The Scope and Effect of the Algerian Law Relating to the Reestablishment of Civil Concord

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Keywords: Algeria; civil concord; international crimes; amnesty; duty to prosecute.

Abstract: On 13 July 1999 Algeria joined the growing list of countries that have adopted some form of 'amnesty law' as a means of restoring peace and encouraging reconciliation. After a brief description of the historical context, this article examines the features of the Algerian Civil Concord Law. This law is then used as a backdrop in considering eight ways in which modern amnesty laws may be drafted and adopted to ensure compliance with developing principles of international law.

1. INTRODUCTION

> Yes we have a terrorist problem. Yes there is a civil war. But the authorities must keep the rule of law. They must not destroy the law. But this is what has happened. Algeria has become a country of fear. People look to the courts, but the courts will not protect them.[1]

Algeria gained independence from France on 5 July 1962 after an eight year war of independence led by the Front de Libération Nationale (FLN) in which more than one million Algerians were killed and two million internally displaced. In the Evian Accords, France and Algeria agreed to proclaim an amnesty immediately, thereby giving up the right to prosecute their respective war criminals.[2]

Since 1992, the civilian population of Algeria has been trapped in another spiral of violence.[3] The Islamic Salvation Front (FIS) and other Islamic fundamentalist insurgent groups such as the Armed Islamic Group (GIA) have slaughtered, decapitated, mutilated, tortured, raped and abducted thousands of people in targeted and random attacks. Furthermore, they have attempted to in-

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1. M. Bouchachi, *Three Leading Human Rights Activists Call For International Action On Algeria*, Amnesty Magazine, May-June 1998.
2. Exchange of letters and declarations adopted on 19 March 1962 at the close of the Evian talks, constituting an agreement between France and Algeria, Paris and Rocher Noir, 3 July 1962, 7395 UNTS 27 Chapter I(k) (1964).
3. *See* Amnesty International, *Algeria: Programme of Action to End Human Rights Crisis*, Amnesty International Report, 6 March 1998, http://www.waac.org/articles_reports.htm.

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ternationalize their cause by executing journalists, killing and kidnapping foreigners, placing bombs in Algiers International Airport and the Paris metro, and hijacking an Air France flight. In the meantime, the government security forces have allegedly been responsible for extrajudicial executions, killings in detention, torture and disappearances "on a scale that can only be characterized as systematic."[4]

The first civilian President of Algeria, Abdelaziz Bouteflika, came to power on 15 April 1999 after a controversial election.[5] Bouteflika estimated that the death toll in Algeria's civil war had reached 100,000 and vowed to bring peace to his nation. His plan for peace is contained in the 'Law relating to the reestablishment of civil concord' of 13 July 1999.[6] The law provides that certain concessions will be granted to those who have been implicated in acts of terrorism or subversion if they undertake to cease their criminal activities. Algeria has therefore joined the growing list of countries that have adopted some form of 'amnesty law' as a means of restoring peace and encouraging reconciliation.[7]

It is proposed to examine the scope of the Civil Concord Law and, against this background, to consider ways in which modern amnesty laws may be drafted and adopted to ensure compliance with international law principles.

2. Historical Background to the Civil War in Algeria

When Algeria gained independence, the Secretary-General of the FLN, Ahmed Ben Bella, introduced a draft constitution providing for a presidential regime with the FLN as sole political party. Ben Bella was elected president in 1963 but was deposed and arrested in 1965 in a coup led by Colonel Houari Boumedienne who became president in 1976. When Boumedienne died in 1978, he was replaced by Colonel Chadli Ben Djedid. Chadli aimed to reverse the socialist economic policies pursued by his predecessor.

In October 1988 an insurrection began with riots in reaction to Chadli's ineffective economic reforms, rising unemployment and shattered social and eco-

4. Human Rights Watch, *Human Rights Watch Calls on Algeria to Set Up Independent Investigation of Atrocities*, Human Rights Watch Report, 31 August 1998, *see* http://www.waac.org./rep98/HRW 831.htm.
5. Low voter turnout was attributed to public disgust after all six opponents charged electoral fraud and withdrew.
6. Décret présidentiel no 99-169 du 19 Rabie Ethanie 1420 correspondant au 1er août 1999 portant convocation du corps électoral pour le référendum du 16 septembre 1999, *see* http://www.gga.dz/ elections/guidesFr/concorde.html.
7. The list includes Chile, El Salvador, Guatemala, Nicaragua, Uruguay, Honduras, Peru, Argentina, Haiti, South Africa, Sierra Leone, Mozambique, Angola and Sudan. The amnesties have ranged from sweeping (Chile, 1978; El Salvador, 1987) to qualified (the Guatamalan National Reconciliation Law of 1996 included several amnesty provisions but excluded the possibility of amnesties for forced disappearances, torture, genocide and crimes for which a statute of limitation does not apply), with most falling somewhere in between.

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nomic expectations. The violence was repressed by the government, leaving at least 500 people dead at the hands of the security forces. Chadli was elected to a third term of office and promised to make Algeria a 'nation of laws' by separating the FLN from the state, moving the military out of interference in politics and heading towards democratization. In 1989 a new constitution was passed which included the right to form political parties. Shortly afterwards the Islamic Salvation Front (FIS) was born and certified as a political party.

Local elections were held in June 1990 with the FIS receiving 55% of the votes cast. Seemingly undaunted, Chadli authorized multiparty general elections, to be held early the following year. However, when the government introduced an electoral law increasing the number of seats in the Assembly from 295 to 430, which potentially favoured the FLN, violence erupted again with the FIS inciting a general strike and demonstrations. Martial law was imposed, the elections were postponed and about 700 FIS members were arrested. Despite the chaos, elections went ahead in December 1991 and in the initial round the FIS won 188 of 231 seats, while the FLN won only fifteen. The military, alarmed by the outcome, forced Chadli to resign and replaced the presidency with a five member High Council of State. The elections were cancelled, a state of emergency was declared and the FIS was formally dissolved.

In an early attempt to deter the insurgents, special courts were created in September 1992 to try cases of terrorism. 13,770 people were tried over a two year period resulting in 1,661 sentences of death (1,463 of which were passed *in absentia*), 8,448 sentences of imprisonment, and 3,661 acquittals.[8] A National Human Rights Observatory was established in 1992 but was invested with little authority beyond the gathering of information.[9]

When Zeroual became president in 1994 he announced his preparedness to pursue a dialogue with the various factions if they promised to renounce the use of violence. However, extremists on both sides prevented any negotiations from taking place. In 1995 a Roman Catholic Group called Sant 'Egidio convened a meeting of Algerian opposition leaders in Rome which resulted in a 'National Contract' condemning violence, imposing conditions for the opening of negotiations, and appealing for respect for legality, human rights and democracy. The Contract was denounced by the government as interference in its domestic affairs. This was also the manner in which the government regarded action by United Nations human rights bodies, although in 1998 it invited a 'panel of eminent persons' to gather information on the situation in Algeria and present a re-

8. Report of the Panel appointed by the Secretary-General of the United Nations to gather information on the situation in Algeria in order to provide the international community with greater clarity on that situation, July-August 1998, at 7, *see* http://www.un.org/NewLinks/dpi2007/.

9. In 1996 the Observatory was supplemented by an Office of Ombudsman of the Republic to which any individual who has been wronged by the malfunctioning of a public institution may apply, after exhausting all other remedies.

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port to the United Nations Secretary-General.[10] Human Rights Watch argued that a visit by diplomats was no substitute for an in-country investigation by United Nations human rights experts and argued that: "[c]redible investigations are critical to ensure that the perpetrators of atrocities and human rights abuses do not enjoy impunity, and the victims are not compelled to live in perpetual fear."[11]

In June 1999 the newly elected President Bouteflika declared that thousands of an estimated 20,000 political prisoners serving time for their role in terrorist activities would be granted amnesty. Several thousand supporters of the relatively moderate Islamic Salvation Army (AIS), which had been observing a truce since October 1997, were freed, and Bouteflika offered to pardon many more insurgents if his plan for the restoration of civil harmony was approved in a referendum. Three weeks previously, FIS leaders Abassi Madani and Madani Mezeraq had announced a truce with the Algerian authorities.

In a referendum on 17 September 1999, Algeria's 17.5 million voters were asked the simple question: 'Do you agree with the President's approach to the restoration of peace and civil harmony?' Of the 85.06 percent of people eligible to vote who went to the polls, 98.63 percent voted in favour of Bouteflika's plan.

3. The Plan for the Reestablishment of Civil Harmony in Algeria

In accordance with the Civil Concord Law, insurgents who have expressed their willingness to surrender their arms and be reintegrated into civil society will benefit from one of the following measures: exoneration from proceedings (Chapter II), placement under probation (Chapter III), or attenuation of penalties (Chapter IV). Persons wishing to benefit from these measures must have presented themselves spontaneously to the competent authorities and notified them of the cessation of all terrorist or subversive activity within six months of the law taking effect, or within three months in the case of attenuation of penalties.

Exoneration and probation (under Article 7) are not available to persons who have been involved in murder or causing permanent disablement; rape; or the use of explosives in public places or places frequented by the public. Probation[12] consists of the temporary adjournment of proceedings for a minimum of three years and a maximum of ten years in order to ensure complete rehabilitation. It is aimed at individuals who have been members of organizations[13] and such in-

10. *Supra* note 8.
11. H. Megally, Executive Director Human Rights Watch, Middle East and Africa division, in *Human Rights Watch Calls on Algeria to Set Up Independent Investigation of Atrocities*, *supra* note 4.
12. *See also* Textes d'application de la loi relative au rétablissement de la concorde civile, http://www.gga.dz/elections/guidesFr/concorde.html.
13. The Law refers to Art. 87, *bis* 3 of the Algerian Penal Code.

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dividuals will be exonerated at the end of the probationary period. Under Article 8, probation is also applicable to persons belonging to organizations who have presented themselves collectively to the authorities within three months if they have not been involved in collective massacres or the use of explosives in public places and if they have been admitted, under the authority of the state, to participate in the fight against terrorism. Persons belonging to such organizations must make a declaration as to arms and explosives in their possession and as to the acts committed or participated in. If acts that have not been declared are subsequently revealed, the adjournment is immediately revoked and proceedings will be instituted or continued. Article 9 provides that at the end of the period of probation proceedings will be initiated, but there will be some attenuation of penalties.

Persons who have not been admitted to the probation regime and who have not been involved in collective massacres or the use of explosives in public places may benefit from attenuation of penalties as follows: a maximum of twelve years imprisonment where the normal penalty is death; a maximum of seven years where the normal penalty is between ten and twenty years; a maximum of three years where the normal maximum is ten; and a reduction by half in all other cases. All other persons who turn themselves in to the authorities within six months will benefit from some attenuation of penalties and will escape the death penalty.

Article 40 provides that victims can be civil parties to any criminal action that is commenced and can claim compensation. However, if the victim has already obtained redress from another source, the State can reclaim and redistribute the money. The law makes no further reference to the rights of the victims.[14]

4. VALIDITY OF THE CIVIL CONCORD LAW UNDER INTERNATIONAL LAW

The word 'amnesty' implies the decriminalization of a past offence and the absence of any investigation or acknowledgment of responsibility.[15] The word 'pardon', on the other hand, implies the suspension of punishment without overlooking the fact that an offence was committed.[16] It has been said that "pardon or commutation is granted to individuals on the basis of individualized considerations, whereas amnesty is granted to groups on the basis of public policy

14. *See also* 'Décret exécutif déterminant les modalités d'application des dispositions de l'article 40 de la loi relative au rétablissement de la concorde civile', http://www.gga.dz/elections/guidesFr/concorde.html.
15. *See* M.P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*', (1996) 31 Texas International Law Journal 1-41, at 3, n. 8 (1996).
16. *Id.*

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concerns".[17] The Algerian Law seems to combine elements of both concepts. The provisions on exoneration from proceedings amount to an amnesty in respect of the least serious crimes. However, even these provisions do not exclude some individualized consideration of a case and some acknowledgment of responsibility. The competent authorities must have a basis upon which to decide whether an individual or organization should benefit from Chapter II, III or IV of the Law, and the promise to cease terrorist activity could be regarded as an acknowledgment of past involvement in such activity.

The provisions on probation are novel and far-sighted in their emphasis on rehabilitation and reintegration. Persons who are subject to a probation order cannot be said to be benefiting from an amnesty in its accepted sense, as probation is essentially a form of sanction involving supervision and control. "A probationary sentence [...] is arguably a 'system-bound' sanction in that it is primarily designed to resocialize the defendant,"[18] while protecting the public from further harm.

Finally, the provisions on attenuation of penalties relate neither to amnesties nor to pardons as they only become relevant after a full investigation and criminal trial. These offenders may escape their 'just deserts' but the provisions would seem to be unobjectionable from an international law perspective, particularly as they prevent the use of the death penalty in cases in which it would otherwise be imposed.

International law does not prohibit amnesties as such but may limit their reach.[19] An amnesty will be contrary to international law if it covers international crimes for which prosecution is mandatory. For example, there is a duty to prosecute those suspected of grave breaches of the 1949 Geneva Conventions,[20] genocide[21] and crimes against humanity,[22] and an emerging duty to prosecute in

17. N. Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, *in* N. Roht-Arriaza (Ed.), Impunity and Human Rights in International Law and Practice 22 (1995).
18. S. Walther, *Problems in Blaming and Punishing Individuals for Human Rights Violations: The Example of the Berlin Wall Shootings*, *in* Roht-Arriaza (Ed.), *supra* note 17, at 109.
19. *See* N. Roht-Arriaza, & L. Gibson, *The Developing Jurisprudence on Amnesty*, 20 Human Rights Quarterly 843-885, at 875 (1998).
20. *See* M. Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 Law and Contemporary Problems 4, 41-61, at 43-44 (1996). 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 74 UNTS 85 (1950); 1949 Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (1950); 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950); 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 (1950).
21. *See* Art. 6 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951). Customary international law also requires states to prosecute acts of genocide, *see* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, 1951 ICJ Reports 15, at 23, in which the Court refers to the "universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge'", and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary

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respect of torture,[23] war crimes in internal armed conflicts[24] and serious violations of human rights treaties.[25] The general position has been described as follows:

> In the light of the existing treaties, declarations and the practice with regard to war crimes and crimes against humanity committed during the Second World War, one can conclude that the international community of states has accepted the obligation to prosecute those suspected of having committed war crimes and crimes against humanity (including possibly enforced disappearances and arbitrary executions), even though in practice prosecution does not always occur. A norm extending such obligation to other human rights violations is developing.[26]

Collective massacres have clearly occurred in Algeria and are referred to in the Civil Concord Law, however, there is no suggestion that genocide has taken place. Indeed, it seems that the terrorists have not been pursuing any specific

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Objections, Judgment of 11 July 1996, 1996 ICJ Rep. 595, para. 31, in which "[t]he Court notes that the obligation each State [...] has to prevent and to punish the crime of genocide is not territorially limited by the Convention."

22. *Cf* Scharf, *supra* note 20, at 59, who argues that: "notwithstanding an array of General Assembly resolutions calling for the prosecution of crimes against humanity and the strong policy and jurisprudential arguments warranting such a rule, the practice of states does not yet support the present existence of an obligation under customary international law to refrain from conferring amnesty for such crimes." *See also* Scharf, *supra* note 15, at 28, 34.

23. The Human Rights Committee has taken the view that amnesties in respect of acts of torture are "generally incompatible with the duty of states to investigate such acts", General Comment No. 20, 44th session, Art. 7, UN Doc.CCPR/C21/Rev.1/Add.3, para. 165 (1992). In the *Furundžija* case before the International Criminal Tribunal for the former Yugoslavia (ICTY), it was held that amnesties for torture are null and void and will not receive foreign recognition, Case No IT-95-17/1-T, 10 December 1998; *see* 39 ILM, paras. 151-157 (1999). Dugard doubts whether state practice supports this contention, *see* J. Dugard, *Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?*, 12 LJIL 1001-1015 (1999).

24. The ICTY Trial Chamber stated in the *Celebiči* case: "While 'grave breaches' must be prosecuted and punished by all states, 'other' breaches of the Geneva Conventions may be so." *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landzo*, Case No IT-96-21-T, 16 November 1998, para. 308.

25. *See*, for example, Scharf, *supra* note 15, at 25-28; C. Edelenbos, *Human Rights Violations: A Duty to Prosecute?*', 7 LJIL 5-21, at 8-10 (1994).

26. Edelenbos, *id.*, at 15-16. The United Nations Secretary General Kofi Annan instructed his Special Representative for Sierra Leone, Francis Okelo, to make an oral disclaimer that the amnesty granted in the Lomé Peace Agreement would not apply to genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law, *see* A.J.M. McDonald, *Sierra Leone's Uneasy Peace: The Amnesties Granted in the Lomé Peace Agreement and the United Nations' Dilemma*, Humanitäres Völkerrecht Informationsschriften (forthcoming). But the question of an obligation to prosecute under international law remains the subject of debate. *See*, for example, M.C. Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 Law and Contemporary Problems 4, 9-28, at 16 (1996) who states: "the duty to prosecute or to extradite, while argued for by scholars, must nonetheless be proven part of customary international law in the absence of a specific convention establishing such an obligation." Bassiouni goes on to say that there should be a principle of no general amnesty for the '*jus cogens* crimes' of genocide, crimes against humanity, war crimes and torture, *id.*, at 21; *see also* Scharf, *supra* note 20.

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objective.[27] The Law states clearly that those responsible for such massacres can only benefit from attenuation of penalties and the same would appear to hold true for persons who have committed crimes against humanity or serious war crimes. Torture, on the other hand, is not expressly excluded from the scope of Chapters II and III where it does not involve rape or permanent disablement. Algeria ratified the Torture Convention[28] on 12 September 1989 and both its constitution and legislation ban torture and other cruel, inhuman and degrading treatment.[29] Consequently, any amnesties in respect of torture would be incompatible with Algeria's duties under international law as well as its own national law.

The Civil Concord Law does not on its face appear to be invalid under international law or even to offend international law principles. Indeed, it is not so much an amnesty law as a regime for reconciliation that is tailored so that it remains within the strictures of international law.[30] The Law therefore represents a further step away from sweeping, blanket amnesties and may inform the debate on how a balance can be struck between the obligation to prosecute and the often countervailing interest in peace.

5. KEEPING 'AMNESTY LAWS' WITHIN THE FRAMEWORK OF INTERNATIONAL PRINCIPLES AND POLICY

It is clearly desirable from an international law perspective that anyone who commits an international crime or violates human rights should be held accountable. The arguments for accountability[31] revolve around deterrence, the establishment of an authoritative record of abuses, the responsibility to provide justice, the impossibility of reconciliation without justice, legitimacy, and strengthening the rule of law in new and fragile democracies. But the international interest in saving lives globally must sometimes be balanced against the national interest in saving lives locally. Fragile democracies may find it difficult to cope

27. *See* Report of Eminent Panel, *supra* note 8, at 7.
28. 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 ILM 1027 (1984).
29. *See* US Department of State, Bureau of Democracy, Human Rights, and Labour, *Algeria Country Report on Human Rights Practices for 1997*, 30 January 1998, at 4, http://www.waac.org/rep98/us_country_report.html.
30. However, the Civil Concord Law does not refer expressly to international law.
31. *See* Scharf, *supra* note 15, at 12-15; D.F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale Law Journal 7, 2537-2615 (1991); S. Landsman, *Alternative Responses to Serious Human Rights Abuses: of Prosecution and Truth Commissions*, 59 Law and Contemporary Problems 4, 81-92, at 83-87 (1996); N.J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 Law and Contemporary Problems 4, 127-152, at 128-129 (1996); L. Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20 Law and Social Inquiry 51-78, at 55-64 (1995).

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with the potentially destabilizing effects of trials which in any case impose unrealistic demands on the judiciary.

It has been said that "the policy debate has tended to view the imperatives of the rule of law as somehow fundamentally at odds with political reality. This approach is unwarranted. The law itself can accommodate the constraints surrounding transitional societies while securing crucially important values."[32] If amnesty laws are inevitable for peace and reconciliation, what features can ensure that they remain within the framework and strictures of international law and policy?

The general rule that there can be no mitigation of the duty to prosecute in respect of a growing list of international crimes will be taken as a starting point. The only possible exception to this rule[33] is a conditional amnesty[34] accompanied by the establishment of a genuine truth and reconciliation commission based on the South African model.[35] In the absence of such a truth commission, an amnesty regime which does not cover genocide, grave breaches and crimes against humanity[36] and which fulfils the following requirements may be acceptable from an international perspective.

First, the amnesty law must have been adopted in accordance with a proper and transparent legislative process and must not be self-serving. In other words, an amnesty that exonerates conduct attributable to the state, such as the Chilean amnesty decree,[37] will be invalid, whereas one that is granted by a state to its opponents, such as the Algerian Law, may be valid.

Second, in countries undergoing a transition from dictatorship to democracy, the law should be approved by a national referendum.[38] This was one of the bases upon which the Uruguayan Government defended the validity of its amnesty law. Uruguay also pointed to the fact that the law had been enacted for the

32. Orentlicher, *supra* note 31, at 2546-2547.
33. It is doubtful whether the duty can ever be mitigated in the case of genocide. Landsman states that the obligation to prevent and punish genocide "is of such importance that the interests of a single nation should never be allowed to thwart prosecution", *supra* note 31, at 90.
34. An amnesty is conditional if it can only be granted following an application for amnesty and a full investigation and disclosure of the facts.
35. Following an analysis of the South African model, Dugard puts forward eight minimum requirements for an acceptable truth commission, *supra* note 23, at 1012.
36. Scharf does not include crimes against humanity in this list, *supra* note 20, at 60. *Cf* D. Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 Law and Contemporary Problems 4, 197-230, at 228-229 (1996), who puts forward guidelines for amnesties covering serious violations of human rights in the Americas and states that: "Amnesties must not apply to crimes against humanity."
37. The blanket amnesty which Augusto Pinochet in effect granted to himself in 1978 was given virtually no consideration by the House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No 3), [1999] 2 All ER 97; *see also* the Inter-American Commission's 1986 guidelines discussed in Cassel, *supra* note 36, at 208.
38. While recognizing that some states are constitutionally hostile to referenda, it is suggested that a referendum may be necessary to ensure national consensus in the absence of a democratic government which takes account of popular sentiment.

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sake of the common good, within the context of a process of reconciliation, pacification and strengthening of democratic institutions.[39] Referendums may be misleading, however, as often people caught up in a savage conflict feel there is no alternative. As one voter in the Algerian referendum stated: "I am doing my duty for my country. All we need is peace."[40]

Third, the judicial independence of the courts applying the amnesty law must be assured and their powers of interpretation should not be unduly restricted by the executive and legislative powers. Given that the Algerian Law is not self-serving there does not seem to be any reason why the Algerian courts would suffer interference. However, the Report of the 'panel of eminent persons' states:

> we believe that energetic efforts should be made to entrench in society and all public institutions a state of legality and respect for the rule of law, as well as to encourage more political openness. It is important to work resolutely for a change of mentality in the judiciary, the institutions responsible for upholding human rights, in the police and the army, and in the Algerian body politic as a whole.[41]

Fourth, the granting of amnesties must be accompanied by investigations to document abuses and identify perpetrators. Therefore, some form of truth commission or commission of inquiry is necessary. Truth is being recognized as an important value in itself and locating the dead and disappeared may be as valuable to the victims as prosecutions.[42] This feature is apparently missing from the Algerian regime and it is not clear whether the National Human Rights Observatory will have a role to play.

Fifth, the victims should not be denied an effective legal remedy and compensation must be available. Ideally, the possibility of civil actions should not be excluded.[43] The Uruguayan amnesty law dismissed all criminal proceedings involving past human rights violations but allowed civil proceedings and differed in this respect from the Argentinian laws.[44] However, in practice the victims faced considerable obstacles in obtaining legal redress. An alternative would be for the state to create a compensation commission and fund to deal with the claims of victims. The Algerian Civil Concord Law allows victims to claim

39. The Inter-American Commission on Human Rights rejected these arguments without addressing the substance of Uruguay's submission, *see* Edelenbos, *supra* note 25, at, 10; *see also* Cassel, *supra* note 36, at 211-213.

40. H. Schneider, *Algerians Approve Rebel Amnesty Plan*, Washington Post Foreign Service, 17 September 1999.

41. *Supra* note 8, at 20.

42. Seventeen truth commissions have been established since 1974, generally operating as a substitute for prosecutions. *See* Dugard, *supra* note 23, at 1005, and P. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, 16 Human Rights Quarterly 600 (1994).

43. *Cf* the South African Truth and Reconciliation Act of 1995 which provides for an amnesty in respect of both criminal and civil liability and see further the decision of the South African Constitutional Court in *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa*, 1996 (4) SA 671 (CC), 691, in which the amnesty was upheld.

44. *See* Edelenbos, *supra* note 25, at 9.

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damages in criminal actions and seems to envisage some form of state control over the issue of compensation.

Sixth, in accordance with the Algerian example, persons wishing to benefit from an amnesty must be required to present themselves to a competent authority within a specific time limit. This compels anyone wishing to benefit from an amnesty to surrender and admit responsibility. It also allows the authorities to monitor the effectiveness of the process and to compile records.

Seventh, the amnesty regime should be tailored to reflect the gravity of the crimes that are alleged to have been committed. The Civil Concord Law provides a good example of how this may be done by introducing the concept of probation as part of a three tier system. Orentlicher has suggested that an amnesty system may be acceptable so long as those most responsible for atrocities are punished[45] and she puts forward certain selection criteria based on degrees of culpability.[46] State practice could be said to support such an approach in view of the fact that the focus of the International Criminal Tribunals for the former Yugoslavia and Rwanda is on prosecuting those at the top of the chain of command, leaving national systems to deal with vast numbers of lesser criminals. However, this practice may be based on practical, rather than policy considerations.[47]

Finally, it is suggested that a person who has been involved in human rights abuses and who has been granted amnesty should not be rewarded with a position in the new government. Following the Lomé Peace Agreement in Sierra Leone which included a broad amnesty, eight governmental positions were granted to the members of the Revolutionary United Front of Sierra Leone (RUF), a rebel group responsible for serious and widespread violations of international humanitarian law.[48] Such a move risks enabling those who have already committed crimes to use the state apparatus to commit further crimes and completely ignores the goals of individual and collective deterrence.[49] These argu-

45. Orentlicher, *supra* note 31, at 2599.
46. *Id.*, at 2602-2603.
47. But *see* Bassiouni, *supra* note 26, at 20, who argues that: "As a matter of policy, international prosecutions should be limited to leaders, policy-makers, and senior executors; however, this does not preclude prosecutions of other persons at the national level, which may be necessary to achieve particular goals." Kritz states that it is for reasons of both practicality and policy that the Tribunals have limited their reach to a relatively small number of people, (*supra* note 31, at 133). He goes on to say that: "A symbolic or representative number of prosecutions of those most culpable may satisfy international obligations [...]," *id.*, at 134. *See further* Landsman, *supra* note 31, at 85-86, on the problems of selection.
48. *See* McDonald, *supra* note 26, at 2-3.
49. Lustration is controversial as it can lead to stigmatization of a group and produce cases of individual injustice. However, large-scale purges may be distinguishable from a refusal, on an individual basis, to reward criminal behaviour with an official position. *See further* Huyse, *supra* note 31; M.S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 Law and Contemporary Problems 4, 181-196 (1996); Bassiouni, *supra* note 26, at 21-22; Kritz, *supra* note 31, at 138-141.

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ments aside, one of the major difficulties in Algeria is that the problem of political reintegration has not been solved. However, it is to be hoped that the democratic process is capable of providing the solution.

The international community has a responsibility not to endorse amnesties that do not contain all or most of the features that have been discussed[50] and it must take care not to neutralize its efforts to uphold the value of deterrence in, for example, the former Yugoslavia, by giving sweeping amnesties elsewhere in the world its imprimatur. Moreover, there should be no asylum or safe haven abroad for leaders responsible for orchestrating violence as this would defeat the purpose of reintegration and reconciliation. In Haiti an amnesty was granted to members of the military as part of the 1994 peace accords which were negotiated under the auspices of the United States and the United Nations. The United States also arranged for some of the top military leaders to receive political asylum in Panama. The amnesty led to peace but it may be questioned what sort of message the process sent out to violators of human rights in other conflicts.[51]

6. Effect of the Civil Concord Law in Algeria and in International Law

It is estimated that eighty percent of the Algerian rebels had disbanded and surrendered upon the expiry of the amnesty deadline in January 2000. However, the GIA vowed to fight until the end and the killings have continued. Bouteflika's announcement that: "[w]ithout any doubt [...] the problem is ninety-nine percent solved, certainly inasfar as weapons and arms are concerned"[52] may have been premature.

Most Algerians seem to favour a middle ground between a military dictatorship and an Islamic dictatorship[53] but there is still no guarantee that a genuine democracy based on religious and political tolerance will be the final result of Bouteflika's peace plan. However, the Civil Concord Law, with its emphasis on the rehabilitation and reintegration of insurgents has the potential to contribute to a lasting peace. It remains to be seen whether the system envisaged in the Law will be supplemented by an investigation into the acts of government agents. Now that the government has established itself as the peacemaker with little interference from the United Nations or the international community gen-

50. The United Nations has helped to negotiate and/or endorsed amnesties in Cambodia, El Salvador, Haiti, South Africa and Sierra Leone.

51. The Haitian amnesty, which covered crimes against the security of the state, was accompanied by a truth commission and a program of victim compensation and civil redress, and arguably it is the manner in which the amnesty was imposed that is more objectionable than the amnesty itself. *See* Scharf, *supra* note 15.

52. *Algeria says thousands of rebels surrendered*, Reuters, 1 February 2000.

53. *See* P. St. John, *Insurgency, Legitimacy and Intervention in Algeria*, Canadian Security Intelligence Service Commentary No. 65 (Jan. 1996).

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erally, it is perhaps unlikely that members of the security forces will be put on trial for torture. It has been said that the crimes committed by the insurgents cannot be equated with the excesses of government agents.

> What the Islamic terrorists have committed are crimes against the human species. Violations of human rights are sometimes committed by Governments. But the acts committed by the terrorist Islamic groups, are crimes against humanity. In Algeria the power in place is not quite democratic and we fight and struggle against it for more democracy. But that does not mean that we want the Afghan veil. I tell you this as a woman. We cannot have dialogue with such terrorists. We cannot condemn women to their vision of society. We would not be compelled to live like that.[54]

But torture is not justified simply because the defendant can argue *tu quoque*. In order to uphold the rule of law and ensure that Algeria does not remain a country of fear, it may be necessary for the authorities to accept responsibility for their own contribution to the violence. The authorities must also ensure that the probation regime leads to true reintegration and not simply repression.

Amnesty laws have no clear extra-territorial effect. This means that if a national from Algeria who has been granted amnesty travels abroad, there is apparently nothing to stop a national court in another country from trying that person for international crimes under the principle of universal jurisdiction via a national law incorporating international law. However, an amnesty will be a relevant factor in any subsequent prosecution[55] or decision to prosecute.[56] This state of affairs is in some respects logical. If the goal of amnesties is reconciliation, then anyone who is granted an amnesty should be encouraged to contribute to this cause and be rehabilitated into a peaceful society. In other words, if a crime is committed in a particular society and that society is willing to forgive and rehabilitate without instituting criminal proceedings then the cycle is complete. But the international community should not be prevented from upholding and endorsing universal values at the international level and will, in any event, only have an interest in prosecuting where the crimes involved are heinous or the nationals of a third state are victims.

The path to peace and reconciliation chosen by a state is appropriately viewed as a matter of international concern and since the evidence shows that amnesties usually have the desired effect, international law may need to find ways of accommodating them while encouraging the trend in support of man-

54. Report of Eminent panel, *supra* note 8, at 16-17.

55. It has been suggested that amnesties may constitute a legitimate ground for reduction of sentence, *see* M.T. Kamminga, *The Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences: Final Report*, International Law Association 13 (2000).

56. The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, does not refer to amnesties. However, an amnesty may be a relevant factor in the Court's determination as to the admissibility of a case under Art. 17(1)(b), alternatively, the Prosecutor could decide not to proceed under Art. 53(1)(c) if an investigation would not serve the interests of justice.

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datory prosecution. This trend may have been important in ensuring that the second eight year war in Algeria is not marked by the same degree of impunity as the first. It can only be hoped that this war will be the last.

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