**Is there Something Missing in the Proposed Convention on Crimes against Humanity?**

**A Political Question for States and a Doctrinal One for the International Law Commission**

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**Abstract**

*Part of a special issue on the proposed Convention on the Prevention and Punishment of Crimes against Humanity in the Journal of International Criminal Justice, this essay does not comment on what is in the draft Convention, but on what is not in it: consideration of the demands of a negotiated settlement to end armed conflict or political oppression. In the context of a negotiated settlement, the essence of transitional justice is the pursuit of justice in a way that facilitates the simultaneous pursuit of peace and reconciliation. Reading the draft articles and commentaries through this transitional-justice lens, the essay reflects upon the proposed Convention’s implications for attempts to transition from conflict to peace and from oppression to democracy. With the aim of opening up a debate, it poses a political question to states — essentially about the meaning of justice and who should decide on that meaning — and a doctrinal question to the International Law Commission — about the current status of amnesties in international law.*

**Keywords:** crimes against humanity, apartheid, duty to prosecute, transitional justice, peace negotiations, South Africa, Convention on the Prevention and Punishment of Crimes against Humanity, International Law Commission

1. **A Duty to Prosecute Crimes against Humanity** — **Under All Circumstances?**

There is more to the notable speed and ambition with which the International Law Commission (ILC) has advanced its work on draft articles for a Convention on the Prevention and Punishment of Crimes against Humanity than its Special Rapporteur’s remarkable energy and legal and diplomatic skills. One explanatory factor is a growing consensus that crimes against humanity are ‘orphans’, lacking their own suppression treaty, unlike their ‘sibling’ international crimes: genocide and war crimes.[[2]](#footnote-2) The availability of recent models for suppression treaties — the Convention against Torture and the Convention against Enforced Disappearances — must also have assisted. But perhaps the most significant explanation is the Commission’s approach to this project: rather than trying to codify existing custom, it has focused on progressively developing the law.[[3]](#footnote-3) This has allowed the Commission to avoid the laborious process of ascertaining the status of customary law.

Arguably, however, the ‘progressive development of international law’ requires even more work and more inclusive debate than the codification of customary law. For in this pre-law phase, choices are made about what the law should become, in light of a vision of what society should look like, in other words, what would amount to ‘progress’. These are inherently political choices that cannot be left to lawyers alone.[[4]](#footnote-4)

This debate is required particularly for what is at the heart of the draft articles: the obligation to respond to crimes against humanity through criminal proceedings. Most of the draft Convention’s obligations on states are dedicated to criminalisation, investigation, prosecution, extradition, the trial and mutual legal assistance. Criminal proceedings with a view to meting out punishment may seem the corollary of understanding crimes against humanity as crimes: a crime is ‘a legal rule the violation of which results in the liability of the violator to punishment’.[[5]](#footnote-5) The liability to punishment differentiates criminal law from bodies of law that ‘merely’ prohibit. However, practically, crimes against humanity are committed in, and often intertwined with, complex political and social contexts, and in some instances the criminal-law response may make it more difficult to address these contexts. It may even become an obstacle to ending and preventing crimes against humanity. In those scenarios it matters that the concept of a crime in international law merely leads to *liability* to punishment and does not by definition *require* punishment or the proceedings through which punishment can be imposed. There can thus be agreement that crimes against humanity are crimes — indeed, among the most horrific crimes — and also that they must be prevented, and yet be disagreement as to whether they should under all circumstances solicit the response prescribed in the draft articles: criminal proceedings with a view to imposing criminal sanctions.[[6]](#footnote-6)

The proposed Convention would amount to a significant intensification of the criminal-justice approach to crimes against humanity and may seriously reduce societies’ freedom to forego criminal proceedings. First, states parties in which the crimes were committed would be under an obligation to instigate criminal proceedings for crimes against humanity — an obligation of which the customary status is unclear and that is absent from the Rome Statute of the International Criminal Court (ICC). Secondly, in states parties where the crimes were not committed but a suspect is present, the Convention would transform what is probably currently an authorization under customary international law into a duty: they would be obliged to exercise criminal jurisdiction.[[7]](#footnote-7)

In a day and age in which ‘fighting impunity has become both the rallying cry and a metric of progress for human rights’,[[8]](#footnote-8) questioning the centrality of criminal proceedings may be out of tune with some governments’ official statements. But it is essential. The belief in trials and punishment as a way to promote international law is relatively recent and contingent; it is not a teleological outcome.[[9]](#footnote-9) State practice sometimes flat out contravenes this article of faith and, as this article will argue, there are a host of other empirical and normative arguments that may challenge its dominance.

In order to illustrate that criminal proceedings and criminal sanctions are not necessarily the most appropriate response to crimes against humanity, this article focuses on the situation of a negotiated settlement after a civil war or political oppression. This is one of several circumstances in which states are confronted with the question of how to address large-scale human rights abuses and international crimes, in other words, how to engage in ‘transitional justice’. Unlike situations of a total victory of one side of the conflict (e.g. post-World-War-II Germany; post-genocide Rwanda), or the gradual reform of an incumbent authoritarian government (e.g. post-Franco Spain; Pinochet’s Chile), the situation of a negotiated settlement (e.g. between the National Party and the African National Congress, ‘ANC’, in South Africa; between the Government of Colombia and the Revolutionary Armed Forces of Colombia) usually involves negotiations on the key pillars of the future society, including on how that society should deal with its past. If a treaty were to prescribe that states must prosecute crimes against humanity under all circumstances, this would seriously limit the influence of the directly affected society in defining the meaning, shape and execution of ‘their justice’.

Proponents of the criminal-justice approach will argue that this is exactly the objective of the treaty: rendering prosecutions beyond the pale of negotiations on the ground that crimes against humanity are ‘of concern to the international community as a whole’.[[10]](#footnote-10) The purpose of this article is to stimulate a debate among states, and ideally other actors, too, about the political and normative question whether crimes against humanity must be prosecuted and punished through criminal sanctions under all circumstances. If the answer is negative, a doctrinal question emerges: whether the draft articles in their present form sufficiently qualify the duty to prosecute. If they do not, text should be introduced to accommodate negotiated settlements that aim to pursue justice, peace and reconciliation in an integrated manner.

This article thus aims to push the debate in the opposite direction of where Hugo Relva takes it in his contribution to this special issue.[[11]](#footnote-11) Representing Amnesty International, he argues that there are several things missing in the draft articles, among them, a prohibition on amnesties. While I agree that there is something missing, I argue that what is missing is an explicit qualification of the duty to submit cases for prosecution in cases of negotiated settlements, given that there are good reasons to qualify this duty, including, in some circumstances, respect for amnesties. However, unlike Relva’s article, this piece does not focus on amnesties per se. Amnesties easily become a red herring: they are easy to rally against but a prohibition on amnesties in and of itself does little to secure meaningful accountability. Instead, we should look at the reasons why states sometimes do not want to prosecute and whether these reasons in some circumstances deserve accommodation, or not.

The article begins with the normative and political question: should criminal trials and punishment always be the response to crimes against humanity? Directing this question for now primarily to states, the primary actors to provide comments on the draft articles, it illustrates the significance of this question with a transition that once was internationally welcomed, but would probably have clashed with the obligations in the proposed Convention. The article then analyses doctrinally whether under the proposed provisions it would be possible to argue that in situations of a negotiated settlement, there can be exceptions to the duty to prosecute. In the absence of an explicit exception, but in the presence of some open-ended language that could be read as qualifying the duty to prosecute, the ILC’s commentaries on the permissibility *vel non* of an amnesty under international law will be analysed. This leads to this article’s second key question: a doctrinal one, for the ILC. The ILC’s commentary surveys relevant instruments, (quasi-) judicial opinions and practice, but what are the legal ramifications of those materials? This article concludes that although the duty to prosecute crimes against humanity under customary law is ambiguous and the draft articles in and of themselves seem to qualify the duty to prosecute to some extent, there is a risk that adjudicators and implementers will interpret this qualification away, no longer allowing leeway for negotiated settlements that provide for a justice arrangement other than criminal proceedings and ordinary criminal sanctions. Against that background, an example is given of language that would explicitly allow for consideration of the demands of a negotiated settlement.

 **2. The Burning Political and Normative Question**

The burning political question for states and others to engage with is how to weigh the strong normative argument in favour of a duty to prosecute — an expression of condemnation of an international crime — against the implications of, and justifications for, negotiated settlements. At a more fundamental level, the question arises whether it is desirable or even possible to resolve this issue now for all possible future scenarios. Another fundamental question is which society (the local, national, regional or international, that of victims or survivors) should have a say, or the final say.

For an illustration of the justice question in a negotiated settlement, we can turn to South Africa’s ‘miracle transition’ from apartheid to a united, democratic and non-racial state. The South African example is helpful because, on the one hand, it has been the scenario that has featured most prominently as a potential alternative to prosecution in debates related to the present one, for instance, whether the ICC should respect domestic transitional-justice arrangements or whether amnesties can be compatible with international law.[[12]](#footnote-12) On the other hand, the South African transitional arrangement beautifully illustrates the painful trade-offs that negotiated settlements may require. Precisely because it was not ‘ideal’, neither in design nor in implementation, the South African transitional-justice arrangement is an ‘ideal’ case study for the purposes of this article.[[13]](#footnote-13)

1. ***The South African Transitional-Justice Model: In Theory and in Practice***

In terms of design, the South African transitional-justice model is often portrayed as one of amnesty in exchange for truth, mediated through a truth commission. However, the truth-in-exchange-for-amnesty model was a relatively small part of a larger settlement that required many more deviations from any duty to prosecute. The essence of that settlement was that the National Party agreed to majority rule and dismantling apartheid, in exchange for the ANC not challenging the legality of the previous legal regime, along with everything that had occurred within the confines of law produced by that regime, including apartheid and the economic privilege of the white minority. In jurisprudential terms, the ANC adopted H.L.A. Hart’s approach to law, rather than that of Lon Fuller,[[14]](#footnote-14) in that it accepted the previous regime’s legal acts as ‘law’ even though apartheid violated ‘the inner morality of law’.[[15]](#footnote-15) Indeed, it agreed not challenge the legality of the previous legal order even though the United Nations (UN) Security Council had declared the 1983 Constitution, which had entrenched apartheid, as ‘null and void’.[[16]](#footnote-16)

The respect for the legality of the previous regime influenced the boundaries of the truth commission’s mandate. The category of ‘gross violations of human rights’ that it was mandated to investigate consisted only of acts that had been illegal under the previous regime (killing, abduction, torture, or severe ill-treatment).[[17]](#footnote-17) It did not include the most widespread and systematic attack on the largest part of South Africa’s civilian population: apartheid,[[18]](#footnote-18) probably already at that time a crime against humanity.[[19]](#footnote-19) The respect for the legality of the previous regime also meant that multiple Indemnity Acts, provisions and regulations continued to shield members of the South African military from civil and criminal liability,[[20]](#footnote-20) obviating their need for an amnesty.

In terms of implementation, the South African transitional-justice model was only partially put into effect. The Truth and Reconciliation Commission (TRC) collected testimonies from victims, granted amnesties to those who applied for them if they disclosed the facts of their politically motivated crimes, and published an extensive report, recommending, inter alia, that the state provide reparations to victims. However, the state instigated less than a dozen of criminal proceedings for the thousands of people who had defied the amnesty process, or whose amnesties were rejected. Most of these prosecutions failed or ended in a plea bargain.[[21]](#footnote-21) And, compared to what the TRC had recommended, the state paid only a very small amount of reparations.

Five key implications emerge from the negotiations of the South African settlement, the settlement itself, and its implementation when they are considered in light of the proposed duty to prosecute crimes against humanity.

First, the process of negotiating in and of itself required the parties to de-emphasise, if not abandon, the criminal frame: the pursuit of a negotiated settlement necessitated treating members of the other party as political, rather than criminal, opponents. The National Party had to change its frame of the ANC as a ‘terrorist organisation’, while the ANC could not approach the National Party as a *hostis humani generis* that had committed crimes against humanity, including apartheid.

Secondly, the South African negotiated settlement that was eventually reached prioritised, as Mahmood Mamdani has argued, political justice over criminal and social justice.[[22]](#footnote-22) That is to say, the primary objective was a transition in power. The settlement did not directly address the enormous economic inequality; this was believed to get remedied, over time, through the transition in power. Promoting reconciliation through truth telling was prioritised over criminal justice.

Thirdly, apartheid, arguably the ‘grossest’ human rights violation of all, was not treated as a crime for the commission of which one risked prosecution if one did not apply for amnesty.[[23]](#footnote-23) A future without apartheid was one of the main objectives of the settlement, but it pursued this future by not challenging the fact that apartheid had been legal under South African law.

Fourthly, while there may be controversy as to whether apartheid as such was at the time a crime against humanity,[[24]](#footnote-24) it is evident that other crimes against humanity — widespread and systematic persecution on racial grounds, torture, enforced disappearances and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health — were committed and yet not prosecuted.

Finally, while the transitional-justice model that South Africa has become internationally famous for was one of truth telling induced by the carrot of individual amnesties and the stick of prosecution, the practice was one of hardly any prosecution, with or without amnesty.

1. ***The International Response to the South African Transitional-Justice Model: Then and Now***

While some South Africans opposed the absence of systematic prosecutions and specifically the fact that the amnesty barred even civil claims,[[25]](#footnote-25) internationally South Africa’s transition was widely admired.[[26]](#footnote-26) It was not just the fact thatSouth Africa transitioned that received praise, but also howit transitioned. After the transition, the UN General Assembly welcomed the negotiating process and accepted its outcomes. It did so even though prior to the transition, the General Assembly had labelled apartheid a crime against humanity and had adopted the Convention against Apartheid, which calls for its prosecution.[[27]](#footnote-27) Nelson Mandela became the world’s greatest political figure of his time not because he was seen as giving in to political necessity, but because he symbolised the presumed willingness of the oppressed majority to pursue reconciliation rather than vengeance, which in practice meant a different type of justice than criminal justice. Indeed, states did not argue that South Africa was under a duty to prosecute. Nor did states rely on extraterritorial grounds of jurisdiction to do so themselves, provisions in the Apartheid Convention notwithstanding.[[28]](#footnote-28) In not doing so, they respected the course that South Africa had chosen.[[29]](#footnote-29) This was a respect for the overall policy; there was no international involvement suggesting ‘ok, amnesty for this person, but not for that person’. Such deference to national discretion was crucial; unravelling elements of the settlement could have undermined the entire settlement.

If the argument is that now, 25 years after South Africa’s transition, there is international consensus that crimes against humanity must always be prosecuted — i.e. that South Africa should have prosecuted the crimes against humanity that were committed and that had President F.W. De Klerk travelled to Oslo to collect his Nobel Peace Prize today, rather than in 1993, Norway should arrest him for involvement in crimes against humanity — we must analyse the arguments that support this position. We can distinguish among two broad types of arguments.

One set of arguments rests on empirical claims and relates to the consequences of, or need for, a particular transitional-justice arrangement. For instance, a report on amnesties by the UN High Commissioner for Human Rights states:

The United Nations policy of opposing amnesties for war crimes, crimes against humanity, genocide or gross violations of human rights, including in the context of peace negotiations, represents an important evolution, grounded in long experience. Amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict.[[30]](#footnote-30)

The problem with this type of argument is the weak social science on which it is based. With respect to the ‘failure’ argument, it shows no awareness of the risk of the attribution error that Mark Freeman has warned against: ‘citing amnesty as the cause of a bad situation rather than as merely the reflection of it’.[[31]](#footnote-31) Vice versa, the fact that amnesties may sometimes not have been necessary could be the result of a better situation.

A related argument is that states that have given amnesties often subsequently overturn these, or are under pressure to do so, because the demand for criminal accountability reverberates through generations.[[32]](#footnote-32) Argentina, Cambodia and Spain indeed provide telling illustrations. But again, that does not deny the necessity of the amnesty to achieve that transition in the first place. As stability increases, criminal justice may become more possible.[[33]](#footnote-33) Jack Snyder and Leslie Vinjamuri argue on the basis of an empirical analysis that the first step in creating a peaceful political order is not the universal adoption of just rules, but a political bargain among contending groups and the creation of robust administrative institutions that can predictably enforce the law. *Ergo*: ‘Justice does not lead; it follows’.[[34]](#footnote-34) Historical understanding remains key, as Dan Markel reminds his assumed, and presumably western, readers of his 1999 article on the justice of amnesty:

With the relative calm of our own period of post-war revitalization and reconciliation, we risk forgetting how precarious the existence of early modern life was and, indeed, how precarious political life still is in many parts of the world today, like South Africa. For this reason, it is necessary to recall our own cultural history to gain a little more understanding of the efforts towards reconciliation elsewhere in the world.[[35]](#footnote-35)

The more cogent type of argument for the prosecution of crimes against humanity rests on a normative, rather than empirical, claim: the ‘international community’ insists on their prosecution because these are crimes under international law, irrespective of what the society directly affected considers the best way to address them. This accountability norm has become stronger and more dominant over the past two decades, due to influential reports, the creation of international criminal tribunals and the case law of human rights courts.[[36]](#footnote-36) The emergence of this norm over the last two decades may explain why South Africa ‘got away’ with not prosecuting in the mid-1990s,[[37]](#footnote-37) while it is likely that it would face more international pressure to prosecute today.[[38]](#footnote-38) However, even the strongest proponents of a duty to prosecute have suggested that there should be an exception for a situation as in South Africa.[[39]](#footnote-39) This requires an evaluation of the justifications for the South African transitional-justice arrangement at the time: would they still hold today?

1. ***Evaluating the Justifications of the South African Transitional-Justice Arrangement at the Time***

Prominent South Africans have defended the country’s way of dealing with the past on different grounds. We can refer to these as: (1) political necessity; (2) transitional-justice objectives; (3) the republican argument and (4) the practical argument.

*1. Political Necessity*

Writing the majority’s decision in the Constitutional Court case dealing with a challenge to the amnesty, Justice Mahomed DP adopted a ‘realist’ justification where he reasoned ‘but for a mechanism providing for amnesty, the “historic bridge” [the reference in the constitution to the transition from apartheid to democracy] itself might never have been erected’: the National Party would not have agreed to political reform including ending apartheid if it had not received reassurances that its key actors could avoid prosecution.[[40]](#footnote-40)

Is the claim of political necessity still an acceptable justification not to prosecute? Since the time of the South African transition, the argument that peace should prevail in case it clashes with criminal justice has been rejected not only on the basis of questionable empirical claims, discussed above, but also on normative arguments: peace built on a negotiated settlement that foregoes criminal prosecutions does not deserve the name peace. Unlike some of the empirical arguments mentioned above, this view recognises that political realities may be such that insistence on criminal justice might perpetuate bloodshed. However, it holds that law should not give in to these realities.

There are two difficulties with this argument: one in terms of consequences; the other in terms of the implicit prioritization of values through a definition. In terms of consequences, this position effectively encourages parties to pursue a total victory rather than their second-best option of a negotiated settlement. First, by insisting on the criminal-law frame, this position may obstruct peace talks: as discussed above, negotiations usually require treating the opponents primarily as political, rather than as criminal, actors. Secondly, from a purely rational perspective it is unlikely that any negotiating party will accept an outcome that leads to life-long imprisonment for its key members. Unless international actors are willing and able actually to stop the armed conflict, the outcome of a position that insists on criminal trials and ordinary criminal punishments will thus be continued violence. How does one justify insistence on the must-prosecute-and-punish norm to those who suffer its consequences, and for whom ‘truce at gunpoint’ might have been preferable to no truce at all?[[41]](#footnote-41)

In terms of implicit prioritization of values, if peace is defined as peace only if criminal justice is done, peace in and of itself is no longer recognised as a value. It is true that while international law has traditionally been strong on promoting the value of peace among states, it has been much weaker in doing so for the value of peace within a state. It is, however, notable that particularly states trying to secure and internationally defend negotiated settlements have done so by stressing their responsibility to promote peace.[[42]](#footnote-42) Hitherto, judicial opinion has been stronger in interpreting human rights provisions as requiring prosecutions, rather than peace. However, the fact that the majority of the judges of the Inter-American Court of Human Rights, the international court known to be harshest on amnesties, has joined a concurring opinion that advocated the idea of a human right to peace, does suggest an increasing awareness of the need to promote peace within a state as a value in and of itself. In the opinion, the Court’s President distinguished amnesties agreed upon in the context of a negotiated settlement from other types of amnesties, and argued:

States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal. Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and that the State must achieve it.[[43]](#footnote-43)

Seen in this light, compromising criminal justice in the pursuit of peace is not a sacrifice of law on the altar of Realpolitik, but a settlement within international law to promote its distinct values simultaneously.

1. *Transitional-Justice Objectives*

South African institutions and individuals have also defended the country’s transitional-justice arrangement on the ground that it provided for those most affected a more meaningful form of justice than criminal prosecutions.[[44]](#footnote-44) Two elements of this argument must be considered: who are considered those most affected, and different understandings of meaningful justice.

With respect to those most affected, human rights law tends to focus on the individual victims of specific human rights violations. The definition of victim in the South African transitional-justice arrangement followed this human-rights approach, also in focusing on violations of human rights related to bodily integrity.[[45]](#footnote-45) However, the settlement as such was underpinned by a desire to serve the far broader community of people who had suffered under apartheid.[[46]](#footnote-46) While such suffering was not technically treated as a human-rights violation, the settlement made it possible to eradicate its root cause: apartheid. The South African transitional-justice arrangement thus tried to foster respect for both the human rights of individual victims of violations of bodily-integrity rights, and for the interests of society as a collective — interests that international human rights law, with its inherently individual focus, has challenges in protecting.

Indeed, respect for the principle of *ubuntu*, referred to in the constitutional postamble, requires treating even perpetrators as part of a society affected by crimes. *Ubuntu* implies, in the words of Bishop Tutu, chairman of the TRC, that ‘[w]hat dehumanizes you inexorably dehumanizes me’.[[47]](#footnote-47) Antjie Krog writes that this was ‘the unspoken foundation on which the TRC initially was built: that apartheid destroyed people’s humanity so that many people turned into murderers’.[[48]](#footnote-48) As a poignant illustration of this worldview, which she describes as ‘interconnectedness-towards-wholeness’, she provides an excerpt from a statement by Cynthia Ngewu, a witness who testified to the TRC and whose son, Christopher Piet, had been murdered: ‘[t]his thing called reconciliation … if I am understanding it correctly … if it means this perpetrator, this man who has killed Christopher Piet, if it means he becomes human again, this man, so that I, so that all of us, get our humanity back … then I agree, then I support it’.[[49]](#footnote-49) From the epistemological and ontological worldview of *ubuntu*, a key question with respect to ‘crimes against *humanity*’ would thus be how they can be responded to in a way that fosters ‘a fullness of humanity that includes all people’.[[50]](#footnote-50)

Constitutional Court justices and the TRC have argued that the transitional-justice arrangement was also better in pursuing transitional-justice ideals — truth, justice, reconciliation and reconstruction[[51]](#footnote-51) — in line with the postambular consideration in the *interim* constitution that there was ‘a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization’.[[52]](#footnote-52) Justice Mahomed, for instance, argued that the chosen arrangement promoted the ideal of truth:

That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous deeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do.[[53]](#footnote-53)

The significance of the argument that South Africa’s negotiated settlement provided a more meaningful form of justice than criminal justice is that it presents the tension not as peace versus justice but as criminal justice versus other forms of justice.

In other situations of conflict, for instance, northern Uganda and Darfur, too, people have put forward diverging visions of which form of justice should be prioritised: the restoration of relationships, putting an end to ongoing abuses, redistribution, non-criminal law forms of punishment or equality.[[54]](#footnote-54) The conceptions of justice are not necessarily mutually exclusive. But the real division is over which — and whose — vision of justice should be prioritised if they clash in specific instances or if resources are limited. The explanation for the differences in prioritisation of distinct conceptions of justice is not necessarily found in cultural differences; the alternative conceptions of justice probably exist, to a greater or lesser extent, in all societies.[[55]](#footnote-55) How societies prioritise these conceptions of justice will depend on the particular demands of the particular context. As instances in which societies have changed their views on the acceptability of a specific transitional-justice arrangement of the past illustrate — consider Argentina, Spain, Cambodia — with changes in the context, the prioritisation of concepts of justice may also change. Neither this article nor even the ILC is going to solve the millennia-old debate over the best definition of justice. However, what matters for the purpose of drafting this Convention is to recognise that the matter has not yet been resolved.

1. *The Republican Argument*

The ‘republican’ argument justifies the South African transitional arrangement on the basis that this was an arrangement agreed upon by the South African people and came about through democratic and inclusive processes.[[56]](#footnote-56) In and of itself, this argument cannot be sufficient: democratic and inclusive processes can result in substantive injustices. However, the argument can bolster the substantive arguments discussed above.

*The Practical Argument*

The ‘practical’ argument for the South African justice model is that prosecutions would have overwhelmed the criminal justice system, directing its limited human and financial resources away from contemporary crime and would have often failed due to difficulties in securing evidence.[[57]](#footnote-57) This argument also goes some way in explaining the only partial implementation of South Africa’s transitional-justice model, namely the very limited successful prosecution of those who did not apply for amnesty or whose applications were rejected. The other explanation is that prosecutions were considered risky in light of the seeming fragility of the transition — former security members were still considered a threat[[58]](#footnote-58) — and were not what the ANC wanted to be focusing on: prosecutions can be financially, politically and socially costly, and the new government wanted to invest in the future.

***What* Exactly *is the Convention after?***

In searching for a substantive bottom line in how states should respond to crimes against humanity, it may be helpful openly to discuss the philosophy of international criminal law that should underpin the future Convention. What exactly should the proposed Convention be after? Should it be about punishment, and if so, what should be considered punishment? Should it be about accountability? Should it be about condemning conduct? Should it be primarily about victims? If it is agreed that the proposed Convention must be about putting people in prison, then the draft articles should indeed not provide much scope to allow alternative conceptions of justice to substitute criminal justice. But all the other objectives could be served, and sometimes be served better, by avenues that do not necessarily involve incarceration.

Some people have for instance argued that punishment should not be about locking offenders up, but confronting them on a day-to-day basis with the havoc they have wrought and working for the affected communities.[[59]](#footnote-59) Accountability can be pursued in venues other than criminal trials.[[60]](#footnote-60) It could be served, for instance, by amnesties conditional upon truth telling since, in the words of the South African TRC, ‘[t]he amnesty applicant has to admit responsibility for the act for which amnesty is being sought’.[[61]](#footnote-61) Moreover, as Antje du Bois-Pedain has also argued, amnesty mechanisms such as the South African one where the applicant had to prove the political objective of their act by demonstrating belonging to a political group, had the effect of also creating a form of accountability for organizations and institutions behind the applicant, thus recognising the collective dimensions of the crimes — an inherent weakness of criminal justice, which must focus on the individual.[[62]](#footnote-62)

Conduct can be condemned, too, without putting offenders in prison. The word ‘only’ in the oft-cited quote from the Nuremberg judgment that ‘crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced’ leads to an exaggeration. In some instances, non-criminal sanctions may be more effective in enforcing international law than individual punishment. Perhaps the best way of condemning conduct, for instance apartheid, is by radically breaking with it. If trials are an obstacle to doing so, they are not the ultimate condemnation.

Finally, respect for victims’ rights does not necessarily require criminal proceedings and sanctions either. An often neglected element of respect for victims’ rights is the duty not to assume that victims want one particular thing.[[63]](#footnote-63) To paraphrase one of Kamari Clarke’s interlocutors: when victims want justice, that need not mean they want law.[[64]](#footnote-64) Victims will often have diverging wishes and needs, especially when the category is broadly conceived.[[65]](#footnote-65) Armed conflict, for instance, may not have been labelled a crime in and of itself, but usually still creates its own ‘victims’ as it involves enormous limitations if not abuses of human rights. A state trying to transition from conflict or oppression to a situation of the absence of violence and inclusive democracy should consider the interests of those ‘victims’ too, and indeed, also of those potential future victims: ‘[t]he quest for justice for yesterday’s victims of atrocities should not be pursued in such a manner that it makes today’s living the dead of tomorrow.’[[66]](#footnote-66) States face the daunting challenge of ensuring the rights of all these ‘victims’, as much as possible.[[67]](#footnote-67)

1. ***Who Should Have the Final Say?***

Even though ‘victims’ play an increasing role in international criminal law, the field’s primary objective is upholding international legal norms through criminal proceedings for the benefit of international society at large.[[68]](#footnote-68) But prosecutions, even mere threats of prosecution, have an impact on specific people and specific societies in concrete situations. Who should have the final say if the demands for justice among victims and survivors, the local, national, regional and international society diverge? And is it possible to determine now that crimes against humanity must always be prosecuted, given the diversity of contexts within which they are committed? Acknowledging the validity of these questions does not mean abandoning the project of a draft convention on crimes against humanity. All that is needed is ensuring that the text of the future Convention sufficiently qualifies the duty to prosecute to consider the demands of, and possibly diverging views about, a negotiated settlement.

Against this background, we now turn to assessing whether the draft articles as currently formulated allow for deviations from the must-prosecute-and-punish model in the context of a negotiated settlement.

**3. An Analysis of the Draft Articles and a Doctrinal Question for the ILC**

Let us walk through the draft articles with four different scenarios in mind. First, one in which a state adopts a general amnesty for crimes committed during a civil war or oppressive regime without making an exception for crimes against humanity (for instance, Mozambique, after the conclusion of the General Peace Agreement in 1992).[[69]](#footnote-69) Secondly, a scenario in which a state adopts an amnesty act that allows for the grant of an individual amnesty in respect of acts and offences, not excluding crimes against humanity, associated with political objectives committed in the course of past conflict, if certain conditions are fulfilled, for instance, full disclosure of all the relevant facts (for example, South Africa in 1995).[[70]](#footnote-70) Thirdly, a scenario in which there is no amnesty for crimes committed during the conflict, but no criminal proceedings either (like in Sudan and South Sudan after the 2005 Comprehensive Peace Agreement). Finally, a scenario in which a peace agreement provides for investigations and prosecutions, but also for ‘special and alternative sanctions’, for example, community service and house arrest instead of imprisonment, and a reduced maximum term of sanctions, if the individual concerned has fulfilled certain conditions, for instance providing the full truth, reparations to victims and guarantees of non-recurrence (consider the 2016 Colombian Peace Agreement with the FARC-EP).[[71]](#footnote-71)

In analysing the draft articles, it may be helpful to distinguish between obligations on the state in the territory of which the crimes were committed and states where alleged perpetrators are present other than the state on the territory of which the crimes were committed.

1. ***The State on the Territory of which the Crimes were Committed***

We can go straight to the draft articles related to investigation and prosecution. While South Africa’s transitional arrangement was in part made possible by the fact that apartheid was not a crime against humanity under domestic law, the duty to initiate criminal proceedings, rather than the duty to criminalise as such, would have been the biggest obstacle to the settlement.

* + - 1. *The Duty to Investigate*

Draft Article 8 obliges the state to ‘ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is a reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction’.[[72]](#footnote-72) The text of the provision itself does not suggest that these investigations in and of themselves must be criminal investigations; impartial investigations could also be carried out by, for instance, a truth commission or fact-finding commission. Accordingly, the Mozambique and Sudan-South Sudan scenarios would be in violation of the obligation in Article 8 due to the absence of any investigation, but the South African one would not.[[73]](#footnote-73) However, without specifying the take away from these quotes, the commentary cites a recommendation made by the Committee against Torture that would suggest that a truth commission’s investigations might not comply with the duty to investigate, as it requires that investigations be ‘under the direct supervision of independent members of the judiciary’.[[74]](#footnote-74)

* + - 1. *The Duty to Take Preliminary Measures*

Draft Article 9 obliges a state to take preliminary measures when allegations have been made against a specific offender and this offender is on its territory. These preliminary measures include, ‘upon being satisfied … that the circumstances so warrant’ to take the person into custody, and to make immediately a preliminary inquiry into the facts. An exception to the obligation could be embodied in the phrase ‘upon being satisfied … that the circumstances so warrant’ — a phrase the ILC’s commentary leaves unexplained. It probably refers to the evidentiary threshold for taking people into custody set by the state’s domestic law, rather than any considerations of the interests of a negotiated settlement. The commentary cites the International Court of Justice (ICJ) which has analysed a similar provision in the Convention against Torture to the effect that ‘the choice of means for conducting the inquiry remains in the hands of the States Parties’,[[75]](#footnote-75) but the requirement of custody suggests that the article does not allow alternatives to criminal proceedings. Indeed, the commentary also quotes the ICJ in the same case to argue that the purpose of the preliminary measures is ‘to enable proceedings to be brought against the suspect … and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.’[[76]](#footnote-76) Whereas in a broad understanding, impunity can be countered in ways other than through criminal trials, in the context of the proposed Convention with its focus on criminal justice, Article 9 is likely to be interpreted to require preparations for criminal trials.

*3. The Duty to Submit the Case for Prosecution or Extradite*

Draft Article 10 provides the crux of the regime: the obligation to ‘submit the case to [the] competent authorities for the purpose of prosecution’, the only exception to which is extradition or surrender to another state or international criminal tribunal. The article gives some leeway in that it does not require prosecution; it obliges only to ‘submit the case … for the purpose of prosecution’. Prosecutorial authorities may decide to prosecute, or not to.[[77]](#footnote-77) The commentary mentions as one relevant factor the sufficiency of evidence of guilt.[[78]](#footnote-78) The commentary cites the ICJ again where it interprets the analogous obligation in the Convention against Torture and the Convention for the Suppression of Unlawful Seizure of Aircraft to explain that the formulation was meant to ‘respect … the independence of States parties’ judicial systems’.[[79]](#footnote-79) However, the discretion is limited by the second sentence of the relevant provisions in those conventions, and of Article 10 in the draft articles on crimes against humanity, providing as it does that the authorities ‘shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State’. Still, if the domestic law grants prosecutorial authorities substantive discretion even in the case of serious crimes, or allows amnesties for other grave crimes, crimes against humanity would not always have to be prosecuted.

The real issue arises sooner, however, in that the effect of an amnesty is likely to be that a case will not even be submitted for prosecution. Indeed, the ILC’s commentary explicitly acknowledges that the obligation contained in Article 10 ‘may conflict with the ability of the State to implement an amnesty’.[[80]](#footnote-80) It is in this respect that the proposed Convention could change the normative landscape fundamentally. Whether this change will indeed be fundamental depends on whether the said obligation codifies or progressively develops the law and, specifically, on international law’s current position on amnesties.

The ILC’s commentary leaves the issue open. It dedicates three paragraphs to observations about amnesties, setting forth that there are several kinds of amnesties; that the possibility of including a provision on amnesty was debated during the negotiation of the ICC Statute and the Convention on Enforced Disappearance but that no such provision was included; what international courts have said about amnesties; the position of the UN Secretariat; and some state practice prohibiting amnesties. But it does not specify the legal take away from these observations. Rather, it concludes its observations in a fourth paragraph:

With respect to the present draft articles, it is noted that an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the offence. Within the State that has adopted the amnesty, its permissibility would need to be evaluated, *inter alia*, in the light of that State’s obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations to victims and others.[[81]](#footnote-81)

The first sentence of this conclusion is true and obvious: amnesties granted in national instruments do not bind other states. The second sentence, however, begs the question: can amnesties be compatible with the obligations to criminalise, to fulfil victims’ rights and to prosecute or extradite? An amnesty does not run counter to criminalisation; it does not render conduct in accordance with the law, but removes the ordinary criminal-law consequences of such conduct, and only for those who benefit from the amnesty. Indeed, an amnesty can be given only on the basis that conduct is considered criminal in the first place. With respect to victims’ rights, while victims have the right to obtain reparation, it is less clear that they also have a right to criminal proceedings. While the case law of human rights courts is mixed, the draft article pertaining to victims’ rights in the ILC’s articles on crimes against humanity does not create such a right.[[82]](#footnote-82)

 The essential outstanding question is thus whether an amnesty, or more specifically, some forms of amnesty, can be compatible with a state’s obligations under the present draft article to submit a case for prosecution or extradite. It is in this area that the ILC could make a crucial contribution. Composed of the world’s leading international lawyers, it could analyse the legal implications of all the factors that it lists. For instance, it mentions that amnesties can have different legal origins and be general or conditioned by certain requirements. Do the conditions that the ILC gives by way of example — ‘disarmament of a non-State actor group, a willingness of an alleged offender to testify in public to the crimes committed, or an expression of apology to the victims or their families by the alleged offender’ — actually matter for the obligation contained in draft Article 10 and, if so, how? Which words in draft article 10 make these relevant considerations? And do all of the conditions have to be fulfilled, or are some enough? For instance, the South African amnesty was conditional upon disclosure of facts, not an apology.

Similarly, what is the legal take away of the fact that provisions on amnesties were discussed in the context of the ICC Statute and the Convention on Enforced Disappearances, but not included? And what is the significance of the International Criminal Tribunal for the former Yugoslavia stating that an amnesty adopted in national law in relation to the offence of torture ‘would not be accorded international legal recognition’?[[83]](#footnote-83) Does it say anything more than the obvious fact that an international criminal court would not be bound by a domestic amnesty instrument (unless its statute provides for its applicability)? The fact that a foreign or international court does not have to apply a domestic legal instrument does not render that instrument per se prohibited under international law. The same issue arises with respect to the ILC’s observation that the instrument establishing the Special Court for Sierra Leone (SCSL) provided that an amnesty adopted in national law is not a bar to the Court’s jurisdiction.[[84]](#footnote-84)

The ILC’s commentary equates in this respect the SCSL with the Extraordinary Chambers in the Courts of Cambodia (ECCC) but this is factually incorrect. As a footnote in the ILC’s commentary reflects, the law establishing the ECCC provides that ‘[t]he scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.’[[85]](#footnote-85) In other words, precisely because these Chambers are part of the domestic legal system rather than an international court — and in that sense fundamentally different from the SCSL — domestic legal instruments granting amnesty could not *a priori* be ignored. In the *Ieng Sary* decision that the ILC’s commentary also cites, the ECCC found that it could sidestep domestic amnesties, but the ECCC’s reasoning suffers from adopting considerations from other courts without justifying the application of those legal grounds in the proceedings at hand. Moreover, in *Ieng Sary*, the ECCC distinguished cases that upheld amnesties on grounds on which they can hardly be distinguished.[[86]](#footnote-86)

The weakness of the *Ieng Sary* decision is characteristic of the weakness of the argumentation on which the ‘emerging consensus’ against amnesties, to which the ILC’s commentary refers, has been built: it is based on an amalgamation of incommensurable legal arguments. The commentary illustrates this where it says that ‘the European Court of Human Rights and the African Commission on Human and Peoples’ Rights … have found amnesties to be impermissible or as not precluding accountability under regional human rights treaties’:[[87]](#footnote-87) impermissible and not precluding are two different things that cannot be added up in order to get to a prohibition on amnesties. Similarly, (obiter) arguments that try to construct a prohibition on amnesties on the basis of the *jus cogens* status of a crime[[88]](#footnote-88) — arguably suffering from similar weaknesses as the ICJ identified in arguments to deny immunities on the basis of a *jus cogens* prohibition of the alleged conduct[[89]](#footnote-89) — are fundamentally different in character from those that hold that amnesties are incompatible with a duty to prosecute under conventional international human rights law. The latter’s existence, scope and legal basis vary per region in the world and human rights duties to prosecute might be subject to derogations under human rights law. As Miles Jackson has persuasively argued, the fact that some human rights are absolute does not automatically lead to duties flowing from that right, for instance, a duty to prosecute, enjoying the same status.[[90]](#footnote-90)

Since, in the system of sources of international law, the value of decisions of international courts lies not in the outcome but in the reasoning,[[91]](#footnote-91) the ILC could make a crucial contribution by evaluating the various decisions that the commentary now merely lists. It would be good if the ILC could examine not only the judicial considerations against amnesties, but also those in favour. A footnote in the current commentary cites the European Court of Human Rights in *Marguš* where it speaks of a ‘growing tendency in international law’ against amnesties, but omits the judgment’s subsequent sentence, which seems to leave the door open for some types of amnesties where it considers: ‘Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims…’.[[92]](#footnote-92)

Equally, with respect to state practice, the ILC should then pay attention not only to states that have adopted laws that prohibit amnesties, but also to states that have adopted amnesties that do not exclude crimes against humanity from their scope.[[93]](#footnote-93) Similarly, it should recognise that some of the states that have adopted laws prohibiting amnesties have also adopted differently-titled instruments with the same effect as an amnesty.[[94]](#footnote-94) It could also consider as relevant practice that the framework decision on the European Arrest Warrant provides amnesties as a mandatory ground for refusal to execute, without excepting the crimes within the jurisdiction of the ICC, which normally give rise to surrender pursuant to the European Arrest Warrant.[[95]](#footnote-95) And it would be helpful to see the ILC’s view on the legal significance of the UN’s position on amnesties: a UN policy not to support peace agreements that contain amnesties is just that — a policy; it does not translate into an international legal prohibition on amnesties. Moreover, UN practice has shown that its opposition to amnesties is more a matter of form than substance: it has been willing to be involved in the implementation of peace agreements accompanied by an amnesty, as long as that amnesty was incorporated in a separate document.[[96]](#footnote-96)

While the status of amnesties under customary and conventional law remains controversial, it is clear that draft Article 10’s wording of a duty to submit a case to the authorities would run counter to the negotiated settlement in three of our four scenarios.[[97]](#footnote-97) In situations of *de facto* amnesty, no one was prosecuted. In situations of *de jure* amnesty, the amnesty act barred cases being put forward for prosecution. And indeed, in South Africa, even individuals who did not apply for an amnesty were still not prosecuted for practical and political reasons.

*4. A Duty to Punish?*

Of our four scenarios, only the Colombian one is thus far compatible with the obligations in the ILC’s draft articles on crimes against humanity. The Colombian agreement does envisage investigation and prosecution, but the question arises whether its alternative-sanctions regime would be considered compatible with a future convention on crimes against humanity. Draft Article 6(7) provides that ‘[e]ach State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.’ Assuming that a state has legislated accordingly, it could be argued that a subsequent settlement that provides for an alternative-sanctions regime for a specific context (for instance, house arrest or community service) does not necessarily contradict this obligation.

 That said, given the emphasis on punishment in the working title of the future Convention and in the article setting forth the ‘general obligation’ under the Convention combined with the preambular anti-impunity commitment and impunity literally meaning ‘freedom from punishment’, there is a real chance that interpreters of the Convention will take a more a restrictive reading. In the different but related context of the ICC we have seen a similar tendency. The Office of the Prosecutor (OTP) has indicated that — for the purposes of rendering a case inadmissible on grounds of complementarity — the sentences imposed at the domestic level must be consistent ‘with a genuine intent to bring the convicted persons to justice’, and that this means that they ‘adequately serve appropriate sentencing objectives for the most serious crimes.’[[98]](#footnote-98) In other words, the OTP reads ‘to bring … to justice’ as meeting sentencing objectives.[[99]](#footnote-99)

1. *Implications of the Obligations for States on the Territory of which the Crimes have been Committed for Negotiated Settlements*

The draft articles seem to provide only limited leeway for negotiated settlements. They oblige authorities to submit a case for prosecution rather than to prosecute, and it could be argued that they leave scope for deviating from standard punishments. However, from the perspective of negotiating a settlement, this limited leeway will usually provide insufficient guarantees. First, as already discussed above, submitting cases for prosecution means accepting the criminal frame that parties to a negotiated settlement may wish, and need, to avoid. Secondly, parties may not be willing to sign if they risk prosecution.

 Moreover, it is very likely that the interpreters of the future Convention will adopt an interpretation that prioritises the criminal approach, thereby narrowing the limited leeway that the wording of the current draft articles may grant. The ILC’s commentaries themselves foreshadow this risk by extensively drawing on analogies with other suppression treaties, especially the Convention against Torture, without considering the different characters of the crimes addressed.[[100]](#footnote-100) In other words, the interpretation on the basis of analogy is based on the parallel response (criminal trials and punishment) rather than the underlying acts. Experience with the interpretation of the ICC Statute also suggests that the interpretation of provisions in a treaty with a stated objective of ending impunity tends to further the criminal approach, to the detriment of alternatives.[[101]](#footnote-101) For instance, the ICC Statute grants the Prosecutor discretion not to investigate and prosecute if that would not serve the ‘interests of justice’.[[102]](#footnote-102) Some states might have hoped that this would encourage, or at least allow, the Prosecutor not to intervene in, for instance, a situation like South Africa. However, the OTP has interpreted the concept of the interests of justice narrowly, on the ground that as a starting point prosecution must be considered in the interests of justice and that a consideration of the interests of justice does not include a consideration of the interests of peace.[[103]](#footnote-103)

 With or without leeway, one key challenge that the draft articles pose for states trying to negotiate a settlement is that they focus on individual suspects, rather than on a state’s overall transitional-justice policy. Draft Articles 9 and 10 create obligations to investigate and prosecute, or extradite, specific individuals suspected of crimes against humanity, the inquiry into the facts having to be ‘immediate’. Even if states decide to take the criminal route and prosecute some people for crimes against humanity, they could still be held in violation of the Convention if they did not immediately consider the cases of others.[[104]](#footnote-104) Negotiated settlements often concern situations in which many people have been involved in the commission of crimes against humanity. Even the ICC, with a budget of more than 150 million euros per year and a staff specialised in international crimes, prosecutes less than a handful of accused per year. It might be desirable for the future Convention to reflect in the duties it creates the nature of the events it is addressing: the large number of people often involved in crimes against humanity. States trying to emerge from conflict or oppression need a transitional-justice policy, part of which addresses how the prosecutorial task should be approached.

 The need for consideration of an overall transitional-justice policy, rather than an assessment as to whether a state has adequately addressed each and every individual potential offender, is inspired not just by the number of people involved. It is also inherent in the need for the simultaneous pursuit of the sometimes conflicting objectives of peace, justice (in its multiple dimensions), truth and reconciliation to the maximum extent, with specifically designed procedures for the interaction among the various transitional-justice mechanisms (for instance, a truth commission and courts), a logical timeline, and ultimately, finality, providing legal certainty to all involved. As it stands, with their focus on individual suspects, the current draft articles seem to grant little leeway to take such an overall policy into account. Nor is there consideration for timing or the need for respect for the finality of a transitional-justice arrangement as a whole.

1. ***States where Alleged Perpetrators are Present, Outside the State on the Territory of which the Crimes were Committed***

With respect to the category of states other than the state where the crimes were committed, for instance the case of Norway receiving F.W. De Klerk, we can be brief. The same Articles 9 and 10 apply, thus the same duties to take suspects into custody and to submit their case for prosecution or to extradite them. Due to the obligation to take these decisions in accordance with domestic law, and ‘in the same manner as in the case of any other offence of a grave nature under the law of that State’, the foreign state is unlikely to have much legal ground not to prosecute in the interests of a *foreign* negotiated settlement.[[105]](#footnote-105)

The shift in the normative landscape for foreign states is both less and more significant than with respect to the state where the crimes were committed. It is less significant in that states were never bound to respect foreign negotiated settlements or foreign legal instruments, such as amnesties, emanating from those settlements. It is more significant, however, in that foreign states were far less likely to prosecute in the first place, whereas the proposed Convention would oblige them to arrest the alleged offender if on their territory and to submit the case for prosecution or extradite. In other words, if a state party, Norway would have to arrest De Klerk.

States should consider the consequences of this normative shift, again in light of considerations of Realpolitik, ideals and the republican and practical argument. With respect to the Realpolitik argument about the impact on a negotiated settlement, it could be argued that the risk of foreign prosecution is less destabilising to a negotiated settlement than that of domestic prosecution. Suspects would just have to accept that foreign travel has become riskier than it was and possibly pay the price of a *de facto* ‘country arrest’. On the other hand, negotiated settlements that depend on finding a foreign safe haven would become more difficult in the case of widespread ratification of the proposed Convention.

From the perspective of promoting ideals, however, foreign states themselves may not wish to be under a duty to prosecute if in some instances they actually want to pay tribute to a state’s negotiated settlement. Do states now want to be under an obligation to prosecute members of the FARC, instead of congratulating Colombia on the settlement it has reached? Negotiated settlements often involve multiple values and multiple understandings of some of those values — for instance, justice. Even though most of these values and understandings find some protection in international law, they at times compete. If states want to continue to be able to balance these carefully, also in their foreign relations, on a case by case basis, a future Convention on crimes against humanity must accommodate this.

**4. Conclusion**

As the ILC’s open-ended commentary on the current status of international law on amnesties illustrates, the draft Convention on Crimes against Humanity is more an exercise in the ‘progressive development of international law’ than in its codification. But progressive development of law can be a dangerous experiment, and some people will be its subjects. All the more important is a thorough debate among states and within states about the fundamentally political choices that are being made in these draft articles about how to address crimes against humanity. This debate could take place once states negotiate the envisaged treaty. In practice, however, that stage is likely to be too late to address fundamental questions about the object and purpose of the entire endeavour — the train will be considered to have left the station.[[106]](#footnote-106)

Engaging with the fundamental political questions that this article has raised will strengthen, rather than weaken, the proposed Convention. More of a risk to the Convention is that states — which are not single-issue organizations — will not want to lose political capital by being seen as challenging the ascendant anti-impunity mantra and instead challenge the Convention at the later stages of ratification or implementation. That is, they will let this train leave the station on an unaltered track, but then either decide not to ratify the Convention, or to ratify it in the expectation to ignore it if that ever became necessary in a concrete case. Even if states did ratify, implement and comply with the Convention, the Convention could hardly be considered ‘progress’ if, due to insufficient qualifications of a duty to prosecute, it foreclosed negotiated settlements, thereby possibly becoming an obstacle to ending crimes against humanity.

In not explicitly considering situations of a negotiated settlement, the current draft articles follow what Oren Gross and Fionnuala Ní Aoláin have labelled in the context of human rights in a state of emergency as the ‘business as usual model’: in not providing for a right to derogate from human rights obligations in times of emergency, the legal instrument aspires to a perfect reality.[[107]](#footnote-107) However, the consequence is, so they argue, that in times of emergency the system will be adjusted in less transparent ways. A second model that they present is that of ‘extra-legal measures’, in which ‘under extreme circumstances, public officials may act extra-legally when they believe that such action is necessary for protection and the public in the face of calamity’.[[108]](#footnote-108) It is then up to ‘the people’ to decide whether to treat the conduct as extra-legal or to give it a stamp of approval. Apart from the problem that this partially subverts law’s power as law, it is also questionable, in the context of international law, whether there is one ‘people’ and how to deal with multiple ‘peoples’ disagreeing with each other on whether or not the extra-legal conduct should be retroactively brought within the boundaries of the law. This article is based on the premise that, in the context of negotiated settlements, the third category that Gross and Ní Aoláin identify is preferable, namely that of ‘accommodation’: by providing for qualifications of the duty to prosecute within the law, the point is also to regulate and restrict the exceptions.[[109]](#footnote-109) It is precisely because of respect for the law that the law itself should provide for the exception.

This does not require a fundamental overhaul of the draft articles. Indeed, a few words could suffice. The exact provisions and language would depend on the outcome of the debate that this article has sought to stimulate. If states suggest, for instance, that potential cases must be submitted for prosecution, but that prosecutors should have leeway not to prosecute out of respect for a negotiated settlement, it could be phrased along the following lines:

1. The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Subject to paragraph 2, those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.
2. Where a State, in the fulfilment of its duties to promote human rights and to end crimes against humanity, oppression and armed conflict, has adopted accountability processes other than criminal proceedings, the competent authorities mentioned in paragraph 1 may determine that it is not in the interests of justice to prosecute. In taking this decision, the competent authorities must consider, among others, the procedures that led to or followed the adoption of the processes other than criminal proceedings, the objectives pursued and respect for victims’ rights.

Similarly, provisions could be included to allow for the consideration of mitigating circumstances in decisions about punishment,[[110]](#footnote-110) or alternatives to criminal investigations.

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2. For genocide, see Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277. With respect to war crimes, suppression-treaty obligations exist only for one category of war crimes, namely the so-called ‘grave breaches’: see Geneva Conventions I-IV, all dated 12 August 1949, 75 UNTS 31 and onwards, and Protocol I, 8 June 1977, 1125 UNTS 3. On the idea of ‘siblings’, see S.D. Murphy, ‘Foreword’, in this special issue of the *Journal*. [↑](#footnote-ref-2)
3. This is acknowledged implicitly by Special Rapporteur S.D. Murphy in the *Third report on crimes against humanity*, UN Doc. A/CN.4/704, 23 January 2017, at 139. The fact that the draft articles’ seventh preambular recital (‘recall[s] that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity’) uses ‘recalls’ might suggest that the ILC believes there already is such a duty. The commentary, however, gives no evidence for this statement, instead explaining that the recital ‘foreshadows’ obligations set forth in the draft articles. *Report of the International Law Commission, Sixty-Ninth Session (1 May-2 June and 3 July-4 August 2017)*, UN Doc. A/72/10, 9 (hereinafter ‘2017 ILC Report’), commentary to the Preamble, at 24, § 8. [↑](#footnote-ref-3)
4. See also, with respect to the ILC’s work more generally, K. Daugirdas, ‘The International Law Commission Reinvents Itself, 108 *AJIL Unbound* (2014) 79, at 80. [↑](#footnote-ref-4)
5. R. O’Keefe, *International Criminal Law* (Oxford University Press, 2015) at 48, § 2.4. [↑](#footnote-ref-5)
6. See also, and more generally, M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007). [↑](#footnote-ref-6)
7. *Cf. contra* A. Coco, ‘The Universal Duty to Establish Jurisdiction over, and Investigate, Crimes against Humanity: Preliminary Remarks on draft Articles 7, 8, 9 and 11 by the International Law Commission’, in this special issue of the *Journal*, arguing that such a duty exists already as a matter of customary law. [↑](#footnote-ref-7)
8. K. Engle, Z. Miller and D.M. Davis, ‘Introduction’, in K. Engle, Z. Miller and D.M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press, 2016) 1, at 1. [↑](#footnote-ref-8)
9. K. Engle, ‘Anti-Impunity and the Turn to Criminal Law in Human Rights’, 100 *Cornell Law Review* (2015) 1069; S. Moyn, ‘Anti-Impunity as Deflection of Argument’, in K. Engle *et al.* (eds), *Anti-Impunity*, *supra* note 7, 68. [↑](#footnote-ref-9)
10. 2017 ILC Report, *supra* note 2, at 22, fourth preambular recital. [↑](#footnote-ref-10)
11. H.A. Relva, ‘Three Propositions for the Convention on Crimes Against Humanity to Become an Effective Tool Against Impunity’, in this special issue of the *Journal*. [↑](#footnote-ref-11)
12. For the idea that the ICC must have respect for transitional-justice arrangements as in South Africa, see for instance Kofi Annan, speaking in his capacity as UN Secretary-General: ‘Some people [...] have suggested that in the future such an exemplary process of national reconciliation might be torpedoed, since the Statute empowers the Court to intervene in cases where a State is “unwilling or unable” to exercise its national jurisdiction. … [T]hat argument is a travesty. The purpose of that clause in the Statute is to ensure that mass murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa’s, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.’ See UN Press Release, ‘Secretary-General Urges “Like-Minded” States to Ratify Statute of International Criminal Court’, (SG/SM/6686), 1 September 1998, available online at <https://www.un.org/press/en/1998/19980901.sgsm6686.html> (last visited 23 July 2018). For discussion of the legal significance of the South African amnesty law having received widespread international approval, see, for instance, in judicial opinion, Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon), *Ieng Sary* (002/19-09-2007/ECCC/TC), Trial Chamber, 3 November 2011, § 52 and, in the scholarly literature, C. Kreß and L. Grover, ‘International Criminal Law Restraints in Peace Talks to End Armed Conflicts of a Non-International Character’, in M. Bergsmo and P. Kalmanovitz (eds), *Law in Peace Negotiations* (2nd edn., Torkel Opsahl Academic EPublisher, 2010) 41, at 50. [↑](#footnote-ref-12)
13. The South African transitional-justice model has been criticised on various grounds. Some criticism goes to the negotiated settlement, which prioritised political justice over social and criminal justice (see M. Mamdani, ‘Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa’, 43(1) *Politics & Society* (2015) 61, at 67). Those who criticise this prioritisation usually do not argue, however, that there has not been enough criminal justice, but that there has not been enough socio-economic justice. See, for instance, W. Gumede, ‘Failure to Pursue Economic Reparations has, and Will Continue to Undermine Racial Reconciliation’, in: M. Swart and K. van Marle (eds), *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On* (Brill Nijhoff, 2017) 59. Also often criticised are the limitations on the mandate of the Truth and Reconciliation Commission (TRC), or the TRC’s interpretation of its own mandate (see e.g. M. Mamdani, ‘Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa’, 32 *Diacritics* (2002) 32) and the TRC’s epistemology and methodology (see e.g. C. Bundy, ‘The Beast of the Past: History and the TRC’, in W. James and L. Van de Vijver (eds), *After the TRC: Reflections on Truth and Reconciliation in South Africa* (Ohio University Press/David Philip Publishers, 2000) 9. But again, these criticisms do not imply that there should have been more criminal justice. The same applies to the criticism that the government failed to pay sufficient reparations, especially in light of the fact that it had barred civil cases, a criticism levelled even by commissioners of the TRC (see e.g. A. Boraine, ‘South Africa’s Truth and Reconciliation Commission from a Global Perspective’, in C. Sriram and S. Pillay (eds), *Peace versus Justice* (University of KwaZulu-Natal Press, 2009) 137, at 139-140 and 150). The criticism that the South African process failed to target ‘beneficiaries’ of apartheid is not a criticism of a lack of prosecution either (M. Mamdani at a panel discussion reflected in A. Krog, *Country of My Skull* (2nd ed, Johannesburg: Random House, 2002) at 112-113). Criticism that does go directly to the amnesty comes from those who had wanted prosecutions or at least have the possibility of civil claims (see Constitutional Court of South Africa, CCT 17/96, Judgment of 25 July 1996, in *Azanian People’s Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1997] 4 LRC 40, at 53 (§19) (hereinafter, ‘*AZAPO*’)) and those who argue that the amnesty was incompatible with international law (Z. Motala, ‘The Promotion of National Unity and Reconciliation Act, the Constitution and International Law’, 28 *International Law Journal of Southern Africa* (1995) 338, at 339-340). Others have criticised the fact that individuals who did not, or not successfully, apply for amnesty were not prosecuted either, or indeed, were subsequently granted pardons (see e.g. A. Mudukuti, ‘Apartheid-era crimes still haunt us’, *The Star*, 13 August 2015, available online at https://www.iol.co.za/the-star/apartheid-era-crimes-still-haunt-us-1899266 (last visited 23 July 2018)). Others have argued that the amnesty arrangement has been hijacked: ‘[t]he proponents of restorative justice have, it seems, been outmanoeuvred by those who see the value of amnesty/forgiveness for lubricating the apparatuses of political and state power.’ (H. van der Merwe and M. B. Lykes, ‘Transitional Justice Processes as Teachable Moments’, 10 *International Journal of Transitional Justice* (*IJTJ*) (2016) 361, at 363). Again others have criticised the process for imposing reconciliation on victims (see R.A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, 2001)). But see, for the counterargument that this criticism fails to recognise the *Weltanschauung* within which reconciliation at that time in that place must be interpreted, A. Krog, ‘Rethinking Reconciliation and Forgiveness at the South African Truth and Reconciliation Commission’, in Swart and Van Marle, *supra* in this footnote, 11. Krog (at 13) also argues that black people’s disillusionment with the transition is due to white people not fulfilling their part of the deal: ‘Black people … opted for reconciliation, because they assumed white people would change and take up their responsibility to repair and restore what they had destroyed. After twenty years of democracy it has become clear that whites are *not* changing to that extent and this ignites the ire.’ [↑](#footnote-ref-13)
14. SeeH.L.A. Hart, ‘Positivism and the Separation of Law and Morals’,71 *Harvard Law Review* (1958) 593; and L.L. Fuller, ‘Positivism and Fidelity to Law―a Reply to Professor Hart’*,* 71 *Harvard Law Review* (1958) 630. [↑](#footnote-ref-14)
15. L.L. Fuller, *The Morality of Law* (Yale University Press, 1963), at 159-160. [↑](#footnote-ref-15)
16. See SC Res. 554, 17 August 1984, § 2. [↑](#footnote-ref-16)
17. Promotion of National Unity and Reconciliation Act, Act 34 of 1995, s. 1(1). The TRC encouraged F.W. De Klerk to apply for an amnesty, but he relied exactly on the position that what he had done had not been criminal: ‘[A]mnesty is there to get a pardon for a crime of which you believe you could be found guilty in court. … Amnesty is not there, that is, [it is] not the correct channel in which to express your sorrow, your acceptance of responsibility, your repentance for things which are not crimes.’ Discussed and cited in A. Boraine, *A Country Unmasked* (Oxford University Press, 2000) at 159. [↑](#footnote-ref-17)
18. For an example of the disillusioning consequences in practice, see the observation of Mahlubi Mabizela, a member of the TRC’s research department: ‘Farm labourers saw the TRC’s coming as a sort of Messiah. But the policy decision was that their suffering was not covered by the Act, it was not a gross violation. The statement takers were the ones who had to say, sorry, we are not talking to you.’ (quoted in Bundy, *supra* note 12, at 19).

Criticising the TRC for staying within the boundaries set by the TRC Act and based upon respecting the legality of the previous legal order, Mahmood Mamdani has invoked a question posed by Hannah Arendt with respect to the Holocaust: ‘What happens when crime is legal, when criminals can enthusiastically enforce the law? Perhaps the greatest moral compromise the TRC made was to embrace the legal fetishism of apartheid. In doing so, it made little distinction between what is legal and what is legitimate, between law and right.’ M. Mamdani, ‘A Diminished Truth’, in James and Van de Vijver (eds), *supra* note 12, 58 at 60. [↑](#footnote-ref-18)
19. ‘Memorandum of Law in Support of Concluding that Apartheid is a Crime against Humanity under International Law’, reproduced in R. Slye, ‘Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission’, 20 *Michigan Journal of International Law* (1999) 267. *Cf contra* P. Eden, ‘The Role of the Rome Statute in the Criminalization of Apartheid’, 12 *Journal of International Criminal Justic*e (*JICJ)* (2014) 171.  [↑](#footnote-ref-19)
20. On which, see A. du Bois-Pedain, ‘Accountability through Conditional Amnesty: The Case of South Africa’, in F. Lessa and L. A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press, 2012) 238, at 244-245. [↑](#footnote-ref-20)
21. See O. Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission’s Amnesty Process* (Martinus Nijhoff Publishers, 2009); A. du Bois-Pedain, ‘Post-Conflict Accountability and the Demands of Justice: Can Conditional Amnesties Take the Place of Criminal Prosecutions?’ in N. Palmer, P. Clark and D. Granville (eds), *Critical Perspectives in Transitional Justice* (Intersentia, 2012) 459. A former National Director of Public Prosecutions has testified how the ANC government intervened to discourage criminal proceedings in apartheid-era cases (Sworn affidavit Vusi Pikoli in the case of Thembisile Nkadimeng v the NDPP and others, available online at <http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Vusi-Pikoli-Affidavit-Simelane.pdf> (last visited 23 July 2018)). [↑](#footnote-ref-21)
22. Mamdani, *Beyond Nuremberg*, *supra* note 12, and Bundy, *The Beast*, *supra* note 12, at 11-12. [↑](#footnote-ref-22)
23. See also J. Dugard, ‘Reconciliation and Justice: The South African Experience’, 8(2) *Transnational Law & Contemporary Problems* (1998) 277, at 296. [↑](#footnote-ref-23)
24. See the articles by Slye and Eden cited *supra*,note 18. The controversy mostly depends on the standards adopted for the formation of customary international law and, particularly, *jus cogens*. [↑](#footnote-ref-24)
25. See e.g. *AZAPO*, *supra* note 12. See also J. Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, 2004) 6. [↑](#footnote-ref-25)
26. See e.g. GA Res 48/258, 6 July 1994, passed without a vote, operative clauses 1 & 2, according to which the GA: ‘Expresses its profound satisfaction at the entry into force of South Africa’s first non-racial and democratic constitution…’ and ‘Congratulates all South Africans and their political leaders on their success in bringing apartheid to an end and in laying, through broad-based negotiations, the foundations for a new, non-racial and democratic South Africa with equal and guaranteed rights for each and all’. See also GA Res 48/159 A, 24 January 1994, which was passed, also without a vote, during the negotiating stages of the transition. [↑](#footnote-ref-26)
27. J. Gavron, ‘Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court’, 51 *International and Comparative Law Quarterly* (2001) 91, at 115. [↑](#footnote-ref-27)
28. Some foreign involvement in South Africa’s transitional justice arrangement emerged a decade after the transition when South African victims’ organisations brought *civil* cases against foreign companies under the US Alien Tort Statute. See e.g. *Khulumani v. Barclays National Bank Ltd*, 504 F. 3d 254 (2d Cir. 2007). These eventually failed due to the US Supreme Court’s restrictive reading of the Statute in *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, 569 U.S. 1 (2012). On the controversy about the impact of this litigation on South Africa’s transitional arrangement, see R. Kesselring, *Bodies of Truth: Law, Memory, and Emancipation in Post-Apartheid South Africa* (Stanford University Press, 2017), Chapter 1. [↑](#footnote-ref-28)
29. See also the call to this effect in Truth and Reconciliation Commission of South Africa, *Report* (1998) (hereinafter, ‘TRC Report’), Vol. 5, Chapter 8, at 349, §114: ‘The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.’ See also Vol. 1, appendix, at 94, §§ 1-2: ‘[T]he Commission — as part of the international human rights community — affirms its judgement that apartheid ... was a crime against humanity. … This sharing of the international community’s basic moral and legal position on apartheid should not be understood as a call for international criminal prosecution of those who formulated and implemented apartheid policies. Indeed, such a course would militate against the very principles on which this Commission was established.’ [↑](#footnote-ref-29)
30. Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, HR/PUB/09/1 (2009), at *v*. [↑](#footnote-ref-30)
31. M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, 2009), at 26. [↑](#footnote-ref-31)
32. *Rule-of-Law Tools*, *supra* note 31, at 1-2, claiming that amnesties are often not sustainable, giving Argentina as example. [↑](#footnote-ref-32)
33. See also Freeman, *supra* note 30, at 26. [↑](#footnote-ref-33)
34. J. Snyder and L. Vinjamuri, ‘Trials and Errors: Principle and Pragmatism in Strategies of International Justice’, 28(3) *International Security* (2003) 5, at 6. [↑](#footnote-ref-34)
35. D. Markel, ‘The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States’, 49 *University of Toronto Law Journal* (1999) 389, at 445. See also TRC Report (*supra* note 28) Vol. 1, Chapter 1, at 5, § 22: ‘We have the luxury of being able to complain [about the amnesty] because we are now reaping the benefits of a stable and democratic dispensation.’ [↑](#footnote-ref-35)
36. See, inter alia, L. Joinet, *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political*), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 26 June 1997; D. Orentlicher, *Promotion and Protection of Human Rights: Impunity*, UN Doc. E/CN/4/2004/88, 27 February 2004. Those studies, especially Orentlicher’s, argued that there was a growing trend of combating impunity through criminal prosecution, at the exclusion of amnesties. For other encapsulations of this view, see L. N. Sadat, ‘Exile, Amnesty, and International Law’, 81 *Notre Dame Law Review* (2006) 955; and L. J. LaPlante, ‘Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes’, 49 *Vanderbilt Journal of International Law* (2009) 915. [↑](#footnote-ref-36)
37. ‘Norm’ is used here in the political-science, rather than legal, understanding of the term, namely as ‘collective expectations for the proper behaviour of actions with a given identity’. See P.J. Katzenstein, ‘Introduction: Alternative Perspectives on National Security’ in P.J. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press, 1996) at 5. [↑](#footnote-ref-37)
38. In her report, Orentlicher praised the South African TRC on various accounts, but implied that truth and reconciliation commissions were no longer acceptable as an alternative, but only as a complement to criminal trials. See Orentlicher, *supra* note 35, §10. Note, however, that in her scholarly work, Orentlicher said she would not insist ‘on prosecutions if doing so would block a peace agreement that would end human carnage’. D. Orentlicher, ‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency’, 1(1) *IJTJ* (2007) 10, at 21. It is unclear whether the South African arrangement was considered to have ended ‘human carnage’. [↑](#footnote-ref-38)
39. See e.g. Sadat, *supra* note35, at 1034, noting that ‘[y]et international criminal justice is not and should not be a “one size fits all” proposition, nor is it a panacea for the world’s ills. The South African experience suggests that although the criminal law is an important tool, where a society is able to come together in a democratic process and engage in deliberation concerning the fate of perpetrators of atrocities under a former regime, some of which may be prosecuted, others not, that decision should be respected.’ See also at 987. [↑](#footnote-ref-39)
40. *AZAPO*, *supra* note 12, at 53 (§ 19). See also TRC Report, *supra* note 28, Vol. 1, Chapter 1, at 5, §21: ‘There were those who believed that we should follow the post World War II example of putting those guilty of gross violations of human rights on trial as the allies did at Nuremberg. In South Africa, where we had a military stalemate, that was clearly an impossible option. Neither side in the struggle (the state nor the liberation movements) had defeated the other and hence nobody was in a position to enforce so-called victor’s justice.’ See also A. Boraine, ‘Truth and Reconciliation in South Africa: The Third Way’, in R.I. Rotberg and D. Thompson (eds), *Truth v. Justice* (Princeton University Press, 2000) 141, at 143-144 and D.N. Ntsebeza, ‘The Uses of Truth Commissions: Lessons for the World’, *ibid*., 158, at 160 and 168. [↑](#footnote-ref-40)
41. See also J. Dugard, ‘Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?’, 12(4) *Leiden Journal of International Law* (1999) 1001, at 1006: ‘International opinion, often driven by NGOs and western activists who are strangers to repression, fails to pay sufficient attention to the circumstances of the society which chooses amnesty above prosecution.’ [↑](#footnote-ref-41)
42. The Colombian peace agreement provides some examples: see the 11th preambular recital (‘Emphasizing that peace has come to be universally described as a superior human right and as a prerequisite for the exercising of all other rights and duties incumbent upon individuals and citizens;’), and consider the title of the special justice arrangement (‘the Special Jurisdiction for Peace’). Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (the Colombia Final Agreement), 24 November 2016, available at <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> (last visited 23 July 2018). [↑](#footnote-ref-42)
43. Inter-American Court of Human Rights (IACtHR), *The Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment, 25 October 2012, Concurring Opinion of Judge D. Garcia-Sayán, at § 37. [↑](#footnote-ref-43)
44. See also K. Asmal, ‘Stopping Crimes through Negotiations: The Case of South Africa’, *Guest Lecture Series of the Office of the Prosecutor*, The Hague, 14 March 2006, at 9: ‘Retributive justice would purge our society of people, but not of apartheid.’ [↑](#footnote-ref-44)
45. Promotion of National Unity and Reconciliation Act, *supra* note 16, s. 1(1). [↑](#footnote-ref-45)
46. See also *AZAPO*, *supra* note 12, at § 43: ‘The families of those whose fundamental human rights were invaded by torture and abuse are not the only victims who have endured “untold suffering and injustice” in consequence of the crass inhumanity of apartheid which so many have had to endure for so long. Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many.’ [↑](#footnote-ref-46)
47. D. Tutu, *No Future Without Forgiveness* (Rider, 1999), at 35. [↑](#footnote-ref-47)
48. Krog, ‘Rethinking Reconciliation’, *supra* note 12, at 12. [↑](#footnote-ref-48)
49. *Ibid.*, at 15 and 18. [↑](#footnote-ref-49)
50. *Ubuntu* as defined by C. Villa-Vicencio, ‘Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet’, 49 *Emory Law Journal* (2000) 205, at 209. [↑](#footnote-ref-50)
51. *AZAPO*, *supra* note 12, at 53, § 17; TRC Report, *supra* note 28, Vol. 1, Chapter 5, at 125 et seq; A. Sachs, *The Soft Vengeance of a Freedom Fighter* (third and revised edition, Souvenir Press, 2011), Epilogue. [↑](#footnote-ref-51)
52. Constitution of the Republic of South Africa, Act 200 of 1993, ‘National Unity and Reconciliation’. [↑](#footnote-ref-52)
53. *AZAPO*, *supra* note 12, at 53, § 17. See also TRC report, *supra* note 28, Vol. 1, Chapter 1, at 5 § 22 and Chapter 5, at 128 § 91. [↑](#footnote-ref-53)
54. See, more elaborately, S.M.H. Nouwen and W.G. Werner, ‘Monopolising Global Justice: International Criminal Law as a Challenge to Human Diversity’, 13 *JICJ* (2015) 157. [↑](#footnote-ref-54)
55. *Ibid.*, at 164. [↑](#footnote-ref-55)
56. See, for instance, TRC Report, *supra* note 28, Vol. 1, at pages 1, 9, 53, 104 and 109. The republican argument is implicit in Kofi Annan’s statement, *supra* note 11; in the TRC report as quoted *supra* note 28, and in Sadat, as quoted *supra* note 38. See also K. Asmal, *supra* note 43, at 5 (‘what we mean by justice must be rooted in the circumstances of the people in whose name it is being dispensed’). However, *cf.* *contra*, Wilson, *supra* note 12, at 7-8. [↑](#footnote-ref-56)
57. See also L. McGregor, ‘Individual Accountability in South Africa: Cultural Optimum or Political Facade?’, 95(1) *American Journal of International Law* (2001) 32, at 36. [↑](#footnote-ref-57)
58. On the threat posed by the security establishment, see TRC Report, *supra* note 28, Vol. 1, Chapter 1, at 5 §§ 22-23. [↑](#footnote-ref-58)
59. Nouwen’s discussion with two Acholi elders, Gulu, September 2008, cited in Nouwen and Werner, *supra* note 53, at 171. For arguments for a broader notion of *poena*, see also M. Drumbl, ‘Impunities’ *Washington & Lee Legal Studies Paper No. 2017-17*, 17 November 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3070346 (last visited 19 May 2018). [↑](#footnote-ref-59)
60. See also L. McGregor, *supra* note 56, at 37. [↑](#footnote-ref-60)
61. TRC Report, *supra* note 28, Vol. 1, Chapter 1, at 8-9, § 35. For another example of a mechanism that is an alternative to ordinary criminal trials, but serves transitional justice objectives, see S. Garibian, ‘Ghosts Also Die: Resisting Disappearance through the ‘Right to the Truth’ and the *Juicios por la Verdad* in Argentina’, 12(3) *JICJ* (2014) 515. [↑](#footnote-ref-61)
62. A. du Bois-Pedain, ‘Communicating Criminal and Political Responsibility in the TRC process’, in F. du Bois and A. du Bois-Pedain (eds), *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge University Press, 2009) 62. [↑](#footnote-ref-62)
63. See also F. Mégret, ‘The Strange Case of the Victim who Did Not Want Justice’, *IJTJ* (2018), forthcoming. [↑](#footnote-ref-63)
64. K.M. Clark, ‘“We Ask for Justice, You Give Us Law”: Justice Talk and the Encapsulation of Victims’, in C. De Vos, S. Kendall, and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 272. [↑](#footnote-ref-64)
65. See, more elaborately, S. Kendall and S. Nouwen, ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’, 76 *Law & Contemporary Problems* (2013) 235. [↑](#footnote-ref-65)
66. Anonymous, ‘Human Rights in Peace Negotiations’, 18 *Human Rights Quarterly* (1996) 249, at 258. [↑](#footnote-ref-66)
67. See also L. McGregor, *supra* note 56, at 39, commenting on the South African transition: ‘no process will ever satisfy everyone; instead, the mission was to devise a system that would address as many people’s needs as practically possible.’ [↑](#footnote-ref-67)
68. Possibly due to the convergence with individual human rights law, ‘victims’ are increasingly also considered as beneficiaries of international criminal law. See Kendall and Nouwen, *supra* note 64. [↑](#footnote-ref-68)
69. Lei n.° 15/92 de 14 de Outubro (Lei da Amnistia). [↑](#footnote-ref-69)
70. Promotion of National Unity and Reconciliation Act, *supra* note 16. [↑](#footnote-ref-70)
71. Colombia Final Agreement, *supra* note 41, Chapter 5. [↑](#footnote-ref-71)
72. The requirement of a ‘prompt’ investigation makes perfect sense from the perspective of securing evidence, but for states emerging from a long situation of armed conflict, let alone states still in it, it may prove challenging. The commentary draws on the parallel requirement in the Convention against Torture (see 2017 ILC Report, *supra* note 2, commentary to draft Art. 8, at 80, § 2), but torture under that convention by definition implies state involvement, whereas crimes against humanity can also be committed by non-state actors, including in territories where the state has little civilian representation (in the form of police, prosecutors and judges). [↑](#footnote-ref-72)
73. Leaving aside the requirement of promptness. See previous footnote. [↑](#footnote-ref-73)
74. 2017 ILC Report, *supra* note 2, commentary to draft Art. 8, at 81, § 4. The South African Commission’s Amnesty Committee was chaired by a judge, but the Commission as a whole was chaired by Archbishop Desmond Tutu. [↑](#footnote-ref-74)
75. 2017 ILC Report, *supra* note 2, commentary to draft Art. 9, at 83, § 5, citing *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 422, at 454, § 86. [↑](#footnote-ref-75)
76. 2017 ILC Report, *supra* note 2, commentary to draft Art. 9, at 83, § 5, citing *Belgium v. Senegal*, *supra* note 74, at 451, §74. [↑](#footnote-ref-76)
77. An utterly pedantic point reflecting a non-native speaker’s uncertainty about the English language: according to the commentary, the prosecutorial authorities ‘may or may not decide to prosecute’; shouldn’t the ‘not’ go before ‘to prosecute’ rather than ‘decide’, in that the discretion does not relate to whether to decide, but whether to prosecute? [↑](#footnote-ref-77)
78. 2017 ILC Report, *supra* note 2, commentary to draft Art. 10, at 84, § 3. [↑](#footnote-ref-78)
79. *Ibid.*, at 84, § 4, citing *Belgium v. Senegal*, *supra* note 74, at 451. [↑](#footnote-ref-79)
80. 2017 ILC Report, *supra* note 2, commentary to draft Art. 10, at 86, § 8. [↑](#footnote-ref-80)
81. *Ibid.*, at 88, § 11. [↑](#footnote-ref-81)
82. Article 12 grants victims rights in criminal proceedings, but not the *a priori* right to criminal proceedings. On Article 12, see also C. Ferstman and M. Lawry White, ‘Victims’, Witnesses’ and Others’ Rights’, in this special issue of the *Journal*. [↑](#footnote-ref-82)
83. Judgment, *Furundžija* (IT-95-17-1-T), Trial Chamber II, 10 December 1998, § 155, as cited in 2017 ILC Report, *supra* note 2, commentary to draft Art. 10, at 86-87, § 9. [↑](#footnote-ref-83)
84. 2017 ILC Report, *supra* note 2, commentary to draft Art. 10, at 87, § 9. [↑](#footnote-ref-84)
85. Fn 423 in the ILC’s commentary (2017 ILC Report, *supra* note 2, at 87). The footnote refers to Article 40 of the Extraordinary Chambers of Cambodia Agreement, but this should be Article 40 of the ‘Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea’. The relevant article in the cited Agreement is Article 11, but it is the Law, not the Agreement, that established the Chambers.  [↑](#footnote-ref-85)
86. For example, the ECCC in *Ieng Sary* correctly cites the Ugandan Constitutional Court decision in *Kwoyelo* as one upholding an amnesty, but that case gives little support for the claim that that was because of ‘the process by which the amnesty was enacted, the substance and scope of the amnesty, and whether it provided for any alternative form of accountability.’ (*Ieng Sary*, *supra* note 11, § 52 citing Uganda, Constitutional Court, Judgment, *Kwoyelo (alias Latoni) v Uganda*, 22 September 2011, 150 ILR 802.) While indeed adopted in a democratic process, the Ugandan Amnesty Act 2000 was broad in both scope and substance (it covered even future crimes), without providing for an alternative form of accountability. The ECCC identifies as an apparently relevant fact that the Ugandan Amnesty Act 2000 was not a ‘blanket amnesty’, but the amnesty was conditional only upon renouncing violence, for which signing the amnesty application form was sufficient. See Amnesty Act, 2000, Laws of Uganda, Chapter 294. [↑](#footnote-ref-86)
87. 2017 ILC Report, *supra* note 2, commentary to draft Art. 10, at 87, § 10. [↑](#footnote-ref-87)
88. For putative implications of the *jus cogens* status of torture, see *Furundžija*, *supra* note 82,§ 155, which the commentary refers to (see *supra* note 82), but does not comment upon. [↑](#footnote-ref-88)
89. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, at 140-142. See also Lord Hoffman in *Jones v Saudi Arabia* on upholding immunity for *jus cogens* crimes: ‘The jus cogens is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture.’ House of Lords, *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*, 14 June 2006, [2006] UKHL 26, § 44. [↑](#footnote-ref-89)
90. M. Jackson, ‘Amnesties in Strasbourg’, *Oxford Journal of Legal Studies* (2018) 1. [↑](#footnote-ref-90)
91. Hence their inclusion in article 38(1)(d) ICJ Statute as a *subsidiary* source of international law. [↑](#footnote-ref-91)
92. European Court of Human Rights (ECtHR), *Marguš v. Croatia*, Judgment, 27 May 2014, § 139. [↑](#footnote-ref-92)
93. See L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart, 2008) and L. Mallinder, ‘Amnesties’ Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment’, in Lessa and Payne (eds), *supra* note 19, 69. [↑](#footnote-ref-93)
94. For an example of which see S. Vandeginste, ‘Bypassing the Prohibition of Amnesty for Human Rights Crimes under International Law: Lessons Learned from the Burundi Peace Process’, 29(2) *Netherlands Quarterly of Human Rights* (2011) 189. [↑](#footnote-ref-94)
95. See Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA), Official Journal of the European Communities L 190/1, 18.7.2002, articles 3(1) and 2(2). [↑](#footnote-ref-95)
96. See ‘Commentary: Marc Weller, University of Cambridge’, S. Van Hoogstraten, N. Schrijver, O. Spijkers and A. de Jong (eds), *The Art of Making Peace: Lessons Learned from Peace Treaties* (Brill/Nijhoff, 2016) 54, at 65, with respect to Yemen. [↑](#footnote-ref-96)
97. One further relevant doctrinal question, not addressed in the ILC’s commentary, is whether states could avoid responsibility for breaching their obligations under the future Convention by relying on circumstances precluding wrongfulness. Relying on this escape route is risky. First, the threshold for fulfilling the relevant criteria is generally high. Secondly, some of the specific requirements for, or exclusions from, the circumstances could pose difficulties in the case of negotiated settlements. For instance, *force majeure* will be difficult to maintain in that the absence of prosecution is not involuntary. Both distress and necessity will fail if the state has been involved in the creation of the situation, as is often the case in situations of negotiated settlements. [↑](#footnote-ref-97)
98. ICC Statement, ‘“Transitional Justice in Colombia and the role of the International Criminal Court”, keynote speech by James Stewart, Deputy Prosecutor of the ICC’, 13 May 2015, at 13, available online at http://www.iccnow.org/documents/DPs\_Keynote\_Speech\_on\_Transitional\_Justice\_in\_Colombia\_and\_the\_Role\_of\_the\_ICC\_English.pdf (last visited 19 May 2018). [↑](#footnote-ref-98)
99. *Ibid*. [↑](#footnote-ref-99)
100. See e.g. 2017 ILC Report, *supra* note 2, commentary to draft Art. 4, at 51, §13; and commentary to draft Art. 9, at 83, §5. On the different characters, see *supra* note 71. [↑](#footnote-ref-100)
101. This is consistent with Martti Koskenniemi’s observation of structural biases at work in specialised regimes of international law. See M. Koskenniemi, ‘The Politics of International Law – 20 Years Later’, 20(1) *European Journal of International Law* (2009) 7. [↑](#footnote-ref-101)
102. Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, Arts 53(1)(c) and 53(2)(c). [↑](#footnote-ref-102)
103. ICC Office of the Prosecutor, *Policy Paper on the Interests of Justice*, 17 September 2007, available at http://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf (last visited 23 July 2018). [↑](#footnote-ref-103)
104. A possible counterargument is that since the authorities ‘shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State’, they could enjoy discretion not to prosecute because when confronted with overwhelming numbers they ordinarily do not prosecute all crimes either. However, such discretion may be less present in the case of crimes of grave nature. Part of the problem is that very often the context in which crimes against humanity are committed is not the same as that of ‘any other offence of a grave nature’. [↑](#footnote-ref-104)
105. With respect to the question of circumstances precluding wrongfulness, raised *supra* note 96: If a foreign state did refrain from prosecuting on those grounds and were to be found in breach of the Convention as a result, it would have an even smaller chance of successfully invoking necessity than the state where the crimes were committed: in prosecuting, it would not have risked its own peace process. [↑](#footnote-ref-105)
106. See M. de Hoon in the context of the crime of aggression: when she asked diplomats at the Review Conference of the Rome Statute as to whether including the crime of aggression in the jurisdiction of the ICC was a good idea, the response was ‘the train has left the station’. M. de Hoon, *The Law and Politics of the Crime of Aggression* (PhD thesis on file at VU University of Amsterdam), at 181, available online at <http://dare.ubvu.vu.nl/handle/1871/55318> (last visited 23 July 2018). [↑](#footnote-ref-106)
107. O. Gross and F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006), 10 and Chapter 2. [↑](#footnote-ref-107)
108. *Ibid.*,at 11. See also Chapter 3. [↑](#footnote-ref-108)
109. *Ibid.*,at 9 and Chapter 1. [↑](#footnote-ref-109)
110. As in the Convention on Enforced Disappearances, where Article 7(2)(a) provides that each party may establish: ‘[m]itigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance.’ [↑](#footnote-ref-110)