NOTE

USING A CONDITIONAL AMNESTY AND TRUTH AND RECONCILIATION COMMISSION AS A TRANSITIONAL JUSTICE MECHANISM IN SYRIA

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I. INTRODUCTION

In March 2011, citizens of the southern Syrian city of Deraa protested the arrest and torture of local teenagers who had painted revolutionary slogans on the wall of a local school. In response to the protest, government forces of Bashar Al-Assad’s Baath regime opened fire on the crowd, killing many in attendance. This initial demonstration spurred many such more, both in Deraa and other cities around the country, including Aleppo, Hama, Homs, and the capital, Damascus. Subsequently, this initial uprising developed into a civil war that has left more than 191,000 Syrians dead, more than two million people displaced, and thousands more injured, detained, or disappeared.

The civil war has forced Syria to consider how to find justice for the victims of atrocity and restore peace and stability to a country besieged by turmoil. In this regard, Syria is not alone. Indeed, the country joins the more than 250 intrastate conflicts that have occurred since the beginning of the twentieth century, which by the year 2000 resulted in the deaths of between 75 and 170 million.

4. Id.
As was true in each prior atrocity, each person aggrieved by the Syrian conflict deserves justice. Of the various methods that a country such as Syria may implement in its attempt to find stability and justice, the act of passing an amnesty law remains the most controversial. Grown out of the ability to grant collective clemency, the term “amnesty” refers to “legal measures adopted by states that have the effect of prospectively barring criminal prosecutions against certain individuals accused of committing human rights violations.” Advocates for amnesties believe such laws are essential to halting the violence within a state and that without a promise of clemency made to those committing injustices during the period of atrocity, violence will only continue. Critics of amnesties dispute this notion, arguing that such laws encourage impunity and violate international law.

However, amnesties are not uniform in nature and, depending on their construction, do not always violate international law. Amnesty laws that are designed to shield only particular crimes—rather than all crimes indiscriminately—and which are implemented with a truth and reconciliation commission do not violate either customary or codified international law. Implementing such a law with a conjoined truth and reconciliation commission ensures that the state remains consistent with its legal obligations of investigating crimes and holding perpetrators accountable.

9. *See infra Part II.*
12. *See Carlos S. Nino, The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2639 (1991). Nino describes how “the factual context may frustrate a government’s effort to promote the prosecution of persons responsible for human rights abuses, except at the risk of provoking further violence and a return to non-democratic rule.” Id.
14. *See infra Part III.*
Implementing Conditional Amnesty in Syria

2015]

while also assisting a society forgive factions for their past abuses, reconcile, and ultimately move forward.\textsuperscript{15} The use of a conditional amnesty with a joint truth and reconciliation commission was employed with great success in post-apartheid South Africa;\textsuperscript{16} the same mechanism should be used as a model to assist Syria emerge from conflict.

Part II of this Note will survey the various mechanisms a state may employ to provide justice to victims and transition to peace, with a focus on South Africa’s amnesty law. Part III will argue that if a state follows the South African amnesty law model, amnesty laws are not a violation of any settled international legal norm, based either on a treaty or on customary international law. Part IV will then provide further evidence as to why a conditional amnesty and truth commission would be compatible with the Syrian civil war by emphasizing specific characteristics that make particular types of conflicts like Syria’s more suitable for the implementation of the South African style amnesties. Although undoubtedly this decision must be left to Syrians themselves, this Note will propose how a conditional amnesty law and truth and reconciliation commission could help resolve this period of conflict and provide justice and resolution.

II. TRANSITIONAL JUSTICE MECHANISMS

Transitional justice refers to the “set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses.”\textsuperscript{17} Such mechanisms frequently overlap and may be utilized by a state simultaneously.\textsuperscript{18} This Part begins with an examination of formal trials and then proceeds to consider other mechanisms available to

\begin{footnotesize}
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\item See infra Part III; see also Tricia D. Olsen et al., Conclusion: Amnesty in the Age of Accountability, in Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives, supra note 11, at 336, 343 (describing how scholars advocating for this approach believe “truth commissions acknowledge, condemn, and deter violence more effectively than trials, and they do so without jeopardizing democracy and the rule of law”).
\item For example, South Africa utilized a truth and reconciliation commission, reparations program, conditional amnesty, and criminal prosecutions in The Promotion of National Unity and Reconciliation Act. Promotion of National Unity and Reconciliation Act 34 of 1995, 1995 (1) JSRSA 2-385 (S. Afr.) [hereinafter Act 34 of 1995].
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states in post-conflict situations. The Part concludes with a review of different types of amnesties, with a focus on South Africa’s conditional amnesty.

A. Criminal Prosecutions

Traditionally, formal trials have been used to restore justice and hold perpetrators accountable post-atrocity. In the twentieth century, domestic prosecutions became of interest to the international community and evolved into a method for global society to play a role in restoring justice after a period of conflict. Doing so was based on the belief that while an act may have been committed within a state’s own territory, the horrific nature of the crime made the criminal “an enemy of all mankind,” bestowing upon the global community a duty to ensure that such a crime did not go unpunished. The Nuremberg Trials were one of the earliest and most infamous occasions of international justice and the proceedings were a vehicle to hold Nazi perpetrators accountable for their actions during the Second World War. Such international trials have become increasingly more popular, evidenced by the establishment of the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the emergence of hybrid domestic and international courts, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC).

B. Reparations Programs

Reparations programs are established to assist victims in restoring their lives after suffering through a period of atrocity. The programs focus on victims’ futures in order to redress the past.

20. Laplante, supra note 10, at 918.
22. See id.
23. See id.
29. Id.
To accomplish this goal, reparations programs may provide victims with financial compensation or ensure access to education or social services. Countries such as Chile, Morocco, Sierra Leone, and South Africa have implemented such reparations programs, in conjunction with other transitional justice mechanisms.

C. Truth and Reconciliation Commissions

Truth and reconciliation commissions are truth-seeking measures that attempt to create a historical record of past atrocities to ensure an accurate portrayal of them in the future. Commissions also provide victims the opportunity to participate in the truth and reconciliation process by allowing them to voice their own recollection of the past atrocity and, if they so desire, confront their own perpetrators. Commissions investigate the conflict by interviewing victims, protecting evidence, compiling archives, and publishing state information to produce reports and recommendations. As of 2011, at least forty truth commissions had been established around the world. Truth commissions frequently coincide with other transitional mechanisms, such as in South Africa, where a commission was used with a conditional amnesty and reparations program.

D. Amnesty Laws

The term “amnesty” derives from the ancient Greek word amnesia, meaning forgetfulness or oblivion. Although all amnesty laws share the common element of granting clemency to an individual who has committed a past wrong, the laws differ in scope and manner of implementation. Past laws have opted to shield state actors, non-state actors, or a combination of the two groups. The amnesty may be implemented by those responsible for the human rights violations the amnesty is designed to shield, such as in
Argentina.\textsuperscript{40} Or, the law may be a blanket amnesty, prohibiting prosecutions and investigations of all crimes committed during a specified time period, such as in El Salvador.\textsuperscript{41} Finally, the law may come in the form of a conditional amnesty, choosing to restrict the prosecution to only certain perpetrators after they have satisfied particular mandatory conditions—such as participating in a truth and reconciliation process—as in South Africa.\textsuperscript{42}

1. Case Study: South Africa’s Conditional Amnesty and Truth and Reconciliation Commission

From 1948 to 1990, South Africa engaged in systemic racial discrimination, or apartheid.\textsuperscript{43} The apartheid policy constituted a crime against humanity\textsuperscript{44} and clearly violated the Universal Declaration of Human Rights, which South Africa had abstained from signing.\textsuperscript{45} Despite the status of apartheid, when the policy terminated in 1990 and negotiations began between the National Party and the opposition groups, the United Nations left it to South Africa to consider the best manner to deal with its horrific past and move forward as a united country.\textsuperscript{46} Ultimately, South Africa chose to implement a conditional amnesty accompanied by a truth and reconciliation commission.\textsuperscript{47}

The Interim South African Constitution established the intent of the new government to focus on reconciliation.\textsuperscript{48} Specifically, the
constitution’s postamble called for “a need for understanding, but not of vengeance,” and established that “amnesty shall be granted in respect of acts, omissions, and offences associated with political objectives and committed in the course of conflicts of the past.”

The South African government established The Truth and Reconciliation Commission Act (TRCA)—which was comprised to enact regulations to bring these goals to fruition. The work of the TRCA was completed through the use of its four separate divisions—The Truth and Reconciliation Commission, The Committee on Human Rights Violations, The Committee on Amnesty, and The Committee on Reparation and Rehabilitation.

The goals of the TRCA were to establish “as complete a picture as possible of the causes, nature and extent of the gross violations of human rights” committed during the period of time established by the government; to facilitate “the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act”; to establish and make known “the fate or whereabouts of victims,” restore “the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims,” and recommend “reparation measures in respect of them”; and lastly, to compile a report “as comprehensive . . . as possible.” These objectives unambiguously declare that amnesty was granted only with full participation in the truth-telling process. While some perpetrators were shielded from prosecution under the TRCA if they satisfied all requirements and their crime was of a type that permitted amnesty, as discussed below—victims of their crimes were not left without a method of which to receive justice, as truth-telling and reparations programs were provided.

The TRCA required specific elements before granting amnesty to a perpetrator. In particular, perpetrators needed to apply for amnesty and participate in the truth-telling process established by

49. Id. epilogue.
50. Id.
52. Id. ch. 2.
53. Id. ch. 3.
54. Id. ch. 4.
55. Id. ch. 5.
56. Id. ch. 2(3)(1).
57. Id. ch. 4.
the commission.58 Additionally, amnesty applied to acts only “associated with a political objective,”59 as determined by motive, context, legal and factual nature, object or objective of the act, whether it was committed in execution of an order or whether a relationship between the act and the political objective pursued could be identified.60 Consequently, acts committed for personal gain or out of personal malice or spite, or acts that were disproportionate to the political objective the perpetrator had pursued would be denied amnesty.61 In the event an amnesty application was denied, criminal or civil proceedings could commence against the perpetrators.62 However, these proceedings could not use the disclosure made through the TRCA process against the perpetrators in court.63 The Amnesty Committee encouraged perpetrators to come forward and confess to past crimes by warning them that if they did not, they would live their lives “with fear of being hunted down or fingered by the evidence of a former colleague.”64 In total, approximately eight thousand persons applied for amnesty.65

Moreover, the Amnesty Committee would inform the victims if their perpetrator applied for amnesty.66 Victims were encouraged to participate in the truth-telling procedure if they so desired.67 Victims were also provided assistance by other bodies of the TRCA, such as the Committee on Reparation and Rehabilitation,68 a body that possessed the authority to establish an investigating unit to further examine the past crimes committed.69

Ultimately, the South African model struck a balance between two factions with different objectives—one group that wanted a full account of atrocities, justice for victims, and punishment for apartheid leaders, and another that wanted unconditional amnesty for all perpetrators during the previous years of conflict.70 As a

58. Id. ch. 4(2)(1).
59. Id. ch. 4(20)(2).
60. Id. ch. 4(20)(3).
61. Id.
62. Id. ch. 4(21).
64. Id.
65. Id.
67. Id.
68. See id. ch. 5.
69. See id. ch. 6.
result, the TRCA gave amnesty to select perpetrators while simultaneously providing justice to victims and helping society reconcile.

III. THE LEGALITY OF AMNESTY LAWS

To determine whether international law places a prohibition on the use of amnesties, an analysis of both treaty-based law and customary international law is necessary. Section A will demonstrate that although some treaties have established particular restrictions to implementing amnesties, there is no absolute bar against establishing amnesty laws as long as they are conditional and investigate crimes. Section B will similarly conclude that customary international law does not restrict states from imposing a conditional amnesty with investigative procedures.

A. Conditional Amnesties with Truth Commissions Are Not Prohibited by Codified International Law.

Passing an amnesty law in Syria, or any other country, would be impermissible under international law if the state were a party to a treaty that prohibited such implementation.71 Although some treaties do not specifically state that formal prosecutions are required, such as the International Convention on Civil and Political Rights (ICCPR),72 critics argue amnesties are barred because they do not qualify as proper “remedies” permitted by the treaty.73 Critics of amnesties also argue that while there may be no explicit bar to their implementation within a treaty, an express requirement to formally prosecute will invalidate the application of amnesties.74

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),75 the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

73. See Orentlicher, supra note 13, at 2568–71.
74. Young, supra note 70, at 225–27.
75. Article 6 of the Genocide Convention states:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Punishment (Torture Convention),\textsuperscript{76} and the Geneva Conventions\textsuperscript{77} all contain such prosecution provisions. Furthermore, opponents of amnesty laws also contend that even without specific language used in treaties requiring remedies or prosecutions, trials still remain necessary because they are part of a state’s duty to use due diligence to protect their citizens and investigate crimes.\textsuperscript{78} Yet, none of these arguments constitute a concrete bar from implementing all forms of amnesties.

1. The International Convention on Civil and Political Rights

The ICCPR, ratified by Syria in 1969,\textsuperscript{79} requires states to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”\textsuperscript{80} However, the ICCPR does not state what constitutes an “effective remedy.”\textsuperscript{81} As such, there is controversy over whether the phrase is limited to formal prosecutions or if other mechanisms of justice such as truth commissions or non-traditional trials also qualify.\textsuperscript{82} Nevertheless, prior amnesties, such as those of South Africa, have gained support from

\textsuperscript{76} Article 4 of the Torture Convention states:
Each state party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. . . . Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.


\textsuperscript{78} See Laplante, supra note 10, at 937–38.


\textsuperscript{80} ICCPR, supra note 72, art. 2(3).

\textsuperscript{81} See Mark Freeman & Max Pensky, The Amnesty Controversy in International Law, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES, supra note 11, at 42, 48–49.

\textsuperscript{82} See Young, supra note 70, at 246–41. An example of such an informal trial system is the traditional tribal methods of forgiveness implemented by the Acholi people of Uganda. See Marc Lacey, Atrocity Victims in Uganda Choose to Forgive, N.Y. Times (Apr. 18, 2005), http://www.nytimes.com/2005/04/18/international/africa/18uganda.html. Another example of traditional trials is the Gacaca trials implemented in Rwanda. See Background Information on the Justice and Reconciliation Process in Rwanda, Outreach Programme.
the international community and the United Nations as being useful mechanisms for justice and reconciliation, rather than condemned for not providing an effective remedy under the ICCPR.\footnote{Trumbull, \textit{supra} note 16, at 293, 295.} This analysis suggests that amnesty laws that prohibit prosecuting certain perpetrators—but allow other forms of transitional justice to investigate crimes and support victims—are still valid under the ICCPR and that such a strategy may be implemented in Syria without violating the convention.


The Genocide Convention, of which Syria has been a party since 1955,\footnote{Status of Convention on the Prevention and Punishment of the Crime of Genocide, \textit{United Nations Treaty Collection}, https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-1&chapter=4 (last visited Feb. 14, 2014).} states that all acts of genocide, whether interstate or intrastate, require formal prosecutions.\footnote{Genocide Convention, \textit{supra} note 75, art. 4. Article 4 states that persons committing genocide or other acts so specified “shall be punished,” regardless of where the act occurs and the nationality of the victim or perpetrator. \textit{Id.}} The prosecution may be conducted either by a competent tribunal of the state in the territory of which the act was committed or by an international tribunal.\footnote{Id. art. 6.} This language, therefore, implicitly asserts that an attempt to pardon the crime of genocide, such as through the act of amnesty, would be a violation of international law.

Nonetheless, the Genocide Convention is not an impediment to a conditional amnesty and truth and reconciliation commission. Rather, the Genocide Convention only dictates a bar against granting amnesty to those who had committed acts of genocide. The convention would not bar granting amnesty to pardon other non-genocidal crimes.

In order for a tribunal to find genocide, the perpetrator must have had “the specific intent to commit genocide”\footnote{Id. art. 2.} against a national, ethnic, racial, or religious group,\footnote{Id.} and the act must have been “directed at members of one of the four groups explicitly identified in the convention.”\footnote{Trumbell, \textit{supra} note 16, at 289.} The crime of genocide includes:
[K]illing members of the group, causing seriously bodily harm or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group.90

Any amnesty that attempts to shield an act of genocide where the actor had the specific intent to commit such genocide would thus be prohibited by the Genocide Convention. However, in reality, this situation rarely arises.91 When it has, perpetrators have been prosecuted in manners required by the Convention—rather than shielded by an amnesty law—as are exemplified by international tribunals for the former Yugoslavia and for Rwanda.92

While the Syrian Civil War has raised serious human rights concerns, it has not been labeled as genocide.93 Should the conflict or particular acts within it be found to be acts of genocide, no amnesty could bar prosecutions against the perpetrators who committed those crimes.

3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Torture Convention, ratified by Syria in 2004,94 treats interstate and intrastate violations equally.95 If a torturer is found

90. Genocide Convention, supra note 75, art. 2.
95. Torture Convention, supra note 76, art. 2(2). Article 2(2) states that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Id.
within a state’s jurisdiction, that state must either extradite the perpetrator to face prosecution outside of their territory or “submit him to its competent authorities for the purpose of prosecution.” The Torture Convention’s “prosecute or extradite” provision has been interpreted as ambiguous and perhaps requiring “less than an absolute obligation” on part of the state to formally prosecute. Rather than requiring the state to submit the torturer to a formal prosecution, the phrase implicitly allows states “the decision whether to prosecute alleged torturers to the prosecutorial authorities.” For instance, the language of the Torture Convention’s “extradite or prosecute” provision differs from the language of other conventions that include similar conditions. In other conventions, the language is more forceful and concrete and imposes a clear obligation on the state to formally prosecute the torturer if it chooses not to extradite. For example, the Genocide Convention clearly states that if a person is not extradited by the state in whose territory he or she has been found, the person “shall be tried by a competent tribunal of the state in the territory of which the act was committed.” The Torture Convention does not speak with this same degree of specificity. This ambiguity suggests that a state may punish the crime of torture as it sees fit. Thus, a mechanism that dispensed justice for victims by means other than formal prosecutions—yet that still fulfilled the same purpose prosecutions were intended to provide by the convention—may be permitted.

Another limitation to the scope of the Torture Convention is the definition of “torture.” The convention encompasses only acts of torture that are committed or instigated by a person in an official capacity or those to which an official consented or acqui-

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96. Id. art. 7(1).

97. Freeman & Pensky, supra note 81, at 47.


99. Freeman & Pensky, supra note 81, at 47.

100. Genocide Convention, supra note 75, art. 6.

101. Torture Convention, supra note 76, art. 1, defines torture as follows: Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Id.
esced.\textsuperscript{102} Therefore, acts committed by rebel forces—or by any person not considered as an official of the state—are not covered by the convention.

At best, the language of the Torture Convention is ambiguous. However, even if opponents of amnesties were correct that its “extradite or prosecute provision” does indeed require formal prosecutions,\textsuperscript{103} this still would not prohibit a qualified amnesty with joint truth and reconciliation commission. Rather, it would suggest only that torture is a crime for which perpetrators may not be granted amnesty. The convention would not impede an amnesty barring prosecutions for other crimes to move forward.

4. The Geneva Conventions

The four original Geneva Conventions codify “international rules regarding the treatment of prisoners of war and civilians during international armed conflict.”\textsuperscript{104} They impose an absolute duty on state signatories, including Syria,\textsuperscript{105} to prosecute individuals who commit “grave breaches” under the conventions.\textsuperscript{106} “Grave breaches” are enumerated in the four Geneva Conventions and consist of “willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering of serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”\textsuperscript{107} Conduct that may also rise to the level of a grave breach include “compelling a prisoner of war to serve in the force of a hostile power, of willfully depriving a prisoner of war of the rights of fair trial and regular trial prescribed in this Convention.”\textsuperscript{108} However, as these “grave breaches” apply only to international armed conflict, they rarely obstruct amnesty implementation, which generally shield prosecutions for violations that

\textsuperscript{102} Trumbull, supra note 16, at 289.  
\textsuperscript{103} Orentlicher, supra note 13, at 2566–67.  
\textsuperscript{104} See Trumbull, supra note 16, at 288.  
\textsuperscript{106} See Geneva Convention I, supra note 77, art. 50; Geneva Convention II, supra note 77, art. 51; Geneva Convention III, supra note 77, art. 130; Geneva Convention IV, supra note 77, art. 147.  
\textsuperscript{107} See Geneva Convention I, supra note 77, art. 50; Geneva Convention II, supra note 77, art. 51.  
\textsuperscript{108} See Geneva Convention III, supra note 77, art. 130; Geneva Convention IV, supra note 77, art. 147.
Implementing Conditional Amnesty in Syria

occur within a single state. Thus, qualified amnesties that do not shield the prosecution of crimes committed during international armed conflicts are permissible.

5. Geneva Protocol II

The 1977 Geneva Protocol II, which Syria has neither signed nor ratified, regulates the protection of victims of intrastate armed conflicts. Protocol II takes a very different stance than the four original Geneva Conventions regarding the duty to prosecute. Rather than restricting the implementation of amnesties, Protocol II encourages them. For example, Article 6(5) states, “at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained.” This provision clearly grants states permission to implement amnesties for a non-international conflict. Protocol II does not merely list amnesty as one of a multitude of options a state may select. Rather, the language used in Protocol II urges the application of the broadest possible amnesty. A clear declaration that amnesty laws may be implemented upon conclusion of a state’s internal conflict demonstrates that treaty-based international law does not prohibit the use of all amnesties in every circumstance. Instead, Protocol II’s existence implies that amnesties are acceptable, at least in some scenarios.

6. A State’s Due Diligence to Prosecute

Opponents of amnesty laws also argue that even without an explicit prohibition specified within a treaty, the use of amnesties is barred by the implied duty of states to use their due diligence to investigate atrocities. Such a duty stems from the Inter-American Court of Human Right’s decision in Velasquez-Rodriguez v. Hon-

112. See id. art. 6(5).
113. See Orentlicher, supra note 13, at 2540; Laplante, supra note 10, at 937–39.
duras. The Velasquez-Rodriguez case demonstrates that even when specific treaties do not require prosecution of certain crimes, courts may still impose upon states the duty to prosecute these crimes. In Velasquez-Rodriguez, the court found Honduras to be liable for violating the American Convention of Human Rights by contributing to the disappearance of the victim, even though the treaty does not use the term “disappearance.” The court also found that even if Honduras had not been complicit in the crime, the government still would have been liable for the victim’s disappearance. Honduras’ liability stemmed from its duty as a sovereign to use its due diligence to “prevent, investigate, and punish any violation of the rights recognized in the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.” Yet, in this list of state responsibilities, the court did not specifically declare that a state must prosecute a perpetrator. Instead, the court bestowed upon the state the duties to prevent future crimes, investigate crimes committed, compensate victims, and “punish” perpetrators—using a word that does not necessarily imply formal prosecutions.

Moreover, the Velasquez-Rodriguez court explained that “[t]he objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparations of damages resulting from the acts of the states responsible.” While formal prosecutions may be considered one of many means by which justice may be provided to victims of intrastate violence, the court’s passage demonstrates that prosecuting the perpetrator is not, nor should it be, the end goal itself. Implementing alternatives to prosecutions could satisfy the requirements of compensating victims and investigating crimes without prosecutions. Ultimately, the Velasquez-Rodriguez court did not require Honduras to prosecute those that were responsible for the disappearance of Velasquez-Rodriguez; it required only that Honduras pay reparations to his family.

117. See id. ¶ 172.
118. See id. ¶ 166.
119. See id.
120. Id. ¶ 134.
121. See id. ¶ 194.
Implementing Conditional Amnesty in Syria

2015] Implementing Conditional Amnesty in Syria 909
decision lends further support to the proposition that the court did not intend for “due diligence” to be synonymous with “prosecution” and that its holding leaves room for amnesties to be established in states as long as they are combined with methods to investigate crimes and assist victims.


States can be bound by certain norms—even ones that they have not expressly agreed upon via treaty—if that norm has become a rule of customary international law.122 Once this occurs, a state will be bound by that norm, unless the state persistently objected to the norm while it was emerging.123 Customary international law norms result “from a general and consistent practice of states followed by them from a sense of legal obligation (opinio juris).”124 Thus, even if Syria were not a signatory to a treaty that required formal prosecutions or barred amnesties, if such a treaty had become a norm of customary international law, Syria would be prohibited from implementing an amnesty.125

If customary international law prohibits amnesty laws, there must be both a near universal state practice against implementing amnesties and evidence that states have declined their implementation out of a sense of legal obligation.126 However, proving either such a near universal state practice against amnesty laws or its relationship to the states’ sense of legal obligation is difficult.

1. There Is Insufficient Evidence to Prove a Uniform State Practice Against Implementing Amnesties.

The present and historical use of amnesty laws demonstrates that states use them far too frequently to find a customary international

122. VCLT, supra note 71, arts. 34–37 (precluding a rule set forth in a treaty from becoming binding upon a third-party state as a customary rule of international law, recognized as such).


125. See VCLT, supra note 71, art. 38.

126. When applying the Restatement (Third) of Foreign Relations Law, § 102 to the issue of determining whether amnesties are against customary international law, these factors would have to exist.
law norm against their implementation. Additionally, given the myriad of states that have chosen to implement amnesties, there is a lack of evidence that these states are mere persistent objectors to an established norm, which would allow a customary norm of international law to exist, except for within those states that protested its establishment. Between 1945 and 2011, 537 amnesties were granted in 129 countries. Of 537 amnesties, 398 were granted after 1979. These statistics, from the Amnesty Law Database, shed some light on questions concerning the state use of amnesties. The amnesties considered were all employed during periods of “political crises including civil unrest, military coups, international or internal conflict, [and] authoritarian government[s].” By looking at amnesties across a wide range of time, it was established that the use of amnesty laws has—while ebbed and flowed depending on world events—generally remained constant over the past thirty years.

2. There Is Insufficient Evidence to Prove that States Have Declined to Implement Amnesties Due to Opinio Juris.

In the past decade, there has been a growing trend among states to repeal the amnesty laws they had formerly chosen to implement. Countries such as Uruguay, Peru, and Argentina have repealed their amnesties, due to actions taken by either their own domestic court system or the Inter-American Court of Human Rights. In other countries where amnesty laws remain intact, such as Spain, there has been fervent call for repeal. This pattern may demonstrate a changing attitude regarding amnesty laws, perhaps suggesting that a new norm against amnesties is emerging. Alternatively, this trend may suggest that the legal obligation a state


128. Even if this were the case, if a multitude of states all object to a norm, it could evidence that there actually is no established norm at all due to insufficient state practice. See STATEMENT OF PRINCIPLES, supra note 123, art. 12.

129. See Mallinder, supra note 127, at 79.

130. Id.

131. Id. at 77.

132. Id. at 79–80.


134. See id.

ows to its own citizens has changed due to the expansion of the field of human rights law.\footnote{136}{See Kathryn Sikkink, The Age of Accountability, in Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives, supra note 11, at 19, 20.}

Nonetheless, these arguments do not prevail. As noted above, the state practice to implement amnesties has continued despite the changing views in the field of human rights law.\footnote{137}{See Mallinder, supra note 127, at 70–71.} Even the argument that the perception of amnesties solely within the region of Latin America has shifted would be difficult to substantiate. Although particular countries have repealed amnesty laws, amnesties remain intact elsewhere, such as in Guatemala and Brazil.\footnote{138}{See Padgett, supra note 133; Brazil Urged to Scrap Amnesty Law that Protects Rights Abusers, Amnesty Int’l. (Aug. 26, 2011), http://amnesty.org/en/for-media/press-releases/brazil-urged-scrap-amnesty-law-protects-rights-abusers-2011-08-26; Trumbull, supra note 16, at 297.}

New amnesties are also in the process of emerging, as Colombia is currently working to establish an amnesty law to reincorporate guerrilla forces back into society.\footnote{139}{See Trumbull, supra note 16, at 335.}

There are reasons aside from a sense of pure legal obligation why states might choose to repeal their amnesty laws. For example, an amnesty law may no longer be necessary within the country. Amnesties provide a secure method of transition for countries in periods of strife, particularly when the threat of prosecuting either side in a conflict is too risky or impractical.\footnote{140}{In fact, “the chief argument against a general rule requiring prosecutions is that fragile democracies may not be able to survive the destabilizing effects of politically charged trials.” Orentlicher, supra note 13, at 2544.} Once sufficient time has lapsed and political climate has settled, an amnesty may no longer be necessary to ensure peace within the region.\footnote{141}{See id.}

Additionally, countries may be repealing these laws not truly out of a sense of legal obligation but rather for the sake of appearances because they feel strong-armed by international organizations and regional courts. Regional courts have declared particular amnesties contrary to state obligations, as evidenced by the Inter-American Court of Human Right’s decision regarding the Peruvian amnesty.\footnote{142}{Barrios Altos v. Peru, Merits, Judgment, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, § X, ¶ 4 (Mar. 14, 2001). This decision has been interpreted to apply narrowly to self-amnesties. See Laplante, supra note 10, at 964.} Accordingly, it would be logical for a state to attempt to distance itself from using a mechanism that has been questioned by a high court.
International organizations have also been ambiguous in their stance on amnesties, as exemplified by the U.N. position on Sierra Leone. Kofi Annan, the then U.N. Secretary General, stated the following on Sierra Leone’s amnesty law:

While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity, or other serious violations of international humanitarian law.143

Understandably, statements that simultaneously recognize amnesties as a legal concept and condemn them can be puzzling. States may desire to avoid amnesty implementation not out of a legal obligation to prosecute but to avoid getting embroiled in a chaotic area of international law.

IV. Specific Factors Supporting a Conditional Amnesty in Syria

As Richard Goldstone, a Justice of the Constitutional Court of South Africa, stated, “certainly, there is no simple solution capable of addressing the complexities and subtleties inherent in a range of different factual situations. The peculiar history, politics, and social structure of a society will always inform the appropriate approach to this question in any given context.”144 The realities of a state’s particular conflict must always be considered to determine whether a conditional amnesty along with a truth commission would be an adequate resolution.

The South African conditional amnesty model would translate effectively to the Syrian context given the degree of violence committed by both pro- and anti-government forces, the practical reality of prosecuting each perpetrator in Syria, the time length of formal trials, and the history and culture of repression within Syria. As demonstrated below, each of these factors supports the conclusion that the implementation of the South African model would be beneficial to the Syrian community.

144. Laplante, supra note 10, at 927.
Implementing Conditional Amnesty in Syria

A. Violent Acts Committed by Both Pro- and Anti-Government Forces

An important element to the Syrian conflict that supports the creation of an amnesty law and truth and reconciliation commission is the degree of violence committed by both pro- and anti-government forces. This “equal violence” factor was a vital characteristic of South Africa’s conflict and it led to the country’s decision to implement a conditional amnesty and truth and reconciliation commission. As the apartheid system came to its end, the leaders of the transition characterized South African society as being in a “stalemate,” as both factions of society had committed acts of violence against each other. Due to societal tensions that persisted at the time, largely as a result of such violence, the transition leaders believed that without implementing a conditional amnesty and a truth and reconciliation commission, society would have been overwhelmed by a “bloodbath.” This imperative factor—that violence has been committed by many opposing factions, to the harm of many groups of people—should also be considered in the Syrian context.

The violence in Syria has escalated rapidly since it began in 2011. Non-governmental organizations such as Human Rights Watch and Amnesty International have gathered evidence of atrocities committed both by the Syrian government and the anti-government rebels, a force that includes the largest anti-government group, the Free Syrian Army, and other smaller factions. Pro-government forces are responsible for carrying out extrajudicial killings, excessive use of force, enforced disappearances, and indiscriminate attacks against civilians, in addition to other crimes. The most well-known—and arguably the most horrific—aspect of violence came in August 2013, when chemical weapons killed hundreds of civilians in the suburbs of Damascus. Although both sides deny

145. See Annual Report: Syria 2013, supra note 145; Syria: Executions, Hostage Takings by Rebels, supra note 145.
147. See id.
148. See id.
149. See Annual Report: Syria 2013, supra note 145; Syria: Executions, Hostage Takings by Rebels, supra note 145.
150. See Annual Report: Syria 2013, supra note 145.
being responsible for the chemical attack, the vast majority of sources and evidence attribute the carnage to the government’s forces.\textsuperscript{152} However, as mentioned above, the Syrian rebels also have blood on their hands. Opposition forces have also been found responsible for torturing and killing pro-government forces after conducting makeshift “courts,” targeting pro-government journalists, abducting civilians for ransom, and using weapons indiscriminately.\textsuperscript{153} As in South Africa, evidence of mass violence and human rights abuse committed by both opposing factions suggests that an amnesty would be beneficial to the Syrian situation.

B. Volume of Crimes Committed

While formal prosecutions may be beneficial when discussing how to seek justice against top officials, such as Bashar Al-Assad,\textsuperscript{154} not everyone who has committed a crime will be prosecuted, especially given the sheer volume of crimes committed during the course of a conflict.\textsuperscript{155} When speaking about potential Syrian prosecutions, David Tolbert, president of the International Center for Transitional Justice has stated as follows:

We need to recognize that not everyone who committed a violation will be prosecuted, given the massive crimes involved. Moreover, despite the importance of prosecuting those most responsible for the most serious crimes, such trials are not necessarily the best vehicle to address social and historical aspects underlying patterns of repression and crime.\textsuperscript{156}


\textsuperscript{153} See Annual Report: Syria 2013, supra note 145.

\textsuperscript{154} It is important to clarify that domestic amnesty laws imposed are not defenses at an international level. Should the International Criminal Court (ICC) decide to prosecute Al-Assad, an amnesty law would not deter prosecutions against the leaders from going forward. Even if these were to occur, implementing an amnesty law and a truth commission would nonetheless be important. These mechanisms would ensure victims a process to cope with their atrocity at the ground level that would encourage more direct participation from the victims. The two forms of justice do not need to be mutually exclusive. See Laplante, supra note 10, at 969–70. Also of note, the ICC’s Rome Statute states that the ICC prosecutor has the discretion not to prosecute criminals, if such prosecution “is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age of infirmity of the alleged perpetrator, and his or her role in the alleged crime.” Thus, if an amnesty law, while prohibiting prosecutions, was a better mechanism to serve a community, the ICC could refrain from judgment. See Rome Statute of the International Criminal Court, supra note 24, art. 53(2)(c).


\textsuperscript{156} Id.
This assertion emphasizes the practical difficulties of trying each perpetrator and raises the question of how meaningful such prosecutions would be. A truth-telling process may be a better mechanism to address such underlying patterns. As Tolbert clarifies, prosecuting each perpetrator is not realistic.\textsuperscript{157} Moreover, prosecuting even a portion of these crimes would be an extremely costly and lengthy endeavor, whether cases were brought domestically within the Syrian judicial system, internationally, or with the aid of the United Nations or the ICC.\textsuperscript{158} Domestic prosecutions can be difficult, especially in the aftermath of a civil war, due to potential distrust in the government or a breakdown of the state’s judiciary system.\textsuperscript{159} There also can be mistrust within the judicial system due to ties to the old regime and threat of corruption.\textsuperscript{160} Moreover, if the Baath governing apparatus were dismantled, there still would be issues relating to the inexperience of new judges and the new judicial system.\textsuperscript{161} Finally, while assistance from international organizations, such as the United Nations, in the execution of trials may provide for consistency, the length and scope of trials would still be of concern.

By forgoing the improbable ideal of prosecuting each person who committed a criminal act during the apartheid era, South Africa proved capable of providing justice to a wider range of victims than it would have otherwise. By the conclusion of the truth and reconciliation commission, the commission had taken the testimony of approximately twenty-one thousand victims, of which two thousand had appeared in the public hearings.\textsuperscript{162} The commission had received 7,112 applications for amnesty and granted 849 in total.\textsuperscript{163} While these statistics may seem low in comparison to the volume of crimes committed in Syria,\textsuperscript{164} they are a vast improvement upon international courts that generally have the capacity to

\textsuperscript{157}. Id.


\textsuperscript{159}. Laplante, supra note 10, at 927.

\textsuperscript{160}. Id.

\textsuperscript{161}. Id.


\textsuperscript{164}. See supra Part I for current statistics on Syrian victims.
try an even smaller range of perpetrators. Implementing a conditional amnesty with a truth and reconciliation commission would provide justice to a broader range of victims and involve a larger sect of the Syrian population.

C. Financial Realities

While the United Nations aids with the creation of special ad hoc tribunals to prosecute perpetrators from particular conflicts, these are obviously limited by budget. To illustrate, the Special Court of Sierra Leone emerged with financial backing from the United Nations to prosecute those who committed crimes during the Sierra Leone civil war. However, its budget allowed for the trial of only ten individuals. Even though prosecuting these persons may have had significant symbolic impact, the Special Court of Sierra Leone had no plan to provide reparations or justice to the victims abused by anyone other than those ten individuals. A conditional amnesty establishing a truth and reconciliation commission would remedy this problem and permit all victims to seek justice, albeit in a less traditional, less retributive form. Of course, a widespread truth commission would not be without its own high price, but it may be a more meaningful method of reconciliation because it would better address the “underlying patterns of repres-

Given the volume of crimes committed during the civil war, Syria also will need to consider financial realities that accompany formal prosecutions. A conditional amnesty and a truth and reconciliation commission may be less costly mechanisms that would also provide an alternative form of justice to a wider scope of the Syrian population.

165. For example, see infra Part IV.C. Tribunals with a more expensive budget, such as the ICTY, have been able to prosecute approximately 160 people. See About the ICTY, supra note 25. Although this number of prosecutions is compelling, the tribunals’ cost and lack of truth-telling measures still illustrate that they may not be as effective as a form of justice as the method implemented by South Africa. 166. William A. Schabas, Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone, 11 U.C. DAVIS J. INT’L L. & POL’Y 145, 166–67 (2004). 167. Id. 168. See id. 169. Exact statistics about the cost of the South Africa’s Truth and Reconciliation Commission are unavailable. However, it may be inferred through statements made in the Truth and Reconciliation Commission Final Report that formal prosecutions would have been much more costly than implementing the Truth and Reconciliation Commission. Tutu et al., supra note 146. 170. See Tolbert, supra note 155.
Implementing Conditional Amnesty in Syria

D. Timing

Even if a small number of perpetrators could be realistically prosecuted without financial concern, there still would be wariness regarding the extreme length of international prosecutions. For example, the United Nations may consider establishing an international tribunal to prosecute Syrian criminals such as was created to remedy crimes committed in Rwanda and the former Yugoslavia.171 While these tribunals provide a method of holding perpetrators accountable through prosecution,172 there remains a strong concern about the length of trials. The ICTY cases began in 1993 and are not projected to conclude until 2016, twenty-three years after the ICTY commenced.173 The time lapse raises the question of how such a delay impacts the community’s ability to find justice from the prosecutions.

When writing about South Africa’s decision to forego formal prosecutions for every perpetrator, Desmond Tutu explained: “it would also have been counterproductive to devote years to hearing about events that, by their nature, arouse very strong feelings. It would have rocked the boat massively and for too long.”174 Although South Africa’s Truth and Reconciliation Commission’s work still took seven years to complete,175 this time range is far shorter than that of the work of some ad hoc tribunals.176 Likewise, Syria must also consider this timing. The sensitivity of the matters involved suggests that, like in South Africa, a more expeditious method of reconciling society is necessary. Forcing a state to dedicate what could be decades to resolving such horrific events may harm a society more than it would benefit.

E. History and Culture

Another important aspect considered by South Africa in selecting a conditional amnesty and a truth and reconciliation commission was its capacity to help advance a cohesive society.177 South Africa invested not only in providing justice for the specific victims harmed during the years of apartheid but also in its communities,

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171. See About the ICTY, supra note 25; About the ICTR, supra note 26. R
172. See About the ICTY, supra note 25; About the ICTR, supra note 26. R
174. See Tutu et al., supra note 146, at 5. R
175. See Truth Commission: South Africa, supra note 162. R
176. See About the ICTY, supra note 25. R
177. See Tutu et al., supra note 146, at 6–8. R
with the aim of making its public feel comfortable moving forward as one united people.\textsuperscript{178} It is unlikely that formal prosecutions would have had this same ambitious and grandiose effect.\textsuperscript{179}

When Syrian begins examining the different methods of transitional justice it may implement, it should not be looking for a mechanism that will provide justice to only the specific victims harmed by acts of atrocity. Instead, like South Africa, Syria should pursue a strategy that will provide reconciliation for all of its society. The civil war has had a negative impact on each person within the country, even if he or she was not specifically subject to an act of abuse.\textsuperscript{180} Additionally, the state has a long history of enduring repression under a military regime.\textsuperscript{181} While victims of specific acts committed during the civil war must receive justice, the wider range of those adversely impacted and the history and culture of the state should also be considered. A full consideration of these factors demonstrate that—like South Africa—Syria should pursue a transitional justice strategy that has the ability to reconcile all of its society.

V. Conclusion

The Syrian peace talks will inevitably include a discussion of the various mechanisms that could be used to help the country end its civil war and start transition to peace. One of the options should be a conditional amnesty in conjunction with a truth and reconciliation commission such as was used in South Africa. If implemented, this mechanism would help ease the transition out of civil war and provide justice and reconciliation for the Syrian society. Implementing a conditional amnesty is permitted under international law, so long as it does not shield crimes that require formal prosecutions. Establishing such an amnesty law would not only help transition Syria out of the current civil war but also assist the country reconcile and deter future acts of widespread violence from reoccurring.

\textsuperscript{178} See id.
\textsuperscript{179} See id. at 6.
\textsuperscript{180} Syria Profile—Overview, supra note 2.
\textsuperscript{181} Id.