AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY

This edited volume brings together well-established and emerging scholars of transitional justice to discuss the persistence of amnesty in the age of human rights accountability. The volume attempts to reframe debates, moving beyond the limited approaches of truth versus justice or stability versus accountability in which many of these issues have been cast in the existing scholarship. The theoretical and empirical contributions in this edited book offer new ways of understanding and tackling the enduring persistence of amnesty in the age of accountability. Authors use social movement, ideational, legal, path-dependent, qualitative case study, statistical, and cross-national approaches in their chapters. In addition to cross-national studies, the volume encompasses eleven country cases of amnesty for past human rights violations, some well-known and others with little scholarly or advocacy exposure: Argentina, Brazil, Cambodia, El Salvador, Guatemala, Indonesia, Rwanda, South Africa, Spain, Uganda, and Uruguay. The volume goes beyond describing these case studies and considers what we learn from them in terms of overcoming impunity and promoting accountability to contribute to improvements in human rights and democracy.

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Amnesty in the Age of Human Rights Accountability

COMPARATIVE AND INTERNATIONAL PERSPECTIVES

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Foreword

Juan E. Méndez

I am immensely grateful for the opportunity the editors of this book have given me to contribute this foreword. More than that, I am proud to be part of an effort to bring about an honest and thoughtful conversation about peace, justice, and reconciliation, a conversation that in the past has been marked by useless recrimination and accusation. Just as peace should not be pursued at the cost of forcing victims to abandon all hope of seeing justice done, human rights activists also have the responsibility to reckon with the fact that war itself is the ultimate violation of human dignity and the occasion for more and more tragic abuses. This book elevates the discussion well above where it has been until now.

The body of international law on amnesties has evolved significantly over the last quarter century. First, the era of complete and absolute deference to the state as it reckons with how to deal with serious human rights violations and international crimes has come to a close.[1] Second, a state is no longer entitled to exercise absolute discretion regarding the manner in which it chooses to address the legacies of its past when these amount to grave human rights violations and international crimes.[2] Newly formed democratic governments looking to implement clemency and reconciliation measures can no longer do so through amnesties that prevent victims from enjoying certain fundamental rights or that further a state of impunity.[3] Instead, in recent decades, countries have implemented transitional justice mechanisms to address massive and systematic violations of fundamental rights, including criminal prosecutions, truth commissions, reparations programs, and institutional reform.[4]

[1] Garth Meintjes and Juan E. Méndez, "Reconciling Amnesties with Universal Jurisdiction," *International Law FORUM du Droit International* 2 (2000): 76.

[2] Ibid., 76.

[3] Ibid.

[4] "What Is Transitional Justice?" The International Center for Transitional Justice, accessed September 11, 2011, http://ictj.org/about/transitional-justice.

The author wishes to acknowledge the invaluable research and writing support of Ms. Catherine Cone.

These innovative state practices amount to a paradigmatic shift in the way societies reckon with legacies of human rights violations.

The evolution of international law and policy on amnesties is grounded in recent history; it shows that blanket amnesties exempting those responsible for atrocious crimes are not a necessary condition for achieving peace.[5] If experience has taught the international community a valuable lesson, it is that these types of amnesties often fail to secure peace and at times embolden their beneficiaries to commit further crimes.[6] Moreover, international experience and international human rights law have served to reinforce each other in supporting the thesis that amnesty is not a necessary prerequisite for peace.[7] Countries have repeatedly relied on international human rights principles in choosing to restore justice rather than to leave unsettled accounts following the commission of atrocities in their territories.[8] At the same time, the varied country approaches seeking to meet the demands of truth and justice further enriched and developed the practices and experiences of international human rights law.[9] Perhaps the most significant change in many schools of thought regarding amnesties is that when properly pursued, justice and accountability measures can help ensure a sustainable peace.

Amnesties are now regulated by a substantial body of international law that sets limits on their permissible scope.[10] "Most importantly, amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights are inconsistent with States' obligations under various sources of international law as well as with United Nations policy."[11] Amnesties are now deemed contrary to international law when they restrict the rights of victims of violations of human rights or of war crimes to an effective remedy and reparations, and the right of victims and society to know the truth about the circumstances surrounding such abuses.[12]

The sweeping changes in the law applicable to amnesties are due largely in part to the principles of accountability that have emerged in international human rights law. In the new "age of accountability," explained quite adeptly by Kathryn Sikkink in her chapter in this book, international human rights law recognized as an

[5] United Nations Office of the High Commissioner for Human Rights (OHCHR), *Rule-of-Law Tools for Post-Conflict States, Amnesties*, United Nations, HR/PUB/09/1 (New York and Geneva: OHCHR, 2009), accessed September 8, 2011, http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf.
[6] Ibid.
[7] Meintjes and Méndez, "Reconciling Amnesties with Universal Jurisdiction," 77.
[8] OHCHR, *Rule-of-Law Tools*.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid.

international norm what was once viewed only as an emerging principle – namely, that states have an affirmative duty to investigate and punish perpetrators.[13] The state's obligation to investigate, prosecute, and punish arises in cases of grave breaches of humanitarian law or human rights violations and following the commission of international crimes against a narrow class of fundamental rights.[14] International crimes include war crimes, crimes against humanity, enforced disappearances, genocide, and torture.[15] Within the transitional justice framework, these state obligations coexist with even more specific duties to prosecute and punish international crimes; uncover the truth and disclose any information to families and society pertaining to these crimes; provide redress and reparations to victims, including guarantees of nonrepetition; and implement comprehensive institutional reforms, which in some cases requires removing known perpetrators from their institutional ranks.[16]

As relates to grave breaches in international armed conflict, the duty of the state to investigate and prosecute was set forth early in the 1949 Geneva Conventions.[17] Two other treaties, the Convention on the Prevention and Punishment of the Crime of Genocide[18] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[19] entail additional obligations for state parties to prosecute the crimes of torture and genocide. Most recently, the 2006 International Convention on Enforced Disappearances[20] declared that states are required to criminalize enforced disappearances and to take necessary measures

[13] Kathryn Sikkink's chapter references the rise of international treaties providing for these state obligations, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Genocide Convention of 1948. Sikkink also discusses the influential role played by various international courts in interpreting and declaring what is required by states in these cases. Those findings are more thoroughly developed in Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: Norton, 2011).

[14] Meintjes and Méndez, "Reconciling Amnesties with Universal Jurisdiction," 81.

[15] Inter-American Court of Human Rights, Case of *Anzualdo Castro v. Perú*, Merits, Judgment of September 22, 2009, Ser. C, No. 202, para.59. See also Meintjes and Méndez, "Reconciling Amnesties with Universal Jurisdiction," 79–81; Antonio Cassesse, *International Law* (New York: Oxford University Press, 2005), 436.

[16] Meintjes and Méndez, "Reconciling Amnesties with Universal Jurisdiction," 82.

[17] See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 75 U.N.T.S. 85, art. 50; Geneva Convention Relative to the Treatment of Prisoners of War opened for signature, August 12, 1949, 75 U.N.T.S. 135, art. 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 U.N.T.S. 287, art. 146.

[18] Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution 260 A (III), adopted December 9, 1948, 78 U.N.T.S. 277, arts. 1–3.

[19] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/39/51 (1984), entered into force June 26, 1987, arts. 2, 4, 6.

[20] The International Convention for the Protection of All Persons from Enforced Disappearances, December 20, 2006, UN Doc. A/RES/61/177; 14 IHRR 582 (2007), arts. 4, 7.

to extradite or prosecute – including a thorough and effective investigation of the crime – any person responsible for committing, ordering, soliciting, inducing, or participating in an enforced disappearance. A number of human rights treaties also obligate states to ensure enumerated rights set forth in these treaties and to provide an effective remedy to individuals whose rights were violated under the treaty in question.[21]

The international community universally recognizes that states fail to meet their obligations to investigate, prosecute, and punish when they grant certain types of amnesties. For this reason, blanket amnesties, unconditional amnesties that have the effect of precluding investigation of international crimes, are a violation of a state's obligations under international law.[22] In *Gomes Lund v. Brazil*, as Paulo Abrão and Marcelo Torelly discuss in their chapter on Brazil in this volume, the Inter-American Court of Human Rights (IACtHR) defined the state's obligations in cases of enforced disappearances as a duty to investigate without delay and to do so in a serious, impartial, and effective manner.[23] To be effective, the "[S]tate must establish an appropriate normative framework to develop the investigation … [It] must guarantee that no normative or other type of obstacles prevent the investigation of said acts…."[24] Because Brazil had applied a broad amnesty law, the Court found that the state had failed to investigate and punish serious human rights violations, ultimately preventing the next of kin of the disappeared from being heard before a judge and knowing the truth.[25] According to the Court, the state has a responsibility to remove any law or similar measure serving as a legal roadblock, including amnesty laws.[26] Otherwise, the state would effectively prevent the investigation of serious human rights violations, leading to the perpetuation of impunity, the defenselessness of victims, and the inability of the next of kin from knowing the truth.[27] The chapter by

[21] International Covenant on Civil and Political Rights (ICERD), General Assembly Res. 2200 A (XXI), adopted December 16, 1966, UN GAOR, 21st sess., Supp. No. 16, UN Doc. A/6316 (1967), 171; the American Convention on Human Rights, 1144 U.N.T.S. 123, entered into force July 18, 1978; the European Convention for the Protection of Human Rights and Fundamental Freedom, November 4, 1950, CETS No.: 005.

[22] See OHCHR, *Rule-of-Law Tools*, 8–9 (noting that both blanket amnesties and pseudo amnesties, laws that when enacted have the same legal effect as amnesties despite not being directly labeled amnesties, are prohibited under international law).

[23] Inter-American Court of Human Rights, *Gomes Lund v. Brazil*, Merits, Judgment of November 24, 2010, Ser. C, No. 219, 45, para. 108. See also Inter-American Court of Human Rights, *Manuel Cepeda Vargas v. Colombia*, Merits, Judgment of May 26, 2010, Ser. C, No. 213, paras. 117–19 (explaining that the duty to investigate extra-judicial execution implies determining patterns of collaborative action and all individuals who participated together with corresponding responsibilities).

[24] *Gomes Lund v. Brazil*, 45, para. 109.

[25] Ibid., 69, para. 172.

[26] Ibid., 69–70, para. 173. See also Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile*, Merits, Judgment of September 26, 2006, Ser. C, No. 154, 52, para.114.

[27] *Gomes Lund v. Brazil*, 69–70, para. 173.

Par Engstrom and Gabriel Pereira on Argentina and Francesca Lessa's chapter on Uruguay in this volume further discuss the impact of Inter-American Court rulings in those countries' cases.

Since states can no longer unilaterally decide that they will abdicate their roles in effectively investigating and prosecuting international crimes, other states may meet these obligations under the principle of universal jurisdiction.[28] Universal jurisdiction has gained valuable ground as a means of allowing the international community to intervene and prevent impunity for international crimes. Paloma Aguilar shows in her chapter in this volume how Spain has played a key role in advancing universal jurisdiction, even while failing to fulfill its own responsibilities to address impunity. The principle of universal jurisdiction empowers any state "to bring to trial persons accused of international crimes regardless of the place of commission of the crime, or the nationality of the author or of the victim."[29] Universal jurisdiction can be implemented in one of two ways: (1) a state can prosecute the perpetrator so long as the accused is in that state's custody; or (2) a state may prosecute the perpetrator regardless of the perpetrator's nationality, the location of the commission of the crime, or whether the state has custody over the perpetrator.[30] The interest of the international community in breaking the cycle of impunity is a recognition of the inseparability of justice and peace. This recognition is also at the heart of the creation of ad hoc war crimes tribunals for the former Yugoslavia and Rwanda and the adoption of the Rome Statute for an International Criminal Court (ICC).[31]

However, some countries stand out for a middle ground approach whereby the state chooses neither to bury its past nor to imprison all perpetrators, but makes a good faith effort to confront its past.[32] Inevitably, the effort includes truth telling and reparations but also a promise of immunity from prosecutions to those who contribute to the knowledge of the past and to reconciliation. The extent to which such middle ground complies with international standards depends largely on whether, both as conceived and as applied, measures of clemency have the effect of crystallizing impunity for international crimes.[33] It follows, therefore, that not all amnesties violate international law. The persistence of amnesties, documented cross-nationally in studies by Louise Mallinder and by Tricia Olsen, Leigh Payne, and Andrew Reiter

[28] See Cassesse, *International Law*, 451–2.
[29] Ibid., 451.
[30] Ibid., 452.
[31] See S.C. Res. 827, para. 5, UN Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, para. 6, UN Doc. S/RES/955 (Nov. 8, 1994); Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].
[32] Meintjes and Méndez, "Reconciling Amnesties with Universal Jurisdiction," 77.
[33] Garth Meintjes and Juan E. Méndez, "Reconciling Amnesties with Universal Jurisdiction – A Reply to Mr. Phenyo Keiseng Rakate," *International Law FORUM du Droit International* 3 (2001): 47–9.

in this volume, may reflect the ways countries have found legal loopholes through which to employ amnesties for past violations.

Amnesties are sanctioned and often called for directly under international law. As Mark Freeman and Max Pensky discuss in their chapter in this volume, Protocol II of 1977 states that those in power following a noninternational armed conflict can and should provide a broad amnesty to persons who participated in the armed conflict as well as those otherwise deprived of their freedom of movement because of the armed conflict.[34] This language has been authoritatively interpreted to mean that the states may grant amnesties for participating in the conflict but may not condone violations of international law in cases of international crimes or grave breaches of human rights and humanitarian law.[35]

South Africa presents one of the most well-known examples of a carefully crafted amnesty that falls into a middle ground, described by Antje du Bois-Pedain in this volume. The new government under the African National Congress (ANC) struck a balance between responding to the former government's security force's insistence on amnesty as a precondition for transition and rejecting the choice to bury South Africa's past.[36] Rather than adopt a blanket amnesty, the ANC chose to implement a different kind of amnesty that offered conditional clemency ("immunity") but only on a much narrower set of criteria.[37] The Truth and Reconciliation Commission's Amnesty Committee specifically assessed individual eligibility for amnesty based on two factors: first, whether the criminal act was associated with a political objective committed in the course of the conflicts of the past; and second, whether the applicant made a full disclosure of all relevant facts.[38] In this way, the Truth and Reconciliation Commission lived up to its mandate by considering the perspectives of the victims and the motives and views of the perpetrators.[39] The downsides to the amnesty, however, included granting immunity to civil liability; a lack of credible threat of prosecution reinforced by an overly reconciliatory rhetoric; an inability of ANC officials to delve deeply into the past particularly as related to torture in training camps; and, most important, the utter lack of sincere

[34] Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, art. 6 (5).

[35] Afghanistan Independent Human Rights Commission, "The Legality of Amnesties" (discussion paper, International Centre for Transitional Justice, Afghanistan Human Rights Commission, February 21, 2010), accessed January 3, 2012, http://www.unhcr.org/refworld/publisher,AIHRC,,,4bb31a5e2,0.html.

See also Letter by Toni Pfanner, Legal Director, ICRC, to Cassel, dated April 15, 1997: quoted in Douglass Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities," *Law and Contemporary Problems* 59 (1996): 218.

[36] Meintjes and Méndez, "Reconciling Amnesties with Universal Jurisdiction," 88.

[37] Ibid., 78.

[38] Ibid., 93.

[39] Ibid., 89.

remorse displayed by most of the former government officials, even those few who actually applied for amnesty.[40]

Interesting, too, although the South African–style "conditional amnesty" was regarded in 1994 as compliant with international law, the rapid evolution of international law since then suggests that today, even a *conditional* amnesty would be inconsistent with international law if it covered war crimes, crimes against humanity (including disappearances), or torture.[41] It may be for this reason that despite the important precedent set by the South African TRC experience, its example has been followed by other states with respect to truth telling, but not with respect to limited or conditional amnesty.

As the South Africa case illustrates, varying interpretations on the legality of amnesties arise when amnesties do not amount to a full pardon for the most serious crimes but instead are offered on a more limited scope. In assessing the legality of such amnesties, the international community should focus on two factors: (1) the criteria by which the amnesties were granted, and (2) the manner in which the criteria were applied in each case.[42] For example, amnesties provided to perpetrators of political crimes like sedition are valid under international law because the criteria for eligibility would be narrowly tailored to a kind of offense much lesser in degree than international crimes.[43] The international community, however, would still have to conduct a second inquiry into the manner in which such an amnesty is applied. In the example previously mentioned, if a state grants the benefits of an amnesty for political crimes to a large group of demobilized individuals in a haphazard manner, the amnesty would be void because it was applied indiscriminately. Thus a government seeking to apply a limited amnesty would also need to devise a set of mechanisms providing for thorough investigations into who deserves the benefits of the law based on how these actors conducted themselves. Such procedures go a long way in weeding out perpetrators who might confess to committing political crimes for the sake of receiving a pardon even when they transgressed beyond the limits of such crimes.

The two-step inquiry required to assess the validity of a limited amnesty under international law often involves complicated exercises in line drawing. In devising suitable criteria for eligibility, states may also take into account the levels of complicity or degree to which an actor played a decisive role in a crime. International

[40] Ibid., 90–2.

[41] See John Dugard, "Reconciliation and Justice: The South African Experience," *Transnational Law & Contemporary Problems* 8 (Fall 1998): 301 (highlighting the international community's support and approval of the South African TRC). See also OHCHR, *Rule-of-Law Tools*, 11.

[42] Meintjes and Méndez, "Reconciling Amnesties with Universal Jurisdiction," 93.

[43] In this context, political crimes include nonviolent offenses of political opposition as well as rebellion or sedition as crimes in domestic law consisting of rising up in arms against the state, as long as the rebels have not also committed violations of the laws of war.

judgments on a particular amnesty's validity often diverge here. However, certain baselines of amnesty-worthy conduct should be drawn to ensure that perpetrators do not receive benefits for actions that crossed the line from lesser to more serious crimes. For example, a guard who was a lookout at a prison where torture was known to occur cannot be said to have played a direct role in torturing. Thus, this actor could be considered for a limited amnesty. However, a low-level guard who did directly torture victims but who claims in his defense that he merely followed orders should not receive an amnesty.

The ICC adds yet another layer of complexity by drawing its own line at cases focused on the perpetrators who bear the highest level of responsibility for international crimes. In the fight to end impunity, the ICC operates under a two-tiered approach.[44] On the one side, the Court focuses its limited resources on prosecuting leaders who bear the most responsibility for the crimes. On the other, the Court "encourage[s] national prosecution for lower-ranking perpetrators and works with the international community to ensure that the offenders are brought to justice by some other means."[45] Therefore, that the ICC focuses its efforts on individuals bearing the highest responsibility does not mean countries themselves are released from their duty to investigate and prosecute. Moreover, the jurisdiction of the ICC is based on the principle of complementarity whereby the Court complements the investigations and prosecutions of the state over the most serious crimes, asserting sole jurisdiction over these crimes only when the state is unwilling or unable to prosecute and investigate.[46] The Rome Statute does not directly mention the effect of domestic amnesties. However, the Rome Statute permits a reasonable inference that the ICC's jurisdiction is not barred by these measures unless such amnesties conform to international expectations.[47] Depending on how they are drawn and actually applied, amnesties can be indicative of a state's willingness or ability to investigate and prosecute, which in turn can influence the ICC's discretion on whether or not to exercise its own jurisdiction.[48] Even though the Rome Statute does not by its terms prohibit amnesties, it is clear that the ICC panel will be guided by international law and will not be bound by domestic decisions on amnesty when it makes a judgment under the complementarity principle.

[44] International Criminal Court, "Paper on Some Policy Issues before the Office of the Prosecutor," International Criminal Court, page 3, accessed January 3, 2012, http://amicc.org/docs/OcampoPolicyPaper9_03.pdf.

[45] Ibid.

[46] See Rome Statute, arts. 1, 17 (indicating that investigating and prosecuting crimes outside of those of the most serious international concern continue to rest under each state's international law obligations regardless of how or whether the state proceeds with investigations and prosecutions of the most serious crimes).

[47] Meintjes and Méndez, "Reconciling Amnesties with Universal Jurisdiction," 83–4.

[48] Ibid., 84.

Though international law provides clear boundaries prohibiting broad amnesties, this does not foreclose the possibility of using limited amnesties as a mechanism for resolving international and internal conflicts. Limited amnesties are not only consistent with international law; they are also an important tool in the conflict resolution process. It is for this reason that the international community should not only accept them but actively promote them, so long as these amnesties do not serve as a disguise for impunity for international crimes. For example, northern Uganda enacted the Uganda Amnesty Act, which applied to those who voluntarily left the Lord's Resistance Army (LRA).[49] This is the kind of amnesty the international community should support because for the most part LRA soldiers were forcibly recruited as children, which makes these soldiers victims as well as perpetrators.[50] However, Uganda and the international community should implement appropriate screenings to ensure no impunity is granted for major crimes committed when these soldiers were already adults and not acting under coercion.

Besides the move toward limited amnesties, evolving amnesty law has also contributed to the ongoing development of the justice and peace debate. On the one hand, the new international paradigm under which general amnesties are banned and limited amnesties are considered and promoted, but only after undergoing careful scrutiny, makes conflict resolution more difficult. On the other hand, it forces the parties and the mediators to search for solutions that consult the legitimate interests of victims and not just those of the perpetrators of abuse. A first step is to recognize that the terms of a peace agreement cannot be dictated only by the parties to an armed conflict. Although in the end those armed actors will have to agree to lay down their arms, the innocent victims of the conflict must also be given a voice in the process. Civilian populations have borne the brunt of the fighting and its excesses and will have to live with the consequences of an unfair and unjust peace. An unjust peace, by definition, is one that leaves innocent victims without any recourse to obtain redress for what they have suffered. Peace achieved in a manner that consults the legitimate interests of all actors in peace but also the equally legitimate interests of victims in justice may have a better chance of lasting. If anything, the changing stance toward amnesty can further the idea that conflict resolution should be about reaching terms that make justice and peace reinforce each other within a particular conflict. Amnesties as part of a peace deal require an approach that mirrors the larger pattern of addressing the nature of each conflict on a case-by-case basis when attempting to reconcile and promote the demands of both justice and of peace.

[49] OHCHR, *Rights of the Child*, UN H.C.H.R. *Report on Mission to Assess the Situation on the Ground with Regard to the Abduction of Children from Northern Uganda*, U.N. Doc. E/CN.4/2002/86 (OHCHR: November 9, 2001), para. 33 [hereinafter *Rights of the Child Uganda Report*].

[50] Ibid., para. 15.

Within many of these case-by-case approaches, reconciliation is often described as an end goal of conflict resolution. Properly understood, reconciliation is a worthy objective of transitional justice and conflict resolution. This, however, depends on how reconciliation is understood and implemented. When reconciliation is understood as intercommunal talks about property restitution, return to villages, water rights, or grazing rights, it should be part of the peace-making process. These kinds of processes help separate the perpetrators of crimes from the communities they claim to represent, thereby avoiding the cycle of vengeance that can foster new deadly conflict even generations later. It follows that reconciliation in this sense is most appropriate to the resolution of conflicts marked by a distinctive ethnic, religious, or racial character, a discussion Phil Clark pursues in his chapter on Rwanda and Uganda in this volume. However, even in those cases reconciliation cannot be a code word for impunity. In fact, actual reconciliation (between communities) cannot proceed while impunity reigns because it promotes distrust and vindictiveness.

Moreover, as stated originally, amnesties should not be construed as prerequisites for peace. In several instances peace has been achieved without blanket amnesties, including the Dayton accords, Cote d'Ivoire, and Colombia. Yet conversely, even agreements with blanket amnesties have held as in the case of Mozambique. Other amnesties did not result in an end to fighting or an end to mass violations like in Sierra Leone and Angola.[51] Today, however, given the clear demarcation of what constitutes an amnesty against international law, the tougher questions focus on whether other types of legislation, implementing peace agreements or peace enforcement mechanisms, serve as the current and functional equivalents of amnesty, a discussion that Emily Braid and Naomi Roht-Arriaza engage in this volume with regard to Central America.

The obligation to prosecute international crimes cannot be separated from the obligation to conduct such trials with absolute respect for the internationally recognized standards of due process and fair trial. It follows, therefore, that in order to prosecute such crimes a state must have a functioning independent and impartial judiciary. Countries emerging from deadly conflict are seldom equipped with such institutions, and time is needed to rebuild them or create them from scratch. For that reason, immediate prosecutions are not to be expected and may be a bad idea. In that context, transitional justice mechanisms can serve the valuable purpose of sequencing the various measures to be implemented. For example, a truth telling exercise can provide an accurate picture of the universe of crimes and of victims

[51] OHCHR, *Rule-of-Law Tools*, 3 (citing the amnesty provision of the 1999 Lomé Peace Agreement as an example of an amnesty that failed to end the armed conflict in Sierra Leone and did not serve to deter further atrocities).

while the state builds courts and prosecutorial offices eventually able to turn those findings into evidence for proper prosecutions.

In some peace accords, sequencing has been discussed in the context of amnesties and in recognition that some amnesties are impermissible under international law. If, however, the final peace accord is not clear on the issue of sequencing, the resulting ambiguity can pose interesting challenges for the international community. On the one hand, sequencing can be interpreted as a future commitment on the part of the state to prosecute when appropriate conditions are achieved; on the other hand, the silence regarding amnesty, or rather the lack of specific endorsement of amnesty, when coupled with a lack of or delay in action, will be understood (especially by perpetrators) to function like a broad implicit amnesty, as Patrick Burgess discusses in relationship to Indonesia in this volume.

Also, a distinction between how sequencing operates in domestic prosecutions as opposed to ICC prosecutions may be necessary.[52] If the ICC has jurisdiction to act in the specific scenario, there is no justification for sequencing because the ICC is already an impartial and independent court that can render fair trials. Sequencing can be fatal to ICC jurisdiction because of the difficulties involved in investigating crimes and the risk of loss of evidence during a suspension of ICC activities. In addition, sequencing affects the independence and impartiality of the ICC because it subjects it to decisions of political organs and for that reason, political decisions affecting ICC jurisdiction should be kept to a minimum. With respect to domestic prosecutions, on the other hand, some reasonable sequencing can be helpful because the state needs time to restore the credibility and legitimacy of its judiciary, and a period of truth telling can lay the groundwork for later prosecutions.

In addition to sequencing, some countries, like Colombia, have chosen to implement a transitional justice framework that operates as an alternative sentencing law. The framework, known as the Justice and Peace Law (Ley 975),[53] provides reduced sentences – five years to eight years – to demobilized paramilitaries bearing the highest responsibility for grave crimes committed in the course of the internal armed conflict in exchange for the beneficiary's "contribution to the attainment of national peace, collaboration with the justice system (including a full confession exposing the truth of the events), reparation for the victims,

[52] Art. 16 of the Rome Statute for an International Criminal Court allows the Security Council, in exercise of its powers to ensure peace and security of nations under Chapter VII of the UN Charter, to suspend ICC activities in a given conflict for renewable periods of one year at a time. In suggesting such a measure for the conflict in northern Uganda, for example, it has been argued that it would allow the peace process to go forward, thereby sequencing peace and justice.

[53] Ley 975 of 2005, Diario Oficial No. 45.980 (julio 25, 2005), accessed on January 3, 2012, http://www.fiscalia.gov.co/justiciapaz/Documentos/LEY_975_concordada.pdf. An unofficial English translation of Law 975 is available at http://www.mediosparalapaz.org/downloads/Law_975_HRW_and_AI.rtf.

and adequate re-socialization."[54] This kind of reduced sentencing framework for serious international crimes does not on its face conflict with international law or equate to an amnesty contrary to international law because the law takes into account the interests of victims and society. Whether the law is proportional to the severity of the crimes committed is an issue that the IACtHR left open.[55] So long as these kinds of frameworks are carefully monitored to ensure that their benefits are afforded properly, meaning only to those perpetrators who genuinely contribute to truth building, reparation, and peace efforts, then these laws can avoid perpetuating impunity.

The Colombian model was made to comply with international law mainly by a decision of the country's Constitutional Court that amended some key features in the law passed by the congress.[56] As applied until now, however, the Colombian scheme has been an utter disappointment to most victims of paramilitary violence and those interested in reconciling demobilization with justice. The main perpetrators have been extradited to the United States on drug charges and have thereby lost any incentive to contribute to truth, justice, or reparations in Colombia. The process by which the prosecutors and courts decide whether to apply the benefits of the law (a process that should allow for active participation by victims) has been mired in interminable bureaucratic complications, leaving most demobilized paramilitaries outside of the framework of the Justice and Peace Law. These paramilitaries who do not fall under the Justice and Peace Law should be tried under ordinary criminal jurisdiction for their crimes or otherwise risk perpetuating a cycle of impunity. In addition, many perpetrators of egregious violence against civilians have spent years in comfortable internal exile on lands that they confiscated by force while others enjoy house arrest rather than face time in prison. The most notorious paramilitary groups have indeed demobilized, but some have rearmed and new armed groups of a similar kind have emerged.[57] Ultimately, a lasting peace in Colombia is far from accomplished.

[54] Ibid., art. 1.

[55] See Inter-American Court of Human Rights, *Case of the Rochela Massacre v. Colombia*, Merits, Judgment of May 11, 2007. Ser. C, No. 59, para. 196 (highlighting that punishment imposed by the state is intended to be proportional to the rights recognized by law and the level of culpability of the perpetrator. Culpability turns on the nature and gravity of the acts committed. In choosing the appropriate punishment, the state needs to determine specific reasons for the punishment and "every element which determines the severity of the punishment should correspond to a clearly identifiable objective and be compatible with the Convention").

[56] Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 2006, Sentencia C-370/06 (Colom.), accessed January 3, 2012, http://www.fiscalia.gov.co/justiciapaz/Documentos/SentenciaC-370.pdf.

[57] Tadeo Martínez, "La dura guerra contra las bacrim," *Semana*, April 20, 2011, accessed January 3, 2012, http://www.semana.com/nacion/dura-guerra-contra-bacrim/155461–3.aspx (referring to the newly emerged armed group phenomena known as *bacrim* – criminal gangs – that surfaced following the demobilization of the AUC, the former umbrella paramilitary group).

The evolution of international law has made great strides in recent decades. Today, certain types of amnesties are entirely prohibited while others that are more limited in scope are touted as valuable contributions to peace building efforts. Limited amnesties, as Ronald C. Slye mentions in his chapter in this book, can serve as valuable conflict resolution tools. In those cases, it is the duty of conflict resolution specialists and of human rights activists alike to promote and advocate solutions that harmonize the aspirations of the civilian population to peace and justice. It should be clear, however, that some countries suffered mass atrocities without an underlying armed conflict and often arrive at a transition to democracy without the need to put an end to an armed internal rebellion. In those cases, amnesties are unnecessary for purposes of peace and are also a grave injustice to victims. Still other country contexts have illustrated that peace and justice can simultaneously be achieved without affording amnesty measures to perpetrators at all. The peace paradigm may now be more complex because the tools available in the conflict and postconflict context have changed. Clemency measures have become more targeted and limited but the panoply of transitional justice mechanisms that have surfaced instead, when implemented seriously and earnestly, are more likely to yield better results because these mechanisms do not leave behind a legacy of unheard victims, victims who on top of suffering at the hand of war would normally be left to endure a cycle of impunity and unjust peace. Instead, the harmful rhetoric of winners and losers has been replaced by a candid discussion on how best to represent and create just solutions for all of the parties' interests to a conflict.

The essays in this volume thoughtfully and carefully explore these difficult issues. They consider the costs of amnesties and the desire for justice. Special mention must be made of the editors, Francesca Lessa and Leigh A. Payne; not only have they assembled an impressive lineup of contributors, but they have also made sure that all the various legitimate points of view on these matters are represented. The result is a collection of chapters that constitute the state of the art on the matter of peace and justice and their enduring and ever-present dilemmas. Through their contributions, authors who have amassed an impressive array of diverse experiences reflect on these struggles from the past and their persistence in the age of accountability.

Acknowledgments

This volume is the first of its kind. No other project analyzes theoretically and empirically, through cross-national and qualitative country case studies around the world and using a range of disciplinary approaches, the processes of amnesty in the age of accountability. Indeed, the volume fills a void in transitional justice scholarship by addressing in detail the question of amnesty. While some scholarship on amnesty exists, this volume draws together the foremost authorities on these amnesty processes and the countries in which they unfold. It also introduces new researchers who have begun to make a mark in the study of transitional justice. This book also contributes to the literature by raising and beginning to answer particular questions about amnesty processes and their impact on accountability.

Such a volume would not be possible without support from a wide range of sources. Most of the chapters included in this volume were initially presented as papers at a conference on "Amnesty in the Age of Accountability: Brazil in Comparative and International Perspective" held at the University of Oxford on October 22–23, 2010, and organized with the generous assistance of the Latin American Centre, the Brazilian Studies Program, St. Antony's College, Oxford Transitional Justice Research (OTJR), and the School of Interdisciplinary Area Studies. Each of those Oxford units included dedicated staff who managed the maddening day-to-day tasks with aplomb and efficiency. In particular, we would like to thank David Robinson for his careful attention to every single detail before, during, and after the conference. We also thank St. Antony's College for providing the Nissan Theatre as the venue for the conference. The delightful tea breaks, receptions, and High Table stimulated the creative environment in which our work evolved.

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