Chapter 6

Amnesty

Agata Fijalkowski

6.1. Introduction

The topic of amnesty is a vital one in transitional justice scholarship. As a political tool it has historically provided the state the means to suppress dissent, compromise with its enemies, as well as to protect its own state agents implicated in crimes. In terms of transitional justice, which concerns the ways in which the state addresses a predecessor state's crimes, it has a more poignant meaning that can seemingly go against calls for justice.

Amnesty might not be all that it seems. A closer study of amnesty offers an important means to explore more critically the legal measures concerning extradition, or those resulting in impunity – both of which come to the fore as victims and states try and reconcile the demands of justice and the demands of peace. This particular debate concerning its goals – peace or justice – has gone on for some time.

In recent years, however, a change can be noted. For example, there has been another prominent shift protecting state agents from criminal prosecution. What is more surprising is the location of the change – namely the United States (US). The US has traditionally maintained a position which holds that the non-extradition of its citizens – and those of its allies – is strictly adhered to in the name of peace.[1] The US is not alone in its approach, a position that is the subject of ongoing consideration.[2]

Nonetheless, in November 2017, following a US federal court ruling, Innocente Orlando Montano Morales was extradited to Spain to stand trial for murder.[3] Morales is a former Vice Minister of Defence for El Salvador who allegedly gave the order to execute

several Jesuits, including an important intellectual figure, Rev. Ignacio Ellacuría – an important intellectual and leftist representative in the country, who brokered the peace process between the government and the Farabundo Martí National Liberation Front (FMNLF).[4] The executions took place in November 1989. Morales and 19 others have been charged with the murder of six priests, their housekeeper, and her daughter. Five of the six priests were Spanish citizens, thus leading to the Spanish request. Many of the perpetrators of human rights atrocities committed during the 12-year civil war that ceased in 1992 remain free in El Salvador, because national amnesty laws protect them. But even this is changing. In 2016 it was reported that the exhumations taking place at El Mozote have resulted in reassessment of the current amnesty laws. The importance of El Mozote is what occurred there,over a three-day period in December 1981. Soldiers from the Salvadoran army shot hundreds of unarmed men, women and children in the village of El Mozote and surrounding areas. This is the worst atrocity committed during the 12-year-long conflict between leftist guerrillas and El Salvador's right-wing government, in which circa 75,000 Salvadorans died. No one has been held accountable for the massacre or any crimes committed during the war. The amnesty law, passed in 1993, protected perpetrators on both sides of the conflict from prosecution. Significantly, the country's reconciliation process has been viewed as archetypal. Both sides disarmed, the army diminished in size and the security forces became the civilian police. After the civil war ended in 1992, over a six-month period a UN Truth Commission investigated 'serious acts of violence'; 85 per cent were made against the army, paramilitary groups and right-wing death squads[5] (truth commissions are discussed in the chapter 'Truth and Reconciliation Commissions'). In this Commission's report the FMNLF, noted above, was blamed for the 1989 events discussed at the start of this chapter. Importantly, demands for justice were made in 1990 when relatives of the El Mozote massacre filed a suit with the Inter-American Court of Human Rights. The Inter-American Court of Human Rights ruled that El Salvador's government investigate the massacre, punish the perpetrators, and compensate the victims.[6] Efforts to challenge the 1993 amnesty law proved successful. The El Salvadoran Supreme Court declared the law unconstitutional.[7] In January 2020, a retired Salvadoran general acknowledged for the first time that the armed

forces were responsible for the massacre of more than 1,000 people during the country's civil war.[8]

In neighbouring Guatemala, a UN-backed commission to investigate corruption has resulted in prosecutions for human rights atrocities to be brought against officials from the former dictatorship, including the former dictator Efraín Ríos Montt.[9] The trial started in January 2016 only to be suspended.[10] In March 2017 the Guatemalan Constitutional court ordered a new trial against Ríos Montt.[11] Proceedings were piecemeal, and Ríos Montt died on 1 April 2018. His legacy will be that of a ruthless dictator, whose conviction of genocide in 2013, although invalidated, stands as a record of his crimes.[12]

It should be noted that Spain has arguably led the way in seeking justice (by way of criminal prosecution) in cases where its citizens have been victims of human rights atrocities. This in itself is ironic, as Spain adopted a policy of forgetfulness (*Pacto de Olvido*) concerning Spanish rule under the dictator General Franco (1939–1975).[13] Both the Latin American experiences, and the contemporary Spanish response to those military dictatorships' human rights abuses, form an important part of the discussion about amnesty.[14]

This brief introduction draws our attention to several critical factors and concepts, which give rise to questions concerning which types of crimes were the human rights atrocities; the time period during which they were committed and whether statutes of limitation apply; who the perpetrators are and who were the victims; and, finally whether the expectations of victims and democracy, in relation to achieving peace and meeting the demands of justice have been satisfied. To begin this exploration, let us start with the definition. It is not possible to provide a comprehensive overview of amnesty and amnesty laws. Instead, this chapter will focus on key questions concerning this mechanism and refer to important examples throughout the discussion.

6.2. Definition

Amnesty originates from the Greek word *amnestia*, which means ‘forgetfulness’ or ‘oblivion’.[15] The use of amnesty throughout history was part of an approach that could now be described as a utilitarian position vis-à-vis the past.[16] A utilitarian position subscribes to the view that decisions are made with the common good in mind. In this vein, amnesty is a promise to desist from committing crimes from murder to other unspeakable atrocities, and whereby the victims and wider society are asked to forget the past actions of such individuals or organisations and move on for the common good. The trade is made in the name of achieving stability. However, for critics, it comes at the cost of losing truth and justice.[17] Indeed, for these commentators amnesty is politicised, because amnesty is used to silence the crimes and protect the perpetrators under the guise of policies that claim to address the past injustices of the predecessor regime.[18] The measure has come to epitomise an obstacle to justice. In fact, amnesties that recommend blanket, unconditional immunity no longer seem to be the favoured approach in a time where a new norm of accountability for human rights violations is replacing the traditional practice of amnesty. Significantly, the growth in transitional justice scholarship coincides with the calls for accountability and proposals, in some contexts, for limited, conditional amnesties as a means towards peace and reconciliation. To gain a further, critical understanding of this controversial measure, it is helpful to consider selected cases of amnesty along its respective timeline and to map its key points in order to reveal more about local and universal approaches and contexts regarding justice and peace.

6.3. Brief historical overview

Early forms of amnesty date back to ancient Greece. Amnesty was, and continues to be, a practice that has been introduced and supported by the executive, and it constituted a variety of measures, such as pardons, restoring voting rights, suppressing dissent or exacting revenge for past actions of disloyalty. These measures have been noted in state practice of the United Kingdom (for political prisoners), France (exemptions as a way of punishing disloyalty) and the US (restoring voting rights). These historical examples are referred to as pure amnesties,

where there is a true pardon and no change to the relevant law. As will be discussed below, the control over forgetting and forgiveness is an important component of sovereignty.[19] Several scholars note that '[t]he historical granting of amnesties as a means to secure post-conflict peace and stability and its relationship to "stateness" is relevant'.[20] In fact, the issue of sovereignty is one that stands in the way of reconciling the goals of justice and peace. This occurs in cases where the state fails to bring the matter of amnesty to the wider public discourse and ignores the needs and wishes of the victims.

Developments in Latin America are unavoidable when studying or examining amnesty. This relates to the human rights atrocities that occurred in the region. In the 1970s, amnesties, as a sort of makeshift practice, were granted to those involved in the planning, murder and/or torture that characterised the region's military dictatorships.[21] Argentina, Chile, El Salvador, Guatemala and Uruguay were joined by other states in the 1990s, namely Cambodia, Haiti and South Africa, in that each had 'granted amnesty to members of the former regime that commanded death squads that tortured and killed thousands of civilians within their respective countries'.[22] The United Nations supported the negotiations for granting amnesty as a means of restoring peace and a democratic government in four cases: Cambodia, El Salvador, Haiti and South Africa. Thus we have national, regional and universal approaches and involvement in transitional governments. Their involvement might explain the location of amnesty in national policies.

6.4. Purpose

The end of World War II and the Nuremberg and Tokyo trials mark the alteration in state practice as concerns holding individuals accountable for war crimes and crimes against humanity. Suddenly a category of crimes was created that was no longer protected by a statute of limitations (or a law that prohibits criminal prosecution for crimes that were committed a specified number of years ago). Since World War II a range of treaties have been ratified that have had a notable impact on the development of the current approach towards amnesty; specific treaties will be discussed shortly. It is worth mentioning that at this

point an international duty to hold perpetrators accountable is identified. Later, with the arrest of the Chilean dictator Augusto Pinochet in the late 1990s, the notion of universal jurisdiction is on the table; this notion claims that states or international organisations, such as international courts, can claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, or regardless of the accused's nationality, country of residence, or any other relation with the prosecuting body. Spain, and later Belgium, came to the fore with the application of universal jurisdiction. It is the actions of the Spanish judge Baltazar Garzón that give rise to pertinent questions about judicial culture and what underpins moves to challenge sovereign positions on the issue of amnesty.[23] Equally noteworthy are courts and their interpretation of relevant statutes that provides for successful requests for extradition – such as the US development noted at the start of the chapter. Pinochet certainly marked a watershed moment. The case gave rise to discussions about the aims of international criminal justice, and heated debates about what 'seeking justice' entails. Ironically, the location of victims in this constellation was, and continues to be, opaque.

6.5. Points of contention and controversy

For many, amnesty laws are equivalent to impunity (exemption from punishment).[24] This view asserts that such laws present an obstacle to the right of redress, the rule of law and the deterrence of human rights violations.[25] Since the late 1990s, the UN has taken the position that amnesties preventing the prosecution of persons charged with war crimes, genocide, crimes against humanity and other gross violations of human rights are inconsistent with state obligations under numerous ratified treaties and UN policy. It is a position that might also be incompatible with emerging principles of customary international law. Amnesty would come to haunt, as a legitimate feature of transnational polices, the UN and its international positions noted above after the establishment of the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the International Criminal Court (ICC).

On that note, both France and the US introduced provisions that enable the state to recuse the ICC's jurisdiction over war crimes concerning their own nationals.[26] Colombia attempted to use similar means when it sought to protect its paramilitary squads from future prosecution.[27] Under Article 124 of the Rome Statute, it was possible to suspend the jurisdiction of the ICC for a period of seven years. Such approaches thus created a separate legal regime for war crimes by locating them, for example, under a separate title in the criminal code (such as the case of France). The result was that they are covered by the statute of limitations. For example, the French definition of war crimes also left open lacunae; it rejected inserting Article 8 of the Rome Statute,[28] which concerns war crimes, and also rejected the definitions of grave breaches of the Geneva Conventions of 1949 and rejected the First Protocol, by which the state is bound. France withdrew its declaration in 2008 and Colombia in 2009. In 2015 the Assembly of States Parties or (ASP, comprising representatives of states that have ratified and acceded to the Rome Statute) moved to delete Article 124.[29]

Granting amnesty to those suspected of war crimes does not answer calls for justice that is achieved through holding the perpetrators of these crimes accountable. Proponents of amnesties will argue that is based on achieving peace, especially in post-conflict reconstruction. However, any sort of progress requires addressing and resolving the past. Amnesties seem to merely postpone the manifestation of discontent. They should have only limited application and meet stringent conditions before being used.

6.6. Amnesty laws

Many countries have passed amnesty laws, referring to specific events in the country's history, for war crimes or crimes against humanity, or for wider categories of crimes that include these two crimes.[30] The arguments for and against a decision to grant amnesty cannot avoid a consideration of whether there is a duty to prosecute. In other words, there is a difference between a policy decision (which many assert is a poor one) and a decision that

violates international law.[31] Recent studies have considered whether the decision to prosecute a significant number of perpetrators has afforded victims some kind of justice.[32]

There are several international legal instruments to note when considering the assertion that there is a duty to prosecute. Because we are dealing with treaties, Article 27 of the Vienna Convention on the Law of Treaties needs to be noted, whereby '[a] party may not invoke the provisions of its internal law as justification for failure to perform a treaty'.

The 1949 Geneva Conventions comprise four instruments that were negotiated in 1949 to codify the international rules concerning the treatment of prisoners of war and civilians in occupied territory.[33] The Geneva Conventions enjoy being one of the most ratified in the world. Each of the conventions includes a specific list of grave breaches for which there is an individual criminal liability and for which states have a resultant duty to prosecute. These grave breaches are war crimes and include wilful killing, torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction of property not justified by military necessity; wilfully depriving a civilian of the rights of a fair and regular trial; and unlawful confinement of a civilian. State parties to the Geneva Conventions have an obligation to search for, prosecute, and punish perpetrators of grave breaches – unless they decide to hand over the individuals for trial by another state party. It should be noted that the duty is limited to the context of international armed conflict. In the commentary on the conventions the obligation to prosecute is discussed as absolute.[34]

The Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force on 12 January 1952, has also been widely ratified. The convention provides an absolute obligation to prosecute individuals responsible for genocide (as defined in the convention).[35] The convention applies only to those who have the specific intent to destroy a substantial portion of the population of a target group. Also, the victims must constitute one of the groups included in the document, namely national, ethnic, racial or religious. Political groups were intentionally excluded from the convention's definition.[36]

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ~~Convention on the Prevention and Punishment of the Crime of Genocide~~ entered

into force on 26 June 1987.[37] Many of the examples cited in this chapter would be captured by this definition. The convention requires that each state party criminalise all acts of torture in its domestic law, established competence over offences in such cases where the perpetrator is a national of the state, and, if such a state does not extradite the perpetrator, the convention requires it to submit the case to its competent authorities for the purpose of prosecution.

The Committee against Torture, in a case concerning Argentinian amnesty laws, decided in 1990 that communications submitted by Argentinian citizens on behalf of their relatives who had been tortured by the state's military authorities were inadmissible as Argentina had ratified the convention after the amnesty laws had been enacted.[38] The Committee, in its dictum, stated that '[e]ven before the entry into force of the Convention against Torture, there existed a general rule of international law which *should* oblige all states to take effective measures to prevent torture and to punish acts of torture'.[39] The committee intentionally used 'should' in an effort to show that its claim was aspirational and not a statement of binding law.[40]

Although human rights conventions do not specifically mention the duty to prosecute, the position taken by some commentators[41] is that to ensure rights implies a duty to prosecute the perpetrators. For example, to ensure the right to life obliges the state to conduct an effective investigation into a killing to determine if it was lawful or unlawful.

The Human Rights Committee's pronouncements on the issue have not been conclusive. The committee monitors the implementation of the 1966 International Covenant on Civil and Political Rights (ICCPR), in force since 1976. The committee has urged states to prosecute (Surinam), told states to bring violators to justice (Uruguay) and stated that amnesties are generally incompatible with ensuring that the rights set in the ICCPR are meaningful.

Even the case of Velásquez Rodríguez[42] cannot be read as ensuring a duty to prosecute. This case concerned the unresolved disappearance of Manfredo Velásquez in September 1981. The Inter-American Court of Human Rights was presented with testimonies indicating that he had been tortured and killed by the Honduran security services. The court relied on Article 1(1) of the 1969 American Convention on Human Rights to ensure the rights

enumerated in it.[43] It then went on to find the Honduran government to be in breach of its duties under the convention. In its aftermath of Velásquez, the Inter-American Commission took another look at amnesty laws in the case of El Salvador, Uruguay and Argentina. In all three instances, the commission held that the amnesty laws were not compatible with the American Convention's right to a remedy (Article 25) and right to judicial process (Article 8) read in conjunction with Article 1's obligation to ensure rights. The Inter-American Commission went further in 1996 by holding that Chile's approach to self-amnesty failed on two grounds: (1) Chile did not succeed in conducting an investigation that specifically identified all individual perpetrators and, as a result, made it almost impossible to establish any such responsibility before the civil courts; (2) Chile failed to take punitive action against the perpetrators.[44]

Several commentators have noted that there is a customary international law duty to prosecute perpetrators of crimes against humanity and that granting amnesty to such individuals violates international law.[45] As noted above, the Nuremberg proceedings marked an important moment for international crimes. The Charter of the Nuremberg War Crimes Tribunal was the first international instrument in which crimes against humanity were codified. The linkage to war and whether it would be required by international law or merely by its charter has been a subject of dispute, although the jurisprudence of the International Criminal Tribunal for the former Yugoslavia indicated that the nexus requirement need not be with armed conflict.[46]

Despite the promulgation of the Declaration on Territorial Asylum there is no state practice that is propounded; rather, there is an advisory role on the part of the General Assembly.[47] The declaration is often cited by some commentators as being the earliest international recognition of a legal obligation to prosecute perpetrators of crimes against humanity.[48] Equally, no sooner had the term 'crimes against humanity' been coined with respect to the massacres of Armenians during World War I than the international community agreed to amnesty for the Turkish perpetrators.[49] Likewise, in 1962, France and Algeria decided against trying persons who committed atrocities during the Algerian war.[50] In 1971, following the Bangladeshi war, India and Bangladesh agreed not to prosecute Pakistanis

charged with genocide and crimes against humanity in exchange for political recognition of Bangladesh by Pakistan.[51] Finally, the Security Council can, through a Chapter VII resolution, create binding obligations on states to bring those responsible for international crimes to justice.[52]

6.7. Examples of amnesty laws across the world

In order to understand amnesty laws, we may look at the Chilean experience and the Miguel Ángel Sandoval Rodríguez case.[53] The case highlights three factors that are key to the controversy of amnesty laws: statute of limitation, murder and impunity. This case, which is critiqued more for what it did not say than for what it did, is an excellent starting point to a discussion that brings us to present-day developments. The Sandoval case concerned a forced disappearance. Sandoval was a member of the Leftist Revolutionary Movement (Movimiento de Izquierda Revolucionaria). In 1975, the Chilean Directorate of National Intelligence abducted Sandoval and detained him at a secret detention camp (Villa Grimaldi). There he was tortured and later disappeared.

The decision of the Chilean Supreme Court in 2005 came after a series of forced-disappearance cases that the court reopened after dismissal by the military courts.[54] In this unanimous decision the court held that the crime of aggravated abduction equates to a crime of forced disappearance as set out in international human rights law and international criminal law. The court reaffirmed the supremacy of international law in the domestic legal order. What is noteworthy about this case is that the court maintained that amnesty is no bar to investigation, nor is it a bar to the application of criminal sanctions. The 1978 Chilean amnesty law is referred to as a self-imposed or self-proclaimed amnesty law or blanket amnesty law that is wide in scope and incorporated into the constitution.[55] In addition to granting amnesty to ‘all persons who committed, as perpetrators, accomplices or conspirators, criminal offences . . . between 11 September 1973 to 10 March 1978’ defendants in the cases claimed protection under the statute of limitations as sufficient time had passed to bar any proceedings against them. The Court rejected both positions on the grounds that the crime of

aggravated abduction was continuous in nature and therefore not completed within the period set out in the amnesty law. The supremacy of international law overrode any incompatible domestic law.

The following is an overview of developments in selected states that shape the position with respect to amnesty and amnesty laws.

Afghanistan

Afghanistan has a history of amnesties beginning in 1979 with the amnesty issued by the Soviet-backed revolutionary forces, which asserted that the amnesty was a 'humanitarian act'. The move, like the assertion, was propaganda. In more recent years, the plan adopted by the Afghan government for peace – the 2005 Action Plan for Peace, Justice, and Reconciliation – led to the drafting of a bill providing for blanket amnesty for human rights violations and war crimes in Afghanistan for the period 1978 to 2001. The idea underpinning the move was to offer immunity to members of the Taliban (save for crimes against humanity) and to weaken the organisation. The attempt was not successful. Although the bill was not formally enacted as law, it continues to be a contentious issue, and for many it is highly politicised and an abuse of power. The 2007 National Reconciliation Charter granted amnesty to warlords, many of whom entered politics and were in the government.[56] Human Rights Watch has stated that the 2007 law that provides amnesty to perpetrators of war crimes and crimes against humanity should be repealed.[57] In May 2017, the Convention against Torture Committee issued a report that was highly critical of the country's record on preventing torture, and called for the amnesty law to be repealed.[58]

Algeria

Algeria is an important case study. After achieving independence in 1962, the country's post-colonial experience is one that cannot ignore the effect and legacies of French rule and France's approaches to its own past in relation to its actions against those fighting for independence. In 1989 Algeria adopted a new constitution that set up a collision between

Islamic-backed parties and military forces when the government stepped in, under military pressure, to cancel a second round of elections that would have resulted in the Islamic Salvation Front (FIS) gaining absolute majority. The conflict that resulted in the 1990s is referred to as the 'Dirty War' (*la sale guerre*), during which time an estimated 100,000–150,000 people were killed.[59] It was not until the 1999 Civil Harmony Law that the security situation stabilised. The 2005 Charter for Peace and Reconciliation aimed towards negotiations between the disparate groups. The charter also provided for amnesty. The key provision, Ordinance No 06–61, was enacted into law in 2006. It amnestied the Islamic fighters who were engaged in the fighting, but excluded those involved in massacres, rapes and using explosives in public areas. The applicants are required to make individual applications and surrender arms.[60] It is worth noting that an ad hoc committee on disappearances was created in 2003, but the 2005 mandate did not provide for compensation to the victims.

Argentina

In 1995 the chief of the Argentine army apologised to the nation for the military's crimes during the dirty war and in 2004 the then president also asked for forgiveness 'for the shame of a democracy which stayed silent on those atrocities during the past twenty years'.[61] These measures of atonement have been accompanied by amnesties. For example, following the report by the National Commission for Forced Disappearances (CONADEP) the country saw a series of trials of the high-ranking military leaders in the mid-1980s. In 1986, however, under the Raúl Alfonsín regime (1983–1989), the government passed two amnesty laws in order to prevent further trials. Law No 23, 492, or the 'full stop' law, set a 60-day deadline for the initiation of new prosecution. When that law did not prevent the prosecution of large numbers of defendants, Law No 23, 521, or the 'due obedience' law, was passed, which granted automatic immunity from prosecution to all members of the military, save for the high commanders. The due obedience law was deemed constitutional by the Argentine Supreme Court in 1987. In 2001, however, a disappearance case was reopened against two

police agents who were accused of the torture and disappearance of a Chilean-Argentine couple. This ruling resulted in more prosecutions.[62] Under Carlos Menem (1989–1999), the leaders of the military dictatorship were pardoned. Despite the calls for justice led by the Mothers of the Plaza del Mayo, the leaders remain free. The 2005 Argentine Supreme Court ruling overturning the amnesty laws did not extend to this group.[63] However, in 2007, after a series of challenges, the Supreme Court, in a vote of 4 to 2, found that the pardons granted by President Menem were unconstitutional.[64] Under Néstor Kirchner and Cristina Fernández, a presidential decree from 2007 authorised former military officials and those serving in the post-government military, police and government officials to reveal state secrets if called to testify at human rights trials. Presidential Decree No 606 created a Truth and Justice programme responsible to the Chief Cabinet of Ministers.[65] But the slow rate of progress of prosecutions resulted in criticisms of the judiciary on the part of the human rights community.

Sierra Leone

Sierra Leonean history and culture is key to understanding the Civil War (1991–2002) and subsequent efforts to achieve peace, justice and reconciliation. Achieving a sense of justice following a conflict characterised by extreme brutality and the widespread use of child soldiers needs to be considered in this context.[66] Until independence, the country's diverse population largely coexisted peacefully across ethnic, cultural and religious differences.[67] All this changed after 1961, when intergroup relationships came to be influenced by different actors fighting for political power.[68] The Peace Accord came to an end with the 1997 military coup. Negotiation efforts resulted in the conclusion of the 1999 Lomé Peace Agreement. However, this was supplanted by more fighting before hostilities finally ceased in 2002. The presence of a criminal tribunal and a Truth and Reconciliation Commission (TRC; discussed in Chapter 5,'Truth and Reconciliation Commissions') is important. In addition to various restorative and reintegrative measures, the Lomé Peace Agreement included a highly controversial blanket amnesty that nevertheless failed to stop the

Revolutionary United Front's continued military activity, including egregious human rights atrocities against civilians. Laura Stovel observes that the incorporation of the Sierra Leone TRC in the Lomé Peace Agreement, more than being an expression of strong political endorsement of this option, was a way of 'making the amnesty and power sharing deal palatable to the people of Sierra Leone'.[69] The amnesty was not accepted by the UN to include crimes against humanity or acts of genocide for the purposes of the organisation.[70] Whereas the Truth and Reconciliation Commission was included in the Lomé agreement, the Special Court for Sierra Leone was first established in 2002 by agreement between the Sierra Leone government and the UN. Unlike the international criminal tribunals of Rwanda and the former Yugoslavia, the Special Court for Sierra Leone was a hybrid tribunal acting to connect a national and international court. Instead of being imposed by the UN, the Special Court for Sierra Leone was established on the initiative of, and in cooperation with, the Sierra Leonean government.[71]

South Africa

In 1990 negotiations began between the outgoing white minority government and the incoming opposition government led by the African National Congress (ANC). The period was characterised by efforts to ensure a peaceful transition, which included the release of ANC political prisoners and provisions for amnesty. The Promotion of National Unity and Reconciliation Act came into effect in 1995. Amnesty would become a vital part of the process in exchange for truth. None of the parties had monopoly over power and the compromise was seen as necessary. The exchange was viewed as a more positive step than prosecutions. The emphasis was on a more inclusive and restorative approach to reconciliation[72] (the Truth and Reconciliation Commission is discussed in a separate chapter). The process was one in which the state took great strides in engaging wider society. Importantly, granting amnesty was seen as being more reflective of indigenous cultural traditions. For example, *ubuntu* calls for more tolerance rather than retribution. One of the leading figures in the process and an advocate of its philosophy was Archbishop Desmond

Tutu.[73] The bargain of amnesty for truth requires that eligible offenders who do not apply for amnesty or who fail to comply with its conditions will face prosecution. In reality, since the TRC's closure, few prosecutions have been pursued.

Spain

Another relevant case study, Spain, was in a civil war between the Nationalists and the Republicans from 1936 to 1939. The Nationalists won, and under General Francisco Franco, they established a right-wing dictatorship that lasted until 1975. The regime was characterised by the repression, disappearances and executions of a large number of political prisoners. Already in the early 1970s, in anticipation of Franco's death, there were calls for absolute amnesty. In 1975 the first amnesty was introduced to mark King Juan Carlos's accession to the throne. The limitations of the amnesty resulted in instability and the amnesty law was revisited and extended in 1977 to all crimes committed by both government supporters and opposition. The legacy remained largely intact until mid-2000, when mass graves of Republican supporters were excavated, which has led to the promulgation of laws prohibiting the display of symbols and signs of the dictatorship.[74] In 2013, the UN High Commissioner for Human Rights has indicated that the 1977 Amnesty Law be appealed on the grounds that it violates international human rights law.[75] In 2017 the Amnesty Law turned 40. The UN Special Rapporteur contends that the law is in violation of international treaties signed by the country – one of the effects being the difficulty in investigating crimes.[76]

6.8. Current positions

Socio-legal scholars have carried out important critical work on amnesties. The prominent position taken by these commentators is that there is no universal duty to prosecute under international law. Scholars also argue that the deterrent effect of prosecution is 'oversold' and that the rationale for punishment in international justice is 'poorly theorised'.[77] The

assertions in this area frame amnesty in mercy. By doing so, amnesties can become an important tool in peace-making. As seen above, the Latin American experiences were characterised by tensions between principle and pragmatism, or between the demands of justice and the demands of a peaceful transition. Studies that have compared the Argentine, Chilean and Spanish experiences point to the role of the judiciary in overcoming amnesty laws and paving the way towards accountability through prosecutions; of these three, Argentina is the most progressive.[78] One could argue that the emphasis was placed on conducting retributive trials (and also a range of non-punitive measures). The key element of these discussions is sovereignty – which refers to Paul Ricouer and his notion of commanding forgetting and forgiveness.[79]

The philosophy underpinning international criminal processes ranges from retribution to deterrence.[80] The failure to punish and absence of deterrence to future generations has led scholars like Antonio Cassese to argue that impunity for architects of, for example, the Armenian genocide gave a 'nod and a wink' to Nazi leaders.[81] These debates draw on Immanuel Kant's theories.[82] Kant asserted that retribution dictates that criminals should be punished because they deserve what they have done. But international law has not closed the door on amnesties, despite the shift in the discourse. Instead both international and domestic law accept a role for prosecution and amnesties in transitional justice settings. Expressive functions of punishment might involve societal disapproval of criminal behaviour.[83] Punishment carries a message of public disapproval. But any message that is expressed is likely to be a message of many voices and potentially carry multiple and conflicting meanings. The risk is that the offender will not receive the intended message of disapproval.

Transitional justice scholars argue that truth recovery is important for preventing a repetition of crimes and contributing to healing of victims and society. In this way, the importance of truth is a corrective to the amnesia effect connected to amnesties. For these scholars, amnesties have an integral role to play in transitional contexts, as they embrace a restorative role in the transition. Braithwaite famously discusses 'reintegrative shaming' as a way of finding mechanisms where offenders are subject to expressions of community disapproval, which are then followed by gestures of reintegration into the community of law-

abiding citizens.[84] The alternative is ‘disintegrative shaming’, which creates a class of outcasts. For commentators like Kieran McEvoy, a

> criminologically informed view of transitional justice is alive to *seeing* challenges and to trying (at least) to meet them rather than simply defaulting to top-down formalism which would simply pass an amnesty act and make no effort to engage with either victims or communities.[85]

In this sense, amnesties are about managing transitions, appealing to notions of justice, accountability and peace.[86]

Louise Mallinder aptly notes that when approaching these questions, it is important to privilege pragmatism over an attempt to try and apply ill-suited universal models that do not speak to the complexities of the individual transitional state. Countries need to pursue their own approaches to the past and to find their own means of connecting justice and peace.[87] Progress requires a careful consideration of the past. Amnesties should have only limited application and meet stringent conditions before being used.

6.9. Summary

This chapter has critically considered amnesty, its definition, amnesty laws, points of controversy and the current position. We note that amnesty confronts justice and peace, but it continues to be haunted by the victim’s place in any policy measure.

There is no treaty prohibiting amnesties, but states have been unwilling to agree to even the mildest discouragement when presented with an explicit prohibition in treaty law. As noted, in international humanitarian law, the duty to prosecute is absolute and mandatory but the scope is limited, therefore many atrocities cannot be included. With respect to customary law, there is no evidence of state practice or *opinio juris* to suggest there is a duty of prosecution that can only be considered permissive. This allows states discretion with alternative approaches to truth and accountability. In international human rights law, no treaties state an explicit duty, but there is a duty to investigate. Concerning philosophy of

punishment, in the context of transitional justice the retributive potential of punishing human rights violations is limited. Prosecution is typically selective and punishments are rarely proportionate; it might be argued that amnesty that occurs within a properly constituted setting, such as a truth commission, may be a preferred option. And the effects of deterrence are highly uncertain. In conclusion, the present perspective dictates that amnesties be viewed from a restorative perspective. Restorative amnesties can play an important role in transitioning states, facilitating an inclusive dialogue that rebuilds relationships.

6.10. Discussion and tutorial questions

The brief introduction drew our attention to several critical factors and concepts, which give rise to the following questions.

1) Why are there no treaties prohibiting amnesties?

2) Does the involvement of international actors in the transitional process affect the decision to include amnesty as part of the post-reconstruction process?

3) What do the experiences of Latin America indicate with respect to the legitimacy of amnesty laws? Consider the key rulings of the Inter-American Court of Human Rights and the Chilean Supreme Court.

4) Consider the current position of legal scholars who criticise the rationale for punishment in international criminal justice as being ‘poorly theorised’. How does this position challenge classical approaches to punishment? How does this position view amnesties?

Notes

Suggested reading

Akhavan, Payam, 'The Rise, and Fall, and Rise of International Criminal Justice' (2013) 11 *Journal of International Criminal Justice* 527.

Ambos, Kai, Judith Lange and Marieke Werde (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice* (Springer, 2009).

Blair, James T, 'From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia' (2009) 31 *University of Hawaii Law Review* 507.

Henham, Ralph, 'The Philosophical Foundations of International Sentencing' (2003) 1 *Journal of International Criminal Justice* 1.

Igreja, Victor, 'Amnesty Law, Political Struggles for Legitimacy and Violence in Mozambique' (2015) 9 *International Journal of Transitional Justice* 239–258.

Koskenniemi, Martti, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1.

Lessa, Francesca, Tricia D Olsen, Leigh A Payne, Gabriel Pereira, and Andrew G Reiter (eds), 'Overcoming Impunity: Pathways to Accountability in Latin America' (2014) 8 *International Journal of Transitional Justice* 75.

Méndez, Juan E, 'Accountability for Past Abuses' (1997) 19 *Human Rights Quarterly* 255

Orentlicher, Diane, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018).

Robertson, Geoffrey, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin, 2012).

Teitel, Ruti, *Transitional Justice* (Oxford University Press, 2000).

Bibliography

Articles/books/reports

Afghanistan: Repeal Amnesty Law (10 March 2010) Human Rights Watch <www.hrw.org/news/2010/03/10/afghanistan-repeal-amnesty-law>.

Aguilar Fernández, Paloma, 'Jueces, Represión, y Justicia Transicional en España, Chile y Argentina' (2013) 71 *Revista Internacional de Sociologia* 281.

Aguilar Fernández, Paloma, 'Justice, Politics and Memory in the Spanish Transition' in Alexandra Barahona de Brito, Carmen González Enríquez, and Paloma Aguilar (eds), *The Politics of Memory and Democratization* (Oxford University Press, 2001) 92.

Akhavan, Payam, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7.

Badcock, James, 'UN Tells Spanish Government It Must Atone for Franco's Crimes', *Newsweek* (New York), 21 August 2014.

Bassiouni, M Cherif, *Crimes Against Humanity in International Criminal Law* (Cambridge University Press, 2014).

Bassiouni, M Cherif, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9.

Bentham, Jeremy, *An Introduction to the Principles of Morals and Education* (Clarendon Press, 1996).

Boister, Neil, 'International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?' (2012) 23 *Criminal Law Forum* 295.

Bourdon, William, 'Prosecuting the Perpetrators of International Crimes' (2005) 3 *Journal of International Criminal Justice* 434.

Braithwaite, John, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).

Brito, Alexandra Barahona de, Carmen González Enríquez, and Paloma Aguilar Fernández (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford University Press, 2001) 92.

Burt, Jo-Marie and Paulo Estrada, 'The Legacy of Ríos Montt, Guatemala's Most Notorious War Criminal' *International Justice Monitor*, 3 April 2018 <www.ijmonitor.org/2018/04/the-legacy-of-rios-montt-guatemalas-most-notorious-war-criminal/>.

Cassese, Antonio, 'Reflections on International Criminal Justice' (1998) 61 *Modern Law Review* 1.

Cassese, Antonio, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, and Alex Whiting, *Cassese's International Criminal Law* (Oxford University Press, 3rd ed, 2013).

'Digging for Justice', *The Economist* (London), 2 January 2016.

Doggett, Martha, *Death Foretold: The Jesuit Murders in El Salvador* (Georgetown University Press, 1993).

Duffy, Helen, *The 'War on Terror' and the Framework of International Law* (University Press, 2nd ed, 2015).

Dugard, John, 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question' (1997) 13 *South African Journal of Human Rights* 258.

Dugard, John, 'Reconciliation and Justice: The South African Experience' (1998) 8 *Transnational Law and Contemporary Problems* 277.

Dugard, John, 'Retrospective Justice: International Law and the South African Model' in A James Adams (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press, 1997) 269.

'El Salvador Rejects Amnesty Law in Historic Ruling', *Amnesty International*, 14 August 2016 <www.amnesty.org/en/latest/news/2016/07/el-salvador-rejects-amnesty-law-in-historic-ruling/>.

Fijalkowski, Agata and Sigrun Valderhaug, 'Legal Decisions, Affective Justice, and "Moving On"?' (2017) 7(2) *Oñati Socio-Legal Series* 337.

'Guatemala Court: Former Dictator Can Be Tried but Not Sentenced' *The Guardian* (London), 25 August 2015.

Hilibink, Lisa, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge University Press, 2007).

Kant, Immanuel, *The Cambridge Edition of the Works of Immanuel Kant* (Cambridge University Press, 1996).

Katz, Jonathan, 'US Wants Former Salvadoran Ally to Face Justice in 1989 Massacre', *The New York Times* (New York), 13 September 2015 <www.nytimes.com/2015/09/14/world/americas/us-wants-former-salvadoran-ally-to-face-justice-in-1989-massacre.html>.

Lafontaine, Fannie, 'No Amnesty or Statute of Limitation for Enforced Disappearances: The *Sandoval* Case before the Supreme Court of Chile' (2005) 3 *Journal of International Criminal Justice* 469.

Mallinder, Louise, *Amnesty, Human Rights and Political Transitions* (Hart Publishing, 2008).

Mallinder, Louise, *The Ongoing Quest for Truth and Justice: Enacting and Annulling Argentina's Amnesty Laws* (Working Paper No 5, Beyond Legalism: Amnesties, Transition and Conflict Transformation, May 2009).

McEvoy, Kieran and Louise Mallinder, 'Amnesties, Punishment and the Calibration of Mercy in Transition' (2012) 39 *Journal of Law and Society* 410, published as (Research Paper No 12–07, Transitional Justice Institute, 8 September 2012).

Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, 1989).

Orentlicher, Diane, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537.

Orentlicher, Diane, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018).

Renteria, Nelson, 'Salvadoran General Admits Army Carried Out Infamous 1981 Massacre' *Reuters*, 24 January 2020 <www.reuters.com/article/us-elsalvador-massacre-idUSKBN1ZN2MJ?taid=5e2b99ceebed6f0001a552e3&utm_campaign=trueAnthem:+Trending+Content&utm_medium=trueAnthem&utm_source=twitter>.

Ricouer, Paul, *Memory, History, Forgetting* (University of Chicago Press, 2003).

Ríos Montt's Trial: The Ultimate Test for Guatemala's Justice System (8 January 2016) Amnesty International <www.amnesty.org/en/latest/news/2016/01/rios-montt-s-trial-the-ultimate-test-for-guatemala-s-justice-system/>.

Robinson, Daryl, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 481.

Roht-Arriaza, Naomi (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press, 1995).

Scharf, Michael, 'The Letter of the Law: The Scope of International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41.

Segura, Renata and Sabrina Stein, *The Colombian Peace Process with the FARC: A Mapping of Vulnerabilities* (Social Science Research Council, 2018).

Sikkink, Kathryn, *Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (Norton, 2011).

Soares, Patrícia Pinto, 'Positive Complementarity: Fine-Tuning the Transitional Justice Discourse? The Cases of the Democratic Republic of Congo, Uganda and Kenya' in Agata Fijalkowski and Raluca Grosescu (eds), *Transitional Criminal Justice in Post-Dictatorial and Post-Conflict Societies* (Intersentia, 2015) 187.

'Spain: Controversial Franco Era Amnesty Law Turns 40', *Telesur*, 18 October 2017 <www.telesurenglish.net/news/Spain-Controversial-Franco-Era-Amnesty-Law-Turns-40-20171018-0010.html>.

Stovel, Laura, *Long Road Home: Building Reconciliation in Sierra Leone* (Intersentia, 2010).

Sugarman, David, 'Courts, Human Rights and Transitional Justice' (2009) 36 *Journal of Law and Society* 272.

Sugarman, David, 'The Pinochet Case: International Criminal Justice in the Gothic Style?' (2001) 64 *Modern Law Review* 933.

Sutil, Jorge Correa, 'Dealing with Past Human Rights Violations: The Chilean Case after Dictatorship' (1992) 67 *Notre Dame Law Review* 1455.

'Thematic Dossier XVI: Afghanistan's War Crimes Amnesty and the International Criminal Court' *Afghanistan Analyst Network*, 7 October 2017 <www.afghanistan-

analysts.org/publication/aan-thematic-dossier/thematic-dossier-xvi-afghanistans-war-crimes-amnesty-and-the-international-criminal-court/>.

Tutu, Desmond, *No Future Without Forgiveness* (Rider, 1999).

Weisman, Norman, 'A History and Discussion of Amnesty' (1972) 4 *Columbia Human Rights Law Review* 520.

Whitfield, Teresa, *Paying the Price: Ignacio Ellacuría and the Murdered Jesuits of El Salvador* (Temple University Press, 1995).

Cases

Barrios Alto v Peru, decision from 30 November 2001, Inter-Am Ct HR (ser C) No 87 (2001).

Decision on Admissibility from 23 November 1989, Regarding Communications Nos 1/1988, 2/1988 and 3/1988 (*OR, MM and MS v Argentina*), Report of the Committee Against Torture, UN GAOR, 45th sess, Supp No 44, Annex VI, UN Doc A/45/44 (1990) 111.

El Mozote Massacre v El Salvador, decision from 2 March 2006, Case 10.720, Report No 24/06, Inter-Am Ct HR, OEA/SerL/V/II.124 Doc 5 (2006).

Garay Hermosilla et al v Chile, decision from 15 October 1996, Case 10.843, Report No 36/96, Inter-Am Ct HR, OEA/SerI/V/II.95 Doc 7, Rev, 156 (1997).

Juan Contreras Sepulvada y Otros (Crimen) Casación Fondo y Forma, Corte Suprema, 517/2004, Resolución 22267, decision 17 November 2004.

Prosecutor v Dusko Tadic a/k/a 'Dule', decision from 2 October 1995, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, UN Tribunal for the Protection of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No IT-94-1.

Velásquez Rodríguez, decision from 29 July 1988, Inter-Am Ct HR (ser C) No 4 (1988).

Legislation

UN General Assembly, Declaration on Territorial Asylum, GA Res 2312 (XXII), 22 UN GAOR Supp (No 16) 81, UN Doc A/6716 (1967).

Rome Statute of the International Criminal Court, Opened for Signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) <http://legal.un.org/icc/statute/romefra.htm>.

Treaties

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), adopted 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950).

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), adopted 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950).

Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), adopted 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), adopted 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), adopted 8 December 2005 (entered into force 14 January 2007).

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

Other

Assembly of States Parties to the Rome Statute of the International Criminal Court, Res ICC-ASP/14/Res.2, 14th sess, 11th plen mtg (adopted 26 November 2015).

Belfast Guidelines on Amnesty and Accountability, Transitional Justice Institute <www.ulster.ac.uk/research-and-innovation/research-institutes/transitional-justice-institute>.

Treaties and Customary Law, International Committee of the Red Cross <www.icrc.org/en/war-and-law/treaties-customary-law>.

Films and documentaries

Buenos Aires Vice Versa (Directed by Alejandro Agresti, Staccato Films, Agresti Films, 1991).

Facing Franco's Crimes: The Silence of Others (BBC4 Storyville, 2019)

The Girlfriend (Directed by Jeanine Meerapfel, Alma Film, Jorge Estrada Mora Producciones, 1988).

Memories They Told Me (Directed by Lúcia Murat, Elixir Entretenimento, Taiga Filmes, 2013).

The Mothers of Plaza de Mayo (Directed and produced by Susana Blaustein Muñoz and Lourdes Portillo, 1985).

Olympic Garage (Directed by Marco Bechis, Amedeo Pagani, Produced by Marco Bechis, Enrique Piñeyro, Eric Heumann, 1999).

State of Siege (Directed by Costa-Gavras, Reggane Films, Euro International Film, Unidis, 1972).

---

1 Helen Duffy, *The 'War on Terror' and the Framework of International Law* (University Press, 2nd ed, 2015) 456–664.

2 Neil Boister, 'International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?' (2012) 23 *Criminal Law Forum* 295.

3 <www.justice.gov/opa/pr/us-extradites-former-salvadoran-military-officer-spain-face-charges-participation-1989-jesuit>.

4 Jonathan Katz, 'US Wants Former Salvadoran Ally to Face Justice in 1989 Massacre', *The New York Times* (New York) 13 September 2015, <www.nytimes.com/2015/09/14/world/americas/us-wants-former-salvadoran-ally-to-face-justice-in-1989-massacre.html>. For background on the conflict see Martha Doggett, *Death Foretold: The Jesuit Murders in El Salvador* (Georgetown University Press, 1993) and Teresa Whitfield, *Paying the Price: Ignacio Ellacuría and the Murdered Jesuits of El Salvador* (Temple University Press, 1995).

5 'Digging for Justice', *The Economist* (London), 2 January 2016, 25–26.

6 *El Mozote Massacre v El Salvador*, decision from 2 March 2006, Case 10.720, Report No 24/06, Inter-Am Ct HR, OEA/Ser.L/V/II.124 Doc 5 (2006).

7 'Digging for Justice', above n 5, 25–26. 'El Salvador Rejects Amnesty Law in Historic Ruling', *Amnesty International*, 14 August 2016, <www.amnesty.org/en/latest/news/2016/07/el-salvador-rejects-amnesty-law-in-historic-ruling/>

[8] Nelson Renteria, 'Salvadoran General Admits Army Carried Out Infamous 1981 Massacre', *Reuters*, 24 January 2020, <www.reuters.com/article/us-elsalvador-massacre-idUSKBN1ZN2MJ?taid=5e2b99ceebed6f0001a552e3&utm_campaign=trueAnthem:+Trending+Content&utm_medium=trueAnthem&utm_source=twitter>

[9] Montt was president of Guatemala from 1982 to 1983. The charges against Montt are genocide and crimes against humanity. These proceedings are a retrial, after the Guatemalan Constitutional Court overturned his conviction in 2013. 'Guatemala Court: Former Dictator Can be Tried but Not Sentenced', *The Guardian* (London), 25 August 2015, <www.theguardian.com/world/2015/aug/25/guatemala-rios-montt-genocide-trial-not-sentenced>.

[10] *Ríos Montt's Trial: The Ultimate Test for Guatemala's Justice System* (8 January 2016) Amnesty International, <www.amnesty.org/en/latest/news/2016/01/rios-montt-s-trial-the-ultimate-test-for-guatemala-s-justice-system/>.

[11] Jo-Marie Burt and Paulo Estrada, 'The Legacy of Ríos Montt, Guatemala's Most Notorious War Criminal', *International Justice* Monitor, 3 April 2018, <www.ijmonitor.org/2018/04/the-legacy-of-rios-montt-guatemalas-most-notorious-war-criminal/>.

[12] Ibid.

[13] Paloma Aguilar, 'Justice, Politics and Memory in the Spanish Transition' in Alexandra Barahona de Brito, Carmen González Enríquez, and Paloma Aguilar (eds), *The Politics of Memory and Democratization* (Oxford University Press, 2001) 92–118.

[14] *Facing Franco's Crimes: The Silence of Others* (BBC4 Storyville, 2019).

15 Norman Weisman, 'A History and Discussion of Amnesty' (1972) 4 *Columbia Human Rights Law Review* 520. See also Louise Mallinder, *Amnesty, Human Rights and Political Transitions* (Hart Publishing, 2008) 3–7.

16 See Jeremy Bentham, *An Introduction to the Principles of Morals and Education* (Clarendon Press, 1996) first published in 1789.

17 Michael Scharf, 'The Letter of the Law: The Scope of International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41.

18 Mallinder, *Amnesty, Human Rights and Political Transitions*, above n 15, 319–353.

19 Paul Ricouer, *Memory, History, Forgetting* (University of Chicago Press, 2003).

20 Kieran McEvoy and Louise Mallinder, 'Amnesties, Punishment and the Calibration of Mercy in Transition' (2012) 39 *Journal of Law and Society* 410, published as (Research Paper No 12–07, Transitional Justice Institute, 8 September 2012) 4.

21 Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press, 1995). See also Jorge Correa Sutil, 'Dealing with Past Human Rights Violations: The Chilean Case after Dictatorship' (1992) 67 *Notre Dame Law Review* 1455.

22 Scharf, above n 17, 1.

23 David Sugarman, 'Courts, Human Rights and Transitional Justice' (2009) 36 *Journal of Law and Society* 272 and by the same author, 'The Pinochet Case: International Criminal Justice in the Gothic Style?' (2001) 64 *Modern Law Review* 933. See also Lisa Hilibink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge University Press, 2007).

24 Mallinder, *Amnesty, Human Rights and Political Transitions*, above n 15, 319–353.

25 William Bourdon, 'Prosecuting the Perpetrators of International Crimes' (2005) 3 *Journal of International Criminal Justice* 434.

26 Ibid. See also Duffy, above n 1, 456–664.

27 Renata Segura and Sabrina Stein, *The Colombian Peace Process with the FARC: A Mapping of Vulnerabilities* (Social Science Research Council, 2018).

28 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), <http://legal.un.org/icc/statute/romefra.htm>.

29 Assembly of States Parties to the Rome Statute of the International Criminal Court, Res ICC-ASP/14/Res.2, 14th sess, 11th plen mtg (adopted 26 November 2015).

30 Antonio Cassese et al, *Cassese's International Criminal Law* (Oxford University Press, 3rd ed, 2013) 309. The most comprehensive study to date notes that between 1979 and 2010 an average of 12.25 amnesty laws were enacted each year around the world. See McEvoy and Mallinder, above n 20, 4.

31 Scharf, above n 17, 41. Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537.

32 Valuable research has been undertaken that includes empirical work and participation of local audiences, such as Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018).

33 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, adopted 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, adopted 12 August 1949, 75

UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, adopted 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, adopted 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, adopted 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, adopted 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, adopted 8 December 2005 (entered into force 14 January 2007). For full text and commentaries see the *Treaties and Customary Law*, International Committee of the Red Cross, <www.icrc.org/en/war-and-law/treaties-customary-law>.

34 Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, 1989) 215.

35 For the full text see the United Nations Human Rights Office of the High Commissioner at <www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx>.

36 Further discussion of this point is outside the scope of this chapter.

37 For the full text see the United Nations Human Rights Office of the High Commissioner at <www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

38 Scharf, above n 17, 47.

39 Decision on Admissibility from 23 November 1989, Regarding Communications Nos 1/1988, 2/1988 and 3/1988 (OR, MM and MS v Argentina), Report of the Committee Against Torture, UN GAOR, 45th sess, Supp No 44, Annex VI, UN Doc A/45/44 (1990) 111.

40 Scharf, above n 17, 48.

41 Orentlicher, above n 32. See also M Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9.

42 Decision from 29 July 1988, Inter-Am Ct HR (ser C) No 4 (1988).

43 The American Convention has been in force since 1978. The jurisprudence of the Inter-American Court has influenced the case law of the European Court of Human Rights in its interpretation of the 1950 European Convention on Human Rights in similar areas, such as disappearances. Mallinder, *Amnesty, Human Rights and Political Transitions*, above n 15, 164–165, 272–273, 424–428.

44 *Garay Hermosilla et al v Chile*, decision from 15 October 1996, Case 10.843, Report No 36/96, Inter-Am Ct HR OEA/SerI/V/II.95 Doc 7, Rev, 156 (1997).

45 Scharf, above n 17, 41–61.

46 Ibid 53. See *Prosecutor v Dusko Tadic /a/k/a 'Dule'*, decision from 2 October 1995, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, UN Tribunal for the Protection of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No IT-94-1, 72.

47 Scharf, above n 17, 57.

48 UN General Assembly, Declaration on Territorial Asylum, GA Res 2312 (XXII), 22 UN GAOR Supp (No 16) 81, UN Doc A/6716 (1967).

49 Scharf, above n 17, 52. Also M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Cambridge University Press, 2014).

50 Mallinder, *Amnesty, Human Rights and Political Transitions*, above n 15, 50–53.

51 Ibid 130.

52 Scharf, above n 17, 59.

53 *Juan Contreras Sepulvada y Otros (Crimen) Casación Fondo y Forma*, Corte Suprema, 517/2004, Resolución 22267, decision 17 November 2004 (so-called Sandoval case).

54 Fannie Lafontaine, 'No Amnesty or Statute of Limitation for Enforced Disappearances: The *Sandoval* Case before the Supreme Court of Chile' (2005) 3 *Journal of International Criminal Justice* 469.

55 Ibid. See also Mallinder, *Amnesty, Human Rights and Political Transitions*, above n 15, 230.

56 Mallinder, *Amnesty, Human Rights and Political Transitions*, above n 15, 133.

57 *Afghanistan: Repeal Amnesty Law* (10 March 2010) Human Rights Watch, <www.hrw.org/news/2010/03/10/afghanistan-repeal-amnesty-law>.

58 'Thematic Dossier XVI: Afghanistan's War Crimes Amnesty and the International Criminal Court', *Afghanistan Analyst Network*, 7 October 2017 www.afghanistan-analysts.org/publication/aan-thematic-dossier/thematic-dossier-xvi-afghanistans-war-crimes-amnesty-and-the-international-criminal-court/

59 Mallinder, *Amnesty, Human Rights and Political Transitions*, above n 15, 69–71.

60 Ibid 181.

61 Scharf, above n 17, 47–48.

62 The *Barrios Altos* case is important. In 2001 the Inter-American Court of Human Rights declared two Peruvian amnesty laws to be incompatible with the American Convention on Human Rights. *Barrios Alto v Peru*, decision from 30 November 2001, Inter-Am Ct HR (ser C) No 87 (2001).

63 Kathryn Sikkink, *Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (Norton, 2011) 79.

64 This meant that the accused in this case, General Santiago Omar Riveros, could be tried for kidnappings, torture and disappearances.

65 Louise Mallinder, 'The Ongoing Quest for Truth and Justice: Enacting and Annulling Argentina's Amnesty Laws' (Working Paper No 5, Beyond Legalism: Amnesties, Transition and Conflict Transformation, May 2009).

66 Laura Stovel, *Long Road Home: Building Reconciliation in Sierra Leone* (Intersentia, 2010) and Mallinder, *Amnesty, Human Rights and Political Transitions*, above n 15, 336–337.

67 Stovel, above n 66.

68 Ibid.

69 Ibid.

70 Ibid. The Democratic Republic of Congo has also been identified as a vital case study in transitional criminal justice. In 2005 the country adopted an amnesty law that extends to combatants engaged in the conflict in the eastern provinces of the North and South Kivu. The law, however, excludes war crimes, crimes against humanity and genocide. See Patrícia Pinto Soares, 'Positive Complementarity: Fine-Tuning the Transitional Justice Discourse? The Cases of the Democratic Republic of Congo, Uganda and Kenya' in Agata Fijalkowski and Raluca Grosescu (eds), *Transitional Criminal*

Justice in Post-Dictatorial and Post-Conflict Societies (Intersentia, 2015) 187 and Agata Fijalkowski and Valderhaug, Sigrun, 'Legal Decisions, Affective Justice, and "Moving On"?' (2017) 7 (2) *Oñati Socio-Legal Series* (2017), 337.

71 Mallinder, *Amnesty, Human Rights and Political Transitions*, above n 15, 336–337.

72 John Dugard, 'Retrospective Justice: International Law and the South African Model', in A James Adams (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press, 1997) 269–290; John Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question' (1997) 13 *South African Journal of Human Rights* 258; John Dugard, 'Reconciliation and Justice: The South African Experience' (1998) 8 *Transnational Law and Contemporary Problems* 277. Mallinder, *Amnesty, Human Rights and Political Transitions*, above n 15, 167–170.

73 *Ubuntu* is about what binds human beings. It is a belief in a shared, universal connection between people. Desmond Tutu, *No Future without Forgiveness* (Rider, 1999).

74 Mallinder, *Amnesty, Human Rights and Political Transitions*, above n 15, 51–53.

75 James Badcock, 'UN Tells Spanish Government It Must Atone for Franco's Crimes' *Newsweek* (New York), 21 August 2014.

76 'Spain: Controversial Franco Era Amnesty Law Turns 40', *Telesur*, 18 October 2017, <www.telesurenglish.net/news/Spain-Controversial-Franco-Era-Amnesty-Law-Turns-40-20171018-0010.html>.

77 McEvoy and Mallinder, above n 20, 1.

78 Paloma Aguilar Fernández, 'Jueces, Represión, y Justicia Transicional en España, Chile y Argentina' (2013) 71 *Revista Internacional de Sociologia* 281.

79 Ricouer, above n 19.

80 Daryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 481.

81 Antonio Cassese, 'Reflections on International Criminal Justice' (1998) 61 *Modern Law Review* 1 and Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7.

82 Immanuel Kant, *The Cambridge Edition of the Works of Immanuel Kant* (Cambridge University Press, 1996) 472.

83 McEvoy and Mallinder, above n 20, 5–9.

84 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989) 67: 'When individuals are shamed so remorselessly and unforgivingly that they become outcasts . . . it becomes more rewarding to associate with others who are perceived in some limited or total was as also at odds with mainstream standards'. For Braithwaite, reintegrative shaming concerns the application of clear standards of conduct and punishment, with the focus on punishing the criminal act rather than the individual.

85 McEvoy and Mallinder, above n 20, 17.

86 For example, the *Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, <www.ulster.ac.uk/research-and-innovation/research-institutes/transitional-justice-institute> define a framework to evaluate the legality and legitimacy in accordance with the state's legal obligations.

87 McEvoy and Mallinder, above n 20, 22–23.