiritual process of repentance and acceptance of guilt. On the contrary, if a convicted criminal does not accept a pardon, it can be inferred that such a person did not go through a mental and spiritual process of repentance and acceptance of guilt because he or she believes in his or her innocence.

2. The Civil Law and Pardons

Like the common law system, the civil law system also provides for pardons and justifies this mechanism along similar moral lines. Some subtle differences, however, can be observed among countries with civil law systems. Under the civil Spanish Constitution of 1978, it is the King of Spain, rather than the head of the administration, that holds clemency power and who can exercise authority to issue pardons for ordinary crimes.¹⁰⁶ On the other hand, in France—a civil law system—the pardoning power, which embraces the value of reparation, is vested solely in the President of the Republic.¹⁰⁷ Under the French legal system, a victim of an ordinary crime can seek

¹⁰² See U.S. CONST. art. II, § 2.

¹⁰³ See *Burdick*, 236 U.S. at 89–90 (internal quotations omitted).

¹⁰⁴ See *id.* at 91 (acknowledging the “confession of guilt implied in the acceptance of a pardon”).

¹⁰⁵ See *id.*

¹⁰⁶ See CONSTITUCIÓN ESPAÑOLA pt. II, § 62(I) (Spain).

¹⁰⁷ CONSTITUTION DE LA CINQUIEME REPUBLIQUE FRANÇAISE [CONSTITUTION] June 3, 1958, art. 17 (Fr.) (“The President of the Republic shall have the right of pardon.”).

monetary compensation through criminal proceedings as a *partie civile*¹⁰⁸ at the criminal trial. If the granting of a pardon comes about, the French legal system leaves open the opportunity for victims to pursue reparation for damages resulting from the criminal offense that has been pardoned.¹⁰⁹ In this way, the pardon stops only the enforcement of criminal punishments for a wrong, while leaving open opportunities for civil reparation. As a result, although such a pardon halts the enforcement of a sentence after it has been delivered,¹¹⁰ that pardon does not alter the guilt of the individual who has been pardoned.

The value of reparation underlying the pardon system is also embedded in the corpus of international law. Human rights treaties recognize the right to an effective remedy.¹¹¹ UN human rights bodies have asserted that, “the right to reparation has a dual dimension under international law.”¹¹² The dual dimension consists of “(a) a substantive dimension to be translated into the duty to provide redress for harm suffered in the form of restitution, compensation, rehabilitation, [and] satisfaction . . . and (b) a procedural dimension as instrumental in securing this substantive redress.”¹¹³ Jurisprudence from the Inter-American Court of Human Rights has classified reparation into several categories: restitution measures,¹¹⁴ rehabilitation measures,¹¹⁵ recognition of responsibility and apologies,¹¹⁶ memorials to honor victims and commemorations,¹¹⁷ institutional reform,¹¹⁸ and development programs (housing) for communities affected by armed conflict and mass atrocities.¹¹⁹

Moreover, international law recognizes the value of non-repetition or “never again” as a remedy for breaches of the international legal order.¹²⁰ UN

¹⁰⁸ See Mario Chiavario, *Private Parties: The Rights of the Defendant and the Victim*, in EUROPEAN CRIMINAL PROCEDURES 541 (Mireille Delmas-Marty & J. R. Spencer eds., 2002).

¹⁰⁹ See CODE PÉNAL, art. 133-8 (1994) (Fr.) (“A pardon presents no legal obstacle to the victim’s obtaining reparation for the harm caused by the offense.”).

¹¹⁰ See *id.*, art. 133-7 (“Pardon involves only exemption from the execution of the penalty.”).

¹¹¹ See *supra* note 12 and accompanying text.

¹¹² See Office of the U.N. High Comm’r for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, at 6, U.N. Doc. HR/PUB/08/1 (2008).

¹¹³ See *id.*

¹¹⁴ See H. Sofía Galván Puente, *Legislative Measures as Guarantees of Non-Repetition: A Reality in the Inter-American Court, and a Possible Solution for the European Court*, 49 REVISTA INTER-AM. INST. HUM. RTS. 69, 75 (2009).

¹¹⁵ See *id.* at 76.

¹¹⁶ See *id.* at 77.

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 78.

¹¹⁹ See *id.*

¹²⁰ See MINOW, *supra* note 16, at 23; see also Tams, *supra* note 13, at 441–42.

bodies, such as the International Law Commission,¹²¹ the International Court of Justice (“ICJ”)¹²² and the Office of the High Commissioner for Human Rights (“OHCHR”),¹²³ *inter alia*, as well as the Inter-American System of Human Rights,¹²⁴ have issued opinions and rendered jurisprudence on the guarantee of non-repetition value.¹²⁵ The International Law Commission, in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, asserts that, “a state [that breaches its international obligations] is obligated to offer assurances and guarantees of non-repetition” in order to bring itself back into compliance.¹²⁶ The ICJ, in the *LaGrand* judgment, reasoned that a breach of international law entitles “from the breaching state guarantees and assurances that the breach will not be repeated,”¹²⁷ because “an apology is not sufficient”¹²⁸

In turn, OHCHR points out that:

Guarantees of non-repetition is another broad category which includes institutional reforms tending towards civilian control of military and security forces, strengthening judicial independence, the protection of human rights workers, human rights training, the promotion of international human rights standards in public service, law enforcement, the media, industry, and psychological and social services.¹²⁹

Some scholars have reinforced OHCHR’s assertion and have indicated that a fundamental progress in the jurisprudence of some of the regional human rights courts has been precisely achieved through the ordering of guarantees of non-repetition, “which aim to have a broader social impact and prevent repetition of the same type of violations.”¹³⁰ The Inter-American System of Human Rights has embraced the value of the guarantee of non-repetition, or “never again.” For example, the Inter-American Court of Human Rights has

¹²¹ The UN General Assembly created the International Law Commission in 1947, which is responsible for drafting treaties and rules of international law for discussion among UN State Members. See G.A. Res. 174 (II), U.N. Doc. A/RES/174(II) (Nov. 21, 1947).

¹²² The ICJ is the judicial body of the UN. The UN Charter established the Court, which is governed by the Charter and its own statute. See U.N. Charter art. 92; Statute of the International Court of Justice, *supra* note 8.

¹²³ The UN General Assembly established the Office of the High Commissioner for Human Rights in 1994. See U.N. G.A. Res. 48/141, U.N. Doc. A/RES/48/141 (Dec. 20, 1993).

¹²⁴ The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights compose the Inter-American System of Human Rights.

¹²⁵ See Puente, *supra* note 114, at 70–71.

¹²⁶ See MURPHY, *supra* note 35, at 184.

¹²⁷ See Tams, *supra* note 13, at 441.

¹²⁸ *LaGrand* Case (Ger. v. U.S.), 2001 I.C.J. No. 104, ¶ 123 (Jun. 27).

¹²⁹ Office of the U.N. High Comm’r for Human Rights, *supra* note 112, at 7–8.

¹³⁰ See Puente, *supra* note 114, at 79.

ordered “measures of non-repetition so as to avoid repetition of similar human rights violations by the same State”¹³¹ In *Trujillo-Oroza v. Bolivia*, the Court granted guarantees of non-repetition “based on the general State obligation to respect, protect, and fulfill Article 1(1) of the American Convention,”¹³² which set forth the obligation for State Parties to the Convention to “undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination”¹³³

From the statements above, it can be concluded that the values embedded in the common law and the civil law systems of mercy, grace, repentance, forgiveness, accountability and reparation, and the guarantee of non-repetition value rooted in the international legal order, must be the underpinnings for any forgiveness law for any post-conflict society, including Colombia, in confronting the peace versus justice dilemma.

E. Putting the Values at Work into the Equation of Peace and Justice

According to the arguments discussed above, it is feasible to reason that if victims of international crimes have mercy and grace for their perpetrators, then mercy and grace lead to forgiveness. Forgiveness can lead to healing, and healing to individual and collective peace. Concurrently, if perpetrators of international crimes accept guilt, then the acceptance of guilt leads to repentance. Repentance can lead to the confession of the truth. With truth come reparation, justice and guarantees of non-repetition, which in turns paves the way to mercy, grace, forgiveness, healing and peace. Thus, the Peace and Justice Equation below takes these values and puts them together to represent the central premise of the forgiveness law proposal.

1. Clusters of Values

While victims of international crimes must pursue the values of mercy, grace, and forgiveness (victims’ values), perpetrators of international crimes must seek the values of acceptance of guilt, repentance, the confession of the truth, reparation, and guarantees of non-repetition (perpetrators’ values).

Values Table	
<u>Victims’ Values Cluster:</u>	<u>Perpetrators’ Values Cluster:</u>
Mercy	Accountability
Grace	Acceptance of guilt

¹³¹ See *id.* at 70–71.

¹³² See *id.* at 79.

¹³³ American Convention on Human Rights, *supra* note 11, art. 1.

Forgiveness	Repentance
Fairness	Confession of truth
Peace	Reparation
	Guarantees of non-repetition
	Sense of justice

2. Peace and Justice Equation

Policy-makers from post-conflict societies can take these clusters of values and put them together under the Peace and Justice Equation (below). By incorporating the Peace and Justice Equation, which represents the central premise of any forgiveness law proposal, governments of post-conflict societies can use the equation as a tool upon which a solid transition from conflict into peace can be built without contravening international law.

Peace and Justice Equation		
Inputs:		
	Victims' Values Cluster	= VVC
	Perpetrators' Values Cluster	= PCV
Output:		
	Peace and Justice	= P J
Resulting Equation:	(VCV) + (PCV)	= P J

III. THE CASE FOR THE FORGIVENESS LAW PROPOSAL OVER AMNESTY

The forgiveness law proposal has the primary benefit of embracing the inputs needed to achieve the output of justice and peace all the while being solidly grounded in international law. Unlike amnesty laws, the forgiveness law proposal guarantees the following legal elements of crucial relevance for international law: prosecution of international crimes;¹³⁴ the seeking of the truth;¹³⁵ a fair trial¹³⁶ for perpetrators of these crimes; adjudication of individual criminal responsibility; redress for victims;¹³⁷ guarantees of non-repetition;¹³⁸ and mercy for perpetrators. Any forgiveness law that includes and assures the fulfillment of these fundamental subjects of law will comply with the international legal order, in addition to providing for those convicted of international crimes a second opportunity to reintegrate into a society in transition from conflict into peace. In other words, the forgiveness law proposal is consistent with *jus cogens* norms of international law and relevant treaties.

¹³⁴ See *supra* note 9 and accompanying text.

¹³⁵ See Naqvi, *supra* note 10, at 245.

¹³⁶ See *supra* note 11 and accompanying text.

¹³⁷ See *supra* note 12 and accompanying text.

¹³⁸ See Tams, *supra* note 13, at 2.

A. Evaluating the Legality of the Forgiveness Law Proposal Under *Jus Cogens* Norms and Relevant Treaties

If any forgiveness law proposal for post-conflict societies guarantees the prosecution of international crimes,¹³⁹ the seeking of the truth,¹⁴⁰ a fair trial¹⁴¹ for perpetrators of these crimes, adjudication of individual criminal responsibility, redress for victims¹⁴² and guarantees of non-repetition,¹⁴³ then such a proposal will be lawful under international law. In order to prove this assertion, it is imperative to address the following questions: Do *jus cogens* norms of international law and relevant treaties require prosecution of international crimes? Do *jus cogens* norms of international law and relevant treaties involve the seeking of the truth in the aftermath of an international armed conflict? Do norms of international law protect the right to a fair trial for perpetrators of international crimes, the right for victims to seek redress before a court of law, and guarantees of non-repetition? In addressing these questions, this Article makes the case for the legality of the forgiveness law proposal under international law.

1. *Jus Cogens* Norms of International Law and Relevant Treaties Require Prosecution of International Crimes

Violations of the *jus cogens* rules that prohibit slavery, torture, racial discrimination, forced disappearance, genocide and aggression, or violation of similar treaty law not only entitle but also require the prosecution of such violations, either at national or international jurisdictions.¹⁴⁴ *Jus cogens* rules are peremptory norms of international law “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹⁴⁵ Some legal scholars speak of *jus cogens* rules as immovable “bedrock”¹⁴⁶ norms of international law. Jurists talk about *jus cogens* rules as norms pertaining to natural law¹⁴⁷ that are at the top of the hierarchy of international law. Furthermore, it has been reasoned that *jus cogens* norms contain *erga omnes*¹⁴⁸ obligations that

¹³⁹ See *supra* note 9 and accompanying text.

¹⁴⁰ See Naqvi, *supra* note 10, at 245.

¹⁴¹ See *supra* note 11 and accompanying text.

¹⁴² See *supra* note 12 and accompanying text.

¹⁴³ See Tams, *supra* note 13, at 2.

¹⁴⁴ See *supra* note 9 and accompanying text.

¹⁴⁵ See Vienna Convention on the Law of Treaties, *supra* note 8, art. 53.

¹⁴⁶ See LUBAN ET AL., *supra* note 19, at 48.

¹⁴⁷ See *id.* at 49.

¹⁴⁸ See *id.* at 48.

fall upon all states of the international community of nations.¹⁴⁹ The ICJ has held that states have legal interests in protecting basic rights of the human person guaranteed by *jus cogens*.¹⁵⁰ For example, it has sustained that state parties to the Convention Against Torture (“CAT”) have the ability, pursuant to the Convention, to invoke the responsibility of those state parties that violate the protection against torture embedded in the Convention and to bring perpetrators to justice.¹⁵¹ Accordingly, *jus cogens* can be defined as norms of international law that dwell at the top of the international legal order protecting the most fundamental rights of humanity, which are not subject to derogation by any other legal norm unless they are modified by a succeeding rule of international law bearing the same legal status, and which are enforceable upon anyone violating them.

The prohibition against torture stems from these *jus cogens* rules. For the ICJ, “the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).”¹⁵² British Judges denote the crime of torture as a “*jus cogens* crime.”¹⁵³ Likewise, the prohibitions against genocide, racial discrimination, and forced disappearance dwell under the same normative principle,¹⁵⁴ like the prohibition against torture, and have attained the status of *jus cogens* norms of international law “from which no derogation is permitted”¹⁵⁵ and from which enforcement actions can be taken against those violating them.¹⁵⁶

Violations of *jus cogens* rules of international law entail prosecution of international crimes because treaties, such as CAT, the Genocide Convention (“GC”), and the Rome Statute of the International Criminal Court (“ICC Statute”), codify the *jus cogens* prohibitions against torture, genocide, slavery, racial discrimination and forced disappearance.¹⁵⁷ Under the *aut dedere, aut judicare* principle,¹⁵⁸ which means “extradite or prosecute,” and in accord-

¹⁴⁹ See *id.* at 49.

¹⁵⁰ See *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

¹⁵¹ See Questions, *supra* note 9, at 27.

¹⁵² See *id.* at 39.

¹⁵³ LUBAN ET AL., *supra* note 19, at 48.

¹⁵⁴ See *Barcelona Traction*, 1970 I.C.J. 32.

¹⁵⁵ See Vienna Convention on the Law of Treaties, *supra* note 8, at art. 53.

¹⁵⁶ Portilla, *supra* note 2 at 179.

¹⁵⁷ See generally Diane F. Orentlicher, *Setting Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (making the case for an obligation to prosecute gross violations of human rights).

¹⁵⁸ The *aut dedere aut judicare* principle has been included in several international agreements. See, e.g., Convention for the Suppression of Unlawful Seizure of Aircraft art. 8, Dec. 16, 1970, 860 U.N.T.S. 105; International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 206 (“any person committing an act of hostage taking shall either be prosecuted or extradited”); CAT, *supra* note 12, art. 7 (“The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 . . . if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”) U.N. Con-

ance with the CAT, perpetrators accused of committing torture must be prosecuted by the state party to CAT in which the crime of torture was committed, or by another state party to CAT asserting jurisdiction over the crime.

Under Article 7 of the ICC Statute, the crime of torture amounts to a crime against humanity when committed as “part of a widespread or systematic attack.”¹⁵⁹ It can also be considered a war crime in accordance with Article 8 of the ICC Statute.¹⁶⁰ State parties to the ICC must prosecute the international crime of torture when committed as a crime against humanity or when committed as a war crime, because “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”¹⁶¹ Only if a state party to the ICC is “unwilling or unable”¹⁶² to prosecute a crime of torture can the ICC then take on a prosecution under Article 17 of the ICC Statute.¹⁶³

Pursuant to the GC, perpetrators charged with genocide must be prosecuted by the state in which the crime of genocide was executed, or by an international criminal tribunal established for that purpose with jurisdiction over those contracting parties to the GC that accept the jurisdiction of such a tribunal.¹⁶⁴ Under the ICC Statute, the ICC is authorized to exercise jurisdiction over the crime of genocide whenever the state is unable or unwilling genuinely to carry out the investigation or prosecution and the case is of sufficient gravity to justify the exercise of the Court’s jurisdiction.¹⁶⁵ As for enslavement and the forced disappearance of people, the ICC Statute codifies them as crimes against humanity when committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹⁶⁶ If national prosecutors do not prosecute these two crimes that fall upon the jurisdiction of the ICC, William Schabas correctly says that the Court can “take on a prosecution only when national justice systems are ‘unwilling or unable genuinely’ to proceed.”¹⁶⁷ From the arguments discussed

vention Against Transnational Organized Crime, art. 15, U.N. Doc. A/55/383 at 15–16 (Nov. 15, 2000); *see also* Geneva Conventions, *supra* note 9; Additional Protocol I, *supra* note 9; Additional Protocol II, *supra* note 17.

¹⁵⁹ Rome Statute, *supra* note 8, art. 7.

¹⁶⁰ *See id.* art. 8 (when committed “as part of a plan or policy or as part of a large-scale commission of such crimes”).

¹⁶¹ *See id.* at preamble.

¹⁶² *See id.* art. 17.

¹⁶³ *See id.*

¹⁶⁴ *See* Convention on the Prevention and Punishment of the Crime of Genocide art. 6, Dec. 9, 1948, 78 U.N.T.S. 277, 280, 282, *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>.

¹⁶⁵ *See* Rome Statute, *supra* note 8, art. 17 (d).

¹⁶⁶ *See id.* art. 7.

¹⁶⁷ WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 171 (3rd ed. 2007).

above, it can be correctly concluded that any violation of the prohibition against torture, genocide, slavery and forced disappearance, all of which enjoy *jus cogens* status, demand prosecution.

2. Treaty Law Involves the Seeking of the Truth and the Right of Victims to Seek Redress Before a Court of Law

International treaty law requires that victims have the opportunity to prosecute the perpetrators and seek redress for their harm for the following reasons. First, human rights treaties in force, such as the International Covenant on Civil and Political Rights (“ICCPR”), the American Convention on Human Rights, and the European Convention on Human Rights, guarantee victims of gross violations of human rights, such as torture, genocide, forced disappearance, and enslavement, among other abuses, the right to legal recourse and remedy before a court of law.¹⁶⁸ Second, the right to legal recourse protected by human rights treaties entitles victims the right to seek redress and to know the truth. For example, scholars¹⁶⁹ argue that the Human Rights Committee, established by the ICCPR to monitor compliance with the Covenant, has determined that state parties to the Covenant must prosecute gross violations of human rights and must provide compensation to victims of the abuses. And third, human rights treaties are enforceable both in times of peace and war. The UN Office of the High Commissioner for Human Rights ascertained that while human rights treaties apply in times of peace, international humanitarian law applies in times of armed conflict, and “[m]odern international law . . . recognizes that this distinction is inaccurate.”¹⁷⁰ It is clear, then, that human rights treaties apply in times of war and peace. Hence, human rights treaties in force guarantee the right for victims to seek redress before a court of law and the seeking of the truth in the aftermath of an internal armed conflict.

3. Treaty Law Protects the Right to a Fair Trial for Perpetrators of International Crimes

All human beings accused of committing crimes, whether minor offenses, ordinary crimes, or even the most horrendous crimes, such as genocide, torture, forced disappearance, or sexual enslavement, deserve the right to a fair trial that must be respected during criminal prosecutions. Individual criminal responsibility must be proved in accordance with the law. Since the Nuremberg Trials, the right to a fair trial has been included in international

¹⁶⁸ See Orentlicher, *supra* note 157, at 2568–78.

¹⁶⁹ See *id.* at 2571.

¹⁷⁰ See U.N. OFFICE OF THE HIGH COMM’R, INTERNATIONAL LEGAL PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICT, at 5, U.N. Doc. HR/PUB/11/01, U.N. Sales No. E.11.XIV.3 (2011).

agreements. Although International Law Professor William Schabas tells us that “during World War II, Churchill and other Allied leaders flirted with the idea of some form of summary justice for major war criminals,”¹⁷¹ Robert Jackson, a member of the U.S. Supreme Court and one of the chief prosecutors at Nuremberg, expressed that “history would assess the proceedings in light of the fairness with which the defendants were treated.”¹⁷² As a result, the Nuremberg Trials secured for its defendants guarantees such as the presumption of innocence, the right to have legal counsel of choice, to cross-examine witnesses, and to introduce evidence at trial, among other rights.¹⁷³

The International Criminal Tribunal for the former Yugoslavia, one of the ad hoc international criminal tribunals established by the UN Security Council,¹⁷⁴ ruled that international prosecutions of perpetrators of war crimes must guarantee fairness during prosecutions “in full conformity with internationally recognized human rights instruments.”¹⁷⁵ In turn, Article 67 of the Rome Statute set forth the rights of those accused of committing international crimes.¹⁷⁶ Schabas claims that the fair hearing right “established in the *chapeau* of Article 67 of the Statute provides defendants with a powerful tool beyond the text of the Statute, and to require that the Court’s respect for the rights of an accused keep pace with the progressive development of human rights law.”¹⁷⁷ Schabas also points out that pursuant to the Rome Statute, “the right to a fair hearing applies at all stages of the proceedings, and even during the investigation, when no defendant has even been identified.”¹⁷⁸ That the fairness with which defendants were to be treated, exemplified by Jackson’s idea on how to conduct prosecutions at Nuremberg, has coalesced into the current rule of international law.

International human rights law recognizes the right to a fair trial. For example, the right to a fair trial is so enshrined in the Universal Declaration of Human Rights that, although some legal scholars consider it “soft law,”¹⁷⁹ many of its dispositions have achieved the status of customary international law. The dispositions of universal human rights treaties, such as Article 14 of the ICCPR, guarantee the right to a fair trial. Moreover, regional human rights conventions, such as the European Convention on Human Rights, the Ameri-

¹⁷¹ See SCHABAS, *supra* note 167, at 205.

¹⁷² See *id.* at 205–06.

¹⁷³ See *id.* at 206; see also LUBAN ET AL., *supra* note 19, at 76–80.

¹⁷⁴ S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (adopting the ICTY statute).

¹⁷⁵ See SCHABAS, *supra* note 167, at 206 (quoting Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 45) (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

¹⁷⁶ See Rome Statute, *supra* note 8, art. 67.

¹⁷⁷ SCHABAS, *supra* note 167, at 207.

¹⁷⁸ *Id.*

¹⁷⁹ See MURPHY, *supra* note 35, at 111.

can Convention on Human Rights and the African Charter on Human and Peoples' Rights protect the right to a fair trial. Thus, based on a wide range of rules of international law, the right to a fair trial must be guarantee to all kinds of perpetrators, and in all situations, and regardless of the seriousness of the crime involved.

The forgiveness law proposal discussed in Part II of this Article is thus lawful under international law because it comports with the norms that international laws require for a fair prosecution and fair trial of international crimes.¹⁸⁰

B. Forgiveness Triumphs over Amnesty

In the course of a peace process that tries to find ways to end a NIAC, there exist warring factions at the negotiation table intensely seeking amnesty for the crimes they committed during hostilities. However, with amnesty, "prosecutors forfeit the right or power to initiate investigations or criminal proceedings"¹⁸¹ In *Prosecutor v. Morris Kallon*,¹⁸² defense counsel for Kallon, a former commander of Revolutionary United Front ("RUF"), argued that the granting of amnesty to the RUF leadership was the prize for peace between the government of Sierra Leone and RUF to end almost ten years of brutal conflict. In Chile, the Pinochet administration issued amnesties to prevent "any prosecution in relation to human rights abuses committed since the time of the 1973 coup."¹⁸³ Cassese says that "[t]he rationale behind amnesty is that in the aftermath of periods of turmoil and deep rift . . . it is best to heal social wounds by forgetting past misdeeds . . . thereby attaining national reconciliation."¹⁸⁴ On the other hand, pardons forgive punishment once conviction is attained.¹⁸⁵ Prosecution and conviction are secured under forgiveness regimes. While amnesty laws trade justice for peace, forgiveness laws secure justice and peace. Yet, it is necessary to prove the above by outlining the advantage of forgiveness laws over the disadvantages of amnesty laws.

Forgiveness laws secure the administration of justice, which is one of the most important public goods that any government pertaining to the international community of states must provide to its citizens. This is true because, in order to issue a pardon, a government must fulfill all criminal procedures needed to attain conviction of perpetrators brought before its criminal justice

¹⁸⁰ See *supra* note 11 and accompanying text.

¹⁸¹ CASSESE, *supra* note 4, at 312.

¹⁸² See *Prosecutor v. Morris Kallon*, Special Court for Sierra Leone, SCSL-2004-15-AR72, ¶ 27, Decision on Constitutionality and Lack of Jurisdiction, Lomé Accord Amnesty (Appeals Chamber, Mar. 13, 2004).

¹⁸³ See HANNUM ET AL., *supra* note 22, at 954.

¹⁸⁴ CASSESE, *supra* note 4, at 312–13.

¹⁸⁵ See *supra* notes 84–91 and accompanying text.

system. Although a pardon eliminates a penalty once conviction is procured, the recipient of such a pardon is still considered guilty of the crime. In other words, criminal investigations, prosecutions, trials, convictions and sentencing are secured. If any forgiveness legal regime that secures all criminal procedures necessary to obtain conviction is applied to international crimes perpetrators, then pardons, to eliminate a penalty once conviction is guaranteed, will heal individuals and collective wounds, thus helping national reconciliation to bloom in the aftermath of an armed conflict. President Andrew Johnson pardoned Confederate officials after the American Civil War, facilitating an otherwise almost unworkable reunification in the United States.¹⁸⁶ It follows that some of the benefits that the forgiveness law proposal, discussed above, could provide to a country seeking peace are that justice is administered, and guilt found, thereby permitting healing and reconciliation.

On the other hand, amnesty laws impede the exercise of national jurisdiction, thereby endangering the administration of justice, one of the most fundamental pillars upon which peace can be erected. Cassese claims that amnesty laws “may hamper or put in jeopardy the institution of criminal proceedings for international crimes.”¹⁸⁷ Unlike forgiveness, amnesty laws deprive prosecutors of their authority to commence criminal proceedings against perpetrators of international crimes. Although it has been argued that amnesties can “bring about cessation of hatred and animosity,”¹⁸⁸ healing collective wounds by forgetting past offenses, and that amnesty may help broker peace deals that end conflict, it is unlikely that amnesty laws heal social wounds. Cassese says, “when very serious crimes have been committed involving members of ethnic, religious, or political groups . . . moral and psychological wounds may fester if attempts are made to sweep past horrors under the carpet.”¹⁸⁹

Furthermore, amnesty laws draw in the issue of self-amnesties. Both Chilean and Argentinian cases¹⁹⁰ prove that “incumbent military and political leaders themselves passed amnesty laws, in view of an expected change in government and for the clear purpose of exempting themselves from future prosecution.”¹⁹¹ Human rights advocates claim that the legal framework for peace that Colombia enacted in 2012 can be used “to provide immunity to military officials involved in the ‘false positive’ scandal in which Colombian

¹⁸⁶ Under the U.S. Constitution, the President of the United States holds pardon power for federal crimes. U.S. CONST. art. II, § 2; see Meyer, *supra* note 15, at 64, 68.

¹⁸⁷ CASSESE, *supra* note 4, at 312.

¹⁸⁸ See *id.* at 313.

¹⁸⁹ See *id.*

¹⁹⁰ Chile, under Pinochet, and Argentina, under Military Junta, passed amnesty laws. See HANNUM ET AL., *supra*, note 22, at 1030–21.

¹⁹¹ See CASSESE, *supra* note 4, at 313.

soldiers stand accused of killing thousands of civilians before presenting them as guerrillas shot in combat.”¹⁹² Therefore, the impediment of the exercise of national jurisdiction that amnesties cause and the issue of self-amnesties become seriously detrimental to societies seeking justice and peace in the aftermath of an armed conflict.

The forgiveness law proposal guarantees the seeking of the truth,¹⁹³ redress for victims,¹⁹⁴ and compliance with international law. The right to the truth¹⁹⁵ is embedded in the scope of the right to an effective remedy recognized by human rights treaties.¹⁹⁶ Because under the forgiveness law proposal, a government must fulfill all criminal procedures needed to attain conviction of perpetrators brought before its criminal justice system, the truth of gross violations of human rights will most likely emerge at any of the stages of the criminal proceedings, including plea bargain stages.

In addition, criminal prosecutions are effective in the establishment of facts and in the enforcement of the right to information. Because the right to the truth is linked to the right to an effective remedy, and the right to an effective remedy embraces the right to compensation, any forgiveness law that guarantees criminal prosecution will assure redress for victims of international crimes. In France, the fact that the President can issue a decree pardoning an individual who has been convicted for committing an ordinary crime does not repress the right of a victim to obtain compensation for the damages caused by the crime.¹⁹⁷ *Mutatis mutandis*, a pardon granted to a perpetrator convicted for committing international crimes, shall not suppress the right of victims to obtain reparations for the offenses and damages endured. Any forgiveness law containing these elements will benefit any society seeking peace and justice in the aftermath of an armed conflict.

In contrast, amnesty laws negatively affect societies seeking peace and justice, for such laws put “legal impediments to the exercise of national jurisdictions,”¹⁹⁸ inhibiting the commencement of criminal prosecutions and thereby endangering the rights of victims to an effective remedy, the seeking of the truth, and the right to reparation. In addition, international criminal tribunals have ruled that amnesties granted for international crimes as a conse-

¹⁹² See Dodwell, *supra* note 33.

¹⁹³ See Naqvi, *supra* note 10, at 245.

¹⁹⁴ See *supra* note 12 and accompanying text.

¹⁹⁵ The International Center for Transitional Justice has claimed that seeking the truth can help victims or their families to identify perpetrators, to know causes that led to abuses, to know the circumstances and the facts of violations, and to find out the ultimate fate and whereabouts of victims in the event of enforced disappearances. See TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION 3 (Eduardo González & Howard Varney eds., 2013).

¹⁹⁶ See *supra* note 12 and accompanying text.

¹⁹⁷ See *supra* notes 110–111 and accompanying text.

¹⁹⁸ See CASSESE, *supra* note 4, at 312.

quence of peace agreements cannot be used as a defense to bar criminal prosecution by international courts. In *Kallon*,¹⁹⁹ the defendants filed a preliminary motion to challenge the jurisdiction of the Special Court of Sierra Leone.²⁰⁰ The Court held that they had discretionary power to attribute no weight to the amnesty granted to the defendants because such amnesty laws violated international law and the protection that it provides to humanity.²⁰¹ The Inter-American Court of Human Rights has held that the granting of amnesties to perpetrators of torture violates “non-derogable rights laid down in the body of international law”²⁰² Therefore, amnesty laws do not benefit societies seeking peace and justice in the aftermath of an armed conflict. Rather, such laws prevent justice and the seeking of the truth in societies seeking to heal the scars of hostilities, all the while contravening international law.

IV. FORGIVENESS LAW AND THE COLOMBIAN CASE: THE ESTABLISHMENT OF A FORGIVENESS AND RECONCILIATION COMMISSION FOR COLOMBIA

A. Background of the Colombian Conflict

Since the 1960s, Colombian society has witnessed “the longest-running internal conflict in the Western Hemisphere.”²⁰³ In the 1960s and 1970s, inspired and supported by Fidel Castro and the Cuban Revolution, FARC and other leftist guerrillas²⁰⁴ launched an insurgency war against the Colombian government. Over the years, with the rise of drug cartels and other irregular armed groups, such as paramilitary units,²⁰⁵ the Colombian conflict evolved

¹⁹⁹ See *Kallon*, SCSL-2004-16-AR72 at 67.

²⁰⁰ See Portilla, *supra* note 2, at 189.

²⁰¹ See *id.*

²⁰² See CASSESE, *supra* note 4, at 313.

²⁰³ *Background on Colombia*, CENTER FOR JUST. & ACCOUNTABILITY, <http://www.cja.org/article.php?list=type&type=400> (last visited Apr. 25, 2015).

²⁰⁴ Besides FARC, which was launched in 1964, there have been other guerrilla groups that were launched in Colombia in the 1960s and the 1970s, such as the National Liberation Army (“ELN”) launched in 1964, the 19th of April Movement (“M-19”) launched in 1970, and the Popular Liberation Army (“EPL”) launched in 1967.

²⁰⁵ Colombian president Cesar Gaviria Trujillo (1990–1994) issued the Decree-Law 356 of 1994 on the Surveillance and Private Security Statute, which has the force of a law enacted by the legislature and under which the government authorizes individuals and corporations to apply for operating private security armies that are approved and controlled by the government through the Office of the Superintendent of Surveillance and Private Security. See IRENE CABRERA & ANTOINE PERRET, COLOMBIA: REGULATING PRIVATE MILITARY AND SECURITY COMPANIES IN A “TERRITORIAL STATE,” PRIV-WAR REPORT—COLOMBIA, NAT’L REPORT SERIES 19/09, 1, 4–5 (2009). The Decree-Law 356 of 1994 was enacted because at the time of enactment, Colombian armed forces and the Colombian National Police had limited capability to protect citizens from kidnapping, extortions, homicide, and disappearance, among other crimes. Thus, the use of private security armies to “execute security and military activities” was a growing trend in Colombia in the 1990s. Due to governmental corruption, unfortunately, criminal organizations, including drug

into a “triangulated war between guerrillas, paramilitaries and government forces . . . ,”²⁰⁶ in which the battlefield or “centre of gravity”²⁰⁷ of the war has been its people. In other words, the Colombian conflict has taken place “amongst the people.”²⁰⁸ As a result, all parties to the Colombian conflict have violated the laws and custom of war or *jus in bello*²⁰⁹ norms over the course of the armed conflict. Guerrillas, paramilitary units, and government troops have all committed international crimes (“ICC crimes”) that fall upon the jurisdiction of the ICC, specifically war crimes and crimes against humanity.

All parties to the Colombian conflict—paramilitary units, government troops and guerrillas alike—have breached the most important principle embedded in the corpus of international humanitarian law: the principle of discrimination, which commands that all parties to a NIAC must always discriminate between combatants and civilians, and attacks may only be targeted against combatants, not civilians.²¹⁰ On the whole, civilians have suffered negative consequences of the conflict, given that “one in three violent deaths in Colombia [was] the result of the internal armed conflict.”²¹¹ Paramilitary units “aligned with the government” committed “targeted killings . . . and massacres”²¹² Over the course of the war, 218,094 people have died. Although nineteen percent of the 218,094 deaths have been combatants, eighty-one per cent have been civilians.²¹³ In particular, “socially marginalized youth” have been the targets of extrajudicial killings but were “reported as ‘guerrillas killed in combat.’”²¹⁴ The Office of the Attorney General of Colombia has said that there have been more than 2701 cases of such victims,²¹⁵ which is known as the “false positive scandal.”²¹⁶

Similarly, guerrillas have perpetrated attacks on civilian populations settled in Bogota, Colombia’s capital, including the 2003 El Nogal Club Bomb-

cartels, were licensed to operate private security armies that for the most part evolved as paramilitary units. *See id.*

²⁰⁶ *See Background on Colombia, supra* note 203.

²⁰⁷ *See* CARL VON CLAUSEWITZ, *ON WAR: THE COMPLETE EDITION* 151 (2009).

²⁰⁸ *See* RUPERT SMITH, *THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD* 267 (2005).

²⁰⁹ MURPHY, *supra* note 35, at 515.

²¹⁰ *See* U.N. OFFICE OF THE HIGH COMM’R, *INTERNATIONAL LEGAL PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICT*, *supra* note 170, at 20.

²¹¹ Lina Malagón, “*Basta Ya!*”: *On the Colombian Center for Historical Memory Report*, WORLD PEACE FOUND. (Jan. 13, 2014), <http://sites.tufts.edu/reinventingpeace/2014/01/13/basta-ya-on-the-colombian-center-for-historical-memory-report/>.

²¹² *See id.*

²¹³ *Id.*

²¹⁴ *See id.*

²¹⁵ *See id.*

²¹⁶ *See Colombian Soldiers Jailed for ‘False Positive’ Killings*, BBC NEWS (July 6, 2011), <http://www.bbc.com/news/world-latin-america-14055765>.

ing (thirty-two killed)²¹⁷ and the 2012 assassination attempt on Colombia's former Interior and Justice minister.²¹⁸ In addition to the attacks perpetrated in Bogota, there are many examples of FARC's attacks on other towns across Colombia that violated international humanitarian law. On June 16, 1996, FARC executed thirty-four villagers who worked on a cocaine plantation run by right-wing paramilitary groups, an incident now known as La Gabarra Massacre.²¹⁹ In November 1998, FARC launched a three-day offensive against the remote city of Mitu in Southern Colombia.²²⁰ Between 700 and 800 guerrillas seized the town's police headquarters, leaving fifty-one dead.²²¹ On May 2, 2002, FARC attacked a town held by paramilitary units, "indiscriminately mortaring and shooting" both paramilitary fighters and civilians.²²² One hundred and nineteen people were killed in the shooting, an event known as the Bojayá Massacre.²²³ On February 11, 2009, in what is known as the Nariño Massacres, FARC tortured and executed twenty-seven members of the indigenous Awá people who they accused of collaborating with the Colombian military.²²⁴ Thus, all parties to the conflict have violated one of the most important principles of international humanitarian law, which is the principle of distinction, since "parties to the conflict have failed to discriminate civilians from legitimate targets."²²⁵

In addition, guerrillas have committed other breaches of international humanitarian law, such as taking of hostages or kidnapping,²²⁶ causing "damage to civilian properties,"²²⁷ creating enforced displacement, using landmines, perpetrating enforced disappearances, and other gross violations

²¹⁷ Juan Forero, *Blast at Social Club Struck at Colombia's Elite*, N.Y. TIMES, Feb. 9, 2003, <http://www.nytimes.com/2003/02/09/world/blast-at-social-club-struck-at-colombia-s-elite.html>.

²¹⁸ Edward Fox, *Were the FARC Behind the Bogota Bombing?*, INSIGHT CRIME: ORGANIZED CRIME IN THE AMERICAS (May 16, 2012), <http://www.insightcrime.org/news-analysis/were-the-farc-behind-the-bogota-bombing>.

²¹⁹ Stanford Univ., *Revolutionary Armed Forces of Colombia—People's Army*, MAPPING MILITANT ORGS, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/89> (last visited Apr. 25, 2015).

²²⁰ *See id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *See* Portilla, *supra* note 2, at 172.

²²⁶ Victims of kidnappings include civilians, politicians, military personnel and government officials. For instance, on February 23, 2002, Colombian presidential candidate Ingrid Betancourt was kidnapped by FARC. *See* Stanford Univ., *supra* note 219. On December 21, 2009, Luis Francisco Cuellar, governor of the department of Caquetá, was kidnapped by FARC from his home. Cuellar's body was found the day after bound, gagged, and shot and with his throat slit. *See id.* FARC has kept military personnel in captivity for more than ten years. For example, Army sergeant Jose Libio Martínez has been kept in captivity since December 21, 1997. *See* Interim Report, *supra* note 6, at 43.

²²⁷ *See* Malagón, *supra* note 211.

of human rights. Indeed, “Colombia remains the country with the highest number of Internally Displaced Persons (IDPs) in the world,” with more than 5,712,506 victims of enforced displacement.²²⁸ Colombia is also “the second highest country, behind Afghanistan, with regard to the number of landmine victims.”²²⁹ Further, more than 25,000 people have been victims of enforced disappearance in Colombia.²³⁰ FARC also continues the practice of recruiting and enlisting children for war purposes,²³¹ and reports demonstrate that FARC has executed a “widespread use of sexual violence against women and girls as a weapon of war.”²³²

Because of the international crimes allegedly committed by all parties to the conflict, in 2004 the Office of the ICC Prosecutor launched a preliminary examination into the situation in Colombia,²³³ a country that is a State Party to the ICC.²³⁴ The Office of the ICC Prosecutor stated that Colombian irregular armed groups, in particular FARC, ELN, and paramilitary units, have allegedly committed crimes that fall within the jurisdiction of the ICC, particularly crimes against humanity and war crimes.²³⁵ Similarly, the ICC Prosecutor has indicated that Colombian armed forces have allegedly perpetrated crimes against humanity and war crimes, under Article 7 of the ICC Statute and Article 8 of the ICC Statute respectively.²³⁶

As the Office of the ICC Prosecutor moves forward with its preliminary investigation over the situation in Colombia, peace negotiations between the Colombian government and FARC continue in Havana, Cuba.²³⁷ For international media covering the peace process between the government of Colombia and FARC, the winds of peace will eventually spring from Cuba and will rapidly flow toward Colombia, as their voices across the globe proclaim that the “ambitious and complex effort” for peace “appears to be reaching a make-or-break phase.”²³⁸

However, there is an important issue that the parties to the Colombian peace negotiation table in Cuba must openly and transparently address: the

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See Interim Report, *supra* note 6, at 3.

²³² See Malagón, *supra* note 211.

²³³ See Interim Report, *supra* note 6, at 2.

²³⁴ The ICC may exercise jurisdiction over Colombia regarding crimes against humanity committed in the country or by Colombians following the ratification of the ICC Statute by Colombia on November 1, 2002, and war crimes after November 1, 2009. See Interim Report, *supra* note 6, at 2; see also Rome Statute, *supra* note 8, at art. 124.

²³⁵ See Interim Report, *supra* note 6, at 2–3.

²³⁶ See *id.*

²³⁷ See Editorial, *Hope for Colombia’s Peace Process*, N.Y. TIMES, Mar. 9, 2015, http://www.nytimes.com/2015/03/10/opinion/hope-for-colombias-peace-process.html?_r=0.

²³⁸ *Id.*

dilemma of peace versus justice. FARC's negotiators have said that FARC's combatants will not spend a single day in jail for the crimes they have committed.²³⁹ What is more, current Colombian president, Juan Manuel Santos, has said that, "[i]n the long run, justice cannot serve as an obstacle to peace,"²⁴⁰ and that those members of the Colombian armed forces accused of committing international crimes must enjoy the benefits of the rules of transitional justice (indirect amnesty) that the legal framework for peace introduced in the Colombian Magna Carta.²⁴¹ Yet, human rights advocates have asserted that the Santos administration could use the legal framework for peace "to provide immunity to military officials involved"²⁴² in the cases of extrajudicial killings perpetrated by members of the armed forces on civilians, crimes which, for the most part, were perpetrated and known in Colombia when current Colombian president, Juan Manuel Santos, was the national defense minister of the country from 2006 to 2009.²⁴³

The legal framework for peace grants the Colombian Congress the power to issue an indirect amnesty for those accused of committing international crimes. As argued above, amnesty trades justice for peace, contravenes international law, impedes criminal prosecution,²⁴⁴ compromises the truth,²⁴⁵ deprives victims from seeking redress,²⁴⁶ and endangers the guarantee of non-repetition value.²⁴⁷ In addition, the debate among international lawyers on this issue has been peace versus justice.²⁴⁸ Nonetheless, this article has proposed an alternative view and has advocated for the position that Colombian society must be open to debate public policies upon which a solid transition from war into peace can be built. It follows that the forgiveness law proposal and the establishment of the forgiveness and reconciliation commission for Colombia, which must hold different powers from those ones held by truth commissions, can help solve the peace versus justice dilemma that confronts Colombia.

²³⁹ See WASHINGTON OFFICE ON LATIN AMERICA, *The "Transitional Justice" Debate Heats Up*, COLOMBIAPEACE.ORG (Mar. 2, 2015), <http://colombiapeace.org/2015/03/02/the-transitional-justice-debate-heats-up/>.

²⁴⁰ John Carlin, *Colombia Will Send Top Military Aides to Negotiate Definitive FARC Ceasefire*, EL PAIS, Mar. 2, 2015, http://elpais.com/elpais/2015/03/02/inenglish/1425305244_140717.html.

²⁴¹ See WASHINGTON OFFICE ON LATIN AMERICA, *supra*, note 239.

²⁴² See Dodwell, *supra* note 33.

²⁴³ See José Miguel Vivanco & Max Schoening, Op-Ed., *Colombia's Compromise With Murder*, N.Y. TIMES, Nov. 12, 2014, <http://www.nytimes.com/2014/11/13/opinion/colombias-compromise-with-murder.html>.

²⁴⁴ See *supra* note 9 and accompanying text.

²⁴⁵ See Naqvi, *supra* note 10, at 245.

²⁴⁶ See *supra* note 12 and accompanying text.

²⁴⁷ See Tams, *supra* note 13, at 2.

²⁴⁸ See Blumenson, *supra* note 3, at 801–04.

B. Establishment of a Forgiveness and Reconciliation Commission for Colombia and Its Advantages over Truth Commissions

In Colombia, implementation of the forgiveness law proposal should involve the establishment of a Forgiveness and Reconciliation Commission, rather than rely on a truth commission. The Forgiveness and Reconciliation Commission should include mechanisms to secure convictions, to allow for forgiveness, and most importantly should include a diverse set of stakeholders with an emphasis on victim voices. This regime is superior to truth commissions, popularized in other parts of Latin American, because it promotes the values of the forgiveness law and operates within the bounds of international norms and laws.²⁴⁹

Under pardon regimes for ordinary crimes, the pardoning power is an executive prerogative,²⁵⁰ where victims do not have a voice at the proceedings leading to the granting of the pardon. Any pardon regime established for international crimes, however, must secure victim participation. Victim participation can be secured through a society-based or collective body that sets forth proceedings leading to the granting of the pardon sought, because the act of forgiveness is an individual prerogative that cannot be delegated. Thus, neither the Colombian president nor the Colombian Congress alone should grant pardons to those convicted of committing international crimes in Colombia. Rather, the power to grant pardons should be vested in a Forgiveness and Reconciliation Commission, which would manifest the collective effort of Colombia to incorporate and integrate representatives from different spectrums of society, beginning with victims, and including government officials from each of the branches of government power, envoys from international organizations such as the United Nations or other regional institutions of international law, and an envoy from the Catholic Church.²⁵¹

Therefore, a Forgiveness and Reconciliation Commission would hold different powers from those held by truth commissions. Unlike truth commis-

²⁴⁹ Truth Commissions have been established in post-conflict societies in Africa and Latin America as a way to bring about reconciliation. Truth commissions, such as the South African Commission, have been given quasi-prosecutorial and quasi-judicial powers, to achieve such a goal. However, there is a flaw of these truth commissions that must be outlined. Schabas indicates that, regarding truth commissions empowered to grant amnesty, “a line must be drawn establishing that amnesty” for international crimes is unacceptable. SCHABAS, *supra* note 167, at 186. Other scholars, like Hayner, predict that truth commissions with amnesty-granting powers are improbable in the future. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 115 (2011).

²⁵⁰ See *supra* note 97 and accompanying text.

²⁵¹ The Organization of American States (“OAS”) and the Vatican State can join the United Nations and the Colombian society effort in building peace, as well as in the establishment of a forgiveness law. Colombia has been a state member of the OAS since its inception.

sions, such as the Commission on the Truth for El Salvador²⁵² or the South African Truth and Reconciliation Commission, among others,²⁵³ the Forgiveness and Reconciliation Commission proposal for Colombia will have neither quasi-prosecutorial power nor quasi-judicial power. Whereas most truth commissions are empowered to set official investigations units that use “fair procedures”²⁵⁴ to determine the facts of the atrocities committed in the territory where the commission was established, the Forgiveness and Reconciliation Commission proposal for Colombia will be empowered only to receive an individual’s pardon application, and to decide, in accordance with the requirements established by the forgiveness law, on the pardon sought.

There are powerful reasons to conclude that a Forgiveness and Reconciliation Commission proposal for Colombia should not include quasi-prosecutorial and quasi-judicial authority. First, by empowering the Forgiveness and Reconciliation Commission for Colombia only with the task of deciding on a pardon petition, Colombian judicial authorities keep their power to investigate, prosecute, and adjudicate international crimes cases. This is important in order to build legitimacy and confidence in this crucial state institution. Second, by adopting this policy proposal, the government of Colombia will avert possible collisions between its judicial bodies and a truth commission possibly empowered to launch investigations and fact-finding missions and to hold public hearings to hear testimonies of perpetrators, victims, and bystanders. Third, by pursuing the Forgiveness and Reconciliation Commission proposal as described in this Article, the government of Colombia will avoid a conflict of laws between its criminal code and criminal proceedings code, with the statute of the Forgiveness and Reconciliation Commission proposal for Colombia.

In contrast to truth commissions, which are generally empowered to afford amnesties as “the price for allowing a relatively peaceful transition to full democracy,” the Forgiveness and Reconciliation Commission would not

²⁵² The Commission on the Truth for El Salvador was created under the auspices of the United Nations Observer Mission in El Salvador, a peacekeeping mission established by resolution of the Security Council of the United Nations to verify the implementation of the peace accords signed between the government of El Salvador and the Frente Farabundo Martí. See MINOW, *supra* note 16, at 54.

²⁵³ In 1995, the Parliament of South Africa approved the Promotion of National Unity and Reconciliation Act, which included the establishment of a Truth and Reconciliation Commission to provide an official investigation, the telling of the truth of the atrocities committed in the Apartheid era and amnesties for perpetrators of the abuses committed. See The Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.); MINOW, *supra* note 16, at 52–53. Examples of other truth commission are the National Commission on the Disappeared, established in Argentina in 1984, the National Commission on Truth and Reconciliation, established in Chile in 1990, and commissions established in Uruguay and Haiti.

²⁵⁴ MINOW, *supra* note 16, at 55.

circumvent the criminal prosecution process.²⁵⁵ Truth commissions with amnesty-granting power have shown flaws that must be highlighted so as to avoid legal complications in future reconciliation endeavors. Priscilla Hayner says that truth commissions with the power to grant amnesty “are unlikely in future truth commissions—or at least” to apply amnesty “to very serious crimes.”²⁵⁶ It is legally uncertain whether the ICC Prosecutor will “respect a national amnesty granted through a truth commission’s conditional amnesty regime.”²⁵⁷ Moreover, Cassese argues that truth commissions holding amnesty-granting powers “have proved unable to bring about true reconciliation.”²⁵⁸ Even when perpetrators of international crimes have been identified, truth commissions holding amnesty-granting power have withdrawn criminal prosecution on such perpetrators “through amnesty laws.”²⁵⁹ The cancellation of criminal prosecutions by truth commissions granting amnesty has affected “real and lasting reconciliation,” inasmuch as that truth commissions’ practices have “sparked much resentment and anger among the victims and their relatives, who desired retribution, or at least ordinary criminal justice.”²⁶⁰

The Forgiveness and Reconciliation Commission for Colombia, in contrast, will avoid the legal murkiness of truth commissions and will provide a stronger base from which Colombia may begin to heal and move toward peace. The structure of the commission is central to achieving this goal. The Forgiveness and Reconciliation Commission must exist for a period of four years that can be extended up to twelve years; as such, the Forgiveness and Reconciliation Commission will align its tenure with the constitutional term of four years of both the Colombian President and Colombian Congress. It must be composed of twelve members. Four seats must be given to representatives of victims so that they can enjoy their right to exercise their option of forgiveness. Each branch of government power must have one seat. Two seats must be given to the envoys of the United Nations (one) and the Organization of American States (one), thereby allowing the work of the Forgiveness and Reconciliation Commission to comply with Colombia’s international obligation under the UN and OAS. One seat must be given to an envoy appointed by the Pope of the Catholic Church; as such, the Pope may be encouraged to visit Colombia to help Colombians endorse forgiveness in the country. One seat must be given to a representative of the Colombian union, and a representative of the Colombian productive sector must occupy one seat, for these sectors have been involved somehow in the conflict. The Forgiveness and

²⁵⁵ *Id.*

²⁵⁶ See Portilla, *supra* note 2, at 176 (quoting HAYNER, *supra* note 249 at 115).

²⁵⁷ *See id.*

²⁵⁸ CASSESE, *supra* note 4, at 10.

²⁵⁹ *See id.*

²⁶⁰ *See id.* at 10–11.

Reconciliation Commission must have a chairman and a vice-chairman, and must be empowered to hire personnel who can undertake different tasks, ranging from legal and management endeavors to therapeutic services to victims and perpetrators.

Additionally, a written statement of a victim—in which the victim acknowledges the application for a pardon made by his or her perpetrator before the Forgiveness and Reconciliation Commission, forgives the offense, and accepts the apology, reparation and the guarantee of non-repetition offered—must be a necessary requirement of the forgiveness law proposal for Colombia to include in its regime. Without the written statement, the pardon's application must be rejected. Each convicted perpetrator must have the opportunity to seek his or her victim's pardon, since criminal responsibility is solely individual. Thus, each victim must be the only person empowered to express his or her forgiveness for the convicted perpetrator, whose pardon can be revoked by judicial decision at any time if such a convicted perpetrator commits a criminal offense under Colombian law, or to deny it during the process of reconciliation.

CONCLUSION

The legal framework for peace, which the Colombian Congress passed in 2012, essentially provided amnesty for those accused of international crimes. However, the Colombian Congress can use the legal framework for peace to provide both government officials, including military officers, and FARC immunity for the international crimes they have allegedly committed. While the legal framework for amnesty trades justice for peace, the forgiveness law proposal would secure justice and peace together. Unlike amnesty, the forgiveness law proposal is lawful under international law, for it guarantees prosecution of international crimes, discovery of the truth, a fair trial, adjudication of individual criminal responsibility, redress for victims, guarantees of non-repetition, and mercy for perpetrators. Under the proposal, victims—through a Forgiveness and Reconciliation Commission—actively participate in the legal proceedings that lead to the granting of a pardon because the act of forgiveness is an individual prerogative that only victims enjoy. As such, societies seeking healing of the scars of conflict, death and desolation, would achieve peace and justice.