Opening Considerations: On the Perennial Relevance of Amnesties

There are few issues of law and policy as complex and divisive as the question of when and whether to grant amnesties for atrocities. Across the centuries and across the globe, the issue has been faced on innumerable occasions. Yet there is something particular about how it has been confronted in the past several decades that is unlike prior eras. In my view, that "something" has at least two parts: first is the rise of international human rights and international criminal law, which have abridged the scope of state sovereignty and made it impossible to see the amnesty issue in purely political terms; second is the emergence of global information and communications technologies, which have made it easier to mobilize international opinion and action about national traumas that give rise to amnesty dilemmas. These two developments make the resolution of the amnesty question a fundamentally different undertaking from earlier times.

Yet even within this modern era of international law and technological advances, at least two distinct periods can be identified. For simplicity's sake, we could describe these as the amnesty-approval period and the amnesty-disapproval period. These periods are neatly captured in the pioneering work of Louis Joinet, an influential French magistrate and international law expert.

Joinet's part in the story begins in 1983. In that year, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, "having become aware of the importance that the promulgation of amnesty

laws could have for the safeguard and promotion of human rights and fundamental freedoms," requested Joinet (at the time a UN human rights special rapporteur) to prepare a technical study on the topic.[1] His final report, issued in 1985, was in its day the most sophisticated and detailed comparative work on the subject.[2] Although published before the age of the Internet and seldom cited today, it remains a valuable academic reference on the question of amnesty.

In 1991, a mere six years after the publication of that study, the same UN Sub-Commission asked Joinet to undertake a different study on human rights.[3] On this occasion, the study was expected to show how amnesties contributed to impunity rather than to the safeguard of human rights.

At the beginning of the report that Joinet prepared in response to the Sub-Commission's second request, he offered his own reflections on the dramatic shift of perspectives on the amnesty issue that had occurred in such a short period.[4] He did so by dividing the "origins of the campaign against impunity" into four stages. He labeled the 1970s as the first stage, when "non-governmental organizations, human rights advocates and legal experts," in particular in Latin America, argued for amnesty for political prisoners and found it to be "a topic that could mobilize large sectors of public opinion, thus gradually making it easier to amalgamate the many moves made during the period to offer peaceful resistance to or resist dictatorial regimes."[5] Focusing again on Latin American experiences, Joinet described the 1980s as the second stage, when amnesty "was more and more seen as a kind of 'down-payment on impunity' with the emergence, then proliferation, of 'self-amnesty' laws proclaimed by declining military dictatorships anxious to arrange their own impunity while there was still time."[6] He proceeded to describe the first few years after the fall of the Berlin Wall as the third stage, characterizing it as one "marked by many processes of democratization or return to democracy along with peace agreements putting an end to internal armed conflicts" in which questions of impunity constantly arose.[7] Finally, Joinet labeled the period starting with the 1993 Vienna World Conference on Human Rights as the fourth stage, "when the international community realized the importance of combating impunity."[8]

As it turned out, even more dramatic shifts were on the immediate horizon in the years that followed the UN Sub-Commission's request to Joinet. Particularly significant were the creation of international tribunals for the former Yugoslavia and Rwanda, the taking up by the UN Secretariat of a formal position on the subject of amnesty, and the adoption of the 1998 Rome Statute of the International Criminal Court (ICC). One could describe the latter event in particular as the marker of a fifth stage in the global fight against impunity. We are still in that stage.

This fifth stage in the anti-impunity struggle is turning out to be the most interesting of all, although it is also full of challenges concerning the issue of amnesty. For one thing, the amnesty bar is higher now than it has ever been. There are many international lawyers and human rights defenders who categorically reject certain kinds of amnesties, in particular ones that would grant immunity to perpetrators of war crimes, crimes against humanity, and genocide.

Another challenge is that, as a result of the Rome Statute and other significant developments in international criminal law and practice, amnesty outcomes are no longer within any individual state's or institution's control. That may have been the case in prior decades as well, inasmuch as one country's amnesty cannot bind the courts of another. Yet there is a significantly heightened zone of uncertainty today, both because of the existence of the ICC and because of the increased recourse to foreign courts under principles such as universal jurisdiction.

A further challenge linked to this fifth stage is the apparent contradiction between the ethos of amnesty disapproval and the continuing global admiration for South Africa's Truth and Reconciliation Commission (TRC) and its watershed experiment in the amnesty realm. South Africa is widely and properly regarded as one of the paradigmatic cases of a recent and successful transition out of violent conflict and abusive rule. A key institution in that transition was the TRC, which had the authority to grant individual amnesties to perpetrators of crimes of extreme brutality. While there were many shortcomings in the South African process, as in any transitional justice process, the TRC succeeded in ways that most other societies can only dream about. Even the most amnesty-averse international lawyers grudgingly acknowledge its significant social impact, despite the fact that the TRC's amnesty scheme facially contradicts the emergent view on amnesties espoused by, among others, the UN Secretariat.[9]

What this contradiction also highlights is a tension between international criminal law on the one hand and transitional justice on the other hand. The latter was underdeveloped almost everywhere but for Latin America until the experience of the South African TRC. Thus, to the extent that the South African model became the globally emblematic case of transitional justice – of "justice within constraints" – we ended up in this unexpected, almost accidental situation, in which the tolerance for amnesty was receding just as the interest in transitional justice was gathering speed.[10] Indeed, in the ensuing years after the TRC's work had ended, many in the field of transitional justice came to see the South African model in a different light or, to be precise, in a rather skeptical and sometimes even negative light. In the end, we have arrived at a situation in which the model that rightly or wrongly inspired so many

around the world – and undeniably continues to do so – no longer appears acceptable. Ultimately, it has been the permanent ICC and not the temporary South African TRC – groundbreaking though it was – that has come to define the fifth stage in the global fight against impunity.

The full implications of these myriad sudden, simultaneous, and contradictory shifts in global law and policy are still being parsed. For now, what one can say for certain is that it is a difficult time to be a peacemaker. There is less flexibility to cut a deal and less certainty about whether a deal will satisfy those in the international community whose opinions greatly matter, not least the ICC Prosecutor and the UN Secretary-General. Amnesty is like a contraband product now, such that everyone dealing with it is taking a risk.

However, amnesty has not left the scene, and reports of its death are, to paraphrase Mark Twain, exaggerated. Amnesties are as prevalent today as at any time in modern history, as a recent comprehensive work demonstrates.[11] We are no more at the end of amnesties than we are at the "end of history."[12] Circumstances leading to the invocation of amnesties still abound and will continue to do so as long as there are rebels negotiating the laying down of arms or repressive leaders negotiating the terms of their departures. As Professor Max Pensky notes: "It's doubtful whether any successful democratic transition has ever managed to refrain entirely from deviating from the rule of law in the pursuit of democratically legitimate outcomes: you play the cards you've been dealt in such transitions, and flexibility – including a high tolerance for not-quite-clean policy – may be a *sine qua non* for the efficient domestic politician."[13] Professor Ron Slye similarly comments:

> Even as the international criminal justice system expands, states continue to turn to amnesties as the mechanism of choice to address systematic violations of human rights and to facilitate their own political transitions after a period of state-sponsored terrorism. Amnesties of one form or another have been used to limit the accountability of individuals responsible for gross violations of human rights in every major political transition in the twentieth century.[14]

Yet the continued recourse to amnesty as a tool for dealing with periods of extraordinary war and violence is not linked to the presence of political constraints alone. In earlier centuries, amnesties were adopted more in the original sense of the term: *amnesty* derives from the Greek word *amnēstia*, which means "to cast into oblivion." Amnesty in this original sense was a tool to wipe the slate clean, erase, or bury the memory of certain past events so as to focus on the future. Such amnesties were about mercy as well as

pragmatism. The idea was to make a fresh start with former enemies. Amnesty in this early sense was a tool of social rebuilding, of imposing a rupture with the past so as to mend broken relationships that would need to continue into the future.

Admittedly, there are several historical cases in which this traditional form of amnesty was not used. Perhaps the best known of these is the case of Germany, which was economically and politically punished rather than forgiven at the end of the First World War – a fact that is often cited as a major contributor to the rise of Nazi Germany. The watershed trials of the Nuremberg tribunals at the end of the Second World War, which helped crystallize a new set of European values and legal standards, surely constitute another important exception. However, up until the 1990s, the practice of turning the page appears to have dominated state practice through history, especially in contexts in which there was neither a clear winner nor a clear loser.

Is such an approach without merit? Is there any wisdom or validity left in the ideas of letting bygones be bygones and closing the book on the past as a pragmatic means of restoring order and stability? Does mercy in the legal form of amnesty remain an acceptable form of statesmanship? Or does today's emphasis on the need to prosecute eclipse the space for any grand gestures of national unity and reconciliation? Does it prevent today's responsible leaders from saying, "Though you have harmed us terribly, for the sake of the future we will leave you alone?"[15]

The truth is that such questions are difficult to answer in the affirmative – particularly in an era dominated by the European project of an international order where, as Robert Kagan writes, "international law and international institutions matter more than the power of individual nations, where unilateral action by powerful states is forbidden, where all nations regardless of their strength have equal rights and are equally protected by commonly agreed-upon international rules of behavior."[16] An affirmative answer to such questions also is complicated by the new institutional reality of the ICC and the uncontrollable threat of trials by it or by foreign courts exercising criminal jurisdiction over cases involving atrocities committed in other states.

The idea of political mercy through amnesty also is difficult to reconcile with the apparent "norms cascade" that has substituted mercy for accountability when it comes to dealing with past atrocities.[17] And yet the value of mercy remains in keeping with many of the world's most influential religious teachings. As Robert Parker explains, "[A]mnesty is a concept wrought with contradictions and paradoxes: on the one hand, it conjures feelings of benevolence and virtue that are extolled by the religious and cultural traditions of most societies; on the other, it contradicts the rule of law and seems to violate basic notions of justice."[18]

To be sure, no one ever should call on victims or their families to forgive that which is unforgivable.[19] However, who can deny the power of the great political leaders that rise above their own experience as victims and adopt the language and habits of mercy and reconciliation as a means of nation building? As Alex Boraine notes of Nelson Mandela:

> From the day of his release to now, he has focused on the need to come to terms with the past, but always with a readiness to forgive and to move on. It is not merely words that he uses, powerful as they are, but in his actions of reaching out to the very people who had him put in jail, who had kept him there, who had decimated his own past, who were responsible for torture and deprivation, detention without trial, mass removals, and so on. He stretched out a hand of reconciliation and friendship.[20]

The fact is that for one reason or another throughout history, people have managed – against all odds – to cope with their traumatic memories and find ways to live with the murderers in their midst, even when the result is nothing more than peaceful but superficial coexistence.[21] For societies to regenerate after mass violence or genocide, there may, in fact, be no other choice. It is possible that societies rebuild themselves as much on account of what they are able to overlook – or feel required to overlook – as what they are unable to forgive.[22] Indeed, if individuals have a right to truth, then they also have a right, if ability and willingness are present, to try to forget. People can never be forced to forget certain events, but they have every right to choose not to look back, or to at least leave the past behind in their daily lives.[23]

The encouraging news is that, in the aftermath of widespread atrocities, the choice is no longer misunderstood as a binary one between mercy and accountability or impunity and justice. The field of transitional justice has highlighted that there is actually a broad spectrum of choices available to respond to such situations, including formal and informal nonjudicial and quasi-judicial mechanisms such as truth commissions, victim reparation programs, and institutional reform measures. Yet we should continue to recognize that the scale of past abuses, and constraints in the balance of power, invariably will require elements of both impunity and justice.

These observations are all linked to larger debates that persist about how societies can or must deal with their past. Put simply, we are still struggling with the tension between the demands of law and the impediments of reality, and with the tension between the need to remember and the need to overlook. In this debate, especially as it concerns amnesty, there are many valid viewpoints,

and not only legalist and realist ones. The fact is that, when it comes to amnesty, there is much more ambiguity in the legal realm than many legalists are prepared to acknowledge, and there is much less empirical certainty about amnesty's benefits than many realists are ready to concede.

Although the divergent viewpoints of legalists and realists are impossible to fully reconcile, this book proposes several areas where common ground can be reached. It does so, in part, by suggesting the avoidance of red lines and by recommending instead a set of public interest principles and values that can be balanced in sensible ways in specific contexts at particular points in time. It is only in this way that one can hope to achieve a proper weighing of facts, law, and policy in a case at hand. Any other choice precipitates a return to the usual divide, in which one side insists that justice must step back when it directly and significantly threatens the prospects of peace or an end to despotic rule, and the other side insists that amnesty for mass atrocities is a red line that one cannot cross, irrespective of the human consequences.[24]

We should also recognize, however, that these differing positions reflect differing priorities in the context of a fragile negotiation: peace and political transition for some, and justice for others. And one's priorities, of course, shape one's positions. At the same time, priorities are not fixed. For example, a person may place general value on justice, but if he or she suddenly had to choose between survival and justice, this would undoubtedly affect the way that person values justice. This is not a small point. Persons who wish to take rigid stands on amnesty have a responsibility to grapple with the issue from as many different vantage points as possible: the family of a missing person craving to know the fate of a loved one, the torture survivor who rightly insists on justice and reparation without delay, the child soldier who wishes to be forgiven for his crimes and reunited with his family, the sex slave who wants the horror of her circumstances to end no matter what the social cost, and so forth.

Imagining oneself in a variety of circumstances does not make things any easier. But that is precisely the point. There are no obvious or cost-free answers to the amnesty dilemma. Professor Dan Markel captures the predicament well by asking the following questions:

> Imagine that we had to decide between general amnesty, on the one hand, and retribution at the risk of civil war, on the other – from relative positional ignorance, namely, not knowing whether we would be perpetrators, victims, or family members of victims . . . . The problem with this hypothetical contract is that we still have to engage in prediction and value assessment: Is the civil war certain? Will we all die or just some of us? Will a life with no promise of retribution be worth living?[25]

For many years, I have engaged classes with an equally abstract dilemma. I begin by listing various public goods on the board: justice, truth, reparation, institutional reform, democracy, public security, economic development, and reconciliation. I then ask the class to create a hierarchical list of the goods that will best ensure the prevention of atrocities after a period in which they have occurred on a massive scale. The answers naturally run the gamut. Yet there is one thing that never varies: public security always ranks at the top of the list.[26]

I mention this to raise a final issue, which concerns my own bias in writing this book. I rank public security at the top of the list, too. Where public security and the human rights related thereto are jeopardized on a mass scale by the threat of prosecution, in my opinion, the protection of them should prevail. Indeed, for me, the thought of living with impunity is insignificant compared with the thought of living with open, armed conflict or state terror. As a human rights advocate, I am repulsed by the idea of impunity for perpetrators of heinous atrocities. Yet because I consider the human rights related to public security paramount – not least the right to life itself – my repulsion for war and tyranny is greater.

My repulsion for impunity also leads me to this position. Impunity at the national level is at its peak in times of war and tyranny, when the ability or willingness to deliver justice for atrocities is largely absent. Granted, it will always be maddening to forego formal justice concerning people responsible for vicious crimes of any sort. Yet I believe there is a powerful case to be made in both human rights and ethical terms for ceding that right in extreme circumstances. Such a case is powerful even if the only peace that can be guaranteed is a negative peace (absence of direct and violent conflict) with no certainty of being followed by a positive peace (absence of indirect and structural violence).[27] The fact is that even incomplete forms of peace and security are necessary to create the conditions for a society in which there is both freedom from want and freedom to live in dignity.[28]

To be sure, I continue to believe that one's default orientation always should be to do justice. It is important to insist on the state obligation to prosecute, and there is indeed no inherent reason why justice and peace efforts cannot work together in a mutually reinforcing way, as is the case to some degree in places such as Colombia and Sierra Leone. Likewise, I continue to believe that, as a general rule, amnesties must not cover serious human rights crimes. Such crimes should be prosecuted to the maximum extent possible. Yet I hold fast to the importance of exceptions and the notion of the last recourse. In that respect, I always am ready to defend amnesties of the widest possible scope provided that they are necessary, *stricto sensu*. That viewpoint may be at odds with certain prevailing accounts of international legal standards, but I, for

one, could never oppose an amnesty on the basis of law alone. That would be legalism of the worst sort.[29] In a world still full of uncontrolled violence and misery, the concept of the last recourse remains vital to building a fairer and safer world. So I argue in favor of keeping the standards high and clear but also of remaining flexible in the application so as to be responsible in the decision.

As this book will demonstrate, the issue of amnesty is full of unavoidable paradoxes and agonizing choices. Advances in law cannot alter that. And legal advances cannot overturn history. They cannot disprove that amnesties of the widest possible scope adopted in countries such as Spain, Brazil, and Mozambique have accompanied – rather than impeded – gradual and sustained improvements in democracy, peace, human rights, and the rule of law. That is a simple fact.

Yet it is also the case that, in the amnesty arena, there is much room for improvement. The history and practice of amnesties is full of bad models. What we need most of all, to ensure improved amnesty outcomes in the future, is a wider and more sober debate based on a better understanding of what is at stake in theoretical, legal, and practical terms. This book is meant as one contribution to that goal.

PART I

The Debate on Amnesties

1. INTRODUCTION

This part of the book offers an extended analysis of the law and policy considerations concerning amnesties that encompass human rights crimes. It begins with technical analysis and then becomes more polemical. The goal is to deepen debate on both the overt and underlying complexities of the topic, bringing new issues to the fore and reexamining old issues through a different lens. It is the gray areas that are of special interest in this field and the areas where the most important debates still need to occur.

The discussion comprises five sections. The first section offers a definition of the term *amnesty*, including analysis of its distinctive features as a legal instrument. For purposes of conceptual clarity, comparisons will be made between amnesties and other legal instruments that have the effect of displacing individual criminal accountability, including pardons, statutes of limitation, and the various types of standing immunities recognized in treaties and domestic legislation. By understanding the specificity of amnesty as a legal instrument, the subsequent analyses are situated in their proper technical context.

The second section offers an assessment of amnesty in the context of the fight against impunity, a theme introduced in the book's opening considerations. Here the analysis expands considerably, beginning with an examination of the specific ways in which amnesties fit within the field of transitional