# COMMENTS

# Toward a New Amnesty: The Colombian Peace Process and the Inter-American Court of Human Rights

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## I. INTRODUCTION

The Colombian armed conflict is the longest ongoing conflict in the Western Hemisphere.[1] Conservative estimates place its death toll at over 300,000, and it is responsible for ongoing human rights violations and crimes against humanity, such as kidnappings, forced disappearances,

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1. Nicole Summers, *Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?*, 25 HARV. HUM. RTS. J. 219, 220 (2012).

and the mass displacement of vulnerable populations.[2] "It is estimated that in the last twenty years . . . between 15,000 and 50,000 people have disappeared, and since 1963, over 25,000 people have been kidnapped."[3] Moreover, at least 4.6 million victims had been displaced from their land.[4]

Presently the Colombian conflict has three main actors: the state, the Revolutionary Armed Forces of Columbia (FARC), and the paramilitaries. The conflict originated during the Cold War when leftist, rural peasants began to organize guerrilla groups funded by the Chinese and Soviet governments, giving rise to groups such as the FARC.[5] Although ideology played an important role in the early stages of the conflict, some argue that the guerrilla groups' Maoist beliefs were later corrupted by their involvement in Colombia's lucrative drug trade and in thousands of kidnappings motivated by monetary and political interests.[6]

Faced with the threat of being overthrown by leftist guerrillas, the Colombian government began to encourage the formation of self-defense groups put together by large, private land owners during the 1960s.[7] These self-defense groups became known as paramilitary groups.[8] Although they initially served as private armies for private landowners, many of the paramilitary groups also became corrupted by their involvement in the Colombian drug trade.[9] Further, the private landowners were often corporations that sought to exploit Colombia's natural resources and that used paramilitary groups to displace rural landowners and take over their land.[10] In their efforts to intimidate leftist guerrilla groups, paramilitary groups have been responsible for massacring rural peasant populations known to sympathize with the FARC.[11] The Colombian government has also been responsible, directly or indirectly, for grave human rights violations in recent years.[12] In

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2. Peter Burbidge, *Justice and Peace? The Role of Law in Resolving Colombia's Civil Conflict*, 8 INT'L CRIM. L. REV. 557, 557, 560-61 (2008).

3. Summers, *supra* note 1, at 222 (footnotes omitted).

4. *Id.*

5. *See* Burbidge, *supra* note 2, at 560.

6. *See id.* at 559-60; *see also* Sarah R. Sandford-Smith, *A Toothless Tiger: President Uribe's Proposed Amnesty Bill*, 28 HASTINGS INT'L & COMP. L. REV. 167, 169-70 (2004).

7. *See* Burbidge, *supra* note 2, at 560.

8. *Id.* at 560-61.

9. *Id.* at 560.

10. Summers, *supra* note 1, at 222, 230, 232.

11. Sandford-Smith, *supra* note 6, at 169-70.

12. *See* Mapiripán Massacre v. Colombia, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 122, ¶ 2 (Mar. 7, 2005); *Human Rights Groups Slam Colombia's Military Reforms*, FOX NEWS LATINO (Dec. 13, 2012), http://latino.foxnews.com/latino/news/2012/12/13/human-rights-groups-slam-colombia-military-reform/; Adriaan Alsema, *37 Colombian*

particular, the Colombian government and military have repeatedly been linked to paramilitary groups, which are often accused of carrying out state-ordered human rights violations.[13]

The election of President Álvaro Uribe in 2002 marked a turning point in the conflict.[14] Unlike his predecessors, President Uribe's national security policy focused on the military defeat of all illegal armed groups.[15] During his eight-year mandate, the Colombian military delivered unprecedented blows to the FARC's leadership.[16] Although President Uribe pledged that the government would refrain from negotiating a peace settlement with the FARC until the guerrilla group completely demobilized and released all kidnapping victims, his handpicked predecessor and Columbia's current president, Juan Manuel Santos, has taken advantage of the FARC's ever-weakening position to propose a peaceful solution to the conflict.[17]

However, negotiating the end to an internal armed conflict within the current international law regime poses unique challenges to national governments. Although the Executive and Legislative Branches of the Colombian government have expressed a willingness to grant complete amnesty to demobilized FARC combatants, Colombia's obligations under customary international law and treaty law have significantly impaired the state's ability to negotiate an end to the conflict.[18]

## II. AMNESTY LAWS AND INTERNATIONAL LAW

Amnesty laws pose a significant dilemma for conflict-ridden nations seeking to transition into peaceful, democratic societies.[19] On the one hand, amnesty laws offer illegal armed groups and outgoing

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*Congressmen, 5 Governors Convicted for Ties to Paramilitaries*, COLOM. REPORTS (May 16, 2012), http://colombiareports.co/37-colombian-congressmen-5-governors-convicted-for-ties-to-paramilitary-death-squads/.

13. *See* Alsema, *supra* note 12.

14. Juan Carlos Hidalgo, *Uribe's Ultimate Victory*, CATO INST. (July 7, 2008), http://www.cato.org/publications/commentary/uribes-ultimate-victory.

15. *Id.*

16. *Id.*

17. Marie Delcas, *Down But Not Out: Why Colombia's FARC Guerillas Just Won't Go Away*, WORLDCRUNCH (Feb. 23, 2012), http://worldcrunch.com/world-affairs/down-but-not-out-why-colombia-s-farc-guerillas-just-won-t-go-away/c1s4727/#.UVS5Wb928n9; John Otis, *Colombian Peace Talks Start—And So Do the FARC's Delusional Tirades*, TIME (Oct. 22, 2012), http://world.time.com/2012/10/22/colombian-peace-talks-start-and-so-do-the-farcs-delusional-tirades/.

18. Sebastián Jiménez Herrera, *FARC deben entender que una amnistía total es imposible*, ELESPECTADOR.COM (Oct. 15, 2012, 9:00 PM), http://www.elespectador.com/noticias/paz/articulo-381342-farc-deben-entender-una-amnistia-total-imposible.

19. *E.g.*, William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 467 (2001).

totalitarian regimes expeditious incentives to disarm and peacefully reintegrate into society or, in the latter case, relinquish control.[20] On the other hand, amnesty laws are a form of impunity, which raises questions as to whether the state government enacting such laws violates its own constitution or its international obligations.[21]

Although some proponents of amnesty laws argue that their enactment is within the legitimate power of a sovereign state, the advent of customary international law and international treaty law has placed significant limitations on the implementation of such laws.[22] In fact, some scholars argue that the global trend shows an express rejection of amnesty laws by international organs in favor of strict anti-impunity measures, such as judicial prosecution.[23] However, other scholars argue that the incompatibility of amnesty laws with customary international law is not settled.[24] The latter group of scholars notes that the legitimacy and legality of amnesty laws as part of transitional schemes depends on the degree of approval or rejection that these laws generate within the international community.[25] Significantly, these scholars have observed that the obligations of states parties under international treaties are limited to ensuring adequate remedies for victims and that the duty of judicial prosecution for grave human rights violations has been the product of these instruments' interpretation, not their actual provisions.[26]

As a result, it could, and probably should, be argued that not all amnesty laws are created equal. For example, normative liberal international law theory analyzes an amnesty law's compliance with national and international standards through a spectrum of its legitimacy, scope, and goals.[27] Legitimacy refers to the degree to which the provisions of the amnesty law reflect the democratic will of the individuals of a given state.[28] The degree of a law's legitimacy rests upon three complimentary inquiries. First, did the government enacting the law derive its authority from the will of its people (whether the enacting government was freely elected by the people)? Second, did the process

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20. *Id.*

21. *Id. But see* Scott W. Lyons, *Ineffective Amnesty: The Legal Impact on Negotiating the End to Conflict*, 47 WAKE FOREST L. REV. 799, 810-11 (2012).

22. Burke-White, *supra* note 19, at 468, 478.

23. *See* Elizabeth B. Ludwin King, *Amnesties in a Time of Transition*, 41 GEO. WASH. INT'L L. REV. 577, 613-14 (2010). *See generally* Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GERMAN L.J. 1203, 1229 (2011).

24. *See* Lyons, *supra* note 21, at 805.

25. *Id.* at 808-09.

26. *Id.* at 812.

27. Burke-White, *supra* note 19, at 470.

28. *Id.* at 471-72.

by which it was enacted follow a procedure that was democratically established (whether the enactment procedure conformed to national constitutional requirements)? And finally, was the application of the law reflective of the people's will (whether the law is coherent or treats like cases alike)?[29]

The scope refers to the actors of the conflict (be they state agents, civilians, or both) that are covered by the amnesty law and the period of time to which it applies.[30] It is at this point that a state's international obligations limit its sovereign right to enact national legislation.[31] Even if an amnesty law is legitimate at the domestic level, under international law, there are certain crimes for which a state simply cannot grant immunity. For example, *jus cogens* norms, by definition, cannot be abrogated by an individual state.[32] Similarly, some breaches of the Geneva Conventions impose *aut dedere aut judicare* (prosecute or extradite) obligations on states.[33] These two sources of international law bind all nations, but individual states must also comply with their international obligations under the treaties and conventions to which they are party.[34] Thus, international law works to limit the scope of amnesty laws that a state may enact by prohibiting the granting of immunity for grave human rights violations.[35]

An amnesty law's goal must be analyzed on a spectrum.[36] On one end of the spectrum are blanket or self-amnesty laws that seek to immunize state actors from liability for past crimes.[37] On the other end are restrictive amnesty laws that seek to end violent conflicts that would otherwise continue to amass severe human rights violations.[38]

The first kind of amnesty laws to emerge in the modern international system conferred blanket amnesty,[39] which grants broad and unrestricted immunity to state agents for all crimes committed during a specified time period.[40] In Latin America, blanket amnesty laws were usually implemented by outgoing Cold War totalitarian regimes in order to avoid prosecution and failed to make any distinction between political,

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29. *See id.* at 472, 474-77.
30. *Id.* at 477.
31. *Id.*; *see, e.g.*, Lyons, *supra* note 21, at 819.
32. Burke-White, *supra* note 19, at 478.
33. *Id.*
34. *See* King, *supra* note 23, at 600-01.
35. *See* Lyons, *supra* note 21, at 803.
36. *Id.*
37. Burke-White, *supra* note 19, at 482.
38. Lyons, *supra* note 21, at 803.
39. Burke-White, *supra* note 19, at 482.
40. *Id.*; King, *supra* note 23, at 583-87.

international, and common crimes or to consider the motivations for committing the crimes.[41] These laws, also known as self-amnesty laws, typically lack legitimacy, are unlimited in scope, and are enacted for the sole purpose of pardoning the state and state actors for violations committed against its citizens.[42]

Although it is clear why amnesty laws are generally undesirable, careful consideration of a particular law's legitimacy, scope, and goals can make certain amnesty laws more desirable than others.[43] Amnesty laws that are enacted by a democratically elected government, that restrict immunity to a certain class of actors for crimes that do not amount to grave human rights violations, and that seek to end long-lasting violent conflicts are more desirable than blanket amnesty laws.[44] Governments can further minimize the unjust (but arguably necessary) repercussions of restrictive amnesty laws by instituting measures such as truth-and-reconciliation commissions, reduced sentences, and monetary compensation.[45]

## III. INTER-AMERICAN COURT OF HUMAN RIGHTS AMNESTY JURISPRUDENCE

*Barrios Altos v. Peru* is the Inter-American Court of Human Rights' (IACtHR) seminal ruling on amnesty laws.[46] The case is particularly apt for comparison with Colombia's situation because when the amnesty law at issue was enacted, Peru was engaged in an internal armed conflict with leftist guerrillas seeking to overthrow a democratically elected government.[47] *Barrios Altos* arose from the planned execution in 1991 of fifteen suspected members of the *Sendero Luminoso* guerrilla group by a state-sponsored death squadron known as the Colina Group.[48]

After the execution occurred, there were some immediate attempts to conduct an official investigation, but the Government of National Reconstruction and Emergency, which came into power through a law enacted on April 5, 1992, dissolved the National Congress and the

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41. King, *supra* note 23, at 583-86.
42. *Compare* Burke-White, *supra* note 19, at 482, *with* King, *supra* note 23, at 583.
43. *See* King, *supra* note 23, at 610-15.
44. *Id.*
45. *Id.* at 612.
46. *See* Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001); Binder, *supra* note 23, at 1208.
47. *See Translation: The Judgment Against Fujimori for Human Rights Violations*, 25 AM. U. INT'L L. REV. 657 (Aimee Sullivan trans., 2010).
48. Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2.

Senatorial Committee in charge of the *Barrios Altos* investigation.[49] In 1995, the government enacted Amnesty Law No. 26479, which granted amnesty to all members of the security forces and civilians accused, investigated, prosecuted, or convicted for human rights violations from 1980 to 1995.[50] The law went into force on June 15, 1995, and had the effect of definitively quashing the *Barrios Altos* investigation and preventing the perpetrators of the massacre from being found criminally liable.[51]

The IACtHR decided *Barrios Altos* in 2001, holding that the state violated articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the American Convention on Human Rights (Convention).[52]

The IACtHR provided, "[A]ll amnesty provisions . . . are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations . . . prohibited because they violate non-derogable rights recognized by international human rights law."[53] The IACtHR found the state violated article 8(1) because the amnesty law prevented the victim's next of kin from being heard by a judge and, thus, also article 25, which embodies the right to judicial protection.[54] By preventing the investigation, capture, prosecution, and conviction of the perpetrators, the state also violated article 1(1).[55] Finally, the IACtHR held that the mere adoption of the amnesty law violated article 2 because self-amnesty laws are manifestly incompatible with the Convention and that the state had failed to provide a judicial framework that guaranteed the full enjoyment of the rights thereby guaranteed.[56]

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49. *Id.*

50. *Id.* The law granted amnesty to government officials, military personnel, and civilians for all actions resulting or originating from the fight against terrorism that were carried out individually or as a group from May 1980 to the enactment of the present law. Ley No. 26479, 14 junio 1995, Transcripción de la Primera Ley de Amnistía [Transcription of the First Amnesty Law] art. 1, DIARIO OFICIAL EL PERUANO (Peru), *translated in* AMNESTY INT'L, PERU: AMNESTY LAWS CONSOLIDATE IMPUNITY FOR HUMAN RIGHTS VIOLATIONS, at 6, AMR 46/03/96 (Feb. 23, 1996), *available at* http://amnesty.org/en/library/info/AMR46/003/1996/en.

51. Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2.

52. *See* Organization of American States, American Convention on Human Rights arts. 1-4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights]; *Barrios Altos*, Inter-Am. Ct. H.R. (ser. C) No. 75.

53. *Barrios Altos*, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41.

54. *Id.* ¶ 42.

55. *Id.*

56. *Id.* ¶ 43.

The Peruvian amnesty law can be characterized as a blanket amnesty law. The law's legitimacy is questionable because then-President Fujimori handpicked the congressional body that approved the law. The law's provisions are broad, general, and unrestricted in scope,[57] granting immunity not only for the political crimes of government actors, but for all crimes committed in the fight against terrorism during a specified time period.[58] The only goal of the law was to grant self-amnesty to President Fujimori's government to immunize government actors from prosecution for human rights violations.[59]

Prior to *Barrios Altos*, the IACtHR in *Velasquez Rodriguez v. Honduras* imposed a legal duty on states "to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[60] When read in conjunction, the IACtHR's early amnesty jurisprudence seems to place an affirmative duty on states not only to take reasonable steps to prevent future human rights violations, but also to use the means at its disposal to investigate, identify, and punish the perpetrators.[61] The IACtHR has also relied on the Convention's use of the phrase "nonderogable rights" to hold that states lack the legal authority to grant immunity for certain universally condemned crimes such as torture, genocide, and kidnapping.[62]

The IACtHR elaborated its amnesty jurisprudence in *Almonacid-Arellano v. Chile* by imposing a "conventionality control" requirement on domestic courts.[63] In that case, the IACtHR held that Chilean Law No. 2.191 was void.[64] The law granted amnesty for all crimes committed during the five-year national state of emergency.[65] Although article 3 of the amnesty law provided a list of exceptions for crimes like robbery, corruption of minors, and drug trafficking, the exceptions did not include grave human rights violations such as torture, genocide, or forced

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57. Burke-White, *supra* note 19, at 486.
58. *Id.*
59. *See id.* at 487.
60. Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988).
61. *Id.*
62. Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001).
63. Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 124 (Sept. 26, 2006).
64. *Id.* ¶ 119.
65. Law No. 2.191, abril 18, 1978, DIARIO OFICIAL [D.O.] art. 1 (Chile).

disappearance.[66] The IACtHR found the state's enforcement of the law violated articles 1(1), 2, 8(1), and 25 of the Convention.[67] The law's legitimacy was questionable because it was enacted by a departing authoritarian regime, and although the scope of the amnesty law was limited, it nonetheless granted amnesty to a wide scope of grave human rights violators. The goal of the law was to grant immunity to state actors for grave human rights violations.

The IACtHR ultimately proclaimed, "Law No. 2.191 does not have any legal effects and cannot remain as an obstacle for the punishment of those responsible therefor."[68] In declaring the Chilean law void, the IACtHR noted that the obligations acquired by all states parties to the Convention include a positive obligation to ensure that the rights conferred thereon are not hindered by national legislation.[69] "[W]hen the Legislative Power fails to set aside and/or adopts laws which are contrary to the American Convention, the Judiciary is bound to honor the obligation [by] refrain[ing] from enforcing any laws contrary to such Convention."[70] Domestic judiciaries are obligated to exercise this conventionality control by ensuring that national legislation and its implementation conform not only to the provisions of the Convention, but also to the IACtHR's jurisprudence because it is the ultimate interpreter of the Convention.[71] By declaring the Chilean law void and holding that domestic judiciaries should refuse to enforce laws that are contrary to the Convention, the IACtHR significantly expanded its power over the enforcement of domestic legislation.[72]

In *Gomes Lund v. Brazil*, the IACtHR had the opportunity to clarify that its prohibition of amnesty laws is not limited to self-amnesty laws.[73] In that case, the Brazilian government argued that its amnesty law was distinguishable from those previously dealt with by the IACtHR because it did not seek to confer a self-amnesty, but instead offered mutual amnesty due to its bilateralness and reciprocity.[74] The Brazilian government further argued that the IACtHR should consider that the law functions as "a broad and gradual process of political change and

66. *Id.* art. 3.
67. *Almonacid-Arellano*, Inter-Am Ct. H.R. (ser. C) No. 154, ¶ 121.
68. *Id.* ¶ 119.
69. *Id.* ¶¶ 121-123.
70. *Id.*
71. *Id.* ¶ 124.
72. *See* Binder, *supra* note 23, at 1212-14.
73. *See* Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 1 (Nov. 24, 2010).
74. *Id.* ¶ 133.

redemocratization of the country."[75] In other words, by forfeiting rights and granting benefits to both sides of the political spectrum, the amnesty law's broad scope was justified by its general political purpose.[76]

The IACtHR rejected the state argument stating that domestic laws that impede the investigation and punishment of grave human rights violations lack legal effect regardless of whether they are labeled self-amnesties, mutual amnesties, or political agreements.[77] The IACtHR clarified that the incompatibility of amnesty laws with the Convention does not stem from their origin or purpose, but rather from their material failure to comply with the rights guaranteed by articles 8 and 25 of the Convention.[78]

More importantly, the Brazilian government also argued that enacting measures such as truth-and-reconciliation commissions, creating search parties for the remains of forced disappearance victims, and declaring a national day of remembrance were sufficient to satisfy the state's obligation to provide measures of reparation and guarantees of nonrepetition.[79] The IACtHR held that while those measures were important, they were insufficient because they failed to provide victims' next of kin with access to justice.[80]

The IACtHR recently addressed the issue of whether the validity of amnesty laws depends on their legitimacy in *Gelman v. Uruguay*.[81] Unlike the amnesty laws invalidated in the cases discussed above, the Uruguayan Expiry Law was subjected to two democratic referenda.[82] The majority of Uruguayans voted against the abrogation of the amnesty law on both occasions.[83] In rejecting Uruguay's argument that the law should be treated differently because of the referenda, the IACtHR reasoned that Uruguay's voluntary adoption of the Convention created certain obligations, particularly in the area of nonderogable norms of international law that constitute an "impassable limit to the rule of the majority."[84] As a result, the IACtHR made clear that democratic approval

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75. *Id.*

76. *See* Paulo Abrão & Marcelo D. Torelly, *Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice*, *in* AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY 152, 172 (Francesca Lessa & Leigh A. Payne eds., 2012).

77. *Gomes Lund*, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 174-175.

78. *Id.* ¶ 175.

79. *Id.* ¶ 178.

80. *Id.*

81. *See* Merits and Reparations, Judgments, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 222, 229 (Feb. 24, 2011).

82. *Id.* ¶¶ 144-150.

83. *Id.* ¶ 149.

84. *Id.* ¶ 239.

of a state party's amnesty law is irrelevant to the court's *ratio legis*-based inquiry.[85]

In its most recent amnesty decision, the IACtHR distinguished the amnesty laws at issue in its early jurisprudence from amnesty laws that relate to acts "committed in the context of an internal armed conflict."[86] *Massacres of El Mozote v. El Salvador* arose from a series of massacres that took place during El Salvador's twelve-year civil war. As part of the negotiations that put an end to the armed conflict, both parties agreed to enact the Law of National Reconciliation.[87] Article 1 of the law granted amnesty to all actors who participated directly, indirectly, or as accomplices in political crimes prior to January 1, 1992.[88] Article 6 of the law, however, expressly limited the law's scope by excluding "persons who, according to the Truth Commission, participated in grave acts of violence."[89] The Salvadorian amnesty law went into effect on January 23, 1992, more than a year before the Truth Commission issued its findings.[90] On March 20, 1993, five days after the presentation of the Truth Commission's report, the Legislative Assembly adopted a second amnesty law, the Law of General Amnesty for the Consolidation of Peace.[91] That law explicitly annulled article 6 of the Law of National Reconciliation, granting amnesty to the perpetrators of grave human rights violations identified by the Truth Commission.[92]

In its decision, the IACtHR noted that according to international humanitarian law, "the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts are sometimes justified to pave the way to a return to peace."[93] Thus, its analysis of the Salvadorian amnesty law could not rely exclusively on its jurisprudence because it was a case of first impression. Instead, because the laws were enacted as part of a peace accord that ended an internal conflict, the IACtHR looked to article 6(5) of Additional Protocol II to the Geneva Conventions (Protocol II), as well as the provisions of the amnesty law that ended the conflict.[94]

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85. *Id.* ¶ 229.

86. Massacres of El Mozote v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 284 (Oct. 25, 2012).

87. *Id.* ¶ 274.

88. *Id.*

89. *Id.* ¶¶ 2, 274.

90. *Id.*

91. *Id.* ¶ 275.

92. *Id.*

93. *Id.* ¶ 285.

94. *Id.*

Article 6(5) of Protocol II encourages authorities to grant the broadest amnesty possible to the actors of such conflicts.[95] However, the IACtHR noted that such a norm could not be absolute because international humanitarian law has also placed an obligation on states to investigate and prosecute perpetrators of war crimes.[96] As a result, the IACtHR concluded that perpetrators of war crimes and crimes against humanity could not benefit from amnesty laws, but signaled its approval of amnesty laws that absolve other crimes in the context of the resolution of an internal conflict.[97] Because the provisions of the second amnesty law violated the peace accords by granting immunity to the perpetrators of the violations highlighted by the Truth Commission, the IACtHR held the provisions were void.[98]

## IV. COLOMBIA'S RECENT AMNESTY LAWS

Colombia's internal armed conflict exemplifies the dilemma faced by conflict-ridden nations seeking to transition into peaceful, democratic societies. On the one hand, the Colombian government has a compelling interest in ending the conflict swiftly in order to avoid further human rights violations, move its troops out of harm's way, and invest the much-needed and substantial resources it has expended on the military in other areas that will contribute to the country's development.[99] On the other hand, it must also uphold its international obligations to prosecute perpetrators of grave human rights violations.[100]

In an effort to reconcile these interests, the Colombian government has enacted two key pieces of amnesty legislation: the Ley de Justicia y Paz[101] (Justice and Peace Law) and the Ley de Victimas[102] (Victim's Law). The Justice and Peace Law, first enacted in 2005 and amended in 2006, was Colombia's first transitional legislation that offered amnesty and reduced sentences for illegal combatants in exchange for meaningful reparations for victims.[103] After the Justice and Peace Law prescribed, the government enacted the Victim's Law in 2011, which adopted almost all

95. *Id.*
96. *Id.* ¶ 286.
97. *Id.* ¶ 291.
98. *Id.*
99. *See* Summers, *supra* note 1, at 224.
100. *Id.* at 224-33.
101. L. 975, julio 25, 2005, DIARIO OFICIAL [D.O.] 45.980 (Colom.).
102. L. 1448, junio 10, 2011, D.O. 48.096 (Colom.).
103. *See* L.975 of julio 25, 2005 (Colom.); Summers, *supra* note 1, at 224.

of its predecessor's provisions, but significantly expanded victims' access to justice and reparations.[104]

### *A. The Justice and Peace Law*

The Justice and Peace Law was aimed at encouraging the demobilization of illegal armed groups and combatants in Colombia.[105] Although the Constitutional Court of Colombia struck down the original draft of the Justice and Peace Law because its provisions violated the Colombian Constitution and the Convention, the law was later amended and enacted according to the Constitutional Court's recommendations.[106] The Justice and Peace Law undeniably granted amnesty to the perpetrators of human rights violations, but its amended text carefully avoided the sweeping language of the Peruvian, Chilean, and Brazilian amnesty laws that were struck down by the IACtHR.[107]

Initially, the Justice and Peace Law set out procedures whereby victims (or their next of kin) could report a crime, go through an expedited legal proceeding to establish the perpetrator's liability, and subsequently seek damages and restitution from the perpetrator.[108] Articles 3 and 29 of the law provided for an alternative punishment for the perpetrator in exchange for economic restitution, a prison term ranging from five to eight years, full disclosure of the crimes committed, and other obligations including full cooperation with the law's objectives of truth, justice, and reparation.[109]

In a press release prior to the Justice and Peace Law's enactment, the Inter-American Commission on Human Rights (IACHR) provided that the law's procedural mechanisms to achieve its stated goals did not conform to the standards set out in the Convention.[110] Specifically, the IACHR noted that the law did not provide sufficient incentives to elicit complete disclosure of violations, bring to light the involvement of the state, or guarantee the nonrepetition of violations.[111] The IACHR also

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104. *See* L. 1448 of junio 10, 2011 (Colom.); Summers, *supra* note 1, at 225-26.

105. *See* L. 975 of julio 25, 2005 (Colom.).

106. *See* Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 2006, Sentencia C-370-06, Gaceta de la Corte Constitucional [G.C.C.] (vol. 20) (Colom.).

107. *See* Javaria Ahmad, *The Colombian Law of Justice and Peace: One Step Further from Peace and One Step Closer to Impunity?*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 333, 337 (2006).

108. Summers, *supra* note 1, at 224.

109. L. 975 of julio 25, 2005, arts. 29-30 (Colom.).

110. *IACHR Issues Statement Regarding the Adoption of the "Law of Justice and Peace" in Colombia*, INTER-AM. COMM'N ON HUMAN RIGHTS (July 15, 2005), http://www.cidh.org/Comunicados/English/2005/26.05eng.htm.

111. *Id.*

noted that several victims would likely be denied meaningful reparations under the Justice and Peace Law because it assigned the demobilization process to only twenty prosecutors, which was unrealistic due to the time restrictions and the severity of the violations.[112]

In September 2005, after the Justice and Peace Law's initial enactment but before it was amended by the Colombian Constitutional Court, the IACtHR had an opportunity to invalidate the law in *Mapiripán Massacre v. Colombia*.[113] In that case, both parties asked the IACtHR to address the legality of the law. The IACtHR noted that internal laws could not contradict the rights secured by the Convention and explicitly stated that the law granted amnesty that was incompatible with those rights, but unlike the IACHR, the IACtHR stopped short of holding that the Justice and Peace Law violated the Convention.[114]

In 2006, the Colombian Constitutional Court amended the Justice and Peace Law on its own initiative in order to comply with Colombia's constitutional and international obligations.[115] In response, the IACHR issued another press release stating that the reforms substantially improved the scheme of legal incentives for demobilization by offering incentives for the complete disclosure of violations, improving the procedures that facilitated the prosecutor's effective investigation of the violations, and expanding the possibility of victim participation and reparation.[116] The IACHR noted that by conditioning the benefits of the law on the beneficiaries' thorough compliance with those obligations, the Justice and Peace Law's guarantees of nonrepetition were strengthened and that incentives to disclose the complete truth relating to violations were maximized.[117]

### *B. The Justice and Peace Law's Compatibility with the American Convention on Human Rights*

Article 2 of the Justice and Peace Law, which incorporated the spirit of articles 4 (Right to Life) and 5 (Right to Humane Treatment) of the

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112. *Id.*

113. *See* Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 122 (Mar. 7, 2005).

114. *Id.* ¶¶ 26-30.

115. *See* C.C., mayo 18, 2006, Sentencia C-370-06, G.C.C. (vol. 20) (Colom.).

116. *Inter-American Commission on Human Rights Issues Statement on Constitutional Court's Decision Regarding Application of Law of Justice and Peace in the Republic of Colombia*, INTER-AM. COMM'N ON HUMAN RIGHTS (Aug. 1, 2006), http://www.cidh.org/Comunicados/English/2006/28.06eng.htm.

117. *Id.*

Convention,[118] purported to guarantee the victim's rights to truth, justice, and reparation.[119] The law further provided for judicial benefits granted to demobilized illegal combatants in exchange for the victim's opportunity to exercise their right to know the truth about the circumstances under which the punishable offenses were committed and their right to proper reparations for the harms suffered.[120]

In *Velasquez-Rodriguez*, the IACtHR held that states have an affirmative duty to punish violations of any of the rights guaranteed by the Convention, which includes the duty to identify and punish the perpetrators.[121] Although the victims asked the IACtHR to order the prosecution of those responsible, the court merely ordered Honduras to pay financial reparations to the victims as an appropriate punishment.[122] Thus, the Justice and Peace Law seemed to conform to *Velasquez-Rodriguez* because it provided both for a prison sentence (five to eight years for nonpardonable offenses) and for the economic restitution to the victim for certain violations.[123]

Article 18 of the Justice and Peace Law incorporated article 8 (Right to a Fair Trial) of the Convention[124] by requiring that full investigations take place within sixty days of the charges being brought.[125] Further, it is worth noting that article 30 of the Convention provides that the rights therein can be legitimately restricted for reasons of general interest.[126] Because the task before the Colombian government to grant ordinary due process guarantees to every victim and combatant is so overwhelming and would take years, as a practical matter, truncated procedures in some cases may be essential to the achievement of lasting peace.[127]

Articles 8 and 38 of the Justice and Peace Law incorporated article 25 (Right to Judicial Protection) of the Convention.[128] Article 8 (Right to Reparations) provided that victims are entitled to restitution, indemnification, rehabilitation, and truth, as well as guarantees of

118. American Convention on Human Rights, *supra* note 52, arts. 4-5.
119. *See* L. 975, julio 25, 2005, D.O. 45.980, art. 2 (Colom.).
120. *Id.* art. 40.
121. Velasquez-Rodriguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 162-166 (July 29, 1988).
122. *Id.* ¶¶ 191-192.
123. L. 975 of julio 25, 2005, arts. 29-30 (Colom.).
124. American Convention on Human Rights, *supra* note 52, art. 8.
125. *Id.*
126. *Id.* art. 30.
127. *See* Ahmad, *supra* note 107, at 355.
128. American Convention on Human Rights, *supra* note 52, art. 25.

nonrepetition.[129] Article 38 provided that the state has the duty to carry out an "effective investigation in order to identify, capture, and punish those responsible for violations committed by illegal armed groups."[130] Article 38 also set out the rights of the victims and witnesses. It provided for the special protection of marginalized sectors of the population and directed the judiciary to take into account certain circumstances, including the age and sex of the victim, together with the nature of the violation.[131]

Article 37 of the Justice and Peace Law granted victims the right to demand reparations for the harm suffered, the right to be heard, and the right to humane treatment.[132] Articles 70 to 73 provided that the state shall take positive steps to restore victims to the situation they were in before their rights were violated.[133]

Thus, the Justice and Peace Law arguably conformed to the Convention and the IACtHR's amnesty jurisprudence because no perpetrator would go unpunished and no victim would go uncompensated, even if the only punishment and compensation were economic reparations and telling the truth about the violations.[134] Because the IACtHR was satisfied by economic reparations in *Barrios Alto*, *Velasquez-Rodriguez*, and *Mapiripán Massacre*, Colombia would be justified in interpreting the appropriate punishment requirement as being fulfilled under the Justice and Peace Law.[135]

### *C. The Victim's Law*

Although the Victim's Law shares its predecessor's aims of truth, justice, and reparations for all victims, it also incorporates provisions that expand significantly victims' access to justice, that offer additional guarantees of nonrepetition, and that incorporate a comprehensive scheme to compensate or relocate displaced victims.[136]

First, the Victim's Law provides a broader definition of "victim." Unlike the Justice and Peace Law that required victims to establish the perpetrator's culpability as a prerequisite to obtaining legal victimhood

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129. *Id.* art. 8.
130. L. 975, julio 25, 2005, D.O. 45.980, arts. 37-38 (Colom.) (author's translation).
131. *Id.* art. 38.
132. *Id.* art. 37.
133. *Id.* arts. 70-73.
134. *Id.*
135. *See, e.g.*, Velasquéz-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988).
136. L. 1448, junio 10, 2011, D.O. 48.096, arts. 24-31 (Colom.); *see also* Summers, *supra* note 1, at 225.

status, the Victim's Law establishes a new procedure whereby the victim submits a written declaration and supporting evidence to a special institution.[137] Accordingly, victimhood status can now be granted independent of any proceedings relating to the perpetrator.[138] This new procedure expedites victims' access to the social services guaranteed by the Victim's Law and reduces the risk of victims being deterred by threats and violence when initiating proceedings.[139]

Second, and perhaps most significantly, the Victim's Law provides an extensive right to restitution for landowners who were forcibly displaced from their land, either directly or indirectly because of the conflict, since 1991.[140] The law achieves this purpose by placing the initial burden on the current landowner, occupier, or possessor of the property in dispute to prove that they acquired the land lawfully.[141] Consequently, the victim need only present evidence of ownership if the opposing party has met the initial burden. The Victim's Law also establishes three new institutions to oversee and administer the process of restoring land to the victims[142] and promises the deployment of government security forces as part of an effort to guarantee the nonrepetition of these violations.[143]

Third, the Victim's Law provides mechanisms to prevent and punish the corporate involvement that often fueled the mass displacement of rural landowners in the country's resource-rich regions by holding businesses that contributed to displacements and other human rights violations financially liable.[144] Unlike the Justice and Peace Law, which only provided for individual restitution by demobilized combatants, the Victim's Law allows judges in individual reparations cases to instruct corporations to make payments to the Victims' Reparations Fund.[145]

Thus, the Victim's Law adopts most of the Justice and Peace Law's provisions while adding significant benefits for victims and their next of kin. Although the IACtHR has not had an opportunity to scrutinize the Victim's Law, because the Justice and Peace Law was tacitly endorsed by the IACtHR, it is likely that the Victim's Law also conforms to the

137. L. 1448 of junio 10, 2011, arts. 26-31 (Colom.).
138. *Id.* arts. 27-30.
139. *Id.*
140. Summers, *supra* note 1, at 225-26.
141. *Id.* at 226, 229.
142. *Id.* at 229-30.
143. *Id.*
144. *Id.* at 232.
145. *Id.*

obligations set out in the Convention and the IACtHR's amnesty jurisprudence.

### *D. The Colombian Amnesty Laws and the American Convention on Human Rights*

Thus far, the Colombian amnesty laws have satisfied the state's international obligations by taking advantage of the IACtHR's unclear requirements for transitional schemes. In its amnesty jurisprudence, the IACtHR requires states to take reasonable steps to carry out effective investigations through competent authorities in order to impose appropriate punishments on human rights violators and grant effective remedies to the victims.[146] Further, in *Massacres of El Mozote*,[147] the IACtHR opened the door for transitional schemes that do not grant amnesty to perpetrators of grave human rights violations by distinguishing laws that seek to end internal armed conflicts from the blanket amnesty laws passed by Cold War totalitarian regimes addressed in the IACtHR's early amnesty jurisprudence. One of two points could be argued: (1) the IACtHR made a mistake in not clarifying its amnesty law standards and inadvertently left space for legal maneuvering, or (2) the IACtHR purposefully set out bare minimum standards that bar broad, general, and unrestricted amnesty laws, leaving the door open for amnesty laws as part of transitional schemes that balance truth, reconciliation, and prosecutorial justice.

Some scholars have argued that the IACtHR's jurisprudence exemplifies the global trend of anti-impunity and prohibition on amnesty laws.[148] This position supports the proposition that the IACtHR's failure to provide clear standards for amnesty laws was an inadvertent mistake. However, if this is true, then how can the IACtHR's tacit endorsement of the Colombian amnesty laws be explained?

The Colombian amnesty laws can be distinguished from those previously addressed in the IACtHR's amnesty jurisprudence on two points: first, they do not offer a self- or mutual amnesty, and second, they were enacted by a democratically elected government. However, the IACtHR specifically held in *Gomes Lund* that its prohibition of amnesty laws was not based on how the legislation is described, but rather on the

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146. *See, e.g.*, Gomes Lund v. Brazil, Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 173, 241-242, 253, 253-258 (Nov. 24, 2010).

147. Massacres of El Mozote v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252 (Oct. 25, 2012).

148. King, *supra* note 23, at 602-03; *see* Binder, *supra* note 23, at 1205.

irreconcilable fact that amnesty laws grant impunity for violations that individual states lack the power to absolve.[149] Similarly, in *Gelman*, the IACtHR explicitly held that the violation of certain nonderogable rights could not be pardoned by a state, even after that state has obtained the population's democratic approval.[150]

The IACtHR recently qualified its absolute prohibition on amnesty laws in *Massacres of El Mozote*. In that case, the Salvadorian amnesty law provided for the investigation and prosecution of persons responsible for war crimes and crimes against humanity.[151] When a second-related law was enacted a year later that extended amnesty to persons who had been convicted or were awaiting trial for war crimes and prevented the investigation and prosecution of other grave human rights violations, the IACtHR held that the second amnesty law violated the Convention.[152] However, the IACtHR also provided that some amnesty laws could be compatible with the Convention in the context of an internal armed conflict.[153] Although the IACtHR did not hold that amnesty granted by the first amnesty law would have satisfied El Salvador's international obligations, it also did not rule out the possibility that amnesty laws that exclude only the masterminds of grave human rights violations could still be compatible with the Convention.

Even though the IACtHR has stated its standards in vague terms, its amnesty jurisprudence could support a finding that the Colombian amnesty laws violate the Convention. Accordingly, the IACtHR's failure to do so through the Justice and Peace Law suggests that the vague standards were not a mistake. Rather, it suggests that the IACtHR's prohibition on amnesty laws is limited to broad, general, and unrestricted blanket amnesty laws similar to those invalidated in Peru, Chile, Brazil, Uruguay, and El Salvador. One could infer that the redemptory feature of the Colombian amnesty laws are that they do not provide general amnesty embodied in one or two statutes. Instead, the current amnesty laws provide a comprehensive scheme that uses the means at the state's disposal to promote justice (imperfect as it may be), truth, and reconciliation.[154]

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149. *Gomes Lund*, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 175.

150. Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am Ct. H.R. (Ser. C) No. 211, ¶ 239 (Feb. 24, 2011).

151. *Massacres of El Mozote*, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 286; Rome Statute of the International Criminal Court arts. 7-8, July 17, 1998, 2187 U.N.T.S. 3.

152. *Massacres of El Mozote*, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 286.

153. *Id.*

154. *See* American Convention on Human Rights, *supra* note 52.

## V. THE CURRENT PEACE TALKS OF THE COLOMBIAN PEACE PROCESS

The current peace talks between the Colombian government and the FARC primarily deal with the same issues that have dominated peace talks in the past.[155] However, this time, both parties agreed to certain unprecedented conditions and procedures prior to starting the negotiations. First, the peace talks are limited to five negotiation points: agrarian reform, the political participation of former FARC members, the procedures and statutes that would bring an end to the armed conflict, the FARC's involvement in the international drug trade, and the sources of reparations for victims on each side of the political spectrum.[156] Second, both parties agreed that there would be no partial agreements.[157] Any tentative agreements on the five negotiation points will not be honored by either side unless both parties reach an agreement on each of the five points.[158] Third, any final agreement will be the subject of a national referendum in which Colombian citizens will either approve or reject the agreement as a whole.[159] And fourth, the government would continue its military operations against the FARC during the negotiations.[160]

Both recent Colombian amnesty laws have thus far successfully tested the IACtHR's interpretation of the Convention, but the Colombian government's current peace talks with the FARC represent a new challenge for the state. Though the amnesty laws have proven to be valuable incentives for the demobilization of paramilitary groups, they have had limited success in demobilizing members of the FARC.[161] The FARC has suffered devastating blows at the hands of the military over the past decade, but nevertheless exercises control over a significant part of

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155. *Diez puntos clave del proceso*, SEMANA (Oct. 18, 2012), http://www.semana.com/politica/articulo/diez-puntos-clave-del-proceso/266501-3.

156. *See Los puntos de la agenda*, SEMANA (Sept. 1, 2012), http://www.semana.com/nacion/articulo/los-puntos-agenda/263987-3.

157. *See* Juan Carlos Monroy, *Cinco puntos innegociables en el proceso de paz con las Farc*, EL COLOMBIANO (June 13, 2013), http://www.elcolombiano.com/BancoConocimiento/C/cinco_puntos_innegociables_en_el_proceso_de_paz_con_las_farc/cinco_puntos_innegociables_en_el_proceso_de_paz_con_las_farc.asp.

158. *Id.*

159. *Petro apoya propuesta de Santos de referendo por la paz*, ELESPECTADOR.COM (Aug. 26, 2013, 9:27 AM), http://www.elespectador.com/noticias/bogota/petro-apoya-propuesta-de-santos-de-referendo-paz-articulo-442483.

160. *Diez puntos clave del proceso*, *supra* note 155; Edulfo Peña & Daniel Valero, *Presidente cuenta ahora con nuevas 'llaves' para la paz*, EL TIEMPO.COM (June 17, 2012), http://www.eltiempo.com/archivo/documento/CMS-11953061; *see Los puntos de la agenda*, *supra* note 156.

161. *See Estadísticas desmovilizaciones*, VERDADABIERTA.COM (Apr. 3, 2012, 10:41 AM), http://verdadabierta.com/component/content/article/173-estadisticas/3965-estadisticas-desmovilizaciones.

Colombia and continues to run a lucrative drug-trafficking operation.[162] As a result, the FARC feels as though it is in a position to negotiate more favorable terms for their demobilization.[163] With these challenges in mind, President Santos proposed a constitutional amendment that would allow the government to acquiesce to the FARC's demands for amnesty.[164]

### *A. The Legal Framework for Peace*

Unlike the Justice and Peace Law and the Victim's Law, the Legal Framework for Peace (Peace Amendment) is an amendment to the Colombian Constitution that allows the Executive and the Legislative Branches to enact a transitional scheme designed to put a definitive end to the armed conflict.[165] The Peace Amendment is specifically aimed at the demobilization of guerrilla groups.[166] As of the time of this Comment, the Peace Amendment has served as the central document for negotiation in the current peace talks between the Colombian government and the FARC.[167]

The Peace Amendment allows for the enactment of laws that establish a transitional scheme, to be composed of judicial or extrajudicial elements, in order to facilitate the end of the armed conflict, while at the same time guaranteeing the rights of the victims to truth, justice, and reparation.[168] The Peace Amendment also vests the attorney general with the power to select and prioritize the cases that will be criminally prosecuted.[169] The Peace Amendment instructs the legislature to formulate a criteria to determine the circumstances in which to apply extrajudicial sanctions and alternative punishments, taking into account the seriousness and representativeness of the violations, whereby the bulk of the government's resources would focus on the investigation and prosecution of perpetrators of grave human rights violations.[170] Significantly, the Peace Amendment also grants the legislature the

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162. *See* Delcas, *supra* note 17.

163. Peña & Valero, *supra* note 160.

164. *Expertos en paz analizan iniciativa aprobada por el congreso*, ELESPECTADOR.COM (June 19, 2012, 11:34 PM), http://www.elespectador.com/impreso/politica/articulo-354075-expertos-paz-analizan-iniciativa-aprobada-el-congreso.

165. *Todo sobre el Marco legal para la paz*, LEGIS (2012), http://legis.com.co/BancoConocimiento/T/todo_sobre_el_marco_legal_para_la_paz/todo_sobre_el_marco_legal_para_la_paz.asp.

166. *Id.*

167. *Id.*

168. *La FIP en 'Cómo va la paz' analiza Marco Jurídico para la Paz*, FUNDACIÓN IDEAS PARA LA PAZ (May 25, 2012), http://www.ideaspaz.org/publications/posts/123.

169. *Todo sobre el Marco legal para la paz*, *supra* note 165.

170. *Id.*

authority to forego altogether the cases not selected for prosecution.[171] However, the Peace Amendment also explicitly provides that its provisions can only be applied for the purpose of a definitive peace agreement and sets the release of all kidnapping victims as a necessary precondition for its application.[172]

### *B. The FARC's Demands*

The Colombian government's new and unprecedented authority under the Peace Amendment to negotiate the terms that would put an end to the internal conflict was successful in bringing the FARC to the negotiating table.[173] However, the provisions proposed by the FARC for a new transitional scheme would imply a substantial departure from the provisions of the Victim's Law. These demands include: complete amnesty for FARC leaders, Simon Trinidad's (a former FARC leader who was extradited to the United States in 2004) participation in the peace process, that some of FARC's members be allowed to participate in political elections as soon as 2014, and that certain territories currently under FARC control be legally transferred to some of its members on the condition that they supplant illegal drug plantations with legitimate land uses.[174]

The Peace Amendment and the demands of the FARC appear to be manifestly incompatible. First, the Peace Amendment purports to select and prioritize the gravest human rights violations for prosecution.[175] The FARC leaders that are demanding complete amnesty as a precondition for ending hostilities would necessarily have to be prosecuted as the masterminds of systematic kidnappings, massacres, and the recruitment of underage guerrilla fighters.[176] Second, the granting of benefits such as political participation and the legal recognition of certain territories as belonging to former FARC members presupposes that other high-ranking officials would escape criminal prosecution.[177]

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171. *La FIP en 'Cómo va la paz' analiza Marco Jurídico para la paz*, *supra* note 168.

172. L. 1, julio 31, 2012, D.O. 48.508 (Colom.) (creating transitory Article 66 of the Colombian Constitution).

173. *See* Otis, *supra* note 17.

174. *Compare* María del Rosario Arrázola & Hugo García Segura, *De las aproximaciones a los acuerdos de paz*, ELESPECTADOR.COM (Mar. 1, 2013, 10:00 PM), http://www.elespectador.com/noticias/temadeldia/articulo-407835-de-aproximaciones-los-acuerdos-de-paz, *with* L. 975, julio 25, 2005, D.O. 45.980, art. 38 (Colom.).

175. L. 1 of julio 31, 2012 (Colom.).

176. *See ONU: no es posible amnistía a las FARC*, DEUTSCHE WELLE (Nov. 9, 2012), http://www.dw.de/onu-no-es-posible-amnist%C3%ADa-a-las-farc/a-16231617.

177. Arrázola & Segura, *supra* note 174.

## VI. ANALYSIS

In the event that the current peace talks result in a transitional scheme that reflects the FARC's principal demands, Colombia would risk violating the IACtHR's interpretation of the Convention under it amnesty jurisprudence. This would be significant because an adverse judgment in a future case before the IACtHR would not have the usual effect of ordering the state to supply reparations for the victims. Instead, because the IACtHR has required domestic judiciaries to exercise a conventionality control, the Colombian Judiciary could choose to disregard the law and bring charges against FARC members after their demobilization.[178] The most significant impasse to the peace process has been the state's lack of power to grant amnesty to members of the FARC.[179] Because the IACtHR's jurisprudence explicitly prohibits the measures required to meet the FARC's demands, if the Colombian government were to attempt to meet those demands, it would probably be forced to argue that the IACtHR should reconsider its strict prohibition on amnesty laws.

This argument would be particularly difficult given that the IACtHR's jurisprudence specifically provides that its prohibition stems from the manifest incompatibility of amnesty laws with the rights granted by the Convention.[180] However, article 30 of the Convention provides that the rights can be restricted "in accordance with laws enacted for reasons of general interest."[181] The IACtHR could distinguish between the blanket amnesty laws at issue in its early jurisprudence and restricted amnesty laws as part of a transitional scheme passed to put an end to violent conflicts that would otherwise continue to amass human rights violations.[182]

The IACtHR took an important step toward this comprehensive approach in *Massacres of El Mozote* by noting that amnesty laws that exclude perpetrators of grave human rights violations could be compatible with the Convention. However, the IACtHR failed to provide any specifics on what standards an amnesty law must meet in order to achieve compatibility. Thus, it is still unclear whether an amnesty law

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178. Binder, *supra* note 23, at 1210-11; Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

179. *ONU: no es posible amnistía a las FARC*, *supra* note 176.

180. Gomes Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 175 (Nov. 24, 2010).

181. American Convention on Human Rights, *supra* note 52, art. 30.

182. *See* Binder, *supra* note 23, at 1215.

that excludes the intellectual authors of grave human rights violations but absolves those who carried out those acts would be compatible with the Convention. The Colombian armed conflict illustrates the need for such leniency because prosecuting every perpetrator of grave human rights violations in a conflict that spans more than half a century would not only be impractical, but impossible.

The FARC has stood by their demand that high-ranking officials be completely absolved for their crimes in exchange for a peaceful resolution to the conflict. As a result, even if the IACtHR were to hold that the prosecution of the masterminds of the grave human rights violations is sufficient to satisfy a state's obligation under the Convention, a future Colombian amnesty provision that covers high-ranking FARC officials would nonetheless still violate the Convention. In order to acquiesce to the FARC's principal demand while at the same time complying with its international obligations, the Colombian government could not rely solely on the IACtHR's amnesty jurisprudence. Instead, it must persuade the IACtHR to extend its different treatment of amnesty laws that seek to put an end to internal armed conflicts and hold that alternative punishments such as truth commissions, reduced sentences, and economic reparations are sufficiently appropriate punishments even for high-ranking FARC officials. Again, such an argument will be particularly difficult considering that the IACtHR refused a similar proposition raised by the Brazilian government in *Gomes Lund*.[183]

Even though the IACtHR has repeatedly claimed that customary international law prohibits the immunities granted by amnesty laws for grave human rights violations, some scholars have argued that such an interpretation is premature, specifically as it relates to the application of amnesty laws that end internal armed conflicts.[184] These scholars suggest that the wide and representative endorsement of the international community of transitional schemes in countries such as Haiti could signify a departure from the strict prohibition against amnesty laws when part of a transitional scheme.[185] Because state practice is an essential element of what constitutes customary international law, states and international tribunals could find that there is no clear *jus cogens* prohibition on such amnesty laws.[186]

Furthermore, the IACtHR's strict prohibition on amnesty laws stems from its jurisprudence, not from the provisions of the Convention itself.

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183. *See Gomes Lund*, Inter-Am. Ct. H.R. (ser. C) No. 219.
184. Lyons, *supra* note 21, at 807-08.
185. *Id.* at 811.
186. *Id.* at 809-10.

Article 25 of the Convention provides that states parties must undertake to provide citizens with an effective recourse in domestic courts, to develop the possibilities of judicial remedy, and to ensure that the competent domestic authorities grant that remedy when it is due.[187] Article 8 provides that states parties must guarantee the right of the victim to a hearing by a competent, independent, and impartial tribunal.[188] As a result, the Convention itself does not impose a legal duty on states parties to prosecute or punish a perpetrator that violates its provisions.[189] In fact, the language of the Convention would support a finding that the type of reparations and immunities granted by transitional schemes, including truth commissions, economic reparations, and reduced sentences, are all appropriate remedies when granted by a legitimate tribunal.[190]

As a result, the Colombian government could argue that the IACtHR's strict prohibition of amnesty legislation is self-imposed and inappropriate under the circumstances specific to the Columbian armed conflict. Although the IACtHR's strict amnesty jurisprudence may have been appropriate to address the blanket amnesty laws that served to pardon perpetrators of state-sponsored human rights violations, the prohibition on all amnesty laws should not be absolute. Instead, the IACtHR should adopt a normative liberal international law analysis in order to distinguish between blanket amnesty laws and amnesty laws that seek to put an end to violent internal armed conflicts through transitional schemes that are closely tailored to the state's aim of transitioning into a peaceful democratic society.

In applying the proposed analysis to the Colombian peace process, the IACtHR should first consider that the democratic Colombian government would enact any future transitional scheme, pointing to its legitimacy. Second, the Peace Amendment provides that any future transitional scheme must distinguish between the benefits and the punishments it grants to the three actors involved in the conflict, thus limiting its scope.[191] Third, the Colombian peace process as a whole has received unprecedented support from the international community, including the support of the United Nations, the European Union, the United States, and the two nations supervising the process, Cuba and

187. American Convention on Human Rights, *supra* note 52, art. 25.
188. *Id.* art. 8.
189. *See id.*
190. *Id.*
191. Monroy, *supra* note 157.

Norway.[192] And finally, in seeking to put an end to half a century of violent internal armed conflict, the goal of the Colombian legislation would not be to absolve certain individuals for human rights violations, but rather to transition into a peaceful, democratic society.

## VII. CONCLUSION

Although the IACtHR has played a pivotal role as the ultimate defender of human rights in the region, its strict amnesty jurisprudence is currently holding the Colombian peace process hostage. The IACtHR's tacit endorsement of the Justice and Peace Law and the Victim's Law could be read as a willingness to depart from its strict amnesty jurisprudence. However, the FARC's demands in the current peace talks manifestly contradict the IACtHR's interpretation of the Convention. Nevertheless, the IACtHR could depart from its strict prohibition of amnesty laws without contradicting its jurisprudence by endorsing a future Colombian transitional scheme under article 30 of the Convention. The IACtHR could also adopt a normative liberal international law analysis to distinguish a future Colombian transitional scheme from its past amnesty jurisprudence. In adopting this new framework for analysis, the IACtHR could continue to prohibit broad, general, and unrestricted amnesty laws, while at the same time sanctioning a transitional scheme that would bring a peaceful end to the longest ongoing armed conflict within its jurisdiction.

192. *Los elogios de la Unión Europea a los esfuerzos de paz en Colombia*, EL TIEMPO.COM (Jan. 27, 2013, 10:12 PM), http://www.eltiempo.com/politica/ARTICULO-WEB-NEW_NOTA_INTERIOR-12555102.html.