



# **Amnesty in the Age of Human Rights Accountability**

Comparative and  
International Perspectives

Edited by Francesca Lessa and Leigh A. Payne

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COMPARATIVE AND INTERNATIONAL PERSPECTIVES

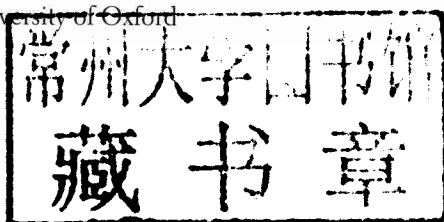
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## Foreword

*Juan E. Méndez*

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

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

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

<sup>2</sup> *Ibid.*, 76.

<sup>3</sup> *Ibid.*

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

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

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

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

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

<sup>5</sup> United Nations Office of the High Commissioner for Human Rights (OHCHR), *Rule-of-Law Tools for Post-Conflict States, Amnesties*, United Nations, HR/PUB/09/1 (New York and Geneva: OHCHR, 2009), accessed September 8, 2011, [http://www.ohchr.org/Documents/Publications/Amnesties\\_en.pdf](http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf).

<sup>6</sup> Ibid.

<sup>7</sup> Meintjes and Méndez, “Reconciling Amnesties with Universal Jurisdiction,” 77.

<sup>8</sup> OHCHR, *Rule-of-Law Tools*.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

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

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

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

<sup>14</sup> Meintjes and Méndez, "Reconciling Amnesties with Universal Jurisdiction," 81.

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

<sup>16</sup> Meintjes and Méndez, "Reconciling Amnesties with Universal Jurisdiction," 82.

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

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

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

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

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

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

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

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

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

<sup>24</sup> *Gomes Lund v. Brazil*, 45, para. 109.

<sup>25</sup> *Ibid.*, 69, para. 172.

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

<sup>27</sup> *Gomes Lund v. Brazil*, 69–70, para. 173.



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

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

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

<sup>28</sup> See Cassesse, *International Law*, 451–2.

<sup>29</sup> *Ibid.*, 451.

<sup>30</sup> *Ibid.*, 452.

<sup>31</sup> See S.C. Res. 827, para. 5, UN Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, para. 6, UN Doc. S/RES/955 (Nov. 8, 1994); Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

<sup>32</sup> Meintjes and Méndez, "Reconciling Amnesties with Universal Jurisdiction," 77.

<sup>33</sup> Garth Meintjes and Juan E. Méndez, "Reconciling Amnesties with Universal Jurisdiction – A Reply to Mr. Phenyio Keiseng Rakate," *International Law FORUM du Droit International* 3 (2001): 47–9.