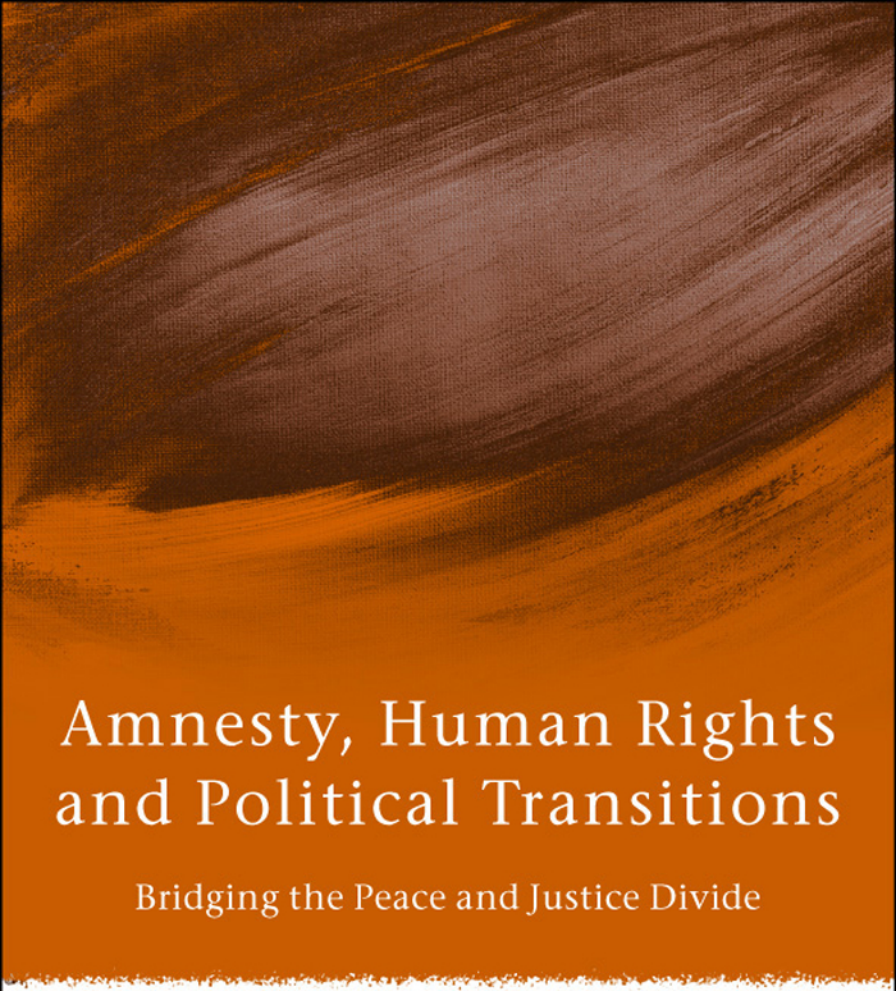

Amnesty, Human Rights and Political Transitions

Bridging the Peace and Justice Divide

Louise Mallinder

STUDIES IN INTERNATIONAL LAW

AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS

Amnesty laws are political tools used since ancient times by states wishing to quell dissent, introduce reforms or achieve peaceful relationships with their enemies. In recent years, they have become contentious due to a perception that they violate international law, particularly the rights of victims, and contribute to further violence. This view is disputed by political negotiators who often argue that amnesty is a necessary price to pay in order to achieve a stable, peaceful and equitable system of government. This book aims to investigate whether an amnesty necessarily entails a violation of a state's international obligations, or whether an amnesty, accompanied by alternative justice mechanisms, can in fact contribute positively to both peace and justice.

This study began by constructing an extensive Amnesty Law Database that contains information on 506 amnesty processes in 130 countries introduced since the Second World War. The database and chapter structure were designed to correspond with the key aspects of an amnesty: why it was introduced, who benefited from its protection, which crimes it covered, and whether it was conditional. In assessing conditional amnesties, related transitional justice processes such as selective prosecutions, truth commissions, community-based justice mechanisms, lustration and reparations programmes were considered. Subsequently, the jurisprudence relating to amnesty from national courts, international tribunals, and courts in third states was addressed.

The information gathered revealed considerable disparity in state practice relating to amnesties, with some aiming to provide victims with a remedy, and others seeking to create complete impunity for perpetrators. To date, few legal trends relating to amnesty laws are emerging, although it appears that amnesties offering blanket, unconditional immunity for state agents have declined. Overall, amnesties have increased in popularity since the 1990s and consequently, rather than trying to dissuade states from using this tool of transitional justice, this book argues that international actors should instead work to limit the more negative forms of amnesty by encouraging states to make them conditional and to introduce complementary programmes to repair the harm and prevent a repetition of the crimes.

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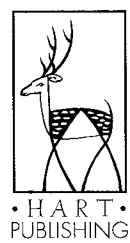
Amnesty, Human Rights and Political Transitions

Bridging the Peace and Justice Divide

Louise Mallinder



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Abbreviations

AU	African Union, formerly Organization of African Unity (OAU)
CAVR	*Comissão de Acolhimento, Verdade e Reconciliacão de Timor Leste* (Commission for Reception, Truth and Reconciliation)
CAT	Convention Against Torture
CONADEP	*Comisión Nacional Sobre la Desaparición de Personas* (National Commission on Disappeared Persons, 'Sabato Commission')
DDR	Disarmament, Demobilisation and Reintegration
DINA	*Dirección Nacional de Inteligencia* (Directorate of National Intelligence)
DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
ESMA	*Escuela de mecánica de la armada* (Naval School of Mechanics)—a notorious torture centre in Buenos Aires during the Argentine military dictatorship
EU	European Union
FMLN	*Frente Farabundo Martí para la Liberación Nacional*
FYR	Former Yugoslav Republic of
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILO	International Labour Organization
Inter-Am CHR	Inter-American Commission on Human Rights
Inter-Am Ct HR	Inter-American Court of Human Rights
JSMP	Judicial System Monitoring Programme (an East Timorese NGO)
LRA	Lord's Resistance Army
MIR	*Movimiento de la Izquierda Revolucionaria* (Movement of the Revolutionary Left)
NGO	Non-governmental organisation
OAS	Organization of American States

PCIJ	Permanent Court of International Justice
RUF	Revolutionary United Front
SADF	South African Defence Force
SCSL	Special Court of Sierra Leone
TRC	Truth and Reconciliation Commission
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	UN High Commission for Refugees
UNHRC	UN Human Rights Committee
VCLT	Vienna Convention on the Law of Treaties

Introduction

> When I heard about the [amnesty] law I was filled with a sense of indignation and powerlessness. They weren't only mocking my brother but all the many others whose families and stories we have been learning about . . . When a brother or son disappears, your life comes to a halt. From that moment on, it only serves to search for your loved ones . . . but this government has no mercy. It doesn't want to let us rest.[1]

FOR MANY VICTIMS of violence, human rights advocates and others, amnesties represent the basest of 'pragmatic' accommodations with former despots, murderers and torturers.[2] For such individuals or organisations, amnesties are a byword for lawlessness, the tolerance of impunity and the triumph of political expediency.[3] They are a crude barometer for the blunt exercise of military and political power, as dictatorial regimes or bloodied insurgents do their utmost to ensure that those who ordered or carried out the most unspeakable of atrocities are never held accountable. In return for dubious promises to desist from such activities in the future, victims and societies are asked to forget the past actions of such individuals and organisations and to move on for the sake of the broader common good. In this conception, amnesties represent

[1] Words of Gisella Ortíz upon learning that the military officials sentenced in February 1994 for killing her brother, eight other students and a professor from La Cantuta University in July 1992 had been released under Peru's amnesty law. Cited in Amnesty International, 'Peru: Human Rights in a Time of Impunity' (February 1996) AMR 46/01/96.

[2] See, eg, Nkosinathi Biko, 'Amnesty and Denial' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, London 2000); Human Rights Watch, 'Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda' (20 September 2005) Vol 17, No 12(A).

[3] During the January 2008 public hearings of the Consultative Group on the Past, an independent body mandated to explore ways of addressing the legacy of the 'Troubles' in Northern Ireland, the possibility of an amnesty being introduced was strongly condemned by some victims. For example, a man whose father was kidnapped and tortured by the Irish Republican Army (IRA) in 1972 said that amnesty should be ruled out 'because my father never got any chance of an amnesty—how can terrorists be entitled to it now?' Similarly, Raymond McCord whose son was murdered by the Ulster Volunteer Force (UVF) in 1997 said, 'Letting out prisoners was bad enough, but to absolve them of all their crimes is beyond the pale . . . It beggars belief that they can even contemplate it. I'm totally opposed to it. I would like to know why they are suggesting to have a different law for killers in Northern Ireland than they have in the rest of Great Britain, and the Republic.' See Sam McBride, 'Victims' Anger at "Amnesty for Terrorists" ' *News Letter* (Belfast 9 January 2008).

Faustian pacts with the 'devil' in the form of torturers and murderers, where rights such as truth and justice are sacrificed for political stability.

This concept of a Faustian pact is reflected in much of the transitional justice literature, which focuses on the supposedly contradictory goals of peace and justice faced by transitional regimes responding to periods of mass violence. In this 'peace v justice' debate,[4] the choice for transitional governments addressing past crimes is often framed in a false dichotomy between the extremes of entirely forgiving and forgetting the past through blanket amnesty laws for the sake of 'reconciliation', or pursuing retributive justice against every perpetrator of human rights violations at the risk of destabilising delicate political transitions. In this approach to transitional justice, amnesties are equated with amnesia.

This book will argue that such a perspective largely fails to recognise either the diversity of amnesty laws, particularly in the different types of crimes that they cover,[5] or the frequency with which they are used to respond to political crises. Drawing upon an Amnesty Law Database created by the author that contains information on over 500 amnesty laws introduced in all parts of the globe since the end of the Second World War, this book sets out to present a more nuanced account of the role of amnesties in political transitions. The book outlines and then examines developments that have seen a move away from amnesties that offer blanket impunity to large groups of offenders towards amnesties that are conditional, individualised and that offer bespoke solutions to local conditions. The book also argues that, rather than amnesties being indicative of an absence of law in the process of conflict transformation, rather, they increasingly speak to efforts to impose a legal framework upon an area that has historically been viewed as being a largely unfettered domain of state sovereignty. Thus, for example, in many recent cases, amnesties are

[4] For discussions of this debate see I William Zartman and Viktor Kremenyuk (eds), *Peace Versus Justice: Negotiating Forward- and Backward-Looking Outcomes* (Rowman & Littlefield, Lanham, MD 2005); Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition* (The Cass Series on Peacekeeping, Frank Cass, New York 2004); Nigel Biggar (ed), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press, Washington, DC 2003); Sterling Johnson, *Peace Without Justice: Hegemonic Instability or International Criminal Law?* (Ashgate, Aldershot 2003); Madeline H Morris, 'Lacking a Leviathan: The Quandaries of Peace and Accountability' in M Cherif Bassiouni (ed), *Post-Conflict Justice* (International and Comparative Law Series, Transnational Publishers, Ardsley, NY 2002); Michael P Scharf, 'Justice Versus Peace' in Sarah B Sewall and Carl Kaysen (eds), *The United States and the International Criminal Court: National Security and International Law* (Rowman & Littlefield, Boston 2000); Donna Pankhurst, 'Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace' (1999) 20 *Third World Quarterly* 239; M Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9.

[5] Chapter 3 discusses the distinction between political crimes, ordinary crimes and crimes under international law. It argues that each of the crimes is different and their commission transgresses different values and harms different targets. Therefore, amnesties for each involve different considerations.

combined with other transitional justice mechanisms, including prosecutions, truth commissions, vetting programmes and reparations measures. The book makes the case that, given the preponderance of amnesties in peacemaking efforts and the developments in the international standards which regulate what may or may not be included in such measures, a more balanced approach to the amnesty issue is required in order to bridge more effectively the peace and justice divide. This analysis will begin by exploring how 'amnesty' can be defined, before looking at why differing conceptions of amnesty are controversial among victims, human rights non-governmental organisations (NGOs), diplomats and politicians.

DEFINING 'AMNESTY'

As is outlined below, amnesty laws are typically characterised as a form of providing impunity, meaning

> the impossibility, de jure or de facto, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[6]

Others forms of impunity include immunity for states and state officials, statutes of limitations, indemnity laws,[7] or de facto immunity where prosecutions are simply not pursued. The book will focus, however, on amnesty laws, rather than impunity in general, as perceptions of amnesty laws' traditional associations with forgetting raise specific issues for accountability and often give rise to the greatest controversy,[8] as will be discussed below. Furthermore, as will be argued throughout this book, in recent years, increasingly innovative forms of amnesty, coupled with other transitional justice mechanisms, reveal that not all amnesties entail impunity, but rather some may offer alternative means of fulfilling the obligations of states under international law, where widespread prosecutions are not possible.[9]

[6] UNCHR, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN 4/2005/102/Add 1 (*prepared by* Diane Orentlicher), Definitions.

[7] Using the definition in the *Webster's Revised Unabridged Dictionary* (1913), indemnity laws in this sense typically describe 'an act or law passed in order to relieve persons, especially in an official station, from some penalty to which they are liable in consequence of acting illegally, or, in case of ministers, in consequence of exceeding the limits of their strict constitutional powers'.

[8] William Bourdon, 'Amnesty' in Roy Gutman and David Rieff (eds), *Crimes of War Book* (John Wiley and Sons Limited, Chichester 1999).

[9] See ch 4 for a detailed discussion of these trends.

Amnesty laws are often distinguished from other forms of impunity, due to the political context in which they are introduced: during conflicts to end the violence; as part of peace agreements to promote reconciliation; by dictatorial regimes trying to undermine opposition movements; or even by newly democratic regimes to release political prisoners.[10] Due to this variety of catalysts, amnesties can have a range of characteristics, and it is therefore necessary to explore what is meant by the term 'amnesty'.[11] This word, like 'amnesia' comes from the Greek word 'amnéstia', meaning 'forgetfulness' or 'oblivion'.[12] It denotes acts of political forgiveness, which have been used since ancient times. Parker claims that 'for as long as there have been written laws there has been an institutionalised power of mercy, pardon and amnesty'.[13] He points to laws such as the Code of Hammurabi (c 1700 BCE), which provided that the king could pardon adulterers.[14] Amnesties were also used in ancient Greece: in 404 BCE, 'Thrasybulus, an Athenian general, forbade any punishment of Athenian citizens for political acts committed before the expulsion of the tyrants'.[15] Similarly, in the Byzantine Empire 'general amnesties were granted to all offenders (except sorcerers, murders, and adulterers) on religious occasions such as Easter'.[16] In his study on amnesty laws, Joinet explained,

> Amnesty is an outgrowth of the right to pardon, an act of individual clemency of theocratic origin. The divine nature of pardon was related to the sacred character of the King, whether the latter was himself a god or an intermediary between the gods and men.[17]

He argued that collective pardon developed at the same time as individual pardons.[18] Although this form of regal pardon was available for any crime, amnesties gradually became 'a means of assuring social peace . . . and even political peace'.[19] Following the signing of the 1648 peace treaties of Westphalia, which marked the birth of the modern nation state, amnesties were frequently used as a component in international peace

[10] For a discussion of the motives for amnesty laws, see ch 1.

[11] The definition can differ substantially between jurisdictions, but for the purposes of this book, an overarching definition has been developed from the academic literature.

[12] Ben Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws* (Longman, Harlow, UK 2002) 8.

[13] Robert Parker, 'Fighting the Siren's Song: The Problem of Amnesty in Historical and Contemporary Perspective' (2001) 42 *Acta Juridica Hungaria* 69, 76.

[14] For a discussion of the history of amnesties from their ancient origins, see Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International, Hague 2002) 5–21.

[15] Norman Weisman, 'A History and Discussion of Amnesty' (1972) 4 *Columbia Human Rights Law Review* 520, 530.

[16] Parker (n 13) 76.

[17] ECOSOC, 'Study on Amnesty Laws and their role in the safeguard and protection of human rights' (21 June 1985) UN Doc. E/CN.4/Sub.2/1985/16 (*prepared by* Louis Joinet) [9].

[18] *Ibid* [10].

[19] *Ibid* [12].

agreements.[20] This use of amnesties has continued to the present day. However, it has adapted with the changes in modern warfare as today amnesties are more often introduced in response to internal conflicts rather than international wars, particularly where no party to the conflict could achieve outright military victory. The original idea of amnesties as a prerogative of the state remains, however, and many amnesties are still enacted in keeping with this tradition, particularly those releasing non-violent political prisoners.[21]

Amnesty has traditionally been understood in a legal sense to denote efforts by governments to eliminate any record of crimes occurring, by barring criminal prosecutions and/or civil suits.[22] In extinguishing liability for a crime, amnesty assumes that a crime has been committed.[23] In this way, amnesties are retroactive, applying only to acts committed before the laws were passed.[24] Furthermore, amnesties are always exceptional, and can be limited in a variety of ways: they could exclude certain categories of crimes, such as serious human rights violations, or certain individuals, such as the leaders and intellectual authors of the policies of oppression and violence. In addition, an amnesty process could be conditional, requiring applicants to perform tasks such as surrendering weapons, providing information on former comrades, admitting the truth about their actions, or showing remorse in order to benefit from amnesty. These conditional amnesties could be individualised, so that applicants can only benefit from an amnesty upon successful compliance with its conditions. Where the amnesty is linked to truth-recovery mechanisms, particularly by granting amnesty in exchange for truth,[25] it differs from the traditional understandings of the term, as, rather than casting the crime into oblivion, it is investigated and the events are publicised in public hearings and official reports.

[20] See, eg: Nijmeguen Peace Treaty 1678, art 3, which ended the Dutch War; Utrecht Peace Treaty 1713, art 2 between France and England, concluded at the end of the Spanish Succession War; Paris Peace Treaty 1763, art 2; Tilsit Peace Treaty 1807, art 10; and Final Act of Congress of Vienna 1815, arts 11–12; Prague Peace Treaty1866, art 10; and Treaty of Constantinople 1879, art 9; and the treaties that followed World War One. For a full discussion, see Fania Domb, 'Treatment of War Crimes in Peace Settlements—Prosecution or Amnesty?' in Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Law* (Martinus Nijhoff Publishers, Hague 1996).

[21] This category of amnesty beneficiaries will be explored in more detail in ch 2.

[22] Carolyn Bull, 'Amnesty' November 2001 (Prepared by Carolyn Bull for Interim Office, Commission for Reception, Truth and Reconciliation in East Timor).

[23] O'Shea (n 14) 2.

[24] Bourdon (n 8).

[25] As will be discussed in ch 4, the model of exchanging amnesty for truth originated in South Africa and, although it has not been exactly replicated, it has influenced the mandates of truth commissions in Liberia, Aceh, Timor-Leste and the Democratic Republic of Congo. In addition to truth commissions, amnesties can be linked to other truth recovery processes such as civil proceedings or commissions of inquiry. For example, testimony given to the Bloody Sunday Inquiry in Northern Ireland cannot be used in criminal proceedings.

The differences in the scope of amnesties have led to the development of terms such as 'blanket amnesty', which means amnesties that apply

> across the board without requiring any application on the part of the beneficiary or even an initial inquiry into the facts to determine if they fit the law's scope of application.[26]

This term is often used in contrast to more limited or conditional amnesties, such as the amnesty in exchange for truth model used in South Africa.[27] Related to 'blanket amnesties' are 'self amnesties', which describes laws or decrees which are passed unilaterally by a government to shield its agents from prosecution. As will be argued in chapter 1, self-amnesties are distinct from amnesties emanating from peace negotiations involving representatives from different stakeholder groups. There can also be 'pseudo-amnesties' meaning

> statutes designed to have the same effect as amnesty laws, or something very close to it, while avoiding the damaging name of amnesty.[28]

Several examples of pseudo-amnesties have been included in the Amnesty Law Database, such as the Argentine Due Obedience Law.[29]

In theory, amnesty applies only to individuals who have not yet been prosecuted and sentenced. This differs from pardons, which are used to release convicted individuals from serving their punishment. In reality, amnesty is frequently combined with pardons, which can blur the distinction between the two practices, and in fact, some academics have begun to use the term 'amnesty' in an all-encompassing manner to describe both practices.[30] Further distinctions can be found among the beneficiaries of amnesties and pardons, as pardons are generally given to individuals, whereas amnesty may be collective.[31] Confusion can also arise regarding amnesties for non-violent political prisoners who have been imprisoned. Where they have simply been interned, but not convicted, describing their release as an amnesty is unproblematic. However, where they have been convicted and are then released through an amnesty, such amnesties resemble pardons. A distinction remains, however, as many amnesties for prisoners of conscience, particularly those following the collapse of an oppressive regime, aim to rehabilitate the prisoners and declare their innocence, rather than simply remove the punishment. It is due to this distinction that such amnesties are included in this study. However, as will

[26] Garth Meintjes and Juan E Méndez, 'Reconciling Amnesties with Universal Jurisdiction' (2000) 2 *International Law FORUM du droit international* 76, 85.

[27] For an overview of the South African amnesty process, see case study 9.

[28] Meintjes and Méndez (n 26) 85.

[29] *Ley de Obedencia Debida* 1987 (Arg.). For more information on the Due Obedience Law, see ch 2.

[30] Domb (n 20) 305.

[31] Bull (n 22).

be argued throughout this book, amnesties for non-violent political prisoners are of course of a different nature from amnesties that cover individuals responsible for unlawful criminal acts. This book will further consider prisoner releases for individuals who have been convicted, where they complement a wider programme of amnesties. For example, in negotiated peace agreements in addition to amnesty for combatants, convicted members of insurgent organisations are often released under the terms of the agreement.[32]

During this research, I was concerned that this book might become a useful source for states seeking to evade their international obligations and avoid prosecuting perpetrators of crimes under international law. While some residual unease is perhaps inevitable, these concerns have been somewhat assuaged: by the fact that all of the information used in this research was already in the public domain; by the fact that there is an ever-burgeoning literature, in particular on how the International Criminal Court (ICC) might approach amnesty laws; by the fact that the ICC Prosecutor has himself appealed for researchers to develop strategies for the Court in this area;[33] and, finally, by the advice from senior colleagues that governments with malevolent intent have rarely required the assistance of academic lawyers to get their way. However, despite these circumstances, any discussion of amnesty laws is likely to be controversial.

CONTROVERSIAL NATURE OF AMNESTY LAWS

Within the international human rights community in particular, some very prominent organisations make strong arguments that amnesties are unacceptable for a number of reasons, including legal, moral and political concerns.

Amnesties, International Law and Legal Claims-making

Anti-impunity campaigners argue that any form of amnesty for serious violations of international law would violate states' obligations to ensure victims' rights to truth, justice and reparations.[34] For example, in 2005, in a joint statement condemning the proposal to enact an amnesty in Algeria, Amnesty International, Human Rights Watch, the International Center for

[32] Leslie Vinjamuri and Aaron P Boesenecker, *Accountability and Peace Agreements: Mapping Trends from 1980 to 2006* (Centre for Humanitarian Dialogue, Geneva 2007).

[33] Luis Moreno-Ocampo, 'Integrating the Work of the ICC into Local Justice Initiatives' (2006) 21 *American University International Law Review* 497. This issue will be discussed in more detail in ch 5.

[34] For a detailed discussion of the nature of these rights, see ch 4.

Transitional Justice, the International Commission of Jurists, and the International Federation for Human Rights proclaimed:

> Amnesties, pardons and similar national measures that lead to impunity for crimes against humanity and other serious human rights abuses, such as torture, extrajudicial executions and 'disappearances', contravene fundamental principles of international law.[35]

These organisations, together with some academics and victims' groups, base their assertion that principles of international law now exist to prohibit amnesties for crimes under international law on the growth of international criminal justice mechanisms and instruments to repress these crimes at the national and international levels.[36] As will be explored in chapter 3, it is certainly true that an increasingly extensive international legal regime has been developed to prohibit and punish war crimes, genocide, torture and disappearances. Furthermore, international and hybrid courts have been established by the international community to provide for the punishment of individuals who are responsible for serious violations of international human rights and humanitarian law. In their depiction of the legal principles, human rights NGOs distinguish between the abstract legal nature of states' obligations under international law and wider political concerns which may affect the decisions of transitional governments, to argue that the principles of international law that they have identified should not be diluted to political concerns. In so doing, they suggest a degree of clarity with regard to the law which arguably does not exist.[37]

[35] Human Rights Watch, 'Algeria: Amnesty Law Risks Legalizing Impunity for Crimes Against Humanity' (14 April 2005). This intervention was ultimately unsuccessful as the amnesty enacted. For a discussion experience of amnesty in Algeria, see case study 4.

[36] Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press, Oxford 1995); John Borneman, *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe* (Princeton University Press, Princeton, NJ 1997); Christopher C Joyner and M Cherif Bassiouni, 'Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference, 17–21 September 1998', *Nouvelles Etudes Penales* (*Association internationale de droit penal*: Eres, 1998); M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63; Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537.

[37] However, the existing legal ambiguities are often apparent in their choice of language. For example, the reference to 'other serious human rights abuses' in the above statement suggests something of an obfuscation as to precisely which crimes trigger a duty to prosecute under international law. The intentions behind this tactic are commendable, as it reflects a desire to be as inclusive as possible when dealing with serious human rights violations. However, there is a risk in adopting such broad and general language that the boundaries of international law will become so stretched as to no longer reflect the lived realities in many conflicts, but rather 'collapses into pacificism'. Where this occurs, McEvoy argues that it could lose 'its lustre as an epistemological and political tool' and, consequently, its ability to influence the behaviour of non-state combatant actors. See Kieran McEvoy, 'Beyond the Metaphor: Political Violence, Human Rights and "New" Peacemaking Criminology' (2003) 7 *Theoretical Criminology* 319, 324 and 335.

With regard to the putative clarity of international law relating to amnesties, while such an assertive position is entirely understandable from organisations who have campaigned tirelessly to overcome cultures of impunity amongst human rights abusers, this book will respectfully suggest that it is too early to say that an absolute prohibition on amnesties for crimes under customary international law exists: it is *lex ferenda*. As states continue to introduce amnesties for all types of crimes, including crimes under international law, such a position is surely questionable. As will be illustrated below,[38] amnesties have increased in frequency during the decades since the end of the Second World War. This trend towards *introducing* amnesty laws as a form of state practice, rather than simply accommodating de facto impunity (wherein individuals will never in practice be prosecuted) could be seen as indicative of the boundaries of customary international law incorporating certain types of amnesty.[39] The argument advanced in more detail below is that amnesties per se, even for serious human rights violations, are not necessarily automatically a breach of international law. Instead, certain types of amnesty that incorporate various aspects of a developing legal regulatory framework, such as exclusions of the 'most responsible',[40] or the establishment of alternative transitional justice mechanisms[41] may in fact be deemed lawful.

By presenting this view of the status of amnesty laws under international law, my intention is in no way to denigrate the work of human rights NGOs. Rather it is simply to recognise that the objective of these organisations is to *persuade* governments, political bodies and intergovernmental organisations to change their policies and practices and to end human rights abuses.[42] And that to achieve these objectives, human rights organisations engage in a process of legal 'claims-making',[43] whereby they assert a clear position recognising the emergence of international legal rules, in the hope that such rules will gradually become established and reflected in state practice. However, such legal claims-making, regardless of the vigour with which it is expressed, does not mean

[38] For a discussion of overarching trends in the introduction of amnesty laws, see the section on trends below and for an exploration of the increase in the number of amnesties for crimes under international law, see ch 3.

[39] It should be noted of course that state practice is only one form of *opinio juris*; the complexities of establishing state practice from this study will be discussed further below.

[40] For a discussion of the legal principles relating to the prosecution of those who are 'most responsible', see ch 2 and for an overview of the jurisprudence of international courts on this issue, see ch 6.

[41] The analysis of how amnesties can complement measures to ensure the victims' rights to truth, justice and reparation will flow through this book, but see particularly ch 4.

[42] This description of the objectives of Amnesty International and Human Rights Watch is based on the mission statements on their websites.

[43] For a discussion of claims-making see Joel Best, 'Rhetoric in Claims-Making: Constructing the Missing Children Problem' (1987) 34 *Social Problems* 101; McEvoy (n 37).

that interpretation of the law remains uncontested, nor that state practice of *opinio juris* necessarily agrees with such claims.

The extent to which legal claims-making reflects the existence of international legal rules regarding amnesties is highly significant for transitional contexts, particularly since the emphasis on the legal rules has coincided with a trend towards what McEvoy has labelled 'the dominance of legalism'.[44] Whilst law has a valuable role to play in political transitions, McEvoy argues its dominance inhibits

> a more honest acknowledgement of the limitations of legalism and a greater willingness to give space to other actors and forms of knowledge.[45]

Human rights discourse, what Michael Ignatieff has referred to as the 'human rights as trumps' style of analysis,[46] lends itself in particular to an obfuscation of the fundamentally *political* questions which transitional jurisdictions must inevitably face.[47] Treating law as an abstract universal entity that should be enforced independent of the political conditions within transitional states is to overlook the very political role that law can have. Furthermore, as will be discussed in chapters 1 and 8, various political motivations influence transitional governments and international actors to support prosecutions or amnesties. In addition, legalism, by focusing on top-down formal legal processes, inhibits the flexibility for transitional states to tailor their transitional justice processes to suit the needs of the populace and to incorporate non-legal tools such as distributive justice programmes, which could be more responsive to the needs of society and individual victims.

Amnesties and the Views of Victims

Where amnesties deny victims their rights to truth, justice and reparations, they can potentially aggravate the victims' suffering in a number of ways. For example, the shroud of impunity cast by a blanket amnesty for serious human rights violations will often mean that the crimes that the victim endured will be denied by the state, causing them to feel continually alienated from society, and to be unable to discover what has happened to their loved ones. Furthermore, where victims are denied recognition of their suffering, they may find it difficult to access medical and psychological services, or to obtain financial compensation for the

[44] Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 *Journal of Law and Society* 411, 412

[45] *Ibid*, 413.

[46] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Amy Gutman, ed, Princeton University Press, Princeton 2001) 21.

[47] David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101, 117.

harm they endured.[48] This could occur, for example, following a state policy of disappearances where the state refuses to acknowledge its responsibility for the crimes, instead lying that those who disappeared must have chosen to go into exile or have been killed while fighting with a guerrilla organisation. The policy of denial, coupled with a failure to investigate, could result in the victims' relatives being denied access to rehabilitation services or to civil remedies.

Another practical reality that arises with regard to amnesties is the proximity to amnestied lower-level offenders in which victims might find themselves living. This can occur when, following an amnesty, offenders are encouraged to reintegrate into their former communities. Such proximity could mean that during their daily life, victims are confronted by the individuals who caused their suffering, which could cause them harm and even lead them to engage in vigilantism.[49]

Despite these potentially damaging consequences of amnesty laws for victims and the frequent condemnation of amnesties as a denial of victims' rights, as will be explored in chapter 9, there is often a diversity of views on amnesty among victims within transitional states. Victims' needs and wishes may be affected by many factors, including the continued risk of physical violence, their economic well-being, the cultural traditions within their community, and their political views. Although many victims' groups do strongly oppose amnesties, there are examples from countries such as Uganda[50] and Brazil[51] of civil society groups lobbying in favour of amnesty. Furthermore, amnesties have received majority support in referenda in Uruguay and Algeria, which would have inevitably included victims among the voters. Although, as will be explored in chapter 1, referenda can be problematic. For example, the Uruguayan referendum is often characterised as having taken place within a climate of military pressure.[52] Furthermore, there were some allegations of vote rigging in Algeria,[53] although it seems that the result has not been disputed. The

[48] For a discussion of the impact of amnesty laws on victims, see ch 9.

[49] Ronald C Slye, 'The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights' (2004) 22 *Wisconsin International Law Journal* 99, 108; and Alex Boraine, 'Alternatives and Adjuncts to Criminal Prosecutions' (Presentation at the conference: 'Justice in Cataclysm: Criminal Tribunals in the Wake of Mass Violence' in Brussels, 20–21 July 1996).

[50] Lucy Hovil and Joanna R Quinn, 'Peace First, Justice Later: Traditional Justice in Northern Uganda' (2005) Working Paper No 17 (Refugee Law Project, Faculty of Law, Makerere University, Kampala, Uganda; International Criminal Court, 'Press Release: Joint Statement by ICC Chief Prosecutor and the visiting Delegation of Lango, Acholi, Iteso and Madi Community Leaders from Northern Uganda' (16 April 2005) No: ICC-OTP-20050416. 047-EN; William Tayeebwa, '"Don't Prosecute Kony"' *New Vision* (Kampala 1 August 2004).

[51] Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* (University of Chicago Press, Chicago, Ill 1998).

[52] Weschler (n 50); Americas Watch, 'Challenging Impunity: The "*Ley de Caducidad*" and the Referendum in Uruguay' (Report) (1 March 1989).

[53] ——, 'Algerians back Civil War Amnesty' *Al Jazeera* (1 October 2005).

referenda seem to indicate that in certain contexts, victims and societies may be willing to prioritise concerns such as peace, stability and reconstruction over measures to prosecute those responsible for past crimes.

Victims' views towards issues of amnesty, peace and justice are not static, however; instead, it is common for victims' views to change over time, as their priorities alter. As will be explored in chapter 9, in the immediate aftermath of mass violence, victims may prioritise physical security and access to food and medical supplies. However, as time passes and the political climate becomes more secure, their needs may change to concerns about their place in society. In different contexts this can be manifest in different ways, ranging from support for prosecutions, to a preference for more restorative approaches, to truth-recovery. As will be argued, amnesty laws can be designed to complement other transitional justice mechanisms.

Amnesties and Pragmatic Peacemaking

Where victims' groups have been supportive of amnesty laws, they have generally expressed the view that such laws were necessary to achieve peace. This justification for amnesty is also common in the rhetoric of national governments, who argue that amnesties are necessary to end the violence. However, where combatants demand amnesty as a prerequisite for a ceasefire, the ICC Prosecutor has labelled this 'blackmail'.[54] Furthermore, the granting of an amnesty does meant that peace will be achieved, as fighting often continues after an amnesty has been offered. However, in such cases, the failure of amnesty to end the violence may not be attributable to the amnesty itself, but rather to the wider political context in which it was introduced. For example, offering amnesty during a conflict may cause the state to appear weak. If such weakness is apparent to insurgents, it may encourage them to think that victory is close and inspire them to continue fighting, rather than surrender. In such cases, the amnesty becomes ineffective and possibly counter-productive. In this way, the potential of an amnesty to contribute to peacebuilding may be dependent upon the relative strengths of the parties to the conflict.

The potential for an amnesty to contribute to a reduction in violence may also be dependent upon its timing and means of enactment. For example, amnesties that are unilaterally introduced by states appear to have less chance of reducing conflict than amnesties that result from a

[54] 'The 4 criminals threatened to resume violence if the arrest warrants are not withdrawn; they are setting conditions; it is blackmail . . .'. See Luis Moreno-Ocampo, 'Eleventh Diplomatic Briefing of the International Criminal Court' (ICC, The Hague, 10 October 2007). See also 'Address by Mr Luis Moreno-Ocampo, Prosecutor of the International Criminal Court' at *Building a Future on Peace and Justice* conference (Nuremberg, 24 June 2007).

negotiated settlement. Indeed, it appears that in a few cases, in offering unilateral amnesties, the state's intention may not be to end the violence, but rather to merely pause it in order to gain time to re-arm.

Within peace processes, amnesty also play a symbolic role by speaking directly to contested meanings of violence, or as McGarry and O'Leary described it, 'the conflict about the conflict'.[55] As McEvoy *et al* have argued, the treatment of combatants or prisoners is perhaps the key theme around which larger political or ideological struggles coalesce.[56] Thus, for example, the granting of an amnesty arguably denotes that the actions of non-state actors were political rather than criminal acts. By granting such recognition, states are arguably affording the activities of 'criminals' or 'terrorists' an unwarranted political status and hence a greater legitimacy. Slye has argued that such an approach can be risky, as

> the privilege afforded political violence under the amnesty process sets a dangerous precedent for future political advocacy, and a dangerous signal to a society that is trying to establish popular legitimacy based on the rule of law.[57]

However, this need not always be the case. Instead, recognition that something was political does not equate to greater legitimacy with regard to acts of violence. Rather it is a view of more clearly 'seeing' the causes, context and consequences of violence. From this perspective, amnesties represent part of a broader process of stripping away the fiction of denial that often characterises state propaganda.[58]

Amnesties and Dealing with the Past

Another controversy surrounding amnesties is that many of the amnesties studied in this book were justified as necessary to 'close the door on the past'. However, rather than being a definitive end to discussions of past crimes, as will be demonstrated in chapter 1, amnesties are often introduced repeatedly to address the same problems.[59] In other cases,

[55] John McGarry and Brendan O'Leary, *Explaining Northern Ireland* (Blackwell Publishing, Oxford 1995) 355.

[56] Kieran McEvoy, Kirsten McConnachie and Ruth Jamieson, 'Political Imprisonment and the "War on Terror"' in Yvonne Jewkes (ed), *Handbook on Prisons* (Willan Publishing, Cullompton, Devon 2007).

[57] Ronald C Slye, 'Justice and Amnesty' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, London 2000) 182.

[58] For a discussion of official cultures of denial, see Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity Press, Cambridge 2001).

[59] Where these amnesty laws provide blanket impunity, they have been argued to contribute to repeated cycles of violence. See, eg, UNCHR, 'Report by Mr BW Ndiaye, Special Rapporteur, on his mission to Rwanda from 8 to 17 April 1993' (11 August 1993) UN Doc E/CN 4/1994/7/Add 1.

amnesties which were intended to permanently prevent investigations of the past are gradually being overturned as political conditions become more stable. Furthermore, as discussed above, the traditional conception of amnesty as 'amnesia' is becoming increasingly outdated. Instead, states are finding innovative ways to address past crimes without burying the truth or enforcing widespread prosecutions. As will be explored in detail in this book, this can include accompanying amnesties with truth commissions, restorative justice programmes or even selective prosecutions. In these cases, amnesties can be favourably contrasted with prosecutions, as trials do not always meet the needs of transitional societies.

Just as the potential impact of amnesties on reconciliation is subject to dispute in the literature, it is also uncertain whether pursuing prosecutions will automatically have a beneficial impact within transitional states. For example, for justice to be effective, it is required that the proceedings be fair and the rights of the accused respected.[60] However, often following periods of mass violence where tactics such as disappearances were used to give the perpetrators 'maximum deniability at the time and afterward',[61] prosecutions could be inhibited by a lack of evidence. Other difficulties in post-conflict situations include the legal infrastructure being in a state of collapse, with a lack of financial resources and trained and impartial personnel. Clearly, the rebuilding of this infrastructure should be a high priority for the new regime, but this can be a lengthy process. Furthermore, where the transition is characterised by an ongoing 'culture of violence', once functioning, the legal infrastructure will have to balance investigating and prosecuting both past and current criminality. These problems worsen where there are large numbers of perpetrators, making it impossible to fairly prosecute and imprison every individual responsible for serious human rights violations.[62] Faced with the difficulty, or even impossibility, of obtaining convictions in the aftermath of conflict, amnesty could be used to bring positive outcomes to a society by encouraging combatants to surrender their weapons and admit the truth about their actions.

It has been argued that blanket amnesties create a risk that the lies and denials that frequently characterise periods of mass violence will become institutionalised,[63] will corrupt processes of institutional reform, and will reinforce suspicions between the different parties to the transition. On the

[60] For a detailed discussion of procedural fairness, see Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press, Cambridge 2006).

[61] Stanley Cohen, 'State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past' (1995) 20 *Law and Social Inquiry* 7, 14.

[62] There are suggestions by some human rights organisations that, in such situations, there can be a policy of investigating and prosecuting the crimes over the long-term, of perhaps 10–15 years. However, as has been seen in Rwanda, this raises its own problems for the penal infrastructure, particularly where suspects are detained for years without trial.

[63] Boraine (n 49).

other hand, it has also been suggested that trials are unable to produce a 'reliable and comprehensive truth',[64] as it is likely the accused will be reluctant to inculpate themselves. In contrast, a process where amnesty is offered in exchange for truth could encourage perpetrators to reveal their actions. This view was expressed by the South African Constitutional Court in the *AZAPO* judgment:

> That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatized become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.[65]

The experience of South Africa also highlights, however, that, in addition to the 'carrot' of the amnesty, the 'stick' of prosecutions is arguably necessary, as without the genuine threat of legal proceedings the higher level offenders are unlikely to apply for amnesty, which will inhibit the degree to which the truth is uncovered.[66] For example, among the 7,116 applications for amnesty to the South African TRC, only 88 came from individuals with 'permanent commanding functions' and 29 from 'leaders at the top structures of organised hierarchy'.[67] Pedain argues that this could result from inter alia the difficulty in proving the complicity of leadership figures in the perpetration of serious crimes, and hence, their perception

[64] Erin Daly, 'Transformative Justice: Charting a path to Reconciliation' (2001) *International Legal Perspectives* 73.

[65] *Azanian Peoples Organization (AZAPO) v the President of the Republic of South Africa* (CCT 17/96) (8) BCLR 1015 (CC) [17]. For further discussion of this judgment and the right to truth, see ch 5.

[66] For a discussion of South Africa's amnesty process and the impact of the 2005 National Prosecuting Guidelines on the bargain that amnesty is offered in exchange for truth, see case study 9.

[67] Pedain's study of the applications to the Amnesty Committee also reveals other interesting data: for example, between 4,000 to 5,000 applications came from common criminals (and were therefore ineligible for amnesty), and 857 applications came from ANC and ANC-related organisations, whereas only 289 came from state security forces and 85 from members of the Inkatha Freedom Party. See Antje Pedain, 'Was Amnesty a Lottery? An Empirical Study of the Decisions of the Truth and Reconciliation Commission's Committee on Amnesty' (2004) 121 *South African Law Journal* 785.

that they were unlikely to be held criminally or civilly liable for their actions.[68]

Amnesty and Reconciliation

The impact of amnesties on long-term reconciliation is often subject to debate. Amnesty is frequently justified by politicians as a means of promoting reconciliation.[69] This view has support amongst some academics, who reason that if, after a war, the victors impose conditions that 'involve crushing the dignity of the vanquished the peace will not last', as was shown to be the case with the onerous conditions imposed on Germany after the First World War.[70] Furthermore, Hadden contends that

> strict punishment of all violators may serve to maintain rather than reconcile the differing recollections and attitudes of the various communal or political groups from which the conflict arose.[71]

The position is even more delicate where there is no clear victor in a conflict, and consequently any political settlement has to be a compromise between the different parties, as an attempt by one side to punish their opponents could reignite the violence.[72] Instead, it has been suggested that, where there is a delicate balance of power, it is better 'to quell the need for vengeance' among various combatant groups through policies of compromise and forgiveness.[73] On this view, where mercy is shown to former enemies and an attempt made to address the root causes of the conflict (for example through other transitional justice mechanisms and institutional reform), the justification for further violence will diminish and the conditions for reconciliation and lasting peace could develop. Such a reconciliatory approach to amnesty was the justification for the South African amnesty process, as expressed in the 1994 Interim Constitution:

> there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization.[74]

[68] *Ibid* 813.

[69] This rationale for amnesty will be explored in ch 1.

[70] O'Shea (n 14) 25. Here, although the dignity of the vanquished was more affected by the reparations 'burden' and the sense of collective guilt imposed on Germany than by widespread prosecutions (although some did take place), the point remains that, where there are clear 'victors' in a transition, if they attempt to punish their opponents rather than restore relationships, they could be creating conditions for ongoing violence.

[71] Tom Hadden, 'Punishment, Amnesty and Truth: Legal and Political Approaches' in Adrian Guelke (ed), *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies* (Palgrave Macmillan, 2004).

[72] Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, Antwerp 2004) 32–3.

[73] O'Shea (n 14) 24–5.

[74] Interim Constitution of South Africa 1994, Postamble.

In contrast, human rights commentators often contend that 'there can be no just and lasting reconciliation unless the need for justice is effectively satisfied'.[75] Furthermore, Daly has argued that amnesties could be dangerous for society, as new transitional governments that choose to disregard the needs of victims may appear unsympathetic,[76] which could encourage 'cynicism about the rule of law and distrust toward the political system'.[77] This could cause individuals to lose confidence in the government.[78] Scharf argues that trials of former leaders are needed 'to assert the supremacy of democratic values and norms and to encourage the public to believe in them'.[79] However, these potential positive benefits of trials will only be achieved where the necessary evidence and resources are available to put individuals on trial, and where the prosecutions do not reignite the violence.

A further issue on which trials and amnesties are often compared is their perceived potential to have an impact on deterrence.[80] Amnesties are often criticised as undermining specific deterrence by enabling individuals who are capable of inflicting horrendous acts of pain, and who may be prone to further violence, to mingle freely in society. Furthermore, it is argued that amnesties impact on general deterrence by sending a message that, if a violent political campaign creates enough disruption, it might be possible to obtain an amnesty as part of the peace negotiations.[81] In contrast, Méndez argues that

> the threat of prosecution can be a clear disincentive for actors in an armed conflict to give up their resort to violence.[82]

However, as will be discussed in chapter 2, the extent to which deterrence operates in the context of political violence is uncertain.[83]

[75] UNCHR (n 6) Preamble. This quote refers to justice in the sense of Western retributive justice, but as will be discussed in ch 4, restorative justice process may coexist with amnesty laws.

[76] Daly (n 64).

[77] Michael P Scharf and Nigel Rodley, 'International Law Principles on Accountability' in M Cherif Bassiouni (ed), *Post-Conflict Justice* (International and Comparative Criminal Law Series, Transnational Publishers, Ardsley, NY 2002) 90.

[78] Boraine (n 49).

[79] Scharf and Rodley (n 77) 91.

[80] For a discussion of deterrence in relation to political offenders, see ch 2, 'Ideology and Political Offenders'.

[81] Slye (n 49) 109.

[82] Juan E Méndez, 'Accountability for Past Abuses' (1997) 19 *Human Rights Quarterly* 255, 273. For a more detailed discussion of the role of deterrence, see David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 *Fordham International Law Journal* 473; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, Boston 1998); Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 *Columbia Human Rights Law Review* 661.

[83] Wippman (n 82) 477. See discussion of 'Ideology and Political Offenders' in ch 2.

Furthermore, the rigorous pursuit of justice is often not a realistic response for transitional societies, where distinctions between victims and perpetrators can become blurred. For example, in Uganda, the majority of the combatants of the Lord's Resistance Army (LRA) are child soldiers (or former child soldiers who grew into adulthood whilst with the LRA).[84] The children will have been drugged, brutalised and sexually abused, and therefore although they may have committed serious crimes, they can also be viewed as victims. Such blurring can make it difficult to distinguish those who should be punished for their actions from those who became involved in violent acts due to duress or psychological trauma. In such circumstances, there are risks that prosecutions will create scapegoats and 'false innocents'[85] through a failure to investigate all perpetrators or acquittals of known offenders due to a lack of evidence.

The alleged risks that amnesties pose to reconciliation have been contradicted by Cobban, who argues that, although Rwanda pursued prosecutions, it is still not free, whereas amnesties in Mozambique and South Africa led to states with improved adherence to the rule of law.[86] These examples, and experiences elsewhere, illustrate that amnesties may not automatically inhibit reconciliation within states, and as will be argued in chapter 1, they could in fact impact positively upon reconciliation at individual, communal and national levels, provided that they are introduced in good faith and are accompanied by other transitional justice mechanisms and institutional reforms.

TRENDS IN THE INTRODUCTION OF AMNESTY LAWS

Since the Second World War, there have been considerable global efforts to combat impunity, through the elaboration of international human rights and humanitarian law treaties, and the creation of courts to try perpetrators of crimes under international law. Such efforts have led some commentators to suggest that a 'justice cascade' is now in existence, whereby

> democratizing states throughout the world are beginning to hold individuals, including heads of state, accountable for past human rights violations, especially though the use of trials.[87]

[84] International Crisis Group, 'North Uganda Peace Process: The Need to Maintain Momentum', Africa Briefing No 46 (14 September 2007) 7.

[85] Heinz Steinert, '*Fin de Siècle* Criminology' (1997) 1 *Theoretical Criminology* 119.

[86] Helena Cobban, 'Think Again: International Courts' *Foreign Policy* (March/April 2006).

[87] Kathryn Sikkink and Carrie Booth Walling, 'Errors about Trials: The Emergence and Impact of the Justice Cascade' (Paper presented at the annual meeting of the American Political Science Association, Marriott Wardman Park, Omni Shoreham, Washington Hilton, Washington, DC, September 2005), see also Ellen L Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 *Chicago Journal of International Law* 1.

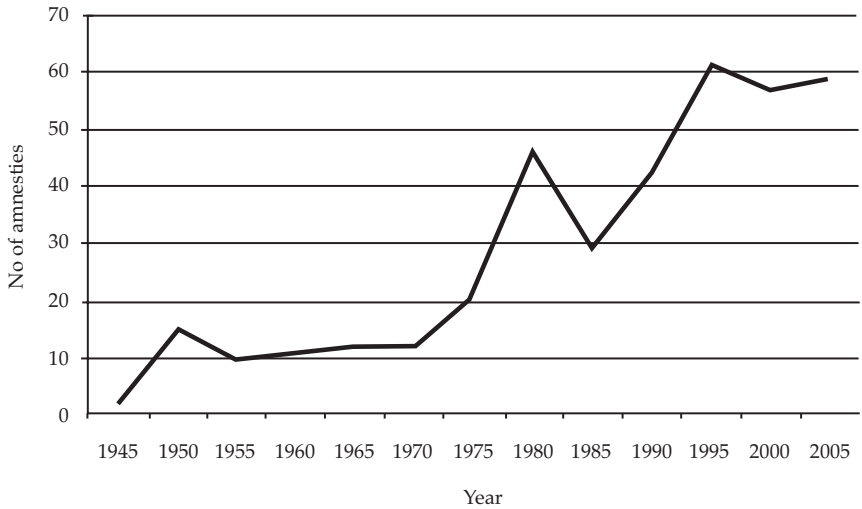

Figure 1: Amnesties by time

Despite all these efforts, however, amnesty laws for crimes under international law, political crimes and ordinary crimes, continue to be introduced by states. Indeed, by analysing the records in the Amnesty Law Database over time, it is possible to see that amnesties have in fact increased in frequency since the Second World War. Their distribution is shown in Figure 1 above.[88] Whilst recognising that these results may be slightly skewed, due to the difficulty of obtaining information for the earlier periods, the trend towards an increased reliance on amnesty laws is unmistakable.[89] A number of factors contributing towards this trend can be identified. For example, since the end of the Second War World the number of states within the world has increased, due to the decline of colonialisation. Furthermore, the end of the Cold War caused many former communist states, or dictatorial regimes that had previously been supported by the superpowers, to move towards democracy. Furthermore, some newly independent states spiralled into civil war, as ethnic tensions that had previously been suppressed under authoritarian rule came to the

[88] This graph corresponds to data on 401 amnesty processes. 'Reparative amnesty laws', which applied to non-violent political offenders or draft dodgers and deserters, were excluded from this graph, as it is intended to contrast the frequency of trials with amnesty laws. Between January 2005 and December 2007 a further 24 (non-reparative) amnesty laws were introduced. For a list of the amnesty processes in the Amnesty Law Database see App 1. Also, see Figure 9 for the relationship of amnesties to crimes under international law between January 1980 and December 2007.

[89] This trend has also been identified in the work of other authors, see Vinjamuri and Boesenecker (n 32); Andrew Reiter, Tricia Olsen and Leigh Payne, 'Behind the Justice Cascade: Sequencing Transitional Justice in New Democracies (on file with the author).

fore, causing amnesties to be relied upon to reduce the violence. It is also possible that changes in the motivations for introducing amnesties have fuelled their continued use. For example, during the 1980s, several amnesties were introduced within dictatorial regimes, to diffuse dissent and encourage exiles to return, whereas during the 1990s, these motivations were outnumbered by amnesty laws that aimed to end the violence in a civil war or to promote national reconciliation following the end of a conflict.[90] The transition from international to internal wars has perhaps created a desire for amnesties to enable all the parties to a civil conflict to live together within the state, rather than the belligerent parties to an international war simply retreating behind their respective borders.

As was noted above, the rise in the number of amnesties may also illustrate a move away from dictatorial regimes characterised by lawlessness to contexts where even repressive governments attempt to demonstrate respect for the rule of law by enacting legislation to authorise their oppressive policies and shelter their agents from prosecution. Such changes could be a response to the increasing salience of human rights law. Slye claims that the rise in the number of amnesties demonstrates, not increased laxity on the part of states towards crimes under international law, but rather 'the growing force of the international human rights movement',[91] which has made governments feel that it is necessary to introduce amnesty laws to protect themselves from prosecution for acts for which they would previously have enjoyed de facto impunity. Although such laws may not result in justice for victims of human rights violations, they could represent a move in that direction, according to the idea articulated by Snyder and Vinjamuri that 'justice does not lead; it follows'.[92] In this way, an amnesty could create the political space for the establishment of 'robust administrative institutions that can predictably enforce the law'.[93] Furthermore, as will be argued in chapter 4, where amnesties are accompanied by reparations and individuals are required to adhere to conditions such as telling the truth about their actions in order to benefit from an amnesty, the amnesty can fulfil many of the goals of human rights law. Due to this process, it is likely that governments will become increasingly innovative in trying to describe their amnesty laws using the rhetoric of human rights.

Secondly, the Amnesty Law Database suggests that amnesty laws are not relied upon solely in certain parts of the world, but in fact occur across the globe. Figure 2 below shows the distribution of amnesty laws for each

[90] This will be explored at length in ch 1.

[91] Ronald C Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* 173, 175.

[92] Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2003/4) 28 *International Security* 6.

[93] *Ibid* 6.

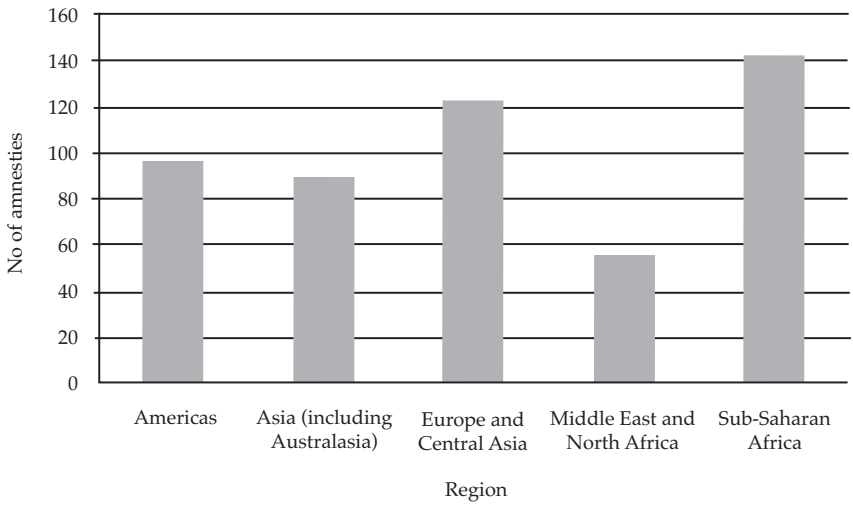

Figure 2: Amnesties by region

region since the Second World War.[94] Whilst it is perhaps unsurprising that Sub-Saharan Africa scores highly in this chart, due to the large number of states within the continent and its high incidence of conflict, it is interesting to see that it is closely followed by Europe and Central Asia. This is particularly remarkable since Europe is frequently viewed as having the most advanced regional system for the protection of human rights. The result can be partially explained by the Second World War, the fall of communism in Eastern Europe, and the wars in the Balkans during the 1990s, which each resulted in a series of amnesty laws occurring in different countries, and by amnesties that have followed wars of independence between former colonies and their metropolis.

Thirdly, the types of government that most commonly introduce amnesty laws can be examined. Using the annual Freedom House Survey of Freedom,[95] the governments that introduced the amnesties in the database were categorised into the rather unwieldy and imprecise categories of 'free', 'partially free' and 'not free', according to the political rights and civil liberties within each country. Although this survey is the most detailed

[94] Based on data for 506 amnesty processes (including reparative amnesties).

[95] Freedom House, *Freedom in the World Comparative Rankings 1972–2006*, available on the Freedom House website at <http://www.freedomhouse.org/uploads/fiw/FIWAllScores.xls> accessed 21 January 2008; and *Freedom in the World 2008 Survey: Tables and Graphs*, available on Freedom House website at <http://www.freedomhouse.org/uploads/fiw08launch/FIW08Tables.pdf> accessed 21 January 2008. Freedom House is a research institute, primarily government-funded and headquartered in Washington, DC, focused on promoting 'liberal democracy' in the world. Its annual reports are frequently quoted by academics, particularly political scientists, and by the media. However, its methodology is disputed by some human rights organisations, which argue that its findings are not credible.

report of its kind, at times some of the classifications applied appear (at the very least) open to argument, for example, for much of the period from 1974–94, South Africa was classified as 'partially free', a classification which would clearly elicit divergent views from different groups within South African society. These caveats aside, the survey is still useful for broadly illustrative purposes. According to Freedom House, the total number of countries falling within each category has altered over time, as shown by Table 1 below.[96] This suggests that since 1977 the number of countries labelled as 'free' has grown from a quarter of all countries to almost half, whereas countries perceived as 'not free' have declined by a similar proportion. When the countries introducing amnesty laws are classified according to their type of government, the results are shown in Figure 3 below.[97] From this, it is clear that fewer amnesty laws are introduced in states that are deemed 'free' and, considering that 'free' states grew from a quarter to almost half of all states during the period under discussion, they seem to be under-represented among the states introducing amnesty laws. Furthermore, similar numbers of amnesty laws are introduced in states described as 'partially free' or 'not free'. Of these 'partially free' states, several were in transition from oppressive rule, whereas others had introduced amnesty laws in response to civil wars or military coups.

CREATING THE AMNESTY LAW DATABASE

In researching this book, the approaches of states to amnesties were investigated using extensive primary and secondary sources.[98] These materials

Table 1: Type of government over time

Year	Type of government		
	Free	**Partially free**	**Not free**
1977	43 (28%)	48 (31%)	64 (41%)
1987	58 (35%)	58 (34%)	51 (30%)
1997	81 (42%)	57 (30%)	53 (28%)
2007	90 (47%)	60 (31%)	43 (22%)

[96] This table is taken from Freedom House, *Freedom in the World 2008 Survey: Tables and Graphs*, available on Freedom House website at <http://www.freedomhouse.org/uploads/fiw08launch/FIW08Tables.pdf> accessed 21 January 2008.

[97] Excludes amnesty laws which date from before 1972 or amnesty laws that occurred during 2008. It also excludes amnesties introduced simultaneously by multiple states, for example, as the result of a bilateral treaty.

[98] These sources have included domestic legislation, academic writing, jurisprudence from national and international courts, international treaties, opinions given by treaty-

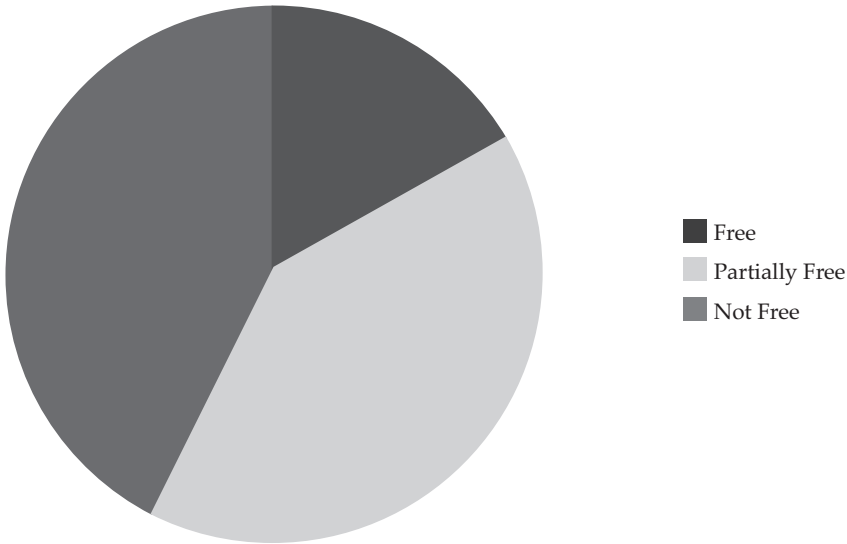

Figure 3: Amnesties by type of government

were used to create the Amnesty Law Database, which forms the basis of this research. To the best of the author's knowledge, this database represents the most comprehensive study of amnesty laws to date.[99] The scope of this database covers amnesties in all parts of the world that have occurred since the Second World War, relating to societies enduring international or internal conflict or authoritarian government, or making a transition to democracy. This study, rather than sampling, includes any amnesty law that was identified and found to meet these criteria. At the time of writing, the database contains information on 506 amnesty processes in 130 countries, covering amnesties for crimes under international law, political crimes and ordinary crimes that occur during conflicts or dictatorial regimes. Many of these are amnesty processes that appear to have been overlooked in the academic and policy literature. It seems likely, however, that many more amnesties have been introduced during the post-war period than have been identified to date, as the process of researching amnesty laws was constrained somewhat by linguistic difficulties and a lack of published information on historical amnesties or amnesties within smaller states.

monitoring bodies, statements by intergovernmental organisations, reports by states and NGOs, and newspaper articles. These sources have predominately been in English, but where appropriate, materials in Spanish and French were also analysed. Furthermore, where possible, efforts were made to contact individuals working in countries that have introduced amnesties, including civil servants, academics and NGO workers to obtain information.

[99] The Amnesty Law Database is currently in the process of being made publicly available online.

Compiling the data within the database enabled the analysis of trends in the introduction of amnesties that have occurred over time and between regions; it also permitted comparison between the behaviour of states and their duties under international human rights and humanitarian law.[100] These trends are explored throughout the book, using the case studies from the database to investigate what motivated a state's decision and what implications each decision could have on a political transition. This investigation made it possible to identify key factors which international actors and judicial institutions should consider when deciding whether to recognise an amnesty process which will be outlined in the conclusion.

STRUCTURE AND PURPOSE OF THE BOOK

The structure of the database complements the divisions of the topic in this book. First, the data on the nature of amnesty laws is used in Part I to explore the motives and characteristics of amnesty laws and reveal how amnesties can be tailored to suit different contexts. This Part will also explore how amnesties can co-exist with other transitional justice mechanisms. Then, in Part II, the implications of each adaptation on the amnesties' validity domestically and under international law will be assessed, using the case law from national and international courts. Finally, in Part III, the responses of key stakeholder groups within political transitions to amnesty laws will be investigated to determine whether amnesties can be reconciled with the needs of each group.

This book was inspired by the controversies outlined above, as they reveal the need to have a clearer view of how states approach amnesties in order to avoid basing crucial efforts to rebuild transitional states on untested assumptions. Based on the controversies, this book has several objectives. First, it aims to explore a realistic approach to the problems faced by states emerging from periods of mass violence involving large proportions of the population where widespread prosecutions may be impractical and potentially dangerous. It will explore the motives and characteristics of amnesties to reveal how they can be tailored to suit dif-

[100] There are some limitations to this approach, however, as each amnesty law is generated by the unique circumstances within the country of its introduction, and by classifying them there is a risk that they will become 'decontextualised'. The classification process can also pose problems where there is limited data available on the transition as this could lead to subjective classifications. For example, where there is limited information relating to an internal conflict in which many non-state actors are parties, insurgents groups may be categorised as opponents of the state, whereas in fact they are paramilitary groups that act as proxies for the government. These difficulties are further accentuated when sources relating to the conflict are biased. Therefore, during this research, efforts were made to obtain data from as wide a range of sources as possible.

ferent contexts. In doing so, it will recognise the uniqueness of each transition and the resulting limitations of a 'one-size-fits-all' approach to human rights violations. It will also investigate to what extent competing demands for peace and justice can be reconciled by individualised, conditional amnesties in conjunction with other transitional justice mechanisms.

Secondly, this book will explore the different facets of amnesty laws and their relationship to international human rights and humanitarian law in more detail than has been done previously. The scope of amnesty laws, in comparison to the provisions of international treaty law, the case law of international courts and treaty-monitoring bodies and international legal principles will be analysed, and the implications of the trends identified in the behaviour of states for customary international law will be explored. However, as will be highlighted in chapter 1, any decisions taken by states on amnesty can be influenced by a number of political, economic, legal and social factors. Similarly, chapter 8 will illustrate how non-legal concerns may influence the attitudes of international actors, such as a belief that an amnesty is necessary to achieve peace. The impact of non-legal issues on decisions to introduce and respond to amnesties for crimes under international law inhibits the identification of state practice in a technical legal sense, as, for a recognised state practice to constitute convincing evidence of a rule of customary international law, there must be: (1) the actual behaviour by states; and (2) a belief that such behaviour is law.[101] The influence of non-legal concerns within decision-making of states makes it difficult to identify such a belief. However, as this research intended to provide the most comprehensive study of amnesty laws to date, it was felt that simply restricting the case studies to amnesties where such a belief could be identified would have inhibited the work, by substantially restricting the number of amnesties eligible for inclusion in the study. Nonetheless, the breadth of this study does provide many useful illustrations of trends in the behaviour of states, which can benefit the analysis of the existence of a customary duty to prosecute.

Thirdly, this book will explore whether the needs of victims can be reconciled with amnesty laws. In addressing this issue, the book will consider the ways in which amnesties can be designed to co-exist with transitional justice mechanisms, such as truth commissions, community-based justice initiatives, reparations and lustration programmes, and even prosecutions, in order to fulfil victims' rights under international law. The book will also assess the limited information available to date on the attitudes of victims to amnesty processes.

Fourthly, this book aims to encourage international actors, including international courts, to work to limit the more negative forms of amnesty,

[101] For a discussion of the nature of state practice, see David J Harris, *Cases and Materials on International Law* (5th edn Sweet & Maxwell, London 1998) 23–44; Malcolm N Shaw, *International Law* (5th edn Cambridge University Press, Cambridge 2003) 77–84.

by encouraging states to make them conditional and to introduce complementary programmes to repair the harm and prevent a repetition of crimes. Consequently, it analyses the behaviours of international actors in relation to amnesties, and will explore how international actors can co-ordinate their interventions with the domestic efforts in order to complement and strengthen the domestic processes.

Finally, this book aims to move beyond a purely legal analysis of amnesties, by considering them within the wider political context in which they are introduced.[102] Consequently, it takes an interdisciplinary approach to the literature and analysis covering disciplines such as criminology, political science, conflict resolution, international relations and psychology. This approach has enabled the impact of socio-economic conditions on the decisions influencing the scope of amnesty and its implementation to be considered throughout the book, using case studies from the database.

This book argues that, where full criminal prosecutions for all offenders are not possible, amnesties can be designed to promote stability whilst responding to the needs of victims and society to know the truth, and to establish accountable forms of government, rather than simply permitting blanket impunity. It asserts that international law currently permits states to pursue a flexible approach to amnesty, provided the amnesty is introduced in good faith to promote peace and reconciliation. Whilst it is recognised that determining which amnesties represent good-faith efforts to end violence can be a complicated and subjective endeavour, the book will progressively work through the aspects of amnesty laws and the responses they elicit from different stakeholder groups, before suggesting factors that can be used to evaluate the legitimacy and efficacy of an amnesty law and that, consequently, should be considered by both national and international actors when evaluating national amnesties.

[102] For a discussion of the merits of moving beyond purely legal approaches to transitional justice, see Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2008) 34 *Journal of Law and Society* 411.

Part I

Amnesties and Peacemaking: Context and Content

1

Enacting Amnesties

INTRODUCTION

THE INTRODUCTION TO this book argued that states are continuing to rely on amnesties when confronted by conflict or authoritarianism, despite the growth of the human rights movement and international criminal justice. The reasons why states continue to implement amnesties are the focus of this chapter. The analysis will begin by discussing the methods by which states introduce amnesty laws, including executive decrees, negotiated peace agreements, parliamentary legislation and referenda. It will argue that the method employed can substantially affect the legitimacy of the amnesty process and its potential to contribute to peace and reconciliation. However, a state's ability to decide whether or how to introduce an amnesty law may be constrained by the provisions of the domestic legal system regulating acts of clemency and by the political circumstances within and outside the state. The trends apparent in states' motivations in introducing amnesty laws will then be analysed before each motive is explored in detail. For the purposes of this analysis, the motivations of states have been grouped into the following categories: alleviating internal unrest and domestic pressure; promoting peace and reconciliation; responding to international pressure; adhering to cultural or religious traditions; providing reparations; and protecting state agents from prosecution. These categories correspond either to the political conditions within the state or to the groups that are specifically targeted by the amnesty. Clearly, there is overlap between these categories, as political conditions may dictate which groups are targeted. In exploring these categories, this chapter will address the key concepts within transitional justice of forgiveness and reconciliation. This chapter will argue that although there are many possible motivations for introducing amnesty laws, the most commonly expressed motivation is to promote reconciliation following internal unrest or conflict. It will also show that many amnesty laws are introduced for multiple reasons, with different political stakeholders supporting an amnesty due to their groups' objectives.

HOW ARE AMNESTY LAWS INTRODUCED?

Depending on the nature of the transition, there are four methods by which a formal amnesty process can be introduced: (i) exercise of executive discretion; (ii) negotiated peace agreements; (iii) promulgated amnesty laws; and (iv) referenda. These methods are not mutually exclusive and amnesties can fall within more than one category. For example, amnesties in negotiated peace agreements are often subsequently ratified by a country's parliament. Similarly, amnesties that are approved by a referendum are usually enacted by the legislature. Based on the information obtained for 372[1] amnesty processes, the occurrence of the different methods is shown in Figure 4 below. From this, it is clear that the most popular ways of introducing amnesty laws are through executive decrees and legislation. In contrast, few amnesties have resulted from public consultation. These differences are significant, as each of these different methods can affect the legitimacy and efficacy of the amnesty.

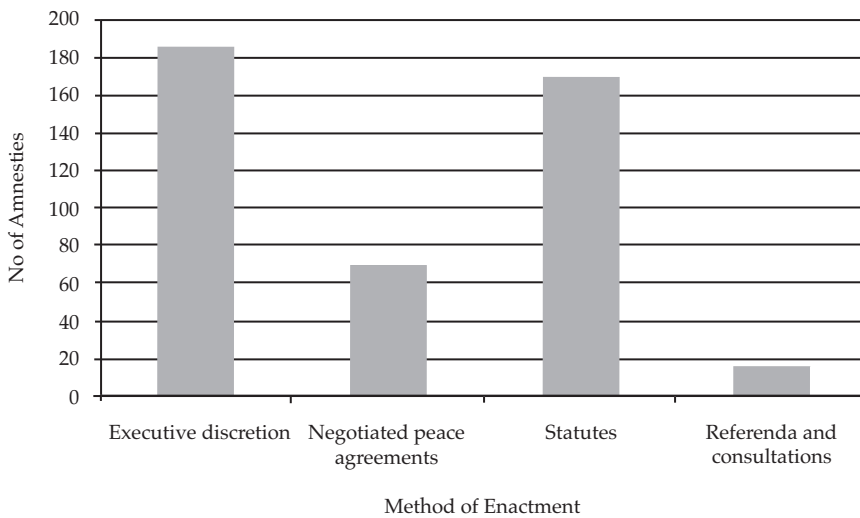

Figure 4: Amnesties and their enactment processes

[1] It has not been possible to obtain clear data on the enactment processes for all amnesties in the Amnesty Law Database, due to the paucity of information on some amnesty processes, particularly those introduced during the earlier years under consideration or by a dictatorial regime.

Exercises of Executive Discretion

'Exercises of executive discretion' refers to amnesties that are introduced by presidential decrees or proclamations. For many amnesty processes, these decrees emanate from undemocratic rulers, such as military juntas. For example, the 1983 amnesty in Argentina was introduced by the military regime that had seized power in 1976 and presided over a period of massive human rights abuses.[2] Such amnesties as authoritarian exercises of power have limited legitimacy, as the law is not approved by representatives of the people.[3] However, according to the constitutions of some democratic states, the president has the power to declare any amnesties or pardons.[4] For example, in the United States, Presidents Ford and Carter were able to issue amnesties for draft dodgers and deserters from the Vietnam War.[5] Where this occurs, the amnesty can have more legitimacy than those of dictators, as the ruler declaring it has been democratically elected. Furthermore, the president can receive counsel from different bodies. For example, when an amnesty was introduced in Northern Ireland in 1969 to release those who had been imprisoned during the violent unrest accompanying the civil rights movement, the Northern Irish Prime Minister, Chichester Clarke, consulted his cabinet and the Attorney General.[6] Similarly, before issuing the 1994 amnesty in the Philippines, President Fidel Ramos consulted a specially-appointed commission.[7] Executive decrees also include amnesties that are promulgated by transitional administrations before the establishment of a parliament, or by

[2] Law of National Pacification, Law No 22.924, published in *Legislación Argentina*, 1983-B, pp 1681 ff.

[3] This is the view that has been taken by the Inter-American Commission, see *Garay Hermosilla et al v Chile*, Case 10.843, Inter-Am CHR, Report 36/96, OEA/Ser L/V/II/95 [1996] [30].

[4] For more information on the presidential power to pardon, see Leslie Sebba, 'The Pardoning Power—A World Survey' (1977) 68 *Journal of Criminal Law and Criminology* 83.

[5] Presidential Proclamation No 4313, 39 Fed.Reg. 33293 (16 September 1974), reprinted in 50 USCA App Section 462 (1978) and Proclamation No 4483, 42 Fed Reg 4391 [1977]. For analysis see ——, 'Pardon for Draft Evaders: Carter's First Act Touches off a Storm' *US News and World Report* (31 January 1977) 22; Alfonso J Damico, *Democracy and the Case for Amnesty* (University of Florida Monographs, University Presses of Florida, Gainesville 1989); Edward F Dolan, *Amnesty: An American Puzzle* (Franklin Watts, New York 1976).

[6] Christine Bell, 'Dealing with the Past in Northern Ireland' (2003) 26 *Fordham International Law Journal* 1095; J Bowyer Bell, *The Irish Troubles: A Generation of Violence, 1967–1992* (Gill and Macmillan, Dublin 1993); Fergal F Davies, 'Applying the Principles of Restorative Justice to a Post-Conflict Situation in Northern Ireland' in Anonymous (ed), *Centre for Criminal Justice Studies, Eleventh Annual Report 1998–1999* (University Print Service, University of Leeds 2000).

[7] US Department of State, 'Human Rights Practices 1994: Philippines' (Report) (February 1995); US Delegation to Preparatory Commission, 'State Practice Regarding Amnesties and Pardons' (Report) (August 1997) <http://www.iccnow.org/documents/USDraftonAmnestiesPardons.pdf> accessed 25 October 2007. For a detailed overview of amnesty laws in the Philippines, see Alberto T Muyot, 'Amnesty in the Philippines: The Legal Concept as a Political Tool' (1994) 69 *Philippines Law Journal* 51.

occupying powers. For example, following the Second World War the Allied forces in Germany introduced and sanctioned several amnesties.[8] More recently, in 2003 the Afghani transitional government offered an amnesty to 'regular' Taliban fighters who surrendered.[9]

Executive decrees can be introduced unilaterally or as a result of negotiations. They are used as reparative amnesties to release individuals who have been detained for their religious or political beliefs, as a tactic to reduce armed opposition and initiate peace negotiations, or as a means of protecting those who are loyal to the regime. They are relied upon in certain instances as they can be introduced more rapidly than other forms of amnesty. They have disadvantages, however, as O'Shea highlights that executive amnesty decrees risk being 'arbitrary exercises of presidential discretion', and suggests that 'properly introduced laws' are preferable,[10] as they provide a greater opportunity for the terms of the law to be debated and negotiated, where the process of debate could strengthen the rule of law.

Negotiated Peace Agreements

Negotiated peace agreements can be either international or national depending on the nature of the conflict. But as warfare has changed since the Second World War, there are far fewer international peace treaties today than in earlier times, and many of those that have occurred resulted from decolonisation conflicts, rather than wars that were fought solely between sovereign states. For example, the 1962 Evian Accords, signed between France and Algeria to grant Algeria's independence following the conflict, offered amnesty to combatants from both parties.[11] Today, however, the vast majority of amnesties emanating from peace agreements are the result of internal conflicts, although representatives of the international community mediate many of the agreements.

[8] Clemens Vollnhals, 'Denazification in the Western Zones: The Failed Experiment' in Stein Ugelvik Larsen and Bernt Hagtvet (eds), *Modern Europe after Fascism* (New York, Social Science Monographs, Columbia University Press, 1998); Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge, Cambridge University Press, 2004); Norbert Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration* (Columbia University Press, New York 2002).

[9] Jonathan Fowler, 'New anti-terror operation launched in Afghanistan as government loyalists seek more help against Taliban' *Associated Press* (Kabul, 10 November 2003); Barnett R Rubin, 'Transitional Justice and Human Rights in Afghanistan' (2003) 79 *International Affairs* 567.

[10] Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International, The Hague 2002), 22.

[11] Declarations Drawn up in Common Agreement at Evian, 18 March 1962, by the Delegations of the Government of the French Republic and the Algerian National Liberation Front, reprinted in (1962) 1 *International Legal Materials* 214, ch I(k).

Peace agreements can grant amnesty in response to demands from insurgents who require safeguards from prosecution before surrendering their weapons. To award amnesty in these circumstances is commonplace but it can be problematic where the insurgents have committed atrocities during the armed conflict, as acquiescing to their demands could be viewed as allowing them to amnesty themselves. Furthermore, awarding them amnesty could be perceived as legitimising their armed struggle and their tactics.[12]

Alternatively, amnesty can be included in peace agreements when the leaders of both state and non-state actors wish to immunise themselves from prosecution, particularly where all sides in a conflict have a history they wish to hide. Such bargains may be popular among the beneficiaries, but where the leaders responsible for human rights violations are able to retain or gain political power; the bargains could breed scepticism among the civilian population of the state and impair the amnesty's potential to contribute to reconciliation. This risk could be mitigated, however, by including provisions for other forms of transitional justice in the peace agreement, such as truth commissions and lustration programmes, so that former perpetrators do not benefit from their crimes.

Negotiated peace agreements can potentially be more democratically legitimate than presidential decrees as they involve representatives of the parties to the conflict or transition process and international observers. The representatives of the new transitional regime, especially if democratically elected, should always participate, in order to enhance the legitimacy of the agreement.[13] If none of the representatives of any of the parties is elected, however, the democratic legitimacy can be reduced, as, although the spokespersons of all the main communities can participate, it may be unclear whether those individuals have a legitimate right to speak on behalf of others.

Statutes

Amnesties frequently take the form of statutes, which can be introduced to ratify the provisions of negotiated peace agreements or to respond to demands from civil society or the executive. Within a peaceful, democratic society, amnesties passed by democratically-elected legislatures would normally be perceived as legitimate due to their approval by the chosen

[12] Ronald C Slye, 'Justice and Amnesty' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, London 2000) 182.

[13] Thomas Hethe Clark, Note, 'The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance' (2005) 4 *Washington University Global Studies Law Review* 389, 409–10.

representatives of the people. This legitimacy would be reduced, however, for those who do not support the regime, when the politicians are not elected, or have achieved their positions following rigged elections, or where the executive dominates parliament to such an extent that opposition opinions are disregarded, particularly where opposition parties represent oppressed minorities. Similarly, the legitimacy of an amnesty could be undermined where it is approved by a bare majority in a divided legislature. In such cases, the author believes that consultation is desirable and that attempts should be made to address the concerns of those who are against the amnesty, perhaps by applying conditions to the grant of amnesty, such as penalties for recidivism, and by ensuring that the mechanisms for granting amnesty are independent of government control.

Public Consultation

Some amnesty processes are enacted following direct public involvement, which can take various forms. First, amnesties could follow orchestrated consultation programmes, such as the consultation that occurred in South Africa before the enactment of the Promotion of National Unity and Reconciliation Act 1995.[14] Secondly, election campaign promises could allow voters the opportunity to express their views on amnesty. Such promises were made in Greece in 1973, where the political party offering an amnesty for coup plotters and legal professionals who co-operated with the military junta received the support of the electorate. Thirdly, amnesties could be voted on in a referendum, either specifically on the amnesty law or on a new constitution that contains amnesty provisions. The complex question of the timing and methods of consultation will clearly depend on the conditions within each transitional state, including the quality of the communication infrastructure and the extent of security concerns, particularly where public involvement during delicate negotiations could destabilise the process by undermining the mandate of the negotiators. However, consultations should in principle be as full and inclusive as circumstances permit.

Consultations are not unproblematic, however, as even where an amnesty law is approved by a referendum, difficulties could arise. For example, simple majority support would not be appropriate where minority groups were the victims of the oppression.[15] Furthermore, after a

[14] Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press, Cape Town 2000); Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, Antwerp 2004) 441. For an overview of the South African amnesty in exchange for truth model, see case study 9.

[15] Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 *Columbia Human Rights Law Review* 661, 703.

referendum, it may be unclear whether the result truly reflects the will of the populace. These difficulties were illustrated in the 1989 Uruguayan referendum:

Case Study 1: Reparative *v* blanket amnesty: the Uruguayan experience

Uruguay provides an interesting case study, as during its transition it had two contrasting but co-existing amnesty processes.

The first amnesty in March 1985, introduced soon after the transitional government assumed power from the military junta, aimed to provide reparations to political prisoners by releasing them from prison and restoring property and funds that had been confiscated. State agents were excluded from its terms.

Following this amnesty, the courts were flooded with complaints against the military of torture and disappearances. The number of cases was apparently completely unexpected. The still-powerful armed forces responded by refusing to comply with subpoenas and threatening severe unrest, particularly since it appears that in 1984, during the Naval Club Pact negotiations on the handover of power, the future civilian president had assured the military leader that the army would not be held to account.

The tension culminated in the adoption of a second amnesty in December 1986, which shielded state agents from criminal prosecutions for crimes committed 'for political reasons' or under orders. This included serious human rights violations such as torture, extra-judicial killings and disappearances. In this way, the second amnesty was a political compromise between a still-powerful military and a cautious civilian administration. However, the amnesty did exclude crimes 'committed for personal economic gain or to benefit a third party', and Article 4 of the amnesty required the executive to investigate all disappearances and inform the victims' families of results of the investigations.

Nonetheless, the second amnesty provoked considerable opposition from human rights activists, who managed to force a referendum on the amnesty law. They were unsuccessful in their challenge, however, as in 1989 the amnesty was approved by 57 per cent of voters. This referendum is often lauded as an example of democratic approval; but it has been contended that the democratic politicians were intimidated by the still-powerful army and that the Supreme Court disqualified many signatures from the petition that led to the referendum, and there were allegations of intimidation of voters by the police.

Despite continued campaigning, the amnesty remained intact until the election in 2000 of President Jorge Batlle, at which point amnesia began to give way to memorialisation, as a Commission for Peace was established to clarify the fate of Uruguayans who had disappeared between 1973 and 1985.

Furthermore, in April 2003, President Batlle announced that he would pay reparations to the families of individuals who had died whilst in state detention.

More recently, President Tabaré Ramón Vásquez Rosas, who was elected in October 2004, promised to implement Article 4 of the 1986 amnesty law. The article had never been enforced. Furthermore, the courts are beginning to seek ways around the amnesty process. For example, the former civilian president Juan María Bordaberry is currently on trial on charges of 'aggravated homicide' for the murder of two Uruguayan congressmen in Argentina. The prosecutors are asserting that the 1986 amnesty law applies neither to civilian defendants, nor to crimes committed outside Uruguayan territory.

These are only limited steps, however, as disappearances represent only a small proportion of the violations that occurred in Uruguay. It is possible that other crimes will be investigated in the future if the campaign to force a second referendum amnesty law, which began to collect signatures on 4 September 2007, is successful.

***Sources**: Lawrence Weschler, A Miracle, A Universe: Settling Accounts with Torturers (Chicago, University of Chicago Press, 1998); Americas Watch (Human Rights Watch), Challenging Impunity: The 'Ley de Caducidad' and the Referendum in Uruguay (1 March 1989); Alexandra Barahona de Brito, 'Truth and Justice in the Consolidation of Democracy in Chile and Uruguay' (1993) 46 Parliamentary Affairs 579.*

If the allegations about the Uruguayan referendum are true, they would undermine the extent of true democratic approval which the amnesty law received. This does not devalue the referendum process entirely, however, as referenda, by inspiring public debate on an amnesty law, can help it to foster reconciliation.

The above discussion of the methods for enacting amnesties has argued that the extent to which an amnesty can be viewed as democratically legitimate within the state where it has been introduced may depend upon whether it was approved directly by the populace or by their elected representatives. Where amnesty is introduced unilaterally by an oppressive regime, or where the views of oppressed populations are overlooked, it seems likely that the amnesty will have less legitimacy, and consequently its potential to contribute to peace and reconciliation could be undermined, as rather than the amnesty contributing to trust building between stakeholder groups within society, it could be viewed as merely a reward for those who perpetrated human rights abuses.

WHY DO STATES INTRODUCE AMNESTY?

The political triggers of amnesty laws in each state are unique and therefore the goals that amnesties are designed to achieve can be wide ranging. As O'Shea highlights:

> They have been used to express public grace and forgiveness, and to further government corruption and oppression. They have been used to bring law into compliance with an accepted reality, and to exempt a contested reality from public scrutiny and moral and legal accountability. They have been granted at times of great social stability and at times of great social unrest; at the start of and during wars for the purpose of recruiting troops, and at the end of wars to foster peace and reconciliation.[16]

The motives of states introducing amnesties can be diverse, but during the process of designing the Amnesty Law Database, these motivations were allocated to the following categories: alleviating internal unrest and domestic pressure; promoting peace and reconciliation; responding to international pressure; adhering to cultural or religious traditions; providing reparations; and protecting state agents from prosecution. Some of these categories, such as adhering to cultural or religious traditions, were based on the motivations outlined by Joinet in his 1985 paper.[17] The remaining categories were extrapolated from accounts by academics and journalists of why amnesty was introduced in individual countries. This process has enabled the factors leading to the introduction of amnesty laws in many countries to be identified and the implications of the decisions to be analysed.

The categorisation process has been problematic in some cases, however, as states often have multiple objectives for introducing an amnesty law. These objectives may be inter-related, such as demobilising combatants, encouraging the surrender of weapons, obtaining a ceasefire, and creating conditions for economic development. They could also be disparate particularly where the state is responding to both exogenous and endogenous pressures. For example, a state by releasing its political opponents from prison may simultaneously be trying to appear benevolent before the international community and to undermine its domestic opponents. Furthermore, an amnesty can be introduced to satisfy both short-term and long-term goals, such as ending the violence, and building a climate of trust that could provide a basis for reconciliation.

[16] Ronald C Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* 173, 174.

[17] ECOSOC, 'Study on Amnesty Laws and their role in the safeguard and protection of human rights' (21 June 1985) UN Doc. E/CN.4/Sub.2/1985/16 (*prepared by* Louis Joinet).

Governments may also alter the terms of their amnesties in response to changing political circumstances. This can be illustrated by the experience in Uganda:

Case Study 2: The changing scope of the Ugandan amnesty

The Amnesty Act 2000[18] in Uganda is a political compromise that aims to end the violence that has been ravaging Uganda for two decades, and it has widespread support among the population in the north of the country. In fact, the government only decided to formalise the pre-existing de facto amnesties following lobbying from Acholi community and religious leaders.

The scope of the amnesty is fairly wide as it covers all crimes that have been committed during the conflicts. The amnesty has, however, been limited in its effect, as it covers only criminal, not civil proceedings. Furthermore, applicants must individually surrender, disarm and renounce their involvement in rebellion in order to receive an amnesty certificate from the Amnesty Commission.

The amnesty covers current and former insurgents from a variety of non-state forces, including those based outside Uganda. However, it does not apply to state actors. In its original form the amnesty included the leaders of the insurgent groups. However, following the amnesty's enactment, the Ugandan government expressed its intention to pursue accountability for those deemed 'most responsible' for the violations committed by the Lord's Resistance Army (LRA), by referring the situation in the north of Uganda to the International Criminal Court (ICC); and on 20 April 2006 the Ugandan parliament passed the Amnesty Amendment Act 2006, which gave the Minister of Internal Affairs the power to disqualify named individuals from being eligible for amnesty under the Act. This amendment was targeted at LRA chief Joseph Kony and his top commanders, Vincent Otti,[19] Okot Odhiambo, Dominic Ongwen and Raska Lukwiya,[20] but it has not yet been implemented. Despite the legislative change, and the issuing by the ICC in July 2005 of warrants for the arrest of the the LRA leaders, the fate of the leaders of the LRA seems uncertain: since the peace negotiations restarted it has remained unclear whether any governments in the region would be willing to apprehend the accused, who are mostly operating from outside Uganda's territory. Furthermore, the Ugandan president publicly stated that Kony himself would benefit from amnesty if he surrendered.[21] However, the president has not yet asked for the arrest warrants to be withdrawn and the ICC has stated its intention to continue the investigation.[22]

[18] Amnesty Act 2000 (Uganda).

[19] At the time of writing, it was widely believed that Vincent Otti had been killed by members of the LRA, but this had not yet been substantiated.

[20] Raska Lukwiya was killed on 12 August 2006 during fighting with the Ugandan People's Defence Force.

[21] ——, '"Amnesty" for Uganda rebel chief', *BBC News* (4 July 2006).

[22] ICC, 'Press release: Statement by the Chief Prosecutor Luis Moreno-Ocampo' (6 July 2006) ICC-OTP-20060706-146-En.

Although the Amnesty Act makes no provision for reparations or truth commissions, its supporters claim that the needs of victims and communities are addressed through traditional community-based justice mechanisms which complement the amnesty.[23] It seems likely that this amnesty will be significantly altered under the framework of the Agreement on Reconciliation and Accountability signed by the parties to the Juba peace talks on 29 June 2007.

***Sources**: Tim Allen, Trial Justice: The International Criminal Court and the Lord's Resistance Army (London, Zen Books, 2006); Payam Akhavan, 'Developments at the International Criminal Court: The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 American Journal of International Law 403; Kasaija Phillip Apuuli, 'Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda' (2005) 5 African Journal of Conflict Resolution 33; Lucy Hovil and Zachary Lomo, 'Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation' (Kampala, Refugee Law Project, 2005); Phuong Pham et al, 'Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda' (Berkeley, International Center for Transitional Justice, University of California, 2005); Manisuli Ssenyonjo, 'The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?' (2007) 54 Netherlands International Law Review 51; Erin Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 International Journal of Transitional Justice 97.*

The Ugandan example shows how domestic politicians can be willing to use both amnesties and the threat of prosecutions tactically in order to end violence and encourage insurgents to surrender.[24]

Identifying the motivations leading to an amnesty can become more problematic where states deliberately obscure their motives for introducing amnesties, with their true intentions sometimes only becoming apparent through implementation.[25] For example, a government may publicly pronounce certain reasons, usually to promote reconciliation, which may even be highlighted in the name it chooses to give the law.[26] But these public reasons may not have been its sole motives, as the government may also have thought the law would help it to, for example, obtain foreign aid by fulfilling the demands of the international community to lessen political repression. In more extreme cases, the government

[23] For an overview of these mechanisms, see ch 4.

[24] For a detailed discussion of the politics surrounding the ICC intervention into the situation in northern Uganda, see Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21 *Ethics and International Affairs* 179.

[25] Sarkin & Daly (n 15) 689.

[26] Amnesty laws are frequently given titles involving words such as 'peace', 'reconciliation' and 'harmony'.

may even try to obscure the fact that it is introducing an amnesty by describing the legislation in other terms, such as the Due Obedience law in Argentina.[27]

Complications can also arise where several stakeholder groups are involved in the enactment process. For example, if an amnesty results from a negotiated peace settlement, the motives of the insurgents demanding amnesty can differ from those of the state granting it. Similarly, in elaborating domestic legislation, political parties may view the same piece of legislation differently, according to their political goals. This potential diversity of views may encourage states to tailor their explanations of amnesties according to their target audience. Furthermore, a government could tactically include measures in an amnesty law to satisfy some stakeholder groups as a means to gain their acquiescence for the government's overall objectives. For example, a government might introduce an amnesty law that provided for the release of political prisoners as a means of obtaining amnesty for state agents, where it would not be possible to achieve this in isolation. The various pressures faced by governments and the multiplicity of demands from different stakeholder groups in society can therefore mean that differing motivations may all co-exist within a state that is introducing an amnesty process.

Using the categorisation scheme, information has been compiled on the motivations in 464 amnesty processes,[28] and their distribution can be seen in Figure 5 below. As discussed previously, each amnesty process may fall within one or several of these categories. From this graph, it is clear that amnesties resulting from internal pressure are, perhaps unsurprisingly, the most common, but overall amnesties are introduced for a diverse array of reasons. Each of these motivations has been influential throughout the period since the Second World War. Furthermore, every motivation has been present in some amnesty laws that have been introduced in each region of the world. These motivations will be explored below using case studies from the Amnesty Law Database.

[27] For more information on Argentina, see ch 2.

[28] Motivations could not be clearly identified for all the amnesties in the Amnesty Law Database. This could be due to the problems discussed above, such as a lack of transparency in governmental decision-making.

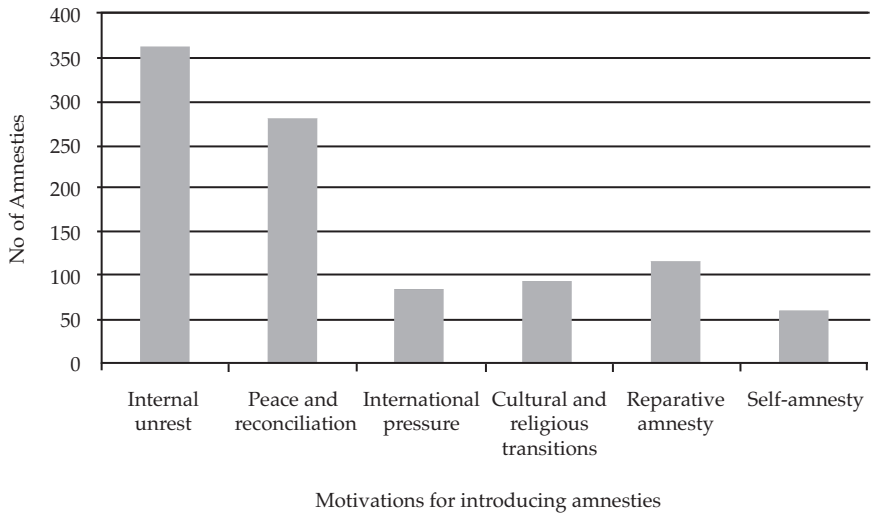

Figure 5: Amnesty motivations

Amnesty as a Reaction to Internal Unrest and Domestic Pressure

When governments introduce amnesties to alleviate internal unrest, their motives are often strategic rather than principled. In this way, the amnesty, rather than resulting from a genuine desire to forgive the alleged crimes, is instead introduced to strengthen a government's other strategic aims, such as securing its own hold on power. Internal unrest can prompt an amnesty in several ways, ranging from desires to bolster support within an already comparatively stable (although not necessarily democratic) society, to attempts to end violent conflicts or implement peace agreements. Across this continuum, from peace to conflict, the motivations influencing decisions to introduce amnesty can have different characteristics.

Amnesty to Consolidate Power

In relatively stable societies, governments usually have a monopoly over political, economic and military power, and consequently might choose to introduce an amnesty as a show of strength, to demonstrate clearly that any opposition does not pose a threat to its rule. This idea was often vocalised in the amnesty laws of the former communist bloc countries, for example, in its 1989 amnesty decree, the Albanian government proclaimed amnesty:

> taking into consideration the constant consolidation of our socialist order, the sound moral and political state of the country, the steel-like unity of the people around the party . . .[29]

[29] Decree No 7338, 1989 (Alb), Preamble.

This law clearly articulates the government's desire to demonstrate that its decision to amnesty individuals, who were alleged to be fugitives or to have distributed anti-government propaganda, was an act of benevolence on behalf of the state, rather than one of simply pandering to the wishes of the opposition. Despite the government's attempt to portray itself as powerful, yet benevolent, it remains clear that the amnesty was introduced at a time of great political upheaval in Eastern Europe, and the government might have hoped that releasing political opponents would prevent challenges to its rule. In other cases, however, governments might choose to implement amnesties to undermine support for the opposition by appearing benevolent whilst eliminating the opposition's ability to rely on the detention of political prisoners as a rallying cry. For example, in 1977 the Romanian president, Nicolae Ceaucescu, amnestied dissenters and those who had tried to leave the country illegally as part of efforts to undermine the domestic human rights movement.[30]

Amnesties have also been used to mitigate the effects of unpopular policies. For example, in 1997 the Azerbaijani government chose to amnesty military crimes, such as desertion, a move that had popular support, in conjunction with agreeing to an unpopular Organisation for Security and Cooperation in Europe (OSCE) proposal for solving the dispute over Nagorno-Karabakh.[31] In addition, governments are occasionally forced to issue amnesties to strengthen national unity in the face of severe economic crises or climatic events that threaten the well-being of the populace. For example, the 1993 amnesty for political offenders in Malawi marking the start of a transition from a one-party state was prompted by the damaging effects of a drought on the national economy.[32] Similarly, the devastation in Aceh caused by the tsunami was followed in January 2005 by an amnesty for the Acehnese insurgents,[33] and then later by the formal peace agreement.

Amnesty to Pacify Serious Unrest

Amnesty may be introduced following severe political unrest, such as widespread rioting, minor armed incursions across a border or serious unrest focused solely on one small region of the country. For example, in

[30] ——, 'Romania Grants Amnesty' *The Washington Post* (Bucharest 9 May 1977) A10; —— —— 'Rumania: Clemency Blockbuster', *Economist* (14 May 1977).

[31] ——, 'Parliament Adopts Amnesty Law' *BBC Summary of World Broadcasts* (18 October 1997).

[32] Qiu Xiaoyi, 'Malawi on Process of Political Transition' *Xinhua News Agency*, (Lusaka 28 December 1993); ——, 'President Banda Decrees "General Amnesty": Correction and Amplification', *BBC Summary of World Broadcasts* (Blantyre 5 January 1994).

[33] Andrew Tait, 'Jakarta offers Acehnese Rebels Partial Amnesty' *International Relations and Security Network* (12 January 2005); Irwan Firdaus, 'Indonesia Offers Rebels Autonomy, Amnesty' *Associated Press* (Banda Aceh 28 January 2005).

Albania in 1997, following the collapse of fraudulent pyramid schemes, which resulted in mass rioting with over 2,000 deaths, the government introduced an amnesty for the rioters.[34] Similarly, amnesties could be introduced to pre-empt threatened military coups where a new regime has taken office but the military remains powerful. This was apparently the justification for introducing the *Punto Final* and *Obedencia Debida* laws in Argentina[35] and the 1986 Uruguayan amnesty law. The Uruguayan amnesty was justified in this way by the then Uruguayan President, Julio María Sanguinetti:

> Trials for the military officers were incompatible with the climate of institutional stability and tranquillity . . . if the military challenged the judiciary, we were faced with the [possibility] of a very dangerous institutional weakening [*degredación*] that, in the medium term, was going to result in institutional breakdown.[36]

Amnesties can also be introduced in the wake of failed military coups to pacify the military, encourage their cooperation with the government, and stabilise the regime. For example, following the 1987 coup in Fiji, the Governor General granted amnesty to all participants in the coup plot, claiming that 'no useful plan would be served by vindictiveness'.[37]

Violence emanating from small-scale or short-lived terrorist campaigns or due to pre-election intimidation has also led to amnesty on occasion. For example, following separatist violence on the island of New Caledonia causing the deaths of 40 people between 1984 and 1988, the French government issued two amnesties to cover those believed to be responsible for the violence. The first amnesty in 1988 was approved by a referendum on the island.[38]

[34] ——, 'Albanian Parliament Approves Law on Amnesty' *Albanian Telegraphic Agency* (11 March 1997); ——, 'Albania Offers Amnesty in Bid to End Rebellion' *The Toronto Star* (7 March 1997); US Department of State, 'Country Report on Human Rights Practices 1997: Albania' (30 January 1998).

[35] See eg Raúl Alfonsín, 'Never Again in Argentina' (1993) 4 *Journal of Democracy* 15; Carlos Santiago Nino, 'The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina' (1991) 100 *Yale Law Journal* 2619.

[36] Brian Loveman, '"Protected Democracies" and Military Guardianship: Political Transitions in Latin America, 1978–1993' (1994) 36 *Journal of Interamerican Studies and World Affairs* 105, 116.

[37] Steward Slavin, 'Amnesty for Coup Leader and a Caretaker Government' *United Press International*, (Suva 22 May 1987); Keith B Richburg, 'Fiji's Leaders Negotiate as Coup Appears to Unravel; Governor General Announces Dissolution of Parliament, Amnesty for Chiefs of Uprising' *The Washington Post* (Suva 19 May 1987) A21; Tom Lansner, 'Fiji Face-to-Face with Apartheid after Army Coup' *The Toronto Star* (Suva 31 May 1987) H5.

[38] *Loi No 88-1028 du 9 novembre 1988 portant dispositions statutaires et préparatoires à l'autodétermination de la Nouvelle-Calédonie en 1998* (art 80); *Loi No 89-473, Loi No 90-33 du 10 janvier 1990 portant amnistie d'infractions commises à l'occasion d'événements survenues en Nouvelle-Calédonie*; Jeffrey Ulbrich, 'French, In Record Low Turnout, Approve New Caledonia Plan' *Associated Press* (Paris 6 November 1988).

Amnesty to End Violent Conflict

The most common form of internal pressure that can inspire amnesty is a desire to end violent conflicts, either national or international. Amnesties can potentially contribute to reducing human rights violations when a conflict is ongoing by creating conditions to enable peace negotiations to occur, particularly where some of the interlocutors would be at risk of prosecution.[39] In this context, amnesty is often considered

> the realistic price one has to pay for ending a destructive war or removing a government that has committed gross violations of human rights in the past,[40]

and that without it, the human rights violations would continue. Slye describes this scenario as a

> trade-off . . . not between victims of past abuses and accountability for perpetrators, but between victims of past abuses and yet to be identified victims of future abuses.[41]

The utility of amnesty in this context was recognised by the Sierra Leonean Truth and Reconciliation Commission, which described the amnesty provisions of the Lomé Peace Accord 'as necessary in the circumstances that prevailed at the time'.[42] In a later passage, the commission asserted:

> Those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of armed conflict. Amnesties may be undesirable in many cases. . . . However, amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities after periods of brutal armed conflict. Disallowing amnesty in all cases would be to deny the reality of violent conflict and the urgent need to bring such strife and suffering to an end.[43]

Often amnesties introduced during violent conflicts are unilateral and occur without any substantial negotiations between the government and its opponents. They may even be used to formalise pre-existing de facto amnesties for surrendering combatants. For example, the 2000 Angolan amnesty formalised a process that already had been occurring for months. President Dos Santos had extended an olive branch to the rebel group, União Nacional para a Independência Total de Angola (UNITA) in many public statements, offering amnesty for those who laid down their

[39] Tom Hadden, 'Punishment, Amnesty and Truth: Legal and Political Approaches' in Adrian Guelke (ed), *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies* (Palgrave Macmillan, 2004).

[40] Slye (n 16) 198.

[41] *Ibid* 198.

[42] Sierra Leonean TRC, Vol. 2, 'Ch 2: Findings' in Truth and Reconciliation Commission of Sierra Leone, 'The Final Report of the Truth and Reconciliation Commission of Sierra Leone' (5 October 2004) <http://www.trcsierraleone.org/drwebsite/publish/index.shtml>, accessed 28 March 2006 [559].

[43] Vol 3b, 'Ch 6: The TRC and the Special Court for Sierra Leone' in *ibid* [11].

weapons before formalising it in legislation on the 25th anniversary of Angolan independence.[44] Such amnesties may form part of a 'carrot and stick' approach, whereby amnesties are designed to entice the surrender of insurgents and the military campaign is used to apply pressure to those who do not come forward. Alternatively, amnesties could represent the fact that the military campaign has been fought to a stalemate and the government has realised that it is not in a position to achieve outright victory solely through military tactics. For example, the Nepalese government offered amnesty in March 2006 in response to an upsurge in violence in the previous months, which the armed forces had been unable to contain, and to threats that the Maoists were planning to blockade main roads and hold a general strike.[45]

Amnesty could also be used tactically to isolate the hard-line insurgents from the communities that support them ideologically, financially, or logistically. This appears to have been the rationale behind the 2004 amnesty in Saudi Arabia, which the government described as an amnesty to bring lower-level sympathisers of al-Qaeda 'back into the fold' before they committed acts of violence.[46] The expectation of such amnesties is that those who are more ideologically fervent will ignore the amnesty, but will be denied logistical support or new recruits, thereby weakening their organisation.

This section has argued that amnesties can be introduced in response to a variety of domestic challenges, which can range in severity from peaceful political protests to violent military conflicts. Often amnesties will be introduced to complement a government's other policy objectives, such as strengthening its own hold on power, mitigating the effect of unpopular policies or changing strategy after a failed military campaign. Furthermore, amnesty is rarely introduced in isolation and can coincide with wider reform packages, or even renewed military activity, as part of a 'carrot and stick' approach to insurgents. Where amnesty is introduced in good faith

[44] *Lei No 7/00* (2000). For description of the law, see the Embassy of Angola, 'Parliament Passes Amnesty Law' (2000) 7 O Pensador 1; ——, 'Angolan Parliament Passes Amnesty Law' *BBC Worldwide Monitoring* (29 November 2000); ——, 'Angolan Rebels Reject Government Amnesty' *BBC News* (1 December 2000).

[45] Shirish B Pradhan, 'Nepal Offers Rs One Mn Reward to Senior Maoists who Surrender' *Press Trust of India* (14 March 2006); Binaj Gurubacharya, 'Nepal Offers Amnesty, Cash, Land to Surrendering Rebels ahead of Planned Blockade' *Associated Press* (Kathmandu 13 March 2006); ——, 'Nepal Government Offers Surrender bait as Maoists Start Blockade' *Indo-Asian News Service* (14 March 2006); ——, 'Nepal govt offers Amnesty to Surrendering Maoists' *Sify* (14 March 2006).

[46] Megan K Stack, 'Saudis offer 1-Month Amnesty to Insurgents' *Los Angeles Times* (23 June 2004); Bouchaib Silm, 'Countering terror with an amnesty: Why it makes sense' *The Straits Times* (Singapore 15 September 2004); James Martone, 'Analysts: Saudi Amnesty Offer a Good Start' *Voice of America News* (24 June 2004); Neil MacFarquhar, 'Saudis Offer Limited Amnesty to Rebels' *New York Times* (Jidda 24 June 2004) 12; Roula Khalaf, 'Saudi prince offers amnesty to militants' *Financial Times* (London 24 June 2004) 11; Heba Kandil, 'Saudi Arabia Offers Militants Chance to Surrender' *Reuters* (23 June 2004).

in order to end the violence in ongoing civil unrest or conflict, it can play a valuable role in reducing the number of human rights violations that can occur and creating stability so that negotiations can proceed. Whilst these are clearly short-term goals, the following section will argue that amnesties can also be designed with longer-term objectives to promote reconciliation.

Amnesty as a Tool for Peace and Reconciliation

Many amnesties have been, or are at least claimed by governments to have been, introduced to promote reconciliation, as either the sole objective or, more usually, in conjunction with other considerations such as an unsuccessful military campaign. These governments proclaim that amnesties are needed to 'create a climate of détente, confidence and assurance'[47] in which all parties can come together in an atmosphere of acceptance and tolerance to establish democracy. However, in common with other transitional justice mechanisms, it is difficult for activists, academics or civil servants to measure the contribution of amnesty to reconciliation. This difficulty can arise for many reasons. First, as will be discussed below, the term 'reconciliation' is complex and often engenders divergent understandings, which can affect the design and efficacy of an amnesty. Secondly, it can be difficult to distinguish the impact of an amnesty from the effects of overarching transitional justice and development programmes, particularly where an amnesty was integrated into other transitional justice mechanisms, such as the South African Truth and Reconciliation Commission (TRC). Furthermore, the ability of amnesties to contribute to promoting reconciliation will often depend on the conditions within the state in which they are introduced. Amnesties are only one measure within often complex transitional arrangements and their contribution could be undermined by a failure to improve the standard of living of those individuals who were previously oppressed; by a failure to implement measures to integrate former combatants causing them to return to armed conflict or criminality; by an insincere government effort to introduce real reform; or by the failure of a peace agreement between elites to 'trickle down' and stem grassroots violence.

As described previously, assessing the 'success' of an amnesty can also be complicated where it is difficult to ascertain the clear motivations behind an amnesty process, as the expressed motives are not always sincere, or at least not the main motives. Indeed, states often borrow the language of reconciliation to conceal their more nefarious intentions. For

[47] Wording is taken from the 1989 announcement of amnesty by the Beninese government, see ——, 'Benin Political Bureau announces amnesty measure' *BBC Summary of World Broadcasts* (31 August 1989).

example, states may claim that they are offering a mutual amnesty to promote reconciliation, but their true intention is that the amnesty only benefits their own supporters. This was the case in Chile,[48] where the military government claimed it was granting amnesty

> to strengthen the ties that bind Chile as a nation, leaving behind all the hatred that has no meaning today, and fostering all measures that consolidate the reunification of all Chileans.[49]

On paper, this law did not distinguish between those acting on state authority and those acting against the state. But, in practice, the majority of government opponents could not benefit from this law as they 'had already been killed, disappeared, or [were] in exile'.[50] Furthermore, newspapers noted that most of the prisoners affected by the amnesty were already free on parole in Chile.[51] Similarly, some governments have introduced amnesties in the name of reconciliation only to use them as a tool to disarm and weaken their opponents. For example, the Varkiza Agreement 1945 in Greece stipulated that all beneficiaries of amnesty must surrender their weapons; but after the resistance movement laid down its arms, the Ministry of Justice, the security apparatus and vigilante bands of anti-communists unleashed a period known as the 'White Terror' in which former resistance fighters were executed and imprisoned.[52] In such cases, where the government's motives for introducing an amnesty are duplicitous, it seems likely that the amnesty will have a negative impact on reconciliation.

While such duplicitous amnesties clearly do not aim to promote reconciliation, others may have sought to contribute to a genuine and lasting political settlement. This section will explore the relationship between amnesties and reconciliation by first exploring the concept of reconciliation, then analysing the understandings of reconciliation that have been used to justify specific amnesty laws, before finally exploring the potential impact of amnesties on reconciliation.

[48] For a discussion of the Chilean amnesty, see case study 5.

[49] Decreto Ley de Amnistía, 1978 (Chile), Preamble.

[50] Robert J Quinn, 'Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model' (1994) 62 *Fordham Law Review* 905, 918.

[51] ——, 'Amnesty Decreed' *Facts on File* (12 May 1978) 351.

[52] For more information see Mark Mazower (ed), *After the War Was Over: Reconstructing the Family, Nation, and State in Greece, 1943–1960* (Princeton University Press, Princeton 2000); Georg Paschos and Zissis Papadimitrio, 'Collaboration Without Nemesis: On the Restoration of Political Continuity in Greece After World War II' in Stein Ugelvik Larsen and Bernt Hagtvet (eds), *Modern Europe after Fascism* (Social Science Monographs, Columbia University Press, New York 1998).

Defining 'Reconciliation'

The term 'reconciliation' is highly disputed,[53] with different stakeholder groups, or individuals, holding differing interpretations on its meaning, how it can be achieved, or even its objectives. For example, is the goal of reconciliation programmes to uncover the truth about past crimes and bring those responsible to justice, or it is to encourage trust-building measures and interaction between members of different communities? Indeed, the term can even be appropriated to justify competing political goals. For example, calls for retribution through widespread prosecutions for past crimes are often based on arguments that without justice there can be no reconciliation,[54] whereas advocates of blanket impunity can also describe their goal as to reconcile society by looking towards the future, rather than reliving the pain and suffering of the past. Often, it seems, such contradictory goals cannot be achieved by the same programmes. Further complications arise from the often diverse views of the different stakeholder groups on the form reconciliation should take. For example, former combatants may view reconciliation in a more forgiving, restorative manner, than their victims.

In describing the objectives of reconciliation, Crocker has suggested that understandings can range from thinner conceptions that aim at ending the violence and establishing 'simple co-existence' between previously warring factions (as discussed above), to thicker conceptions where former enemies 'must not only live together non-violently but also respect each other as fellow citizens'. This could entail encouraging individuals to engage in processes of 'forgiveness and mercy', such as truth commissions or community-based justice initiatives.[55] Adopting a thicker conception of reconciliation entails recognising that reconciliation can occur at different levels within society. Daly and Sarkin have broken down these levels as follows: (1) individual; (2) inter-personal; (3) communal; (4) national; and (5) international.[56] They further highlight that the emphasis placed by

[53] For discussion of the meaning of 'reconciliation', see Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Pennsylvania Studies in Human Rights, University of Pennsylvania Press, Philadelphia 2007); Sarkin & Daly (n 15); Lyn S Graybill and Kimberly Lanegran, 'Truth, Justice, and Reconciliation in Africa: Issues and Cases' (2004) 8 *African Studies Quarterly* 1; Laurel E Fletcher and Harvey M Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *Human Rights Quarterly* 573; Erin Daly, 'Transformative Justice: Charting a Path to Reconciliation' (2001) 12 *International Legal Perspectives* 73; Donna Pankhurst, 'Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace' (1999) 20 *Third World Quarterly* 239.

[54] UNCHR, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN 4/2005/102/Add 1 (*prepared by* Diane Orentlicher), Preamble.

[55] David A Crocker, 'Reckoning with Past Wrongs: A Normative Framework' (1999) 13 *Ethics and International Affairs* 43.

[56] Sarkin & Daly (n 53) 41–2.

individual governments on each level of reconciliation may be influenced by the nature of the human rights violations, particularly whether they were predominantly committed by state agents. The relationship of amnesty laws to each of these levels of reconciliation will be explored below, but first we will consider how national governments use reconciliation to justify their amnesty processes.

Reconciliation as National Unity

National unity has been an expressed motivation for many amnesty processes. For example, during the parliamentary debates on the 1953 amnesty law in France,[57] which offered protection to French citizens who had been incorporated by force into the German army during the Second World War, the president of the Assemblée Nationale, Edouard Herriot, asserted that 'the country is a mother. She cannot let her children tear each other apart on her breast'.[58] Following the end of the Second World War, national unity was also the justification for amnesties of former collaborators or members of fascist organisations in France, Germany, Italy, Japan and the Philippines.[59] Often, the calls for national unity recognised that the individuals concerned acted in response to social pressure, resulting in the view that there was a need to 'close definitively the file'.

National unity has also been used as a justification for amnesty during or after civil wars. For example, before the 1982 amnesty in Colombia for insurgents, President Betancur explained 'this amnesty we proclaim opens doors wider so all Colombians can gather together without exception towards peace'.[60] More recently, during the 2004 election campaign in Algeria in which President Bouteflika promised further amnesties, his campaign manager explained the government's view that

> reconciliation doesn't mean investigations and commissions. . . . It means the great pardon among Algerians. To accept one another as we are. To fight extremism on both sides. To accept our history and accept our personality. Is it worth it to open the whole file? If it risks dividing the people again, it's not worth it.[61]

It has also been expressed in the need to forgive citizens who have been 'misled by false propaganda' into committing crimes against the state. For

[57] *Loi No 53-112 portant amnistie en faveur des Français incorporés de force dans les formations militaires ennemies*, 1953 (Fr).

[58] Cited in Sarah Farmer, 'Postwar Justice in France: Bordeaux 1953' in István Deák, Jan Tomasz Gross and Tony Judt (eds), *The Politics of Retribution in Europe: World War II and its Aftermath* (Princeton University Press, Princeton 2000) 204.

[59] For a more detailed discussion of amnesties for collaborators, see ch 2.

[60] Raymundo Perez, *United International Press* (Bogotá 29 November 1982).

[61] Megan K Stack, 'A Healing Torturous as War' *Los Angeles Times* (Ouled Slama, Algeria 1 June 2004) A.1.

example, the 1979 amnesty issued in Afghanistan by the Soviet-backed revolutionary government proclaimed that the amnesty was a 'humanitarian act' and

> a manifestation of the revolutionary regime's concern for the Afghan citizens who were misled by the imperialist and reactionary forces which would like to turn them into a blind tool for the struggle against their own country and their own people.[62]

Clearly, this proclamation is itself propaganda, and given the context in which it was introduced, it appears likely that the government chose to the issue the amnesty in response to the sustained military attacks it was suffering, rather than a genuine desire to reintegrate those who had fought against the communist government. Where governments introduce amnesties to promote national unity, it is sometimes argued that achieving such unity is contingent upon closing the books on the past and forgetting the violations that occurred, rather than reinforcing grievances and raising tensions by investigating past crimes.

Reconciliation as Forgetting

Calls for reconciliation have often merged with demands for a drawing of a veil over the past. Such demands have arisen in many amnesty processes. For example, Presidential Decree 1754 in the Philippines proclaimed that amnesty was necessary

> to heal and bind the nation's wounds and prevent such from becoming permanent and festering afflictions upon the Filipino nation's unity and harmony, and thereby establishing a clean, fresh and unscarred start for all Filipinos, united in one sustained effort to rebuild their nation, all thoughts of recrimination should be laid to rest.[63]

Forgetting the crimes of the past was also the justification used for the 1949 German amnesty[64] when Konrad Adenauer expressed the apparently widely held opinion that 'in view of the confused times behind us, a general *tabula rasa* is called for'.[65] This argument was also relied upon by Spanish politicians who, during the parliamentary debates on the 1977

[62] Megan K Stack, '"Pravda" on Situation in Afghanistan' *BBC Summary of World Broadcasts* (14 June 1979).

[63] Presidential Decree No 1754, 1980 (Phil), Preamble. This decree is designed to impose conditions on an already proclaimed amnesty. The language used here adopts an organic model of the state and uses 'metaphors of illness and health'. For a discussion of such language to describe states, see Richard A Wilson, 'Anthropological Studies of National Reconciliation Processes' (2003) 3 *Anthropological Theory* 367, 370–1.

[64] Bundesgesetzblatt (BGBl) 1949 p 37f; Gesetz über die Gewährung von Straffreiheit: Law Granting Exemption from Punishment (31 December 1949).

[65] Norbert Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration* (Columbia University Press, New York 2002) 6–7.

amnesty law,[66] praised the law because it was intended to 'close the past', 'forget', and start a new phase. The leader of the Basque Nationalist Party (PNV), Xavier Arzalluz, described the law as an 'amnesty . . . from everybody to everybody, a forgetting from everybody for everybody' as 'both sides [had] committed blood crimes'.[67] The context in which this law was introduced is explained in Case Study 3:

Case Study 3: Post-Franco Amnesties in Spain

From 1936 to 1939 Spain was devastated by a civil war between the Nationalists and the Republicans in which abuses against civilians were widespread. In 1939, General Francisco Franco, the leader of the Nationalists, emerged victorious and established a right-wing dictatorship that endured until his death in 1975. The early years of authoritarian rule were characterised by harsh repression, with many disappearances and executions, and large numbers of political prisoners. The repression of political, linguistic and religious freedoms continued for the duration of Franco's rule.

From the early 1970s, when Franco's death seemed imminent, opposition parties formed a broad coalition to demand a clean break with the old system, political reform and a complete political amnesty. These calls for an amnesty from those who had opposed Franco were based on desires to end discrimination against those who had supported the Republicans and fears that the wounds caused by the civil war could be reopened by prosecutions causing violence to reignite.

Following Franco's death, the first amnesty was introduced to mark King Juan Carlos's accession to the throne in 1975.[68] It proclaimed that it aimed to 'signify a reaffirmation of the goals of solidarity and peaceful coexistence among Spaniards'. It was, however, limited as it excluded persons convicted of committing or abetting terrorist acts, members of illegal organisations cited in an August 1975 anti-terrorism decree, which included most of the political opposition, and persons accused of monetary crimes.

Consequently, most of the opposition and civil rights movement were disappointed and responded with popular protests and industrial conflicts, which were violently repressed. During this period there was also right-wing terrorism and a fear that, if liberalisation went too far, the army would stage a coup (which it attempted in 1982). Due to the severe threats to the stability of the state, a consensus emerged among the elites of all parties that institutional changes should be kept to a minimum and that the crimes of the past should be forgotten.

[66] *La Ley 46/1977, de 15 de octubre (BOE No 248, de 17 de octubre), de Amnistía*, 1977 (Spain).

[67] Paloma Aguilar Fernández, 'Justice, Politics and Memory in the Spanish Transition' in Alexandra Barahona de Brito, Carmen González Enríquez and Paloma Aguilar Fernández (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford Studies in Democratization, Oxford University Press, Oxford 2001) 103.

[68] *Decreto 2940/1975 de 25 de noviembre, por el que se concede indulto general con motivo de la proclamación de Su Majestad Don Juan Carlos de Borbón como Rey de España* (Spain).

This consensus led to a further amnesty in July 1976[69] for persons sentenced or awaiting trial for political offences or offences of opinion, those accused of military rebellion and sedition, military absentees or deserters, conscientious objectors and persons who had escaped from prison while serving sentences for offences covered by the amnesty. This amnesty covered crimes committed by both the government supporters and the opposition. It was restricted, however, to exclude those accused of killing or endangering the lives of others, and those accused of economic crimes.

This amnesty was further extended in October 1977 to cover those who had engaged 'all acts of political intent, regardless of their outcome, committed before 15 December 1976'[70] and those who had committed similar acts between 15 December 1976 and 15 June 1977 with the aim of restoring civil liberties or 'claiming independence for the peoples of Spain'. This was intended to apply to Basque separatists. However, this amnesty again excluded crimes of killing or endangering the life of others.

This legacy has remained untouched until the present day, as there have been no efforts to bring legal cases against any individuals or any discussion of repealing the amnesty. However, there are signs that calls for truth are growing. First, volunteers have begun to excavate the mass graves of Republican supporters. These efforts received the backing of the Spanish Ombudsman who criticised the government's lack of response to these volunteers. Secondly, the government has proposed renaming public sites that celebrate Franco's regime. Finally, victims' groups are beginning to bring legal cases to clear the names of those who were persecuted by the dictatorship. These efforts resulted on 10 September 2004 in a Royal Decree, approved by the Council of Ministers, which created an Inter-Ministerial Commission to investigation the 'moral and legal rehabilitation' of thousands who were victims of the civil war and Franco regime. The commission began its work in November 2004 and in November 2007, the Law of Historical Memory that it proposed, became law. This legislation declares the repression of the Franco era to be illegitimate and requires the government to remove all statues, plaques and symbols of the dictatorship from public buildings.[71]

***Sources**: P. Aguilar, 'Collective Memory of the Spanish Civil War: The Case of the Political Amnesty in the Spanish Transition to Democracy' (1997) 4 Democratization 88; P. Aguilar 'Justice, Politics and Memory in the Spanish Transition' in A. Barahona De Brito, C. González-Enríquez and P. Aguilar (eds), The Politics of Memory: Transitional Justice in Democratizing Societies (Oxford, Oxford University Press 2001); A. Rigby, 'Amnesty and Amnesia in Spain' (2000) 12 Peace Review 73; M. Davis, 'Is Spain Recovering its Memory? Breaking the Pacto del Olvido' (2005) 27 Human Rights Quarterly 858; C.L. Sriram, Confronting Past Human Rights*

[69] *Real Decreto-Ley 10/1976 de 30 de Julio, sobre amnistía* (Spain).

[70] *Ley 46/1977, de 15 de octubre, de amnistía* (Spain).

[71] *Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura* ('*Ley de Memoria Histórica*') (Spain).

Violations: Justice vs. Peace in Times of Transition (New York, Frank Cass Publishers, 2004); Equipo Nizkor, 'The Question of Impunity in Spain and Crimes under Franco', (14 April 2004).

The issue of forgetting was also prevalent in France in 1981, when the Secretary of State in charge of Repatriates, Raymond Courrière, described the 'need' for a new amnesty law[72] (despite several pre-existing amnesty laws) by saying 'the war in Algeria is finished, one must wipe it out once and for all'.[73] Subsequently, in El Salvador in 1993, President Alfredo Cristiani argued that to move forwards and 'build a better future for our country', it was necessary 'to erase, eliminate and forget everything in the past'.[74]

The idea of a clean break from the past within a programme of national reconciliation[75] can be attractive to governments either as a means of hiding their own crimes or as a symbol that the period of violence is over. Alternatively, governments may justify choosing to forget the crimes of the past by highlighting the demands for amnesty from insurgents who threaten further violence if faced with investigations and prosecutions. Institutional policies of collectively forgetting past crimes have been argued by the proponents of the theory of collective memory to be problematic.[76] However, Shaw has suggested that the value of the culture of memory is a relatively recent phenomenon and that in fact

[72] *Loi No 81-736 Loi Portant Amnistie*, 1981 (Fr).

[73] ——, *United Press International* (Paris 12 June 1981). See also *Loi portant amnistie d'infractions contre la sûreté de l'Etat ou commises en relation avec les événements d'Algérie*, 1966 (France); *Loi No° 81-736 Loi Portant Amnistie*, 1981 (France); *Loi No 81-736 Loi Portant Amnistie* 1981. For an overview of amnesty laws in France, see René Lévy, 'Pardons and Amnesties as Policy Instruments in Contemporary France' (2007) 36 *Crime and Justice* 551.

[74] Inter-Am CHR, 'Report on the Situation of Human Rights in El Salvador' (11 February 1994) OEA/Ser.L/V.85 doc. 28 rev., ch 4. For an overview of the amnesty process in El Salvador, see case study 10.

[75] The impact of such programmes on individual reconciliation can be very different from their impact on national reconciliation. See ch 9 for a greater discussion of the impact of amnesties on victims.

[76] Judy Barsalou, 'Trauma and Transitional Justice in Divided Societies' (United States Institute for Peace, Washington DC 2005) 1; Madeleine Davis, 'Is Spain Recovering its Memory? Breaking the *Pacto del Olvido*' (2005) 27 *Human Rights Quarterly* 858; Dani W Nabudere, '*Ubuntu* Philosophy: Memory and Reconciliation' (Réseau Grands Lacs Africains, Geneva, 1 March 2005); Christina Morino, 'Instructed Silence, Constructed Memory: The SED and the Return of German Prisoners of War as "War Criminals" from the Soviet Union to East Germany, 1950–1956' (2004) 13 *Contemporary European History* 323; Heribet Adam and Kanya Adam, 'The Politics of Memory in Divided Societies' in Wilmot Godfrey James and Linda van de Vijver (eds), *After the TRC: Reflections on Truth and Reconciliation* (Ohio University Press, Athens, OH 2001); Paloma Aguilar Fernández, 'Justice, Politics and Memory in the Spanish Transition' in Alexandra Barahona de Brito, Carmen González Enríquez and Paloma Aguilar Fernández (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford Studies in Democratization, Oxford University Press, Oxford

> alternative and incommensurable understandings of the healing powers of *forgetting* have long coexisted in North America and Europe, crystallised in the expression 'forgive and forget'.[77]

She continues that in other parts of the world, these forms of memory practices are preferred and the notion of 'verbally recounting memories of violence' is rejected.[78] As will be explored later in this book, such a desire to avoid reliving the pain of the past, due to cultural practices or fear of the reactions of the perpetrators or even members of the victims' own community may also influence individual victims in their decision whether to publicly 'forget' their suffering (although of course it will be remembered privately) or whether to participate in or campaign for truth-seeking and memorialisation programmes.

Reconciliation as Forgiveness

Philosophical and religious debates on forgiveness have produced a rich and detailed literature on who is required to forgive and on the form that forgiveness should take. The literature has predominantly focused on disputes between individuals, with all the world's major religions advocating forgiveness as a virtuous action.[79] For example, Christianity requires

2001); Alexandra Barahona de Brito, 'Truth, Justice, Memory and Democratization in the South Cone' in Alexandra Barahona de Brito, Carmen González Enríquez and Paloma Aguilar Fernández (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford University Press, Oxford 2001); Brandon Hamber and Richard A Wilson, 'Symbolic Closure Through Memory, Reparation and Revenge in Post-Conflict Societies' (2002) 1 *Journal of Human Rights* 35; Paloma Aguilar, 'Collective Memory of the Spanish Civil War: The Case of the Political Amnesty in the Spanish Transition to Democracy' (1997) 4 *Democratization* 88.

[77] Rosalind Shaw, 'Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone' (United States Institute for Peace, Washington DC 2005) 7. This approach to forgetting was also discussed in relation to Sierra Leone in Tim Kelsall, 'Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone (2005) 27 *Human Rights Quarterly* 361.

[78] Shaw (n 77) 7.

[79] For discussion of the role of forgiveness in amnesty processes, see Roman David and Susanne YP Choi, 'Forgiveness and Transitional Justice in the Czech Republic' (2006) 50 *Journal of Conflict Resolution* 339; Erik Doxtader, 'Works of Faith, Faith of Works—A Reflection on the Truth and Justification of Forgiveness' (2002) XVI *Quest* 50; Claudio Santorum and Antonio Maldonado, 'Political Reconciliation or Forgiveness for Murder—Amnesty and its Application in Selected Cases' (1995) 2 *Human Rights Brief*; Lyn S Graybill, 'South Africa's Truth and Reconciliation Commission: Ethical and Theological Perspectives' (1998) 12 *Ethics and International Affairs* 43; Desmond Tutu, *No Future without Forgiveness* (Rider, London 1999); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, Boston 1998); Donald W Shriver Jr, *An Ethic for Enemies: Forgiveness in Politics* (Oxford University Press, New York 1995); Jean Bethke Elshtain, 'Politics and Forgiveness' in Nigel Biggar (ed), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press, Washington DC 2003); Jeffrie G Murphy *et al*, 'Ninth Annual Stein Center Symposium: The Role of Forgiveness in the Law', 27 *Ninth Annual Stein Center Symposium: The Role of Forgiveness in the Law* (Fordham University School of Law 2000) 1347–1445.

Christians to remember, first, that all human beings are fallible and flawed, and therefore in need of forgiveness; secondly, that they are all created in the likeness of their God and are thus precious; and thirdly, that it is up to god to punish wrongdoers. Therefore, Christians are encouraged to forgive those who trespass against them, regardless of whether those responsible show any remorse.[80] However, Christians who sin are expected to repent if they wish to have their God's forgiveness. This is similar to Judaism, although the latter places less emphasis on forgiveness, focusing more on the concept of atonement, which requires the offenders to make amends to their victims before they can be forgiven.[81] Forgiveness is also a requirement for Muslims and Sikhs and it is encouraged for Buddhists and Hindus as a way of achieving karma.[82] Furthermore, O'Shea argues that in African religions which encompass ancestor rituals, 'illness is a form of punishment' and therefore

> There is . . . some convergence of doctrine between the healing of a sick sinner, re-establishing harmony across the secular and spiritual world, and the healing of a nation often referred to the context of the truth and reconciliation process.[83]

In addition to religious beliefs, the South African amnesty process emphasised communal values by relying on the African principle of *ubuntu*. This principle was explained by South African TRC Chairperson and former archbishop Desmond Tutu in 1996 as:

> *Ubuntu* says I am human only because you are human . . . You must do what you can to maintain this great harmony, which is perpetually undermined by resentment, anger, desire for vengeance. That's why African jurisprudence is restorative rather than retributive.[84]

The value of the concept of *ubuntu* was articulated by Constitutional Court judge, Yvonne Mokgoro, who argued it 'could promote harmony between society's members rather than the desire for retribution, embodied in the adversarial approach in litigation'.[85]

Within philosophy, the concept of forgiveness was addressed by Hannah Arendt who argued that

[80] Minow (n 79) 18.

[81] O'Shea (n 10) 27.

[82] Amy Colleen Finnegan, 'A Memorable Process in a Forgotten War: Forgiveness within Northern Uganda' (MA in Law and Diplomacy book, The Fletcher School, Tufts University 2005) 14–15.

[83] O'Shea (n 10) 28.

[84] Cited in Richard A Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State* (Cambridge Studies in Law and Society, Cambridge University Press, Cambridge 2001) 9.

[85] Lyn S Graybill, 'Pardon, Punishment and Amnesia: Three African Post-conflict Methods' (2004) 25 *Third World Quarterly* 1117, 1119.

> forgiveness is the exact opposite of vengeance, which acts in the form of reacting against an original trespassing, whereby far from putting an end to the consequences of the first misdeed, everybody remains bound to the process.[86]

In this way, vengeance can lead to further violence. In contrast, Clark argues that

> forgiveness, which entails foregoing feelings of resentment and a desire for personal, direct retribution, is necessary to start afresh and to allow people to deal with memories of the past in a more constructive manner.[87]

He continues, however, that this understanding of forgiveness is distinct from reconciliation, as the latter entails restoring relationships whereas 'a victim may justifiably forgive the transgressor and still refuse to engage with him or her again, perhaps for fear of repeat offences'.[88] Despite these limitations of the impact of forgiveness on reconciliation, it is frequently used as a justification for amnesty, particularly through the idea of 'forgetting' past crimes, either in terms of the state forgiving those who committed crimes against it, or by encouraging the citizens to forgive one another.

Forgiveness has been cited as a reason for amnesty in several transitions. For example, in Annex 6 of the Lusaka Protocol 1994, 'all Angolans' were called upon 'in the spirit of national reconciliation' to 'forgive and forget offences resulting from the Angolan conflict and face the future with tolerance and confidence'.[89] Politicians in Guatemala also proclaimed the need for forgiveness when justifying the 1996 amnesty law: 'We do want to live in peace. We have to learn how to forgive'.[90] Perhaps most contentiously, the issue was raised in Sierra Leone by Foday Sankoh, then leader of the Revolutionary United Front (RUF), when discussing the 1999 Lomé Accord, when he declared

> Let us try to forgive. We are asking for forgiveness. We need the support of everyone, especially our brother the president.[91]

A government choosing to forgive crimes against the state is not particularly problematic as the state has standing to do so. But a state encouraging individuals to forgive one another is contentious, as argued by Minow:

[86] Hannah Arendt, *The Human Condition* (University of Chicago Press, Chicago 1958) 241.

[87] Phil Clark, 'Recreating Tradition: Assessing Community-Based Transitional Justice in Northern Uganda' in Tim Allen and Koen Vlassenroot (eds), *The Lord's Resistance Army: War, Peace and Reconciliation* (James Currey, Oxford 2008).

[88] *Ibid*.

[89] Lusaka Protocol, 1994 (Angl).

[90] Alfonso Anzueto, 'War Crimes Amnesty Approved, One of the Last Obstacles to Peace' *Associated Press* (Guatemala City 18 December 1996).

[91] Amba Dadson, 'Sierra Leone Grants Amnesty, Rebels Sign Peace Deal' *Associated Press* (Lomé, Togo 8 July 1999).

> Forgiveness is a power held by the victimised, not a right to be claimed. The ability to dispense, but also to withhold, forgiveness is an ennobling capacity and part of the dignity to be reclaimed by those who survive the wrongdoing. Even an individual survivor who chooses to forgive cannot, properly, forgive in the name of other victims. To expect survivors to forgive is to heap yet another burden on them.[92]

Consequently, applying pressure on victims to forgive their perpetrators, particularly where the perpetrators are not required to atone or apologise for their crimes, could cause significant psychological trauma for the victims. However, where religion is a factor in the debate on amnesty such pressure can arise. For example, the selection of Archbishop Tutu as the Chairperson for the South African TRC contributed to the emphasis placed on religion and forgiveness during the commission's hearings.[93] This emphasis conveyed an image that granting amnesty to former human rights abusers was a virtuous action that complemented the religious and cultural practices among large proportions of the South African population. The problematic consequences of this approach are highlighted in Wilson's account of the South African TRC which describes how during

> the first six months of the Human Rights Violations hearings around the country, Commissioners specifically pressed some victims to forgive perpetrators there and then.[94]

He claims that although some victims, more 'religiously-inclined individuals', were prepared to forgive, many victims saw this approach as 'outrageous', and it was occasionally 'met with such a hostile response that it eventually had to be abandoned'.[95] Therefore, where forgiveness is used to justify amnesty, the conceptions of this term should be limited to national reconciliation where the state 'forgives' offenders through suspending legal penalties, rather than forcing victims to engage in individual acts of forgiveness. Indeed, in many transitional contexts, where the balance of power between previously antagonistic groups is shaky, state acts of forgiveness may be a prerequisite for the establishment of stable democracy.

Reconciliation through the Establishment of Democracy

For 'thicker' forms of reconciliation to be achieved, the transitional state must establish democratic structures for resolving disputes peacefully. Amnesties can contribute to this process as part of a wide-ranging package of reforms that address the root causes of the violence by increasing access to decision-making and resources. For example, the 1997

[92] Minow (n 79) 17.
[93] See eg Boraine (n 14) 265–8.
[94] Wilson (n 84) 119.
[95] *Ibid* 119.

Bangladeshi amnesty was part of a peace process to encourage insurgents to stop fighting. It was accompanied by other measures to ensure greater autonomy for the peoples of the Chittagong Hill Tracts.[96] The relationship between amnesty and other measures within a peace process can be sequenced to permit the amnesty to act as the starting point to enable other aspects of the agreement to occur, such as demobilisation, integration of combatants into the armed forces, or the transformation of insurgent groups into political parties that could perhaps participate in governments of national unity. For example, the 2003 amnesty in the Democratic Republic of Congo was part of an overall peace settlement and was designed inter alia to encourage rebel participation in the future unity government.[97] In these instances, the amnesty could be a tool for building trust between the parties and creating a climate in which the leaders can focus on the redevelopment of the country.

Amnesties can also contribute to rebuilding transitional societies by enabling collaborators, such as bureaucrats from the former regimes, to participate in the reconstruction, as they are often the only people with the necessary knowledge and experience.[98] It has been argued that, without the certainty of an amnesty, these individuals, even when they keep their jobs, may resort to corruption to supplement their income, due to the precariousness of their employment.[99] This could contribute to undermining support for the new regime by making it appear as tainted as its predecessor. A programme to allow members of the former regime to continue in public office should in principle, however, be co-ordinated with individualised measures to remove those responsible for serious human rights violations from office,[100] as a failure to do so will cause disillusionment among victims' groups.[101]

The creation of such democracy has been the expressed goal of some amnesty programmes. For example, the Haitian interim government in 1991 claimed the amnesty was necessary to create a 'climate favourable for the blooming of democracy in Haiti'.[102] Furthermore, some governments

[96] Wilson (n 84), —— —— 'Peace Pact Signed between Bangladesh Gov't, Rebels' *Japan Economic Newswire* (Dhaka 2 December 1997); Farid Hossain, 'Government Announces Amnesty for Rebels' *Associated Press* (Dhaka 6 February 1998); Amnesty International, 'Bangladesh: Human Rights in the Chittagong Hill Tracts' (Report) (February 2000) ASA 13/01/00.

[97] *Decret-Loi portant amnistie pour faits de guerre, infractions politiques et d'opinion*, 2003 (DRC); ——, 'Amnesty Granted to Warring Parties in DRC' *Voice of America News* (17 April 2003).

[98] Adam & Adam (n 76) 34.

[99] Charles T Call and William Stanley, 'Protecting the People: Public Security Choices after Civil Wars' (2001) 7 *Global Governance* 151.

[100] For a discussion of such measures and their relationship to amnesty, see the lustration and vetting and section in ch 4.

[101] See ch 9.

[102] ——, 'Haiti's Government to give Amnesty to January Putschists', *Agence France Press* (Port-au-Prince 25 December 1991).

have proclaimed that their amnesties are part of internal reform programmes. This seems to have been the case in Benin in 1990, where, following a wave of internal political protests, the president amnestied all his political opponents in exile and convened a national conference to discuss establishing democratic rule.[103]

This section has argued that amnesty is frequently justified by national governments as a tool to promote reconciliation and has looked at the various ways in which states can use the language of reconciliation to justify amnesty laws, often with very different outcomes. In many of these cases, the state justifications focus on national reconciliation, but, as discussed above, reconciliation can and should also occur at individual and communal levels. The following section will investigate how amnesties could be designed to promote reconciliation at each of these levels.

Can Amnesty contribute to Reconciliation?

Where amnesty laws are introduced in good faith to promote reconciliation, the divergent conceptions of what reconciliation requires or looks like, discussed above, together with the political and economic conditions within the transitional state and the types of crimes that have occurred, can affect the design of the amnesty laws. This can impact on their ability to contribute to ending violence and establishing harmonious societies through achieving reconciliation at different levels within society.

Within the different levels, individual reconciliation is perhaps the hardest for an amnesty to address, as national policies can often do little to 'heal the physical and psychological wounds of trauma'.[104] However, where an amnesty contributes to reducing or ending the violence, plus saving the expense of costly prosecutions for large numbers of offenders, this could help to create conditions where investment can go into the health infrastructure to provide services for those who have been physically or psychologically injured. The end of the violence would also enhance the physical security of the population, which is a necessary prerequisite for healing to occur. The potential for amnesty to contribute to individual reconciliation is, however, clearly constrained by the diversity of needs and responses among victims' groups.[105] Furthermore, as argued above, individual reconciliation should in principle be left for individual victims to pursue or reject.

Amnesty could be argued to contribute to communal reconciliation where it is accompanied by alternative transitional justice programmes, particularly grassroots initiatives which aim to resolve neighbourhood

[103] *Loi No 90/028 du 9 octobre 1990 portant amnistie des faits autres que des faits de droit commun commis du 26 octobre 1972 jusqu'à la date de promulgation de la présente loi*, 1990 (Benin).

[104] Daly & Sarkin (n 53) 45.

[105] *Ibid* 45.

disputes, which can often be more meaningful for long-lasting reconciliation than measures relating solely to those who are 'most responsible'.[106] For bilateral reconciliation between individual victims and perpetrators, amnesty programmes which are combined with victim–perpetrator mediation could encourage remorse from the perpetrators and lead some victims to offer forgiveness.[107] Furthermore, individualised, conditional amnesties offered in exchange for truth telling could help foster communal reconciliation through the truth that they uncover, particularly by illustrating that all sides suffered during the period of violence. In addition, where thicker conceptions of reconciliation entail long-term processes to encourage individuals to interact with one another culturally, commercially and socially, such interactions can be incentivised by public policy, as governments, in addition to the high-level politics of (re-)establishing representative political and legal institutions, can work in collaboration with all sections of civil society, both national and international, to: (i) facilitate public participation in the life of the state; (ii) develop mechanisms to strengthen civil society organisations;[108] and (iii) promote community sensitisation programmes, perhaps falling within the auspices of a Disarmament, Demobilisation and Reintegration (DDR) programme. Community reconciliation cannot, however, be forced,[109] as to do so would be unrealistic and could cause further harm to individual victims who are trying to regain control of their lives and their place in society.

Finally, amnesty could help to foster national reconciliation[110] where the policies of forgiveness contribute to the establishment of a common identity and where truth-recovery mechanisms facilitate the development of a common history. An amnesty could also strengthen transitional power-sharing arrangements by reducing the fears of combatants that they will be punished if they surrender, enabling them to participate in the transitional government. Where an amnesty contributes to the end of violent conflict, it could also help to promote national reconciliation by contributing to stability, which enables economic growth and development, and the improvement of the living conditions of the population. For any amnesty programme to contribute effectively to national reconciliation, it is desirable that it be implemented following widespread consultation.

The above discussion has shown that amnesties can be designed to complement different approaches to reconciliation by combining them with top-down, elite-driven programmes to establish a common identity within

[106] For a discussion of the relationship between amnesty and other alternative transitional justice programmes, see ch 4.

[107] For an analysis of the views of victims towards amnesty laws, see ch 9.

[108] Daly & Sarkin (n 53) 120.

[109] *Ibid* 186.

[110] The final category of international reconciliation has been excluded here, as there are very few international amnesties in modern times.

the state and functioning institutions, and bottom-up, grassroots measures to encourage individual and communal reconciliation by tackling neighbourhood disputes that are often overlooked in centrally organised programmes such as truth commissions. The appropriate balance between top-down and bottom-up initiatives will depend on the conditions within the transitional state, particularly the forms of violence that occurred, the ethnic divisions, and the stability of the state institutions. In many cases, the decision to introduce an amnesty may also be influenced by external conditions imposed directly or indirectly by international actors.

Amnesty as a Response to International Pressure

For many amnesty laws, the role of international actors is significant. Actors from more than one state are clearly involved in amnesties following international conflicts, and even in the majority of internal conflicts there are often international mediators, either from states or international organisations. As will be explored in chapter 8, their involvement is often based on political motives, such as advocating amnesty to increase the strength of their chosen allies. For example, following the Second World War, Britain decided that Greece was within its sphere of influence and, consequently, it wanted to reduce the political strength of the mainly left-wing resistance movement. Therefore, it intervened to prevent the prosecution of right-wing traitors and collaborators.[111] International pressure for an amnesty law was also a key factor in the Haitian transition, where the United States, eager to reinstall democratic government in Haiti, applied pressure to a reluctant President Aristide to amnesty the military personnel responsible for the *coup d'état* and the ensuing human rights violations.[112] In other cases, international actors have become involved to encourage a negotiated settlement to a conflict. For example, the 1996 and 1999 peace agreements in Sierra Leone, which contained blanket amnesties for all combatants in the country's brutal civil war, were brokered by a range of international actors including the UN, OAU, ECOWAS and individual nation states such as Britain, the United States and Nigeria.[113]

[111] Varkiza Agreement, 1945 (Greece). See also Mazower (n 52); Paschos & Papadimitrio (n 52).

[112] For an overview of the negotiations see Michael P Scharf, 'Swapping Amnesty for Peace: Was There A Duty to Prosecute International Crimes in Haiti?' (1996) 31 *Texas International Law Journal* 1.

[113] ——, 'ECOWAS Officials Defends Amnesty granted to Sierra Leone Rebels' *BBC Worldwide Monitoring* (15 July 1999); William A Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 11 *UC Davis Journal of International Law and Policy* 145; Corinna Schuler, 'Sierra Leone—A Wrenching Peace: Sierra Leone's "See No Evil" Pact' *Christian Science Monitor* (Freetown 15 September

In addition to direct mediation, international actors can influence decisions on amnesty laws indirectly by contributing to the conditions that make amnesty necessary, for example, by imposing sanctions that require the release of prisoners of conscience. This occurred in 1995, when Iraq released all Iraqis charged with political crimes, in order to meet the conditions imposed by the UN Security Council before it would consider lifting trade sanctions.[114] Alternatively, international actors can provide military support to a party to the conflict, with a view to bringing about a particular political settlement. For example, in 1987, the financial and military support provided by the United States to the Contra guerrilla movement resulted in the Nicaraguan government, under the terms of the Arias Peace Plan, using an amnesty of political prisoners to try to prevent the United States funding the guerrillas.[115] In other instances, amnesties to release prisoners of conscience, or to protect minorities and enable exiles to return were conditional on economic aid or military support.

International actors have also occasionally played a role in encouraging states to introduce amnesty laws without a deliberate policy to intervene in the transition. This could result from what Jones and Newburn term 'policy transfer'.[116] For example, the experience of the South African TRC has sparked considerable interest in other states, with delegations often travelling to and from South Africa to exchange experiences. More indirectly, Cavallaro and Abluja have argued that national transitional justice policies may be influenced by international practice through a process of acculturation, where

> state behaviour is highly influenced by the surrounding environment, which leads relevant actors to follow the behaviour of others through mimicry, identification, and status maximisation.[117]

1999); Carsten Stahn, 'United Nations Peace-building, Amnesties and Alternative Forms of Justice: A Change in Practice?' (2002) 84 *International Review of the Red Cross* 191; Karl Vick, 'Sierra Leone's Unjust Peace: At Sobering Stop, Albright Defends Amnesty for Rebels' *The Washington Post* (Freetown 19 October 1999) A12.

[114] ——, 'Iraq's Hussein Issues Amnesty in Apparent Bid to Lift Sanctions' *Associated Press* (Nicosia 23 July 1995) 48; ——, 'Iraq Grants Political Crime Amnesty' *United Press International* (Beirut 31 July 1995).

[115] For a discussion of the implications of this strategy see John J Moore Jr, Note, 'Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador' (1991) 43 *Stanford Law Review* 733.

[116] Trevor Jones and Tim Newburn, 'Comparative Criminal Justice Policy-Making in the United States and the United Kingdom: The Case of Private Prisons' (2005) 45 *British Journal of Criminology* 58, 74. The authors use the term 'policy transfer' to describe the convergence in penal policies between Britain and the United States in both initial ideas and the 'substantive manifestations of policy'.

[117] James Cavallaro and Sebastián Albuja, 'The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below* (Hart Publishing, Oxford 2008).

They further argue that

> There is good reason to believe that the forces leading to acculturation and adoption of world society norms are present or perhaps intensified in situations of transition, in which states and their agents are particularly concerned, and their attention particularly focused on the international community and its standards of legitimacy.[118]

This process seems to have occurred among certain states in South America, which appear to have been influenced by their neighbours' experiences when they were introducing amnesties. Furthermore, it is argued that on occasion, external events, such as the fall of the Berlin Wall, can contribute to pressure for reform in other countries, including the release of political prisoners. In addition, certain amnesties are clearly a response to international criticism of human rights violations and, consequently, represent an attempt on behalf of the state to improve its international prestige. For example, the 1977 Czechoslovak amnesty was timed to coincide with the Belgrade Conference to review compliance with the Helsinki Accord.[119] Whilst such international influences may be positive if they encourage states to introduce more accountability mechanisms than would have occurred previously, commentators in the field of transitional justice generally argue that it may not be sensible for states to borrow an approach from elsewhere as all transitions are unique.

Amnesty as a Cultural or Religious Tradition

In certain countries, there are well-established traditions of the sovereign granting amnesty to individuals on national or religious holidays. Under normal circumstances, these amnesties would usually apply to certain categories of offenders, such as minor criminals, veterans, elderly or unhealthy prisoners, first-time offenders, or female prisoners. However, in many dictatorial regimes they are used as occasions to appear benevolent by releasing opponents of the state. For example, in Russia there was a long-standing tradition of releasing prisoners on public holidays or to celebrate military victories, which has been argued to have contributed to Stalin's decision to release inmates of Gulags following the end of the Second World War.[120] The occasions employed will differ depending on the country. For example, in many Arab countries it is usual to introduce amnesties on religious holidays, whereas in former Soviet bloc countries,

[118] *Ibid*.

[119] ——, 'Czechs Announce Amnesty for All who Left in 1968' *The Washington Post* (Prague 1 July 1977) A20.

[120] Golfo Alexopoulos, 'Amnesty 1945: The Revolving Door of Stalin's Gulag' (2005) 64 *Slavic Review* 274.

amnesties are introduced to celebrate national holidays, such as the anniversary of the founding of the country.

Amnesty as Reparation

In many political transitions, amnesties are introduced to repair the harm inflicted upon those who are deemed to be opponents of the state due to their ethnicity, or supposed religious or political views. These amnesties can cover those who were interned, imprisoned or forced into exile. They can also cover those who lost their jobs, pensions, property or political rights due to their opposition to the regime. For example, a 1980 Peruvian amnesty

> instructed the Executive to reinstate or give indemnity to public servants fired during the previous regime, in violation of the Constitution or the law.[121]

Although, as discussed earlier, such amnesties can be granted by oppressive regimes to reduce domestic tensions or gain foreign aid, as shown by the amnesties used by the Polish communist government in 1983 and 1984,[122] they are more commonly introduced following the fall of a dictatorial regime. For example, amnesty laws introduced in Albania, Bulgaria and Romania after the fall of communism in those countries were designed to negate the crimes of which certain individuals had been accused or had committed in their opposition to their oppressive governments. Such amnesties can proclaim the innocence of former political prisoners. For example, the 1993 Albanian amnesty covered individuals who suffered from

> any act or failure to act between 8 November 1941 and 22 March 1993 on the part of any armed formation or individual of the National Liberation Army, the state security service, the police, the army, or a local government organ on the basis of an order or decree of the party, military, state or judicial organs of the Albanian communists, when this act or failure to act led to loss of life, freedom, of civil rights or classification as kulak or declassed person, as well as any other debarment of the individual from political, economic and social life because of his political or religious convictions or attitudes.

[121] Law No 23216, 1980 (Peru). See Inter-American Commission on Human Rights, 'Annual Report 1979–1980: Peru' (Report) (2 October 1980) OEA/SerL/V/II.50 doc 13 rev 1.

[122] Walter Wisniewski, 'Poland Frees Dozens of Political Prisoners' *United Press International* (Warsaw 22 July 1983); Bogdan Turek, 'Officials say Amnesty aimed at Restoring "Balance" in Poland' *United Press International* (Warsaw 29 July 1983); Bradley Graham, 'Warsaw Abolishes Martial Law; Amnesty Decreed; New Rules Limit Dissident Activities' *The Washington Post* (Warsaw 22 July 1983) A1; —— —— 'Poland; Amnesty for Some, But not for All', *The Economist* (30 July 1983); ——, 'US Holds Fire on Lifting Sanctions on Poland / Political Prisoners Amnesty Welcomed by US' *The Guardian* (24 July 1984); Eric Bourne, 'Poland Awaits West's Reaction to Amnesty for Political Prisoners' *Christian Science Monitor* (23 July 1984) 7; Michael T Kaufman, 'Poland Criticizes US Response to Amnesty' *New York Times* (Warsaw 25 July 1984) 11.

This amnesty then proclaimed

> All those who have been sentenced for political crimes, those who have died in the investigation process, those executed without trials, and those killed while crossing the border are considered innocent.[123]

For the purposes of this research, reparative amnesties for non-violent political prisoners are distinguished from amnesty for those who have engaged in armed opposition to the state, as those involved in violence committed criminal actions, whereas non-violent political prisoners more commonly are imprisoned either under unjust laws that breach international human rights standards or for crimes that they did not commit. This is not to deny that combatants can also be victims of human rights violations, as will be discussed further in chapter 2, but rather to highlight that amnesties often apply to civilians who took no part in armed campaigns, and were instead punished unjustly.

Often when political prisoners are amnestied, they have already been convicted. Such amnesties resemble pardons where there has been a conviction and merely the punishment is withdrawn. A distinction remains, however, as many amnesties for political prisoners, particularly those following the collapse of an oppressive regime, aim to rehabilitate the prisoners and declare their innocence, thereby eliminating the conviction from their record. Such amnesties can imply that the criminal proceedings by which the accused was sentenced were unfair. This was the justification for the release of many political prisoners in the 1987 Salvadorean amnesty.[124] Where individuals were convicted for committing actions that were illegal under the repressive laws of the dictatorship, amnesties can declare that those laws themselves were unjust. For example, the 1991 Bulgarian amnesty provides

> Now that a democratic order is being established in Bulgaria, it is necessary to amnesty acts declared to be crimes but which actually were an expression of the struggle against an oppressive regime.[125]

Similarly, referring to a 1987 amnesty for political prisoners in the USSR, a government official made the rather understated comment that 'because of *glasnost* . . . some of the crimes now look rather different'.[126] In certain instances, this logic has been stretched to groups such as resistance fighters during the Second World War, even where these individuals had committed serious crimes, due to a belief that their offences are 'either

[123] Law No 7660, 1993 (Alb).

[124] *Ley de Amnistía para el Logro de la Reconciliación Nacional, Decreto No 805, Diario Oficial No 199 1987* (El Sal).

[125] Law on Amnesty and Restoration of Confiscated Property and Implementing Regulations, 1991 (Bulgaria).

[126] Martin Walker, 'Soviet Union to Free Dissidents in Amnesty: Releases Extended to Mark Anniversary of Revolution' *The Guardian* (London 25 June 1987).

unworthy of punishment or not properly an offence at all'.[127] Such amnesties can be seen as validation of the justness of their cause and recognition of the sacrifices made by the fighters. However, such groups are excluded from this classification in this research, and would fall instead within amnesties for reconciliation, particularly national unity.

Amnesty as a Shield for State Agents

Whereas amnesties in response to internal pressure often benefit opponents of the state, some amnesties are introduced specifically to benefit state agents.[128] Governments may introduce such laws when they wish to reward the military for its role in establishing the government's power or eliminating political threats. This motivation is occasionally expressed in the law by declaring that the state agents, when they committed crimes, were performing their duty. For example, the 1982 Guatemalan amnesty law includes immunity for 'members of the state security forces that, in carrying out their duties, have participated in actions against subversion'.[129] More problematically, there have even been occasions where the role of the military has been lauded in an amnesty. For example, in announcing the 1993 amnesty in Malawi, the president proclaimed, 'we remember and understand that certain actions were taken to safeguard the security of the country'.[130] More recently, in Algeria, the 2006 amnesty to enact the 2005 Charter on Peace and Reconciliation praised the armed forces in their fight against the Islamic extremists, denied state responsibility for disappearances, and declared that any wrongful acts committed by state agents had already been punished.[131] It is unclear why, when a political transition is not imminent, a dictatorial regime would feel the need to protect its own agents from prosecution as it is unlikely that any cases could be successfully prosecuted against them. Perhaps an amnesty at these times is an attempt to make the state agents feel that their actions, rather than being reprehensible, are actually contributing positively to the state.

On occasion, amnesty laws for state agents have been justified as a means of ensuring national security. For example, the 1986 Israeli amnesty was introduced to protect members of Shin Bet, Israel's counter-

[127] Robert Parker, 'Fighting the Siren's Song: The Problem of Amnesty in Historical and Contemporary Perspective' (2001) 42 *Acta Juridica Hungaria* 69, 83.

[128] For a discussion of who is a state agent, see ch 2.

[129] *Decreto Ley 33-82 se concede amnistía por los delitos políticos y comunes conexos en los cuales hubiesen participado miembros de las facciones subversivas 1982* (Guat).

[130] ——, 'President Banda decrees "general amnesty"' *BBC Summary of World Broadcasts* (Blantyre 5 January 1994).

[131] *Ordonnance no 06-01 du 27 feb 2006 portant mise en oeuvre de la Charte pour la paix et la réconciliation nationale 2006* (Alg) arts 44–45.

intelligence agency, and possibly Israeli politicians, from an investigation into the deaths of two Palestinian bus hijackers in 1984. The government justified the amnesty by arguing that any investigation could risk revealing information crucial to state security.[132]

Amnesties for supporters of the state are also often issued at the end of a conflict, including conflicts that occurred abroad, in order to protect the soldiers who participated. For example, France has issued a succession of amnesty laws for the actions of its military in Indochina and Algeria.[133] Following the end of a conflict, amnesties for collaborators can also be enacted due to sympathy within the government for the crimes committed by the collaborators or a pragmatic view that the involvement of such individuals is necessary for rebuilding the state.

Amnesty could also be a response to a particular event in which the state is implicated and for which it wants to avoid any investigations. This motivation can be illustrated by several case studies. For example, the Slovak government introduced an amnesty in 1998 to pre-empt opposition demands for investigations into high-profile crimes in which the government was allegedly involved.[134] Similarly, the 2002 Kyrgyz amnesty was introduced following clashes in the Aksy district on 17–18 March 2002 between supporters of leading opposition deputy Azimbek Beknazarov and the police in which five people were killed and 90 injured, sparking a wave of protests which destabilised the country for months. The amnesty was designed to protect the police officers responsible for killing civilians and maybe higher-ranking police and politicians who were named in the 18 May 2002 inquiry into the events.[135]

A self-amnesty could also be introduced by an outgoing dictatorial regime wishing to protect itself from future prosecutions. This form of amnesty was common in South American transitions during the 1980s. In these cases, democratically-elected politicians sometimes acquiesced in the amnesty in order to entice the dictators to relinquish power. An example of this process is provided above in Case Study 2, describing the Uruguayan amnesty laws.

[132] ——, '7 From Security Force Seek Israeli Amnesty' *New York Times* (Jerusalem 12 August 1986) 6; Glenn Frankel, 'Israelis Pardon 7 in Slaying; Security Agents Cleared in Deaths of 2 Arab Hijackers' *The Washington Post* (Jerusalem 25 August 1986) A1; Glenn Frankel, 'Pardon of 4 Upheld in Israeli Bus Deaths; Court Rules 2-1 for Secret Service Official' *The Washington Post* (Jerusalem 7 August 1986) A25; Ian Murray, 'Israeli Shin Bet leader resigns / Avrahom Shalom granted presidential pardon over 1984 hijacker killings' *The Times* (Jerusalem 26 June 1986).

[133] See n 74.

[134] ——, 'Slovak Premier Orders to Halt Criminal Proceedings over Referendum' *BBC Worldwide Monitoring* (8 July 1998); ——, 'Meciar Precises Amnesty linked to Abduction of Kovac, Plebiscite' *CTK National News Wire* (Bratislava 8 July 1998); ——, 'Controversial Amnesty Designed to Reconcile Society—Slovak Premier' *BBC Worldwide Monitoring* (6 March 1998).

[135] ——, 'Kyrgyz Parliament passes Amnesty Bill to Acquit those Involved in Aksy Events', *BBC Worldwide Monitoring* (27 June 2002).

From the above, it seems that governments can introduce self-amnesties at various points during their time in office, ranging from their initial days in power following a military coup to their final days before a political transition. Between these points, governments may introduce amnesties to prevent investigations which could incriminate them or threaten state security. Furthermore, amnesties could be introduced whilst waging an armed campaign against a political opposition in order to protect the armed forces from prosecution. Finally, following the assent to power of a democratically-elected government, amnesty may still be introduced for state agents to reduce the threats to the stability of the new government. Although such amnesties may be the result of blackmail by still-powerful armed forces, they could nevertheless be viewed as legitimate if accompanied by measures to investigate the past and provide reparations for the victims, as will be argued later in this book. In contrast, blanket, unconditional amnesties bestowed by dictatorial regimes to their own supporters with the aim of preventing investigations are unlikely to be viewed as legitimate.

REPEATED AND 'ROLLING' AMNESTIES

A surprising characteristic of amnesty processes is that in many situations, rather than representing a definitive closing of the past, they are introduced repeatedly. For example, during the 1980s Guatemala had six amnesty processes relating to the civil war. Similarly, Angola introduced nine amnesty laws between 1989 and 2003 as part of attempts to end its conflict. There could be several reasons why states might follow this pattern.

First, the government may introduce the amnesty for political expediency in response to a short-term goal, such as a forthcoming general election, and consequently fail to implement the policy fully or consider its implications. Similarly, in some transitional contexts events may overtake an amnesty process causing it to become obsolete, only for it to be reintroduced later. For example, following the 1996 Abidjan Accord for the conflict in Sierra Leone, the government, in spite of the peace agreement, continued to pursue a military strategy to defeat the RUF, resulting in the collapse of the peace process and its amnesty provisions.[136] These provisions were reintroduced, however, when a second peace accord was agreed in 1999.

Secondly, the initial amnesty may have been limited in terms of whom it covered or its period of application, only to be expanded by subsequent legislation. For example, as described in Case Study 2, the 1985 amnesty

[136] David J Francis, 'Torturous Path to Peace: The Lomé Agreement and Postwar Peacebuilding in Sierra Leone' (2000) 31 *Security Dialogue* 357, 360.

law in Uruguay[137] was introduced immediately after the establishment of democratic rule and applied only to political prisoners. In the next year, however, following pressure from the military, the amnesty was extended by a second law, which provided immunity for members of the armed forces for serious human rights violations.[138]

Such limited amnesties could mean that the government was constrained in its ability to grant amnesty, or it could be a strategic choice. For example, in conflicts where there are many combatant non-state actors, governments may choose to implement 'rolling amnesty programmes' that initially apply to only one group of non-state actors who have been involved in negotiations or have signed a ceasefire agreement. The governments' objective in such cases would be to use the amnesty and the other terms of the peace process to entice more insurgents to come forward. Often in conflict situations, there is a great deal of mistrust between the parties, but if more moderate groups accept the amnesty, and the government honours its commitments to those who surrender, more hard-line groups may then consider participating. This occurred in Algeria, where the 1999 amnesty law[139] covered only members of certain armed Islamist groups and excluded others who had not supported Bouteflika before his election. However, in 2000 some of the excluded organisations decided that they too wished to participate in the peace process and were consequently rewarded with an amnesty.[140]

Case Study 4: Amnesties in Algeria

In 1989, Algeria adopted a new constitution which permitted the establishment of opposition political parties. Subsequently, there were multi-party local elections in June 1991 in which the Islamic Salvation Front (FIS) won 55 per cent of the vote. It then won 188 seats in the first round of the December 1991 general election and seemed likely to gain an absolute majority in the second until this was cancelled by the government in response to military pressure. The military, which was bitterly opposed to the Islamic political parties gaining power, also pressured the government to dissolve parliament and forced the president to resign. These events, combined with economic problems, caused the FIS to respond violently, and Algeria descended into a civil war in which an estimated 100,000–150,000 people were killed.

The conflict raged during the 1990s. However, before the elections scheduled for 1999, some Islamist groups offered to support to Abdelaziz Bouteflika on condition that serious negotiations were instigated following his election. Subsequently, on 27 April 1999, Bouteflika was elected by default (the other

[137] *Ley de Pacificación Nacional, Ley No 15.737, 1985* (Uru).
[138] *Ley de Caducidad de la Pretensión Punitiva del Estado, No 15.848, 1986* (Uru).
[139] *Loi relative au rétablissement de la Concorde civile, Loi No 98-08, 1999* (Alg).
[140] Presidential Decree No 2000–03, 2000 (Alg).

six candidates having withdrawn following allegations of corruption). He immediately focused on restoring security and stability to the country.

This resulted in the enactment of the 1999 Civil Harmony Law, which was endorsed by 98.6 per cent of the population in a referendum in September 1999 (with an 85 per cent participation rate). This law offered amnesty to members of armed Islamic groups who surrendered voluntarily within six months. The amnesty covered crimes committed during the conflict, with the exception of serious crimes, such as death or permanent disabling of a person, rape, or the use of explosives in public places. The perpetrators of such crimes would, however, receive reduced sentences. Applicants were required to proclaim that they had ceased all their violent activities and appear before a Probation Committee who would determine whether they were eligible for the amnesty. The functioning of these committees has been criticised by human rights groups for being too secretive and lenient.

In 2000, President Bouteflika introduced a further presidential decree to amnesty members of groups who decided to end their violent campaigns after the six month deadline of the 1999 Law expired. Consequently, the Islamic Salvation Army (AIS) formally announced its dissolution on 11 January 2000, followed by the Islamic League for Preaching and Holy War on 13 January 2000.

Following the 1999 Civil Harmony Law, the security situation in Algeria stabilised, although disparate groups of Islamic fighters continued to engage in violent acts. These groups were allegedly the targets of the 2005 Charter for Peace and Reconciliation, which hoped to encourage them to engage in peace negotiations. Critics of President Bouteflika have suggested that the amnesty was instead to benefit the army generals who had supported the president and to strengthen the president's grip on power.

The 2005 Charter was approved by 97.36 per cent of Algerian voters (participation level of 79.76 per cent) on 29 September 2005, although there were allegations that the voting was rigged at some polling stations.

The amnesty provided in the charter was enacted in Ordinance No 06-01 on 27 February 2006. This law amnesties Islamic fighters for engaging in the insurgency, but excludes those involved in massacres, rapes, and using explosives in public places. Similar to the 1999 Law, applicants are required to surrender and declare an end to their violent activities. They must also:

- present an individual application when they surrender, containing the facts of the crimes that they have committed or for which they were an accomplice or instigator; and
- surrender any arms, munitions or explosives in their possession.

The competent authorities are public prosecutors, prosecutors of the Republic, national security services, national police services, officers of the judicial police or the Ministry of Justice. These authorities will decide whether to accept the application or to refer the applicant to the Public Prosecutor for appropriate legal action.

The 2005 Charter also denies state responsibility for disappearances and declares that any wrongful acts committed by state agents have already been punished.

Despite the legal implications of the amnesties, efforts have been made to investigate disappearances in Algeria through the establishment of the Ad Hoc Committee on Disappearances in September 2003, which heard victim testimonies. The impact of this commission is limited, as its report (submitted to the president in March 2005) has yet to be made public. However, the 2005 Charter does have provision for the payment of reparations to victims and their families.

***Sources**: Amnesty International, 'Algeria: Truth and Justice Obscured by the Shadow of Impunity' AI Index MDE 28/11/00 (2000); International Crisis Group, 'La Concorde Civile: Une Initiative de Paix Manquée', ICG Report Africa Number 31 (2001); Human Rights Watch, 'Truth and Justice on Hold: The New State Commission on "Disappearances"' (2003)*

Rolling amnesties may also be required where the initial amnesty failed to gain the support of the individuals whom it targeted. Their reluctance could be because they felt that amnesty was not accompanied by sufficient reform measures and that they would benefit more from continuing their armed struggle. In other circumstances, amnesties have been turned down because they have had onerous conditions attached. For example, in the 1974 United States presidential pardon for draft dodgers from the Vietnam War, there was a requirement that all amnestied individuals must 'earn' their amnesty by completing a period of alternate service under the auspices of the Director of Selective Service. This caused many potential beneficiaries to reject the amnesty as they felt it 'implied a degree of guilt rather than conscientious objection to the unpopular war in Vietnam'.[141] Their failure to participate meant a more lenient amnesty was introduced in 1977.

CONCLUSION

This chapter has explored how and why states continue to introduce amnesty laws, despite the growth of the international criminal justice. It has argued that the methods states employ to implement amnesty laws can affect the laws' legitimacy and potential to achieve their objectives. For example, where amnesties to promote peace and reconciliation have greater popular involvement either through consultation processes, referenda, or even simply through dialogue between representatives of

[141] ——, 'Pardon for Draft Evaders: Carter's First Act Touches off a Storm' *US News and World Report* (31 January 1977) 22.

the different stakeholder groups, they enjoy a greater chance of achieving their aims than amnesties that are introduced unilaterally by states.

This chapter has further argued that amnesty laws can be introduced to respond to a wide range of situations including not just ongoing conflicts, but also military coups, civil unrest, international pressure, religious and cultural traditions, and economic and environmental crises. Often the stimuli causing the amnesty will influence the method by which the grant of clemency is introduced. For example, amnesties that aim to end conflicts will often be introduced within the context of peace negotiations, whereas amnesties that aim to quell internal unrest may be introduced by executive decrees, as they can be implemented rapidly.

Investigating the context that gives rise to amnesty laws is crucial to any attempt to assess the impact of amnesties in transitional states, as the context can indicate the motivations of governments that choose to introduce amnesty laws. As this chapter has demonstrated, these motivations are diverse and can range from positive goals such as attempts to repair the suffering inflicted on opponents of the former regimes, to negative objectives such as providing impunity for state agents. This means that not all amnesty laws are introduced in good faith to end violence or promote reconciliation, and can instead have quite contradictory goals.

Furthermore, identifying the motivations behind an amnesty can be a complicated process, as amnesties can often result from multiple, complementary objectives. For example, during a civil war, amnesty may be used to end the violence, demobilise combatants, establish an alternative policy to a failed military campaign and secure foreign aid for development. In addition, the motivations behind an amnesty are often hidden by governments, particularly where the state is eager to conceal its own weakness or responsibility for violations. These difficulties mean that the categories used in this chapter are designed to illustrate the wide range of motivations of states, but not to provide exact typologies of behaviour.

Nonetheless, it is essential to recognise this diversity of objectives behind amnesty laws when trying to develop methods and indicators to measure their impact within transitional states, and such indicators need to be tailored to the specific context. For example, when confronted by amnesties introduced in bad faith, the lessons drawn from the 'failure' of the amnesties to stem campaigns of mass violence need to recognise the objectives of the amnesties themselves and also assess the behaviour of the states within the wider transitional frameworks. Similarly, where amnesties that aim to promote reconciliation are 'unsuccessful', as few combatants apply or the peace process collapses, the impact of the amnesty needs to be considered in relation to other factors, such as the views of the combatants and how far the other measures of the peace process were implemented.

From the patterns that are emerging in the Amnesty Law Database, it seems likely that as amnesty laws become more contentious on the international stage, states will move away from relying on amnesty for the purely nefarious goals of shielding their own agents or entrapping their opponents to disarm and become weak. Instead, as this chapter has argued, many states already use reconciliation to justify introducing amnesty, and the author contends that this rationale will become more sincere in the forthcoming years.

2

Whom Do Amnesties Protect? The Personal Jurisdiction of Amnesty Laws

INTRODUCTION

ONCE STATES DECIDE to introduce amnesties, they must then determine their scope, depending on the objectives of the state and the dynamics of the conflict or transition. First, states must decide whom to amnesty. As shown in the previous chapter, amnesty laws can be introduced for a variety of reasons. It follows that these laws can be designed to target different groups of people, according to the purpose of each law. Slye claims that a state has a 'continuum of choices', which range from amnesty for all individuals for every possible crime with no time limits in which those crimes must have occurred, to amnesties that are granted to an individual or small number of people for a specific event.[1] Between these two alternatives, states can tailor amnesties by restricting them to members of certain organisations (such as state institutions or insurgency movements) or members of certain ranks, individuals who perpetrated specific crimes, or individuals who committed crimes relating to specific events. A state can also enforce further restrictions by imposing conditions that individual applicants must fulfil in order to obtain amnesty.[2] Amnesties frequently cover individuals who have yet to be investigated, those who are detained pending trial, and those who have already been convicted.[3] In addition, national amnesty laws can apply to both citizens inside and outside of the country and even to non-nationals who committed crimes within the territory. Each of these decisions can affect the efficacy of the law and its perceived legitimacy.

[1] This occurs very rarely and examples could include the 1996 Cambodian amnesty for Ieng Sary, a former minister in the Khmer Rouge government, or 1986 Israeli amnesty for senior Shin Bet officials implicated in the deaths of two Palestinian bus hijackers.

[2] Ronald C Slye, 'The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights' (2004) 22 *Wisconsin International Law Journal* 99, 104–5.

[3] See introduction for discussion of the relationship between amnesties and pardons.

In considering whom states have chosen to amnesty, the recipients have been allocated to the following categories: state agents; opponents of the state; political prisoners; exiles; and foreign nationals. The chapter will begin by contrasting the theoretical arguments that everyone should enjoy equal status before the law with the idea that amnesties should be as limited as possible and can be targeted towards certain groups to achieve political objectives. Then, the categorisation process and the frequency with which each group received amnesty will be explained, before using the case studies from the database to describe how amnesties relate to each group. Subsequently, the motives of offenders will be examined to determine whether all offenders should be viewed as equally culpable, or whether offenders who committed crimes under duress or according to a pervasive ideology could be entitled to amnesty. For limited amnesties, the question of how to decide who should receive protection will involve consideration of whether the amnesty should apply only to the foot soldiers or whether it should extend to those who are 'most responsible'. In so doing, the chapter will discuss the relevant principles of international law in respect of superior orders and command responsibility. This discussion will further consider whether amnesty laws should apply to individuals or groups. Finally, there will be a brief discussion of whether individuals are entitled to refuse amnesty, and instead go to court to prove their innocence. This chapter will attempt to show that states are increasingly moving away from self-amnesties for dictatorial regimes and relying more on mutual amnesties that apply to both agents of the state and their opponents, with prosecutions remaining possible for those who are deemed most responsible.

AMNESTIES, EQUALITY AND THE 'MYTH OF EQUIVALENCY'

Before considering how states have distinguished between different categories of offenders, it must first be recognised that within most conflict or transitional contexts, there are inherent inequalities between state and non-state actors. Clearly, there are often imbalances between the resources available to state agents and insurgents, which can influence their tactics during the conflict. Indeed, many non-state actors assert that their resort to armed campaigns resulted from suffering oppression and discrimination at the hands of the state, and therefore that their actions are legitimate or in self-defence. Furthermore, state- and non-state actors are treated differently under domestic and international law. Under domestic laws, members of the armed forces are treated as having a legitimate monopoly on the use of force, whereas armed opposition groups are usually prohibited under national law and are regarded by the state as criminals to be held accountable. This contrasts with state forces, which are often granted

immunity from prosecution through measures such as indemnity laws. This means that similar actions may be treated differently according to an individual's status.

The legal position of state agents and non-state combatants can also be distinguished under international law. International humanitarian law is viewed as applying to both state and non-state actors as participants in a conflict,[4] but international human rights law has traditionally been viewed as having only vertical application. This means that, in order to protect citizens from abuses of power by their government, international human rights law restricts the actions of states,[5] and that historically, non-state actors have not been viewed as committing human rights violations. Clearly, in modern warfare, non-state actors commit atrocities against civilians. This has led to calls for human rights law to be applied horizontally to actions committed by private actors (ie armed opposition groups) against private actors (ie civilians). Some human rights treaty-monitoring bodies have begun to condemn 'acts of armed opposition groups as harming human rights without considering their acts to be breaches of human rights law'.[6] More progress has been made under international criminal law, where individual members of opposition groups, but not the organisations themselves, can be held accountable for their actions.[7] Furthermore, recent treaties have placed obligations on armed opposition groups. For example, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict requires armed groups, including rebel forces, to prevent children from participating in armed conflict and prohibits the recruitment of children into armed groups.[8] The efficacy of this provision is as yet unclear, as non-state actors cannot become parties to the Optional Protocol, and responsibility for the provision's enforcement seems to rest with the state party.[9] Therefore, it appears that to date, in contrast to domestic legal systems, international law imposes greater restrictions on state agents than insurgents.

If a government chooses to treat state and non-state actors differently under an amnesty, it risks undermining the principle of equality. The idea that each individual should benefit from equal protection before the law and before the courts has long been enshrined in law. The Universal

[4] Geneva Conventions (adopted 12 August 1949, entered into force 21 October 1950), Common art 3.

[5] Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge 2002) 38.

[6] *Ibid* 39.

[7] *Ibid* 44.

[8] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000 art 4(1).

[9] *Ibid* art 4(2).

Declaration of Human Rights (UDHR) proclaims that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law'[10] and that

> [e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[11]

The principle of equality can relate to amnesty in a variety of ways, and amnesty can be argued to both promote and undermine equality.

First, it can be argued that amnesty laws designed for political motives, to benefit only one group that perpetrates certain crimes whilst leaving another group of perpetrators of the same crimes without protection, would undermine the principle of equality, particularly since amnesty laws are introduced after the crimes have taken place, and thus when they occurred the perpetrators theoretically faced identical fates. However, this position fails to take into account the disparity that frequently exists between state agents and opponents of the state during conflict situations. As the opponents of the state have an inherently weaker position, amnesty laws that benefit this group can, in some instances be seen not as creating inequality before the law, but rather as redressing the pre-existing imbalance. For example, according to Aguilar, the 1977 Spanish amnesty law[12] was introduced 'to symbolically put the victors and vanquished in the Civil War on an equal footing'.[13] It was felt that this was needed as, after that war had ended in 1939 with the Nationalist victory, those who had supported the new regime were amnestied, even where they had committed acts of bloodshed, whereas the Republicans were not. Furthermore, even where such amnesties are applied unequally, if they are introduced in good faith, they can potentially contribute to ending violence. In contrast, self-amnesties that only protect state agents can be seen as reinforcing situations of inequality, by providing the already advantaged state agents with greater protections whilst comparatively worsening the position of non-state actors. Furthermore, such self-amnesties run a greater risk of violating the state's obligations under international human rights law.

Secondly, states could introduce amnesty laws that profess to grant equal protection to state agents and opponents of the state. Whilst this appears to treat all groups equally, it can be problematic as such policies risk creating a 'myth of equivalency' where the actions of all parties are

[10] UDHR art 7.

[11] *Ibid* art 10. These rights were subsequently reiterated in arts 26 and 14(1) respectively of the ICCPR.

[12] *La Ley 46/1977, de 15 de octubre (BOE No 248, de 17 de octubre), de Amnistía 1977* (Spain). See case study 3.

[13] Paloma Aguilar, 'Collective Memory of the Spanish Civil War: The Case of the Political Amnesty in the Spanish Transition to Democracy' (1997) 4 *Democratization* 88.

seen as equally justified.[14] This is particularly delicate where the opponents of the state only committed a small proportion of the crimes, or had only resorted to violence in response to severe repression. This was the case in Chile as illustrated in Case Study 5.

Case Study 5: 'Pinochet's amnesty': Self-amnesty in Chile

On 11 September 1973, following a period of political violence and economic crisis in Chile, the armed forces, led by General Augusto Pinochet Ugarte, staged a violent coup to seize power from a democratically-elected left-wing government. Despite the lack of effective armed opposition to the coup, its aftermath was marked by the brutal repression of anyone whom the military considered a threat. By the end of 1973, the military, particularly its intelligence wing DINA, had killed or 'disappeared' 1,200 individuals, including foreign nationals, and there were widespread detentions and torture during interrogations. The disappearances continued until 1977, when DINA was disbanded following the assassination of Orlando Letelier in Washington DC. However, torture and assassinations continued until the transition to democratic rule in 1990.

During this period of widespread human rights abuses by state forces, Pinochet introduced an amnesty law[15] in 1978, which was incorporated into the Chilean constitution by the pro-Pinochet legislature and provided for:

'All persons who, as principals or accessories, have committed criminal offences during the period of the state of siege, between 11 September 1973 and 10 March 1978.'

The amnesty was justified by the military regime as a mutual amnesty designed to further national unity by forgiving the crimes of both the military and insurgents; however, in practice it amounted to a self-amnesty for government agents, as, by the time the amnesty was enacted, many members of the opposition were already dead or in exile. In addition, the amnesty was unconditional and very broad, excluding only some common crimes such as infanticide, armed robbery (plunder), drug trafficking, arson, rape, incest, fraud, embezzlement, dishonesty, smuggling and drunk driving (article 3).

Pinochet's government remained in power until the transition to democracy, which was triggered by a 1988 plebiscite to determine whether Pinochet could continue as president until 1997. The election was conducted freely, and

[14] McEvoy asserts that in the Northern Irish context, 'some former members of the security forces bridle at any reference to themselves and former paramilitaries as former combatants since, from their perspective, this creates a "myth of equivalency". For many such actors in Northern Ireland and elsewhere, state security forces were "upholding law and order" while non-state actors were terrorists'. For further discussion, see Kieran McEvoy, *Truth, Transition and Reconciliation: Dealing with the Past in Northern Ireland* (Willan Publishing, Cullompton 2008).

[15] *Decreto Ley 2,191 (Ley de Amnistía) 1978* (Chile).

resulted in a resounding defeat for Pinochet and the holding of elections in which Patricio Aylwin was elected president and inaugurated in March 1990.

President Aylwin pledged to repeal the 1978 amnesty following his inauguration. However, he was unable to do so, because of strong opposition from the still-powerful armed forces, of which Pinochet continued to be commander-in-chief, and because he only had a minority in the Senate. Consequently, Aylwin decided to establish the National Commission on Truth and Reconciliation, to 'clarify in a comprehensive manner the truth about the most serious human rights violations' suffered during the military dictatorship. He stated the goal of the commission was '*justicia en lo posible*', translated as 'justice inasmuch as was possible'. The commission only investigated cases resulting in death. However, of the cases it investigated, it found that only four per cent of the human rights violations it documented were committed by 'subversives'.[16] This further underlines the fallacy behind the 1978 'mutual' amnesty. The Commission recommended reparations for the relatives of the victims.

In 1998, the British hearings on whether Pinochet could be extradited to face human rights charges in Spain triggered renewed efforts for prosecutions in Chile.[17] This progress was strengthened by the 1999 decision of the Chilean Supreme Court that disappearances are continuing crimes and hence cannot be subject to the amnesty.[18]

More recently, in August 2003, then president Lagos announced new proposals for addressing past crimes: possible immunity from prosecution for people currently not charged or on trial who present themselves before courts to supply information on the whereabouts of victims or the circumstances of their 'disappearance' or death; possible immunity from prosecution for military personnel who argued that they were acting under orders; the transfer of all cases of human rights violations committed during the military government currently under trial in military courts to civilian courts; and the establishment of a commission to examine cases of torture. The National Commission on Political Imprisonment and Torture was established in August 2003 in response to a campaign by civil society groups. It released its report in November 2004, identifying 27,000 torture victims and recommending that they be paid reparations. However, a subsequent law has prevented the courts from accessing the victim testimonies for 50 years, although individual victims are free to make their testimonies public or submit them to the courts if they wish to do so.

The Lagos plans did not include annulling the 1978 amnesty; instead, they allowed the courts to continue to decide on the amnesty's application. In January 2005, the Chilean Supreme Court issued a resolution which allowed judges only six months to conclude their investigations into abuses commit-

[16] Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, Cambridge 2004) 121.

[17] For a discussion of the Pinochet affair and its impact in Chile, see ch 7.

[18] For a discussion of the case law of Chilean courts, see ch 6.

ted by Chile's military dictatorship. Justifying the instructions to close the cases, the court cited international norms that establish the right of the accused to a trial within a reasonable period of time.

Despite these efforts, moves to annul the Chilean amnesty have gained pace in recent years, particularly since the 2006 judgment of the Inter-American Court of Human Rights in the *Almonacid-Arellano* case. In this decision, the court argued that the self-amnesty of the Chilean military junta violated the American Convention on Human Rights by granting impunity for crimes under international law, and that consequently the Chilean authorities had to annul the legislation that contravenes the Convention. It now seems possible that the Chile will follow its neighbour Argentina and annul the amnesty.

***Sources**: Naomi Roht Arriaza (ed), Impunity and Human Rights in International Law and Practice (Oxford University Press, Oxford 1995); Alexandra Barahona de Brito, 'Truth, Justice, Memory and Democratization in the South Cone' in Alexandra Barahona de Brito, Carmen González Enríquez, Carmen and Paloma Aguilar Fernández (eds), The Politics of Memory: Transitional Justice in Democratizing Societies (Oxford University Press, Oxford 2001); Jorge Correa Sutil, '"No Victorious Army has ever been Prosecuted . . .". The Unsettled Story of Transitional Justice in Chile' in A James McAdams (ed), Transitional Justice and the Rule of Law in New Democracies (University of Notre Dame Press, Notre Dame IN 1997); Edward C Snyder, 'The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973–1995' (1995) 2 Tulsa Journal of Comparative and International Law 253; Robert J Quinn, 'Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model' (1994) 62 Fordham Law Review 905; Mark Ensalaco, 'Truth Commissions for Chile and El Salvador—A Report and Assessment' (1994) 16 Human Rights Quarterly 656; Jorge Correa Sutil, 'Dealing with Past Human Rights Violations: The Chilean Case after Dictatorship' (1992) 67 Notre Dame Law Review 1455.*

From this it is clear that in practice the Chilean amnesty law amounted to a self-amnesty, and therefore did not contribute to equality. Sarkin argues that moral equivalency was also a contentious issue before the South African TRC, where the commission's findings on the ANC's culpability for human rights violations caused protest from the ANC, as the 'liberation movement objected to the label "perpetrators"' and argued that 'fighting for and against apartheid' were not equivalent.[19]

The issue of equality can also arise when amnesties are individualised. For example, an individualised, conditional amnesty can result in perpetrators of similar crimes being treated differently depending on how they comply or are deemed to comply with the conditions. The risk of inequality

[19] Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, Antwerp 2004) 111.

can be lessened if the same conditions are applied uniformly to all individuals' applications, regardless of their former status as insurgents or state agents. However, the conditions for applying amnesty laws are often subjective and can result in perpetrators of similar crimes being treated inconsistently,[20] which could have a negative impact on the perceived legitimacy of the process.[21] This problem is aggravated where there are differences in what constitutes a crime for state and non-state forces.

HOW HAVE STATES DISTINGUISHED BETWEEN OFFENDERS WITH DIFFERENT ALLEGIANCES?

In analysing the recipients of amnesty laws, the following categorisations were developed in the Amnesty Law Database: state agents, opponents of the state, political prisoners, exiles and refugees; and foreign nationals. The categories of state agents and opponents of the state were further subdivided to isolate provisions for those who are 'most responsible' for the policies of violence and repression. These categorisations were identified using the academic literature on amnesties, which focuses predominantly on the distinction between state and non-state actors,[22] and Joinet's 1985 report on amnesties.[23] Each amnesty law can apply to either one or several of these categorisations, and these categorisations can overlap. For example, opponents of a dictatorial regime may have gone into exile to escape political repression, and hence an amnesty to encourage them to return would be categorised as both for opponents and for exiles.

Categorising beneficiaries of amnesty laws can be problematic for several reasons. First, an amnesty may be implemented differently to its

[20] For a discussion of the difficulties at the South African TRC in determining whether a crime was 'political', see Ronald C Slye, 'Justice and Amnesty' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, London 2000) 181–2.

[21] For a discussion of the difficulty of applying amnesty procedures consistently, see Sarkin (n 19).

[22] See eg Ronald C Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* 173; Gwen K Young, 'Amnesty and Accountability' (2002) 35 *UC Davis Law Review* 427; Gwen K Young, 'All the Truth and as Much Justice as Possible' (2003) 9 *UC Davis Journal of International Law and Policy* 209; William W Burke-White, 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' (2001) 42 *Harvard International Law Journal* 467; William W Burke-White, 'Protecting the Minority: A Place for Impunity? An Illustrated Survey of Amnesty Legislation, Its Conformity with International Legal Obligations, and Its Potential as a Tool for Minority-Majority Reconciliation' (2000) *Journal of Ethnopolitics and Minority Issues in Europe*; Kristin Henrard, 'The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law' (1999) 8 *MSU-DCL Journal of International Law* 595.

[23] ECOSOC, 'Study on Amnesty Laws and their role in the safeguard and protection of human rights' (21 June 1985) UN Doc E/CN4/Sub2/1985/16 (*prepared by* Louis Joinet).

stated objectives, for example, by claiming to be mutual amnesty but in fact only benefiting state agents. In these instances, the categorisation used has relied on the provisions outlined in the law itself, although additional data has been added to the database to describe the law's implementation.

Secondly, if insurgents or resistance fighters committed crimes during their campaign to overthrow a government and, subsequently, upon successful completion of their campaign and their transformation into a government, chose to amnesty their own actions, should this be classified as amnesty for state agents or opponents of the state? In other words, should individuals be classified according to their status at the time they committed their crimes or their status when the amnesty law was introduced? The approach taken for this study is to classify the beneficiaries according to their status at the time they committed the relevant actions.

It can also be problematic to determine whether state agents who act against their government should be considered opponents of the state. For example, if members of the military attempted unsuccessfully to stage a *coup d'état*, and subsequently were awarded amnesty and reforms to meet their demands, should they be considered opponents of the state? In these situations, the government itself may have been divided and the military may have acted with the backing of elements of the political establishment, rather than independently. In most situations, it would be impossible to determine definitively whether an attempted military coup had the support of some state officials. Therefore, this book will take the approach that military coups are actions against the government, and therefore at the moment the crimes were committed the members of the armed forces involved were opponents of the state.

A final dilemma in classifying the beneficiaries of amnesty laws comes in determining who can fall within the political prisoner category. Within this category, problems can arise in distinguishing between political prisoners and common criminals,[24] and between individuals who have peacefully protested against an oppressive government and those who have used more aggressive tactics.[25] Furthermore, a state may change its own classification of individuals and their crimes as time progresses. As shown in the previous chapter, many actions can be regarded as anti-state crimes during periods of political oppression and consequently those responsible can be labelled as criminals, only for attitudes within states towards the crimes to change due to political liberalisation and for the same individuals to then be viewed as political prisoners. In this book, all individuals who are imprisoned for activities such as attending political meetings or

[24] Common criminals whose crimes are unrelated to a context of conflict or oppression are exempt from the scope of this study.

[25] Kieran McEvoy, Kirsten McConnachie and Ruth Jamieson, 'Political Imprisonment and the "War on Terror"' in Yvonne Jewkes (ed), *Handbook on Prisons* (Willan Publishing, Cullompton 2007).

distributing literature will be treated as political prisoners and opponents of the state, but those who committed violent actions within a context of war or oppression will just be considered as opponents.[26]

Based on the information gained for 501[27] amnesties, the distribution of the protection received by each group is shown in Figure 6 below. It should be noted that one amnesty could contain recipients from several categories. This shows quite clearly that the most common beneficiaries of amnesty laws are opponents of the state, with protection explicitly granted to this group in three times the number of amnesty laws as for state agents. This scale of this result is interesting, as it is perhaps surprising that states are more willing amnesty their opponents than their own agents, particularly since much of the literature on amnesties focuses on the injustice of governments awarding amnesties to their own agents. The pattern can perhaps be explained, first, by considering the wide conception of opponents of the state that has been adopted in this research, as explained below; and secondly, by recognising that, as outlined in chapter 1, amnestying opponents can be attractive to a state for several reasons that may not be applicable to amnesties for state agents. Furthermore, whereas state agents are often included in amnesties that also cover opponents of the state (ie mutual amnesties), many amnesties for opponents of the state exclude state agents either explicitly or by omitting to mention them. This exclusion could result from amnesties that aim to repair the

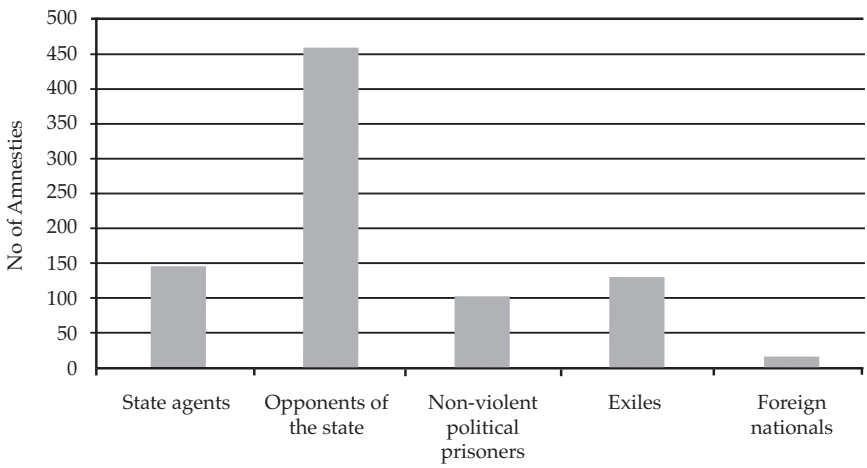

Figure 6: Amnesties by group of beneficiaries

[26] For a discussion of categories of crimes, see ch 3.

[27] Recipients could not be clearly ascribed to a category for five amnesties of the 506 in the database, due to a paucity of data on the amnesty processes concerned.

harm inflicted on non-violent political prisoners, or it could illustrate that, as discussed above, state agents operate in a different legal regime than opponents of the state and consequently may not always require amnesty in the same way.

The pattern is common to each region under consideration, although the ratio between the groups of recipients does vary. The regions that most frequently granted mutual amnesties for both state agents and opponents of the state were Europe and Central Asia and Sub-Saharan Africa which together granted 60 per cent of the total number of mutual amnesties identified (30 per cent in each region). The number of amnesties granted to state agents reached its highest point during the 1990s, although there have been 48 amnesties that have protected this group between January 2000 and December 2007. The amnesties granted to opponents of the state have been increasing throughout the period since the Second World War and there have been 110 since 2000. In addition, it is interesting to note that in almost half the amnesty laws studied, there were provisions for pardoning individuals who had already been convicted.

State Agents

The category of state agents comprises a broad group covering those who actually worked for the state in an official capacity when they committed their crimes, such as the military, police, prison services, intelligence agencies, civil service, and politicians. It can also cover retired personnel. For this study, these individuals continue to be regarded as state agents even when the amnesty law is introduced by a successor regime that has removed them from their positions of power.

State agents are most often included in amnesty laws where the laws grant immunity to *all* combatants in a war or *all* participants in civil unrest. For example, the 1990 Nicaraguan amnesty which was introduced to promote peace and stability and encourage disarmament and demobilisation was proclaimed as, 'a general amnesty and unconditional Amnesty Law for all Nicaraguans, with no distinctions made for any particular class'.[28] However, there are certain amnesty laws that are designed to grant immunity solely to state agents of all ranks. These amnesties tend to occur where the state claims it is fighting a serious threat to the nation. As discussed previously, the idea of governments amnestying themselves is of course troubling, particularly where the amnesty is used to reinforce existing propaganda by applauding the actions of the armed forces.

[28] *Ley de amnistía general y reconciliación nacional, No 81, La Gaceta*, No 53, pp 429–430, 1990 (Nicaragua), Preamble.

States can also introduce amnesty for individuals who acted on their behalf without officially being state agents, such as pro-government militias or paramilitary organisations that are armed, trained and supported by the state. These non-state actors commit crimes according to state policy, but the government does not officially recognise any links to the organisations.[29] Such groups have been amnestied in several contexts: for example, the Zimbabwean amnesty laws in 1995 and 2000 granted impunity to those involved in pro-government violence before elections,[30] and the recent Colombian Justice and Peace Law protects paramilitaries belonging to United Self-Defense Forces of Colombia (AUC), an organisation which is allegedly closely linked to the state.[31] In such cases, the government may claim that the amnesty is to promote peace and reconciliation. But this seems disingenuous where there are 'long-standing and close links between the security forces and paramilitaries', and where

> the *raison d'être* of paramilitarism is the defence of the . . . state and the status quo against real or perceived threats.[32]

Finally, this study also regards collaborators as state agents when their criminal activities were perpetrated in support of the de facto regime. This group can include business people who traded with the enemy or occupying force, or individuals who enlisted in a foreign army, where the enemy exercised de facto control over their territory, even though there may have been a recognised government in exile. Following the Second World War, there were many amnesties for collaborators: for example, in France, a series of amnesty laws granted immunity from criminal punishment or fines for individuals accused of increasingly serious crimes.[33] Similarly, the 1948 Filipino amnesty law[34] offered protection to those who

[29] Ruth Jamieson and Kieran McEvoy, 'State Crime by Proxy and Juridical Othering' (2005) 45 *British Journal of Criminology* 504. Jamieson and McEvoy outline four 'strategies through which states seek to "other" the actors who carry out state actors: perfidy, special forces, collusion and privatization'. 'Perfidy' refers to the concealment of the affiliation of state forces to gain a tactical advantage. 'Special forces' refers to the establishment of dedicated counter-insurgency units who receive special training and are usually subject to less oversight than other units of the security forces. 'Collusion' refers to ignoring or even co-operating with non-state forces to achieve a political objective. Finally, 'privatization' refers to the increased reliance by states on private military companies.

[30] Clemency Order No 1 of 1995; Clemency Order No 1 of 2000 (General Amnesty for Politically-Motivated Crimes), General Notice 457A.

[31] *Ley de Justicia y Paz*, 2005 (Colom). For an overview, see José E Arvelo, Note, 'International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process' (2006) 37 *Georgetown Journal of International Law* 411, 419–25 and case study 11.

[32] Amnesty International, *Colombia: The Paramilitaries of Medellín: Demobilization or Legalization?* (Report) (September 2005) AI-Index AMR 23/019/2005, 11.

[33] *Loi No 47-1504 portant amnistie*, 1947 (Fr); *Loi No 51-18 portant amnistie, instituant un régime de libération anticipée, limitant les effets de la dégradation nationale et réprimant les activités antinationales*, 1951 (Fr); *Loi No 53-681 portant amnistie, 1953 (Fr); Loi No 53-112 portant amnistie en faveur des Français incorporés de force dans les formations militaires ennemies*, 1953 (Fr).

[34] Amnesty Proclamation 1948 (Phil).

worked with the Japanese during their occupation of the Philippines. Many of the beneficiaries were ordinary citizens, but it has been acknowledged that many Filipino civil servants and politicians also collaborated to an extent.[35] As will be seen below, where collaborators acted for personal gain, it can be difficult to justify amnestying their crimes.

Opponents of the State

'Opponents of the state' applies to those who, at the time of the commission of their (supposed) crimes, were acting in opposition to the state, or whom the state had chosen to label as opponents. This category can range from armed insurgents who are fighting to overthrow a central government, to non-political individuals who are interned by repressive regimes. Between these two extremes, groups such as resistance fighters, opposition political parties and even members of the military who participated in *coups d'état* can be situated. It can also cover those who initially campaigned against a regime before, following a transition, forming a new government and then introducing an amnesty to cover their previous actions. For example, after the Allied forces ended the Nazi occupation of France, subsequent amnesty laws benefited inter alia those who had fought with the French resistance.[36]

The scope of this category therefore ranges from amnesties introduced in the midst of a civil war to end the violence to amnesties used as tool to rehabilitate those who were oppressed by the former regime. When amnesties are introduced, they can provide either impunity solely for anti-state forces,[37] or a mutual amnesty for both supporters and opponents of the state.[38] It is most common for mutual amnesties to occur in the context of peace negotiations where all parties to the conflict have committed crimes.

The end of a conflict could also be a stimulus for amnesties for draft dodgers and deserters. For example, the 2001 Yugoslav amnesty covered thousands of young Serbs and Montenegrins who evaded military service from 27 April 1992 to 7 October 2000.[39] These amnesties often provoke highly charged political debates around ideas of patriotism or religious

[35] Gabriel Kolko, *Confronting the Third World: United States Foreign Policy, 1945–1980* (Pantheon Books, New York 1988).

[36] *Loi No 46-729 du 16 avril 1946 Loi Portant Amnistie*; *Loi No 51-18 portant amnistie, instituant un régime de libération anticipée, limitant les effets de la dégradation nationale et réprimant les activités antinationales, 1951* (France); *Loi No 53-681 portant amnistie, 1953* (France); *Loi No 68-697 du 31 juillet 1968 portant amnistie, Journal Officiel*, 2 Aug 1968, at 77521.

[37] There have been 343 amnesties solely for opponents of the state.

[38] There have been 120 mutual amnesties.

[39] Amnesty Law (2 March 2001) (Yugo). For a description of this law, see Stefan Racin, 'Amnesty Law Arouses Controversy' *United Press International* (Belgrade 26 February 2001); ——, 'Yugoslav Parliament Amnesties Draft Dodgers' *BBC News* (8 February 2001).

freedom, as they are seen to undermine the sacrifices made by those who served within the military, whilst possibly weakening the community's strength at a time when political stability has yet to be achieved. Furthermore, where individuals avoided military service in order to join an insurgent organisation, granting them amnesty could be viewed as legitimising their actions.

The label of 'opponents of the state' is not meant to be any reflection of the legitimacy or otherwise of the actions of these individuals. Within this category, there is a great disparity between warlords fighting a central government who commit heinous abuses against civilians, and peaceful protesters who are interned for campaigning for their civil liberties.

Non-Violent Political Prisoners

During a period of transition, amnesties for political prisoners are frequently a highly contentious issue with members of the former regime being reluctant to recognise the political motivations behind the actions of individuals they regard as criminal. McEvoy and others have proposed five broad and sometimes overlapping categories of political prisoners. These are (a) prisoners of war; (b) 'prisoners of conscience'; (c) conscientious objectors; (d) radicalised 'ordinary' prisoners; and (e) politically-motivated prisoners.[40] These categorisations include those individuals who have committed violent crimes. For this book, however, individuals who actively engaged in armed struggle have been excluded from the category of political prisoners, falling instead in the opponents category, whereas, political prisoners are viewed as non-violent individuals who are imprisoned for expressing their religious or political beliefs through non-violent means.[41] Often such individuals are imprisoned under repressive laws that would be regarded as unjust within liberal societies. Similarly, 'conscientious objectors' who are interned for refusing to participate in the armed forces due to their ideological or religious beliefs are treated as political prisoners.[42] As discussed in chapter 1, this narrow approach to political prisoners was adopted for the database in order to facilitate the isolation of reparative amnesties.

[40] McEvoy, McConnachie & Jamieson (n 25).

[41] *Ibid*.

[42] According to the Amnesty Law Database, 54 amnesties have granted immunity to draft dodgers and deserters, either as the sole target group of the amnesty or in conjunction with other groups.

Exiles and Refugees

Many reparative amnesties for political prisoners are combined with amnesties for exiles. It is common practice to encourage refugees to return home after a conflict and this is encouraged by the international community. For example, refugees who fled the fighting in Bosnia were granted amnesty in the 1995 Dayton Peace Accords.

Case Study 6: Limited amnesties in Bosnia-Herzegovina

As part of the wider wars affecting former Yugoslavia during the 1990s, Bosnia-Herzegovina endured a brutal conflict between 1992–5, which left over 100,000 people dead and almost two million displaced. This conflict was characterised by some of the most brutal atrocities of the Balkan wars, including the genocide at Srebrenica.

Following NATO involvement in 1995, the war ended with the signing of the 1995 Dayton Peace Accords. These accords divided Bosnia-Herzegovina into two ethnic 'entities', the Bosnian Federation and Republika Srpska, and required the governments of each entity to cooperate with the International Criminal Tribunal for the Former Yugoslavia (ICTY). The accords also made provision for a limited amnesty in Article VI of Annex 7. This annex aimed to create conditions where all refugees and internally displaced persons felt secure to return to their pre-war homes. The amnesty provided is offered to 'any returning refugee or displaced person charged with a crime, *other than a serious violation of international humanitarian law* . . .' This provides for a wide amnesty that covers political crimes, such as draft dodging and desertion, whilst adhering to the requirement to cooperate with the ICTY.

Following the initialling of the Dayton Peace Accords on 12 November 1995, the requirement to enact domestic amnesty laws in the two entities that comprise the fledgling state soon provoked unrest. These disputes focused on interpreting the exclusion of war criminals from the amnesties. This was particularly a concern for Bosnian Serbs living in the suburbs of Sarajevo, many of whom during the war would have been snipers who fired upon civilians in Sarajevo. Under the terms of the peace accords, these suburbs were due to revert to the control of the Bosnian Federation, which would have placed the former snipers under the jurisdiction of courts that they felt were biased against them.

The Bosnian Federation government was eager to pursue justice for the crimes committed during the conflict in Bosnia, and therefore was reluctant to enact the amnesty legislation. However, Western officials were eager for an amnesty, to encourage the Bosnian refugees seeking shelter within their borders to return home, to prevent an exodus of Bosnian Serbs from Sarajevo's suburbs and to ensure that violence did not erupt in these suburbs, which were due to come under NATO control in December 1995. Consequently,

these officials applied strong pressure on the Federation government, which responded in February 1996 by introducing a broad amnesty for all criminal acts related to the conflict, except crimes within the jurisdiction of the ICTY.[43]

Under the Dayton Peace Accords, the Republika Srpska government was also required to enact amnesty legislation, which it did in June 1996. This law was similar to the law enacted in the Federation entity, except that it excluded draft dodgers and deserters. This was viewed as too restrictive as it prevented many refugees from returning home. Consequently, following international pressure, the Bosnian Serb government amended the amnesty law in 1999.

Sources: *UNHCR, 'Amnesty Laws in Bosnia and Herzegovina' (UNHCR, Sarajevo 1998); UNHCR, 'UNHCR's Position on Categories of Persons from Bosnia and Herzegovina who are in Continued Need of International Protection' (UNHCR 1999); UNHCR, 'Update of UNHCR's Position on Categories of Persons from Bosnia and Herzegovina in need of International Protection' (UNHCR 2000); William W Burke-White, 'Protecting the Minority: A Place for Impunity? An Illustrated Survey of Amnesty Legislation, Its Conformity with International Legal Obligations, and Its Potential as a Tool for Minority-Majority Reconciliation' (2000) Journal of Ethnopolitics and Minority Issues in Europe; Christine Bell, Peace Agreements and Human Rights (Oxford University Press, Oxford 2000); UNHCR, 'UNHCR's Position on Categories of Persons from Bosnia and Herzegovina in Continued Need of International Protection' (UNHCR 2001); William W Burke-White, 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' (2001) 42 Harvard International Law Journal 467.*

However, amnesties to encourage dissidents to return, if introduced by the dictatorial regime from which they fled can be an effort to bolster its political support by introducing a populist policy. For example, former Soviet bloc countries, such as Bulgaria and the Czech Republic, repeatedly granted amnesties for political exiles who had fled their country after the communists had assumed power.

As discussed in the previous section, political beliefs can inspire individuals to become 'conscientious objectors'. Where these individuals flee across borders to evade military service, they too may subsequently become the subject of an amnesty. For example, the United States' 1974 and 1977 pardons for draft dodgers included those who had fled to Canada and elsewhere to evade military service.

Finally, the leaders of opposition groups that organise or have facilities outside the borders of their state are often amnestied when a transition is

[43] Law on Amnesty (Bosnian Federation) (23 February 1996). This law purported to cover the whole territory of Bosnia-Herzegovina and, as such, was unconstitutional, as the Federation parliament could not enact laws for Republika Srpska. Consequently, a revised amnesty law was enacted by the Bosnian Federation in June 1996. This law was replaced by a further amnesty law in 1999.

occurring, to enable them to participate in negotiations on new constitutional arrangements. For example, the 1997 Tajik amnesty allowed exiled opposition leaders to return in order to participate in negotiations.[44] Similarly, the 1990 Beninese amnesty encouraged exiled political leaders to return to participate in the National Conference,[45] and the 1991 Togolese amnesty permitted the return of hundreds of opponents of President Eyadema, who then participated in the National Reconciliation Congress.[46] Alternatively, where they are launching their military strikes against the government from across a border, insurgents may be offered amnesty to encourage them to surrender and end their armed campaign. For example, the 1983 Angolan amnesty offered immunity to UNITA and FNLA members who had fled to Zambia in 1975.[47]

Foreign Nationals

In many transitional contexts, granting amnesty to foreign nationals is not considered, as very few participated in the conflict. However, in other contexts, large numbers of foreign nationals may become involved as mercenaries or ideological supporters, who often share an ethnic or religious identity with one of the belligerent groups. When granting amnesty, states have taken a variety of approaches to foreign nationals within their borders. In some cases, the amnesty is granted for foreign fighters, to encourage them to leave the country. For example, the 2004 Pakistani amnesty targeted foreign nationals fighting with al-Qaeda, and pledged to repatriate those who surrendered to Pakistani forces to their homelands, rather than extraditing them to the US.[48] In contrast, many amnesties frequently exclude foreigners from their provisions. For example, the 2003 amnesty

[44] Law on amnesty to the participants of the political and military confrontation in the republic of Tajikistan (July 1997). For a description, see Chen Ming, 'Peace Accord Signed to end 5-year war in Tajikistan' *Xinhua News Agency* (Tehran 28 May 1997); Umed Babakhanov, 'Tajik Parliament Approves Amnesty after 5 Years of War' *Associated Press* (Dushanbe 1 August 1997); ——, 'Tajik Parliament Adopts Amnesty Law Covering Civil War Period' *Agence France Presse* (Dushanbe 1 August 1997).

[45] ACCPUF, '*Etudes et Doctrine: Niger—Le statut des partis politiques dans les Etats de l'Afrique de l'Ouest francophone*' <http://www.accpuf.org/themes/nig_conclusion_annexes.htm> accessed 20 July 2004.

[46] ——, 'Togolese President Grants Exiles Amnesty' *BBC Summary of World Broadcasts* (14 January 1991).

[47] ——, 'UNITA's Reaction to Angolan Amnesty Offer' *BBC Summary of World Broadcasts* (20 July 1983).

[48] ——, 'Sherpao offers amnesty to foreign militants in case of surrender, registration' *PakTribune* (Pakistan 14 September 2004); ——, 'Pakistani Governor Offers Amnesty to "Foreign Fighters"' *Agence France Presse* (Peshawar, Pakistan 1 April 2004); Pamela Constable, 'Pakistan's Uneasy Role in Terror War; Conciliatory Approach to Tribal and Foreign Fighters Leaves US Officials Frustrated' *The Washington Post* (Islamabad 8 May 2004) A08.

in Côte d'Ivoire excluded mercenaries and other foreigners who fought in the unofficial militia groups that were used by both sides during the conflict.[49]

It can be argued that some foreign nationals who become involved in a conflict as ideological supporters should bear greater responsibility than the local fighters, as, rather than fighting to improve or protect their way of life, they are exploiting the conflict for their own ends. Examples of this situation could be the involvement of 'Wahhabi Arab' fighters in the Chechen conflicts[50] and the foreign presence in the Iraqi insurgency. For both these cases, the authorities chose specifically to exclude foreigners when introducing amnesties.

This section has argued that amnesties can be introduced to cover a diverse array of individuals. These individuals can work for the state or against it. Even among amnesty recipients of a similar classification, there can be substantial heterogeneity in the status of the amnesty beneficiaries and the state's motivations for amnestying them. Furthermore, selecting amnesty beneficiaries can have implications for a state's domestic and international legal obligations. For example, among amnesties for opponents of the state, amnesties for political prisoners may not be contentious and, possibly, may even be required to correct previous legal injustices, whereas amnesties for those who violently opposed the state may inspire considerable debate, and may expose the state to domestic and international legal challenges. Diversity among amnesty recipients can result from the individual reasons for their actions, and recognition of the divergent reasons has been used to justify amnesty laws in some contexts as will be discussed below.

CAN AN OFFENDER'S REASONS FOR COMMITTING A CRIME JUSTIFY AN AMNESTY?

Individual criminal responsibility is a central tenet of international criminal justice and entails that each person can be held accountable for 'any breach of criminal rules'[51] for which he or she is responsible. However, in legal proceedings, the intentions of the accused are frequently relied upon to excuse the punishment, for example, where a killing was committed in self-defence, or to mitigate the sentence, for example, where the offender acted under duress. Similarly, the individual reasons and the political conditions that caused offenders to commit violations have often influenced the decisions of governments on whether to introduce amnesties.

[49] *Loi portant amnistie*, 2003 (Côte d'Ivoire).

[50] CW Blandy, 'Chechnya: Normalisation' (Defence Academy of the United Kingdom, June 2003) P40, 25.

[51] Antonio Cassese, *International Criminal Law* (Oxford University Press, Oxford 2003) 137.

The complexity of human motivation is much analysed in a range of literatures including psychology, social psychology, and sociology, much of which is beyond the remit of this book. Therefore, simplifying for the sake of brevity, three overlapping causes of behaviour will be considered: (1) ideology; (2) duress; and (3) expected personal gain. These reasons for criminal behaviour are not mutually exclusive. For example, some perpetrators may be ideological supporters of a regime and willing to engage in combat to further their goals, but may nonetheless recoil if forced to commit certain acts, such as sexual violence or harming children, and will only commit such actions when they feel under some form of duress. Similarly, some leaders of dictatorial states may be ideologically committed to the regimes that they have established, but willing nonetheless to use their power for personal enrichment.

Individual perpetrators can also overlap certain categories due to their attempts to fight oppressive regimes. For example, individuals could initially support a particular ideology, only to become disillusioned as the organisation becomes more violent and prejudiced against other groups in society, leading them to turn their attention to combating their former comrades. This occurred in Europe preceding and during the Second World War, where some individuals, who initially were sympathetic to the extreme right-wing parties established in many states, subsequently switched allegiances and joined the resistance. This change of allegiance was often taken into account during post-war purges.[52] Similarly, there were individuals, such as SS officer Kurt Gerstein,[53] who claimed that they only remained part of a repressive system to act as a saboteur and prevent worse crimes being committed. In many instances, any determination of who was right and moral in their actions may depend on perspective or the outcome of the conflict. Each category of reasons that may influence an individual's decision to act will be discussed below.

Ideology and Political Offenders

In cases of ideological support for regimes or insurgency movements, individuals may be positively convinced that they are doing the right thing, or they may simply have 'no doubts about morality of their behaviour', particularly when they are only acting as accomplices.[54] This does not mean, however, that all ideological supporters of an insurgency or state necessarily believe every aspect of the propaganda, and instead, are likely

[52] Elster (n 16).

[53] For a discussion of the life of Kurt Gerstein, see Valerie Hébert, 'Disguised Resistance? The Story of Kurt Gerstein' (2006) 20 *Holocaust and Genocide Studies* 1.

[54] Elster (n 16) 137.

to focus only on the parts that are relevant for them. For example, many French collaborators during the Second World War were willing to work with the Nazis, not because they were anti-Semitic, but rather because they were virulently anti-communist.[55]

In most cases of ideological devotion to a cause, those involved are not acting for personal gain, and may even be willing to risk their lives or possessions for their beliefs. Such a strong attachment to their organisation or government may be the result of propaganda that aims to indoctrinate its target audience in the validity or even morality of violent acts by emphasising the (perceived) threat to the group or nation.[56] McEvoy explains how in the Northern Irish prison service many prison guards were willing to

> internalise, adapt and reshape the public perception of what it is they are meant to be doing, even when the origins of that perception is a product of the public relations department or was originally envisaged as straightforwardly propagandist.[57]

Such transformations enable wrongdoers to embrace and justify their actions and even believe that they are the lesser evil in comparison to the threat posed to their people.

In such cases, if perpetrators genuinely, albeit misguidedly, believe that they are acting for the general good, should their actions be severely penalised? Although serious human rights violations must be investigated and victims must receive reparations, imposing severe penal sanctions on the perpetrators could risk further entrenching their beliefs, rather than helping to re-educate and reintegrate them as productive members of society. This approach could be particularly dangerous where the propaganda also focused on dehumanising the opponent, in order to desensitise the combatants to the violence they were committing. In such cases, the resulting prejudices and mistrust could potentially undermine any attempts to establish a new democratic government, and therefore must be one of the key areas of concern for any transitional state.

As discussed in chapter 1, there have been several amnesties where a government has asserted that it is being merciful in order to rehabilitate 'misguided' members of society who had taken up arms against the government after being seduced by opposition propaganda. For example, the 1979 amnesty in Afghanistan applied to Muslim rebels, army deserters

[55] *Ibid* 141.

[56] For examples where perpetrators have justified their behaviour by focusing on the greater threat posed to their nation, see Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press, Cape Town 2000) 129.

[57] Kieran McEvoy, *Paramilitary Imprisonment in Northern Ireland: Resistance, Management, and Release* (Clarendon Studies in Criminology, Oxford University Press, Oxford 2001) 240.

and exiles who had succumbed to 'enemy propaganda'.[58] Here, words such as 'misguided' are used to highlight the wrongness of their actions.

The role of propaganda can become even more insidious where there are long-standing periods of oppression. In these instances, it is argued that the concept of what is manifestly illegal is undermined, as ever greater segments of the population are drawn into the oppressive system. This was a justification provided for the 1946 Italian amnesty,[59] where Justice Minister Togliatti argued that as 'every free voice of criticism of the tyrannical government was forbidden' under the Fascist regime, 'it became very difficult, above all for the younger generation, to distinguish between right and wrong'.[60]

In certain cases, amnesty for individuals who commit crimes due to ideological belief has been justified by arguing that such individuals are less in need of punishment than ordinary criminals are, as the former

> are more easily rehabilitated and less of a societal threat, especially in the context of a society that has undergone or is undergoing fundamental political change.[61]

Slye explains that

> [t]he assumption is that such individuals are driven to commit violent acts because of their political ideology and sense of justice (or injustice), and that now that the reason for their decision to commit violent acts is gone they will revert to being productive and respectful members of society.[62]

Similarly, Holbrook asserts that those who commit crimes during a political conflict 'rarely pose a threat to society in peacetime' as their crimes are 'context specific' and therefore, the need to punish them and deter them from future crimes, is 'rarely present when the circumstances that caused the conflict have abated'.[63] Furthermore, O'Shea argues that

> the rationale for punishment is different for political crimes, as the motivations that inspire their commission can be viewed as selfless, altruistic and in accordance with some perceived 'higher law', rather than being unremittingly bad or evil.[64]

[58] ——, 'Amin's Address to Constitution Drafting Commission' *BBC Summary of World Broadcasts* (Kabul 17 October 1979).

[59] *Decreto Presidenziale 22 giugno 1946, n° 4. Amnistia e indulto per reati comuni, politici e militari* (known as '*Amnistia Togliatti*') 1946 (Italy).

[60] Cited in Elster (n 16) 160.

[61] Slye (n 20) 181. For a discussion of how 'ordinary' people can be transformed into human rights violators, see Martha Knisely Huggins, Mika Haritos-Fatouros and Philip G Zimbardo, *Violence Workers: Police Torturers and Murderers Reconstruct Brazilian Atrocities* (University of California Press, Berkeley 2002).

[62] Slye (n 20) 181–2.

[63] Jon Holbrook, 'War Crimes: Prosecute at any Cost?' (2000) *Spiked Liberties* <http://www.spiked-online.com/Articles/0000000053B1.htm> accessed 7 November 2005.

[64] Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International, The Hague 2002) 76.

He further opines that deterrence is unlikely to be effective for political crimes, as

> the political offender possesses a certain amount of courage in confronting the government that he perceives as unjust or incorrect and is less likely to bend to the fear of punishment than an offender without such motives.[65]

This justification for amnesty need not be accepted unreservedly in all cases, however, as some individuals who commit crimes for political motives may also commit further acts of violence, and indeed, 'may have always been, or now may have become, comfortable with violence as a means of social interaction'.[66] This may particularly be the case where for particularly cruel and aberrant acts, where it becomes difficult for the motivations to provide legitimacy for the means employed. In addition, Slye uses the findings of the South African TRC to highlight that certain political organisations may have deliberately sought 'individuals who had committed non-political crimes in the past to further' the organisation's political struggle.[67] Furthermore, groups, such as al-Qaeda, that fight for indefinite objectives are likely to continue to be a threat even if some of their key grievances are addressed. It is possible, however, that the propensity of the majority of perpetrators to commit further violent crime after the transition could be reduced by rehabilitation and re-education programmes, enabling them to be reintegrated into society.[68]

Duress

In many conflicts or dictatorial regimes, extreme forms of pressure can be applied to individuals to join organisations or commit certain actions. For example, individuals may be forcibly conscripted into either state or insurgent forces and made to commit violent acts. Such actions may be 'imposed as a duty' and anyone who refuses to obey them could themselves be criminalised or punished.[69] Alternatively, in conflicts such as Rwanda or the former Yugoslavia, duress has been used to force civilians to commit crimes against each other, even against family members, on pain of death or serious physical injury. Consequently, those individuals may view any actions they commit under duress as not criminal, but

[65] Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International, The Hague 2002) 77.

[66] Slye (n 20) 181–2.

[67] *Ibid* 181–2.

[68] For further discussion of programmes to rehabilitate and reintegrate former perpetrators, see ch 10.

[69] Ruth Jamieson, 'Towards a Criminology of War in Europe' in Vincenzo Ruggiero, Nigel South and Ian Taylor (eds), *The New European Criminology: Crime and Social Order in Europe* (Routledge, London 1998) 493.

rather may see themselves as victims. The potential for overlap between victims and perpetrators will be further discussed below.

The recognition that perpetrators have committed crimes under duress has been used to justify several amnesty laws: for example, the 1953 French amnesty[70] benefited inhabitants of the Alsace region of France, who were forced to join the German army during the Second World War and then participate in the Oradour-sur-Glane massacre, and who were argued to have been acting under duress.[71] Similarly, the pressure felt by combatants to follow the orders of their superiors was the justification for the Argentine Due Obedience law, which will be discussed in greater detail when considering superior orders.

Self Protection and Personal Gain

In addition to extreme forms of duress, individuals may decide to continue to work in public sector employment and carry out the policies of a repressive government, despite being aware that their actions are wrong, as they wish to insulate themselves from hardship, such as losing their jobs. These individuals usually do not support the regime ideologically nor hope to have any personal gain from working for it. They often rationalise their behaviour by comparing it to that of others who are committing worse actions.[72]

More reprehensibly, other individuals perpetrate human rights violations or collaborate with oppressive regimes to benefit personally. This could be personal gain in the form of professional advancement or financial enrichment, or in the form of using new-found powers to eliminate competitors and conduct personal vendettas. In these cases, the individual perpetrators are aware that their actions are wrong, but are prepared to commit them nonetheless,[73] as they feel that for them the potential rewards outweigh the costs. These individuals are perhaps the most problematic of all groups of perpetrators, as it is difficult to find any moral justification for their behaviour and, consequently, they have frequently been excluded from amnesty laws.[74]

This section has argued that individuals may commit crimes for an array of reasons, and that, perhaps these reasons can be used to justify an amnesty. For example, where crimes were committed according to political or ideological goals in which the offender believed their actions were

[70] *Loi No 53-112 portant amnistie en faveur des Français incorporés de force dans les formations militaires ennemies 1953* (Fr).

[71] Elster (n 16) 144.

[72] *Ibid* 144.

[73] *Ibid* 138.

[74] This exclusion is based on their actions, and consequently will be discussed further in ch 3 in the section on economic crimes.

contributing to the greater good, imposing punishment may risk entrenching their beliefs and destabilising the political transition. Furthermore, where the political grievances that inspired their crimes are addressed during the transition, their motivation for committing the crimes will be removed, and the use of punishment as a deterrence may not be needed. Where a crime was committed under substantial duress, this section has argued that punishment may not be appropriate as the perpetrator can also be described as a victim. This concept will be discussed below.

VICTIM–PERPETRATOR AXIS

As discussed above, the application of duress to individuals may cause them to become perpetrators against their wishes. Such individuals are likely to suffer severe trauma because of the actions they were forced to commit, particularly if they were required to harm their relatives. Therefore, such individuals can be viewed simultaneously as victims and perpetrators.

The distinction between victims and those who oppress them can also be blurred[75] where certain individuals were victims themselves before becoming perpetrators. For example, an individual may be tortured or witness the death of a family member, and then feel compelled to participate in the conflict to exact revenge. Conversely, perpetrators may be captured by enemy forces and tortured, which could also make them victims.

The blurring of the distinction can also occur during the transition. For example, individuals who have been convinced by propaganda of the righteousness of their cause may feel victimised during the transition, if they feel their sacrifices are ignored by those for whom they fought, particularly when 'the enemy that [they] had been trained to hate and kill was now invited to the negotiation table'.[76] In such cases, the former combatants lose not only their jobs, but 'the ideological foundations on which they had built and understood their lives and what they were fighting for'.[77]

The distinction can also be obfuscated in relation to female combatants who often

[75] Trudy Govier and Wilhelm Verwoerd, 'How not to Polarize "Victims" and "Perpetrators"' (2004) 16 *Peace Review* 371, 372. See also Tristan Anne Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa' (2003) 25 *Human Rights Quarterly* 1088, and Sarkin (n 19) 82–3.

[76] Sasha Gear, 'Wishing Us Away: Challenges Facing Ex-Combatants in the "New" South Africa' (2002) Vol 8 (Violence and Transition Series, Center for the Study of Violence and Reconciliation, Johannesburg 2002).

[77] *Ibid*.

> do not fit the usual stereotype of a combatant in that they may not have been directly involved in the fighting, they may have served armed groups as cooks, servants, or sexual slaves.[78]

Furthermore, during the transition, such women might face 'shame, prejudice, and unwanted or unplanned pregnancies' when they are trying to return to their communities;[79] and their societies may be patriarchal and impose pressure on women 'to (re-)submit to often oppressive gender roles'.[80]

A further group that bridges the divide between perpetrators and victims are child soldiers. These children are often among the most vulnerable groups in post-conflict situations, as they usually have suffered traumatic experiences and have limited means of supporting themselves.[81] As it is assumed under most legal systems that children are not criminally responsible for their actions, it is usual for child soldiers not to be prosecuted and, instead, to be encouraged to participate in rehabilitation programmes. The situation can be more complicated for those who 'transit to adulthood whilst in a fighting force',[82] but according to most legal systems, individuals who committed crimes as children should be held accountable according to their age when they committed the crime, rather than imposing adult penalties upon them, and it seems appropriate to this author that former child soldiers are treated in a similar manner.

In many situations, it may seem to dishonour those who have suffered to recognise that those responsible for inflicting harm upon them are also victims, but Boraine reminds us that

> [t]o think of the perpetrators as victims is not to condone their actions or their deeds, nor is it to turn away from the many victims whose lives they destroyed by their activities. It is simply to try to understand something of the ambiguity, the contradictions, of war, of conflict, of prejudice.[83]

This recognition of the humanity and suffering of some of the perpetrators contributed to the understandings of restorative justice that underpinned the South African TRC.[84] Furthermore, it has been used to justify amnesty in several contexts. For example, a recognition of the large numbers of child soldiers in the conflicts in Mozambique and Uganda contributed to

[78] Lotta Hagman and Zoe Nielsen, 'A Framework for Lasting Disarmament, Demobilization, and Reintegration of Former Combatants in Crisis Situations' (International Peace Academy, New York, 12–13 December 2002) 7.

[79] *Ibid* 7.

[80] Anton Baaré, 'An Analysis of Transitional Economic Reintegration' (SIDDR—Reintegration and peace building (paper presented to Working Group 3 of Swedish Initiation for Disarmament, Demobilization and Reintegration in New York on 4–5 June 2005) 4.

[81] Beth Verhey, 'Child Soldiers: Lessons Learned on Prevention, Demobilization and Reintegration' (World Bank 2002).

[82] Baaré (n 80) 13.

[83] Boraine (n 56) 128.

[84] For a discussion of the relationship between amnesties and restorative justice, see ch 4.

a desire to allow combatants to return home and become reintegrated into society.

IMPORTANCE OF RANK: SHOULD STATES DISTINGUISH DIFFERENT LEVELS OF RESPONSIBILITY?

In recognising that individuals commit crimes and human rights violations for different reasons, attempts are being made in some transitional contexts to distinguish between individuals who are perceived to bear different degrees of responsibility. According to the Amnesty Law Database, to date, 11 per cent of the amnesty laws that provide immunity for state agents exclude higher-ranking officials, and 9 per cent of the amnesty laws for opponents of the state exclude the leaders of rebel forces or political movements. The legal implications of such approaches will be explored below, using case studies.

Amnesty for Subordinates?

Under international law, subordinates are liable for all crimes under international law that they commit, even when they were following the legally-binding orders of a superior. This rule applies to 'orders of both military and civilian authority, and whatever the rank of the superior authority'.[85] Despite this, subordinates can receive mitigated punishment for crimes committed when they were following orders, provided that certain conditions apply.[86] These conditions can differ among the international tribunals and national courts. Article 33 of the Rome Statute permits a plea of superior orders where 'the person did not know that the order was unlawful' or 'the order was not manifestly unlawful'.[87] It continues that 'orders to commit genocide or crimes against humanity are manifestly unlawful'.[88] For other crimes, however, the accused may not have realised an order was illegal, particularly where there had been widespread propaganda to encourage the opposite viewpoint and where domestic laws permitted such actions.

Slye has argued that amnesty laws recognising the defence of superior orders are

> less of a threat to the legal legitimacy of the amnesty if we believe that justice is achieved through . . . process-oriented accountability.[89]

[85] Cassese (n 51) 181.
[86] Slye (n 20) 178–9.
[87] ICC St art 33.
[88] *Ibid* art 33.
[89] Slye (n 20) 181.

This means that amnesty laws such as South Africa's, which required applicants to 'publicly associate themselves with a specific violation'; to 'disclose and acknowledge their specific involvement'; and, where appropriate, to 'testify publicly concerning their involvement' and to 'publicly answer questions from the state, victims, and representatives of individuals and communities they harmed' could be viewed as meeting the 'minimal requirements of justice as reflected in international law'.[90] He continues that, in such instances,

> the substantive decisions that provide amnesty to individuals who were 'only following orders' may be more appropriately interpreted as reaffirming the principle that following orders is a mitigating factor rather than an absolute defence.[91]

Amnesties that omit criminal punishment for lower-ranking perpetrators because they were only following orders, but permit investigation of crimes and the granting of reparations to victims, could meet international standards.[92]

The defence of superior orders has influenced the scope of amnesty laws, such as the 1987 Argentine 'Due Obedience' Law.[93] This law

> establishes an irrebuttable presumption that a subordinate who committed a violation acted under orders without any ability to resist or to assess the orders' lawfulness.[94]

In this case, a broad understanding of the term 'subordinate' was employed to cover

> commanding officers, subordinate officers, non-commissioned officers and members of the rank and file of the Armed Forces, security forces, police force and prison force.[95]

This meant that only those who held 'the position of commander-in-chief, area head, sub-area head or head of a security, police or prison force' or superior officers who had been 'legally determined within 30 days of the enactment of this law' to have 'decision-making powers or were involved in the drawing up of orders' could be prosecuted.[96] The law assumed that in all cases the individuals who committed crimes

[90] *Ibid* 178–81
[91] *Ibid* 181.
[92] For a discussion of the international standards on the rights to remedy, truth, justice and reparations, see ch 4.
[93] *Ley de Obedencia Debida 1987* (Arg).
[94] Slye (n 2) 106.
[95] *Ley de Obedencia Debida 1987* (Arg) art 1.
[96] *Ibid* art 1.

> acted under duress, in subordination to a superior authority and following orders, without having the possibility of resisting or refusing to follow those orders and of examining their lawfulness.[97]

The effect of this law was to leave only the most high-ranking officials open for prosecution. A similar law was implemented in West Germany in 1954, which expressly amnestied deeds committed in the assumption of an official or legal duty.[98]

Even where amnesties are used to help lower-level offenders evade criminal sanctions for their actions, international law can be argued to require that the offenders be subject to alternative transitional justice mechanisms, to encourage or compel them to reveal the truth about their actions. This would facilitate the gathering of 'detailed forensic information' about violations, such as 'who did what to whom; how, where, and when a victim died; where a victim's body might be found'.[99] They could also explain to victims why certain violations were committed and why certain victims were targeted. Perhaps even more usefully, they could 'point the finger across and up the chain of command' by providing evidence on who ordered them to commit the crimes. In this way, amnesties could be like plea bargains, with individuals who are able to contribute information that is useful to the investigation of their superiors being able to obtain an exemption from imprisonment on condition that they admit to their crimes. This could represent an efficient use of limited prosecutorial resources,[100] by focusing efforts on prosecuting those who are deemed 'most responsible'.

Amnesty for Superiors?

It is an established principle of international law that superiors can be held accountable for the actions of their subordinates.[101] This category of 'most responsible'[102] individuals is usually considered to include the 'planners, leaders and persons who committed the most serious crimes',[103] and

[97] *Ibid* art 1.

[98] *Gesetz über den Erlaß von Strafen und Geldbußen und die Niederschlagung von Strafverfahren and Bußgeldverfahren vom 17.7.1954*, BGBl I 1954, pp. 203–9 ("Law Concerning Release from Punishment and Fines and the Cancellation of Punitive and Fining Proceedings") 1954 (Germany) para 6.

[99] Slye (n 2) 108.

[100] Slye (n 20) 185–6.

[101] ICC St art 28.

[102] For a discussion of the approach of international courts to those who are 'most responsible', see ch 6.

[103] Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695, 707.

could comprise the 'political, administrative and military leadership'.[104] It is argued that 'any level of participation by any such persons is thus sufficient to bring them within the category of those to be prosecuted'.[105] Therefore, where superiors order the commission of wrongful acts, they are directly responsible for the commission of the crimes (direct responsibility). Superiors can also be held responsible, however, for crimes that they did not order, if it can be demonstrated, that the

> military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes

and he or she

> failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution (imputed responsibility).[106]

The principle reflects the belief that leaders are more 'culpable and blameworthy than their followers'[107] and can apply to the leaders of both state and non-state forces.[108]

A strategy of holding leaders accountable can be risky, as they are generally needed to negotiate peace agreements or transitions. Efforts to hold them accountable could benefit transitional societies, however, as the public repudiation of their actions could represent a clean break from the past and the establishment of a new order based on the rule of law. Furthermore, if they are held accountable, their chances of regaining power are diminished and the public example of their accountability could deter others from trying to replicate their actions.[109] Also, focusing prosecutions on those who are most responsible could represent the most efficient use of limited prosecutorial resources, where it is not possible to prosecute every offender.

Approaches to granting amnesty to high-ranking officials have been divergent, with many amnesties offering immunity to leaders and even granting them a role in government.[110] Other amnesties exempt individuals with high-ranking military or political status, which was deemed to make them more culpable for any abuses that occurred. For example, the 1993

[104] Hassan B Jallow, 'Prosecutorial Discretion and International Criminal Justice' (2005) 3 *Journal of International Criminal Justice* 145, 152, also argues that, in addition to hierarchal status, prosecutorial discretion should consider a perpetrator's 'extensive and vicious involvement' in abuses, the nature and gravity of the offences committed, and the 'geographic spread' of the crimes investigated.

[105] *Ibid* 152.

[106] ICC St art 28(1).

[107] Slye (n 2) 110–11.

[108] Zegveld (n 5) 114–20.

[109] Slye (n 2) 109–10.

[110] The inclusion of former insurgents in transitional government structures will be explored further in ch 10.

Albanian amnesty law excludes inter alia persons who were 'the highest Communist nomenclature approved by the Council of Ministers'.[111] Similarly, the 1946 Italian amnesty law[112] excluded individuals in 'high' political and military positions in the state. In this instance, however, the amnesty text failed to define 'high' and, consequently, the ordinary magistracy and the Cassation interpreted the term broadly and permitted the release of many high-ranking Fascists.[113] In other transitional contexts, leaders who were originally exempted from amnesty laws managed subsequently to obtain legal immunity, through the introduction of further amnesties. For example, leaders who were clearly excluded from the 1987 Due Obedience Law in Argentina were subsequently covered by President Menem's 1989 and 1990 pardons.[114]

In recent years, increasingly intricate processes have been developed to treat offenders differently, depending on their perceived level of responsibility. For example, in Timor-Leste, the UN Transitional Administration established a range of transitional justice mechanisms, including courts, a truth commission and a community reconciliation process, to address the divergent levels of responsibility among offenders.

Case Study 7: UNTAET's approach to divergent levels of responsibility in Timor-Leste

Timor-Leste was invaded by Indonesia in December 1975 after a period of civil turmoil and political instability sparked by competing demands for independence or integration into Indonesia. The invasion brought massive human rights violations and military clashes between Indonesian forces and the independence movement, FRETILIN (*Frente Revolucionária do Timor-Leste Independente*) which continued until 1979. The rebellion against Indonesian rule continued less violently for the duration of the occupation. In January 1999, widespread violence reignited when a pro-Indonesia militia, supported by the Indonesian armed forces, attempted to use violence and intimidation to coerce the Timorese population into supporting Indonesian rule in an UN-organised referendum. This violent approach failed and, in August 1999, the referendum resulted in an over-whelming vote in favour of independence. Following the referendum, the pro-Indonesia militias and the Indonesian armed forces unleashed a campaign of brutal oppression characterised by murders, assaults, rapes, torture, arson, looting and plunder. Thousands of individuals were killed, and 200,000 were forcibly displaced from their homes. In response to this

[111] Law on the Status of Politically Ex-Convicted and Prosecuted People by the Communist Regime, Law No 7748, amended by the law No 7771 (7 Dec 1993) 1993 (Alb) art 5.

[112] 1946 *Amnistia Togliatti* (n 59).

[113] Franco Ferraresi, 'The Radical Right in Postwar Italy', in Stein Ugelvik Larsen and Bernt Hagtvet (eds), *Modern Europe after Fascism* (Social Science Monographs, Columbia University Press, New York 1998).

[114] Presidential Decree of Pardon, No 1002/89 (6 October 1989) (Arg); Presidential Decree of Pardon, No 2741/90 (29 December 1990) (Arg).

violence, in September 1999, the UN Security Council authorised the Australian-led International Force for East Timor (INTERFET) to intervene, and on 25 October 1999, UN Security Council resolution 1272/1999 established the UN Transitional Administration in East Timor (UNTAET).

UNTAET took a diverse approach to addressing the crimes of the past. First, on 6 June 2000 it established panels within the District Court of Dili with exclusive jurisdiction over serious crimes.[115] Simultaneously, efforts were underway to establish the *Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste*, (CAVR) to investigate the atrocities, promote reconciliation and reintegrate persons accused of having committed less serious crimes in the context of the political conflicts in the territory between 25 April 1974 and 25 October 1999. The CAVR was created on 13 July 2001 by UNTAET Regulation 2001/10.

The serious crimes panels and the truth commission were designed to operate simultaneously and to complement one another. Offenders were assigned to an institution according to the crimes that they had committed, with those individuals responsible for serious crimes such as murder, rape and torture facing prosecution, and individuals who had committed minor offences being dealt with by the truth commission. Offenders are required to apply to the truth commission for a Community Reconciliation Process (CRP). Their applications are then referred to the Office of the General Prosecutor who then determines which institution is appropriate. The criteria for determining who had committed a minor offence are:

1. The nature of the crime committed by the applicant [or 'deponent' in the Timorese terminology]: for example, offences such as theft, minor assault, arson (other than that resulting in death or injury), the killing of livestock or destruction of crops might be appropriate cases to form the subject of a Community Reconciliation Process.

2. The total number of acts which the deponent committed.

3. The deponent's role in the commission of the crime, that is, whether the deponent organised, planned, instigated or ordered the crime or was following the orders of others in carrying out the crime.[116]

Where the truth commission, with the support of the Office of the General Prosecutor, felt that a deponent met these criteria, it could conduct a CRP hearing, where it would hear from the applicant, the victim and members of the community,[117] in order to establish the truth, before deliberating on the most appropriate form of reconciliation.[118] An act of reconciliation could include 'community service, reparation, public apology, and/or other acts of contrition'.[119]

[115] Serious crimes within this regulation were 'genocide, war crimes, crimes against humanity, murder, sexual offences and torture'. See Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, 2000 (Timor-Leste) art 1.3.

[116] Regulation No 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor 2001 (Timor-Leste) s 1.

[117] *Ibid* s 27.1.

[118] *Ibid* s 27.7.

[119] *Ibid* s 27.7.

The CRP resembles an amnesty, as it suspends criminal prosecutions and penal sanctions for the crimes that it covers; but there have also been calls for a formal amnesty in Timor-Leste to cover both those who have already been convicted and those who have not. To date, the drafts of the proposed amnesty would exclude crimes which are punishable by more than five years' imprisonment, but the proposed amnesty could grant sentence reductions for these crimes, allowing some individuals who have been imprisoned since 1999 to go free. Furthermore, it would be applicable to pro-Indonesia militias and the Indonesian armed forces, as well as members of the Timorese independence movement. The proposed amnesty was passed by the Timorese parliament in 2004 by 24 votes to 18, but has not yet been promulgated.[120] At the time of writing, it is unclear whether the proposals have been abandoned in favour of the Commission of Truth and Friendship (CTF).

The CTF is a joint Timorese-Indonesian commission, which was created in March 2005 and began functioning in August 2005. It aims to investigate the truth of the referendum-related violence, but not to seek retribution. This commission has the power to recommend amnesty for individuals who are responsible for serious human rights violations, provided that they admit the truth of their actions and apologise to their victims. The Indonesian and Timorese governments will ultimately decide whether to act on the amnesty recommendations. At the time of writing, it was not yet clear whether the commission would use this power.

***Sources**: Hansjörg Strohmeyer, 'Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor' (2001) 25 Fletcher Forum of World Affairs 107; Carsten Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor' (2001) 95 American Journal of International Law 952; Suzannah Linton, 'New Approaches to International Justice in Cambodia and East Timor' (2002) 94 International Review of the Red Cross 93; Spencer Zifcak, 'Restorative Justice in East Timor: An Evaluation of the Community Reconciliation Process of the CAVR' (Asia Foundation, Timor Leste 2004); Open Society Justice Initiative, 'Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor' (Open Society 2004); Judicial System Monitoring Programme, 'The Indonesia–East Timor "Truth and Friendship Commission": More Friendship, Less Truth, Impunity from the Law' (JSMP 2005).*

[120] On 4 June 2007, Timor-Leste's parliament passed a second amnesty law entitled Law on 'Truth and Measures of Clemency for Diverse Offences'. In contrast to the other transitional justice measures that are the legacy of Indonesian occupation, this law applies to crimes committed between 20 April 2006 and 30 April 2007 in relation to elections which were marred by violence. On 16 August 2007, the Court of Appeals found the proposed law unconstitutional, ruling that the limited time period to which it applies was discriminatory.

A more complex process was developed in Rwanda to deal with the large number of perpetrators implicated in the 1994 genocide.

Case Study 8: Rwanda, *gacaca* and international justice

From independence, Rwanda endured periodic episodes of mass violence between the rival groups, Hutus and Tutsis, particularly in 1963, 1974 and 1991, each of which were followed by an amnesty for those involved. The 1991 amnesty followed the outbreak of civil war in October 1990. This war continued until the signing of a peace accord in 1993. The power-sharing provisions within this accord are one of the many factors which led to the genocide of Tutsi (and some Hutu) individuals by extremist Hutu militias between April and June 1994, in which over a million people were killed. The violence ended when the Rwandan Patriotic Front (RPF), an armed group of Tutsi exiles, entered Rwanda and seized control.

Following the establishment of the RPF government, led by President Paul Kagame, the government decided on a policy of retributive justice against those who engaged in the genocide (although not against RPF members who engaged in reprisal killings). They consulted international legal and policy experts[121] and, subsequently, the Rwandan National Assembly adopted a policy of classification which established categories of genocide suspects, who have their cases heard before the International Criminal Tribunal for Rwanda, national courts or *gacaca* tribunals, depending on the severity of their actions. These categorisations have been altered since their original introduction in 1996, and their most recent formulation provides:

First Category:

1. The person whose criminal acts or criminal participation place among [*sic*] planners, organisers, imitators, supervisors and ringleaders of the genocide or crimes against humanity, together with his or her accomplices;

2. The person who, at that time, was in the organs of leadership, at the national level, at the level of Prefecture, Sub-prefecture, Commune, in political parties, army, gendarmerie, communal police, religious denominations or in militia, and has committed these offences or encouraged other people to commit them, together with his or her accomplices;

3. The well known murderer who distinguished himself or herself in the location where he or she lived or wherever he or she passed, because of the zeal which characterised him or her in killings or excessive wickedness with which they were carried out, together with his or her accomplices;

4. The person who committed acts of torture against others, even though they did not result into death, together with his or her accomplices;

[121] Jessica Raper, 'The *Gacaca* Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide' (2005) 5 *Pepperdine Dispute Resolution Law Journal* 1.

5. The person who committed acts of rape or acts of torture against sexual organs, together with his or her accomplices;

6. The person who committed dehumanising acts on the dead body, together with his or her accomplices.

The Prosecutor General of the Republic publishes, at least twice a year, a list of persons classified in the first category, forwarded by *Gacaca* Courts of the Cell.

Second Category:

1. The person whose criminal acts or criminal participation place among killers or who commit acts of serious attacks against others, causing death, together with his or her accomplices; [sic]

2. The person who injured or committed other acts of serious attacks with the intention to kill them, but who did not attain his or her objective, together with his or her accomplices;

3. The person who committed or aided to commit other offences persons, without the intention to kill them, together with his or her accomplices.

Third Category:

The person who only committed offences against property. However, if the author of the offence and the victim have agreed on their own, or before the public authority witnesses an amicable settlement, he or she cannot be prosecuted.[122]

Under this system, those perpetrators who are designated as Category 1 offenders are eligible for prosecution before ordinary courts and will be sentenced according to their crimes and whether they pleaded guilty or repented. In addition, they face a total loss of their civil rights. Category 2 offenders will appear before *gacaca* courts and will be eligible for imprisonment. Finally, Category 3 offenders will also be judged within the *gacaca* system, but instead of imprisonment will be required to perform community service or come to a settlement with the victim.

The *gacaca* courts, which hear the crimes of the lower-level offenders, are adapted from a traditional form of justice. They operate within small communities and work to identify victims and perpetrators and impose appropriate punishments, ranging from community service to life imprisonment. The judges, who are elected by the community, have to determine whether the accused is guilty and whether they have confessed to their crimes. For those who plead guilty, they often do not have to return to prison as they have already served several years waiting for their trial to take place.

[122] *Loi Organique portant organisation, compétence et fonctionnement des Juridictions Gacaca chargées des poursuites et du jugement des infractions constitutives du crime de génocide et d'autres crimes contre l'humanité commis entre le 1er octobre 1990 et le 31 décembre 1994 2004* (Rwanda) art 51.

***Sources**: Erin Daly, 'Between Punitive and Restorative Justice: The Gacaca Courts in Rwanda' (2002) 34 Journal of International Law and Politics 355; Amnesty International, 'Gacaca: A Question of Justice', AI Index AMR 47/007/2002 (2002); Ervin Staub, 'Justice, Healing and Reconciliation: How the People's Courts in Rwanda can Promote Them' (2004) 10 Peace and Conflict 25; Allison Corey and Sandra C Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda' (2004) 103 African Affairs 73; William A Schabas, 'Genocide Trials and Gacaca Courts' (2005) 3 Journal of International Criminal Justice 879; Jessica Raper, 'The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide' (2005) 5 Pepperdine Dispute Resolution Law Journal 1; Jacques Fierens, 'Gacaca Courts: Between Fantasy and Reality' (2005) 3 Journal of International Criminal Justice 896; Mark A Drumbl, 'Law and Atrocity: Settling Accounts in Rwanda' (2005) 31 Ohio Northern University Law Review 41; Coel Kirby, 'Rwanda's Gacaca Courts: A Preliminary Critique' (2006) 50 Journal of African Law 94.*

The Rwandan system combines prosecutions for higher-level offenders with non-penal sanctions for lower-level offenders. The Minister of Justice claimed that this classification system was necessary because 'genocide crimes were often the result of strong state supervision and control'.[123]

This section has demonstrated that both state law and international law distinguish between offenders based on their perceived levels of responsibility. Under international law, subordinates should be held accountable for crimes under international law even where they were following orders, although the existence superior orders can potentially be used as a factor to mitigate punishment. Consequently, where subordinates are encouraged to participate in alternative justice mechanisms and provide information on their actions, with the amnesty only excusing them from penal sanctions, the amnesty could be viewed as fulfilling the needs of justice. Furthermore, encouraging subordinates to reveal information on their actions could provide evidence to facilitate domestic or international prosecutions of those who are 'most responsible' for the policies of oppression. This section has illustrated these arguments using case studies to show that when introducing amnesties some states have recognised that perpetrators hold different levels of responsibility for periods of human rights violations, and have used this recognition has been used to justify suspending punishment for lower-level offenders.

[123] Raper (n 121) 32.

INDIVIDUAL *v* BLANKET AMNESTIES

In choosing to amnesty groups or organisations, states either apply amnesty uniformly to all members of a group or require the members who wish to receive amnesty to apply individually. Alternatively, amnesties could have no links to a particular group and instead could be open to all citizens who wish to apply.

Where states choose to require individual applications, they must establish a process to administer them.[124] First, they must decide who will process the applications: the courts or specifically-designed commissions. Many countries have chosen their judicial systems to administer amnesties in the context of their investigations into human rights abuses. This arises most often in the case of blanket amnesties, where the courts determine merely whether amnesty can be used as a defence if a challenge is brought against an individual defendant.[125] Alternatively, where the legal infrastructure has collapsed or been compromised by the period of conflict or repression, it may be necessary to establish an independent commission to determine amnesty applications, particularly where there is likely to be a large number of individual applications. Where such commissions are established, the experience of truth commissions to date indicates that they must be adequately resourced by the national government, possibly with the assistance of international actors.[126] Furthermore, the author believes that it is desirable that, as with truth commissions, the appointed commissioners be impartial and representative of the population.[127]

Secondly, the government must decide whether the amnesty will remain in effect if the groups that it applies to reject it either by public statements or by their actions, such as continuing their armed campaign. Often, if groups decline amnesty offers, in practice the amnesties become void. However, in some cases, members of an organisation may be willing to apply for amnesty even where their leaders have rejected it. Therefore, the approach taken by the government will depend on the context and the unity of the targeted organisation. Furthermore, some amnesties are introduced with the expectation that the insurgent leadership will reject it, but with the hope that the lower ranks will seize the opportunity to rejoin society, thereby weakening the insurgency.

[124] A state must also decide what conditions are appropriate and what should happen where an individual or group breaches the conditions of a conditional amnesty. For a discussion of this issue, see ch 4.

[125] The role of national courts in implementing amnesty laws will be explored in ch 5.

[126] Priscilla B Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge, New York 2001) 223–4.

[127] *Ibid* 217 and Jeremy Sarkin, 'Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach in the New Millennium of Using Community Based *Gacaca* Tribunals to Deal with the Past' (2000) 2 *International Law FORUM du droit international* 112, 118.

To date, states are increasingly favouring individualised amnesties, although this has not yet formed the majority of cases. This process should be encouraged according to Sarkin, who argues

> [i]f perpetrators apply for amnesty individually, they are more likely to be seen as taking responsibility for their actions, which can promote reconciliation at least on an individual level. If they must do something—provide the details of their crimes, look into the eyes of their long-suffering victims, or simply apologise—they are holding themselves accountable to the community at large and to the victim in particular.[128]

In this way, amnesties can be related to other transitional justice mechanisms, thereby increasing accountability for perpetrators.[129] Therefore, this section argues that although an amnesty may target members of particular organisations, it is desirable that the amnesty beneficiaries are required to make individual applications, rather than automatically benefiting from the amnesty by virtue of their membership of an organisation. Furthermore, individualising amnesty applications enables individuals to decide whether they wish to participate in the programme.

CAN AMNESTIES PREVENT INDIVIDUALS FROM PROVING THEIR INNOCENCE?

While for the majority of amnesty beneficiaries obtaining immunity from prosecution is a valuable asset, for other individuals amnesty may not be such an attractive proposition. Under normal circumstances, amnesty is based upon an assumption of guilt, as it is designed to protect someone who has committed a crime from legal penalties. This means that certain individuals who feel that their actions were not criminal may be unwilling to accept an amnesty, either because their actions were politically-motivated or committed in self-defence in the face of oppressive policies, or because the individuals were innocent of any crime. For example, some members of the *Mouvement des forces démocratiques de Casamance* (MFDC) objected to the 2004 Senegalese amnesty law 'following their habitual discourse that they had done nothing wrong but simply acted to defend their "nation"'.[130] This also proved to be a problem with the 1990 Indemnity Act in South Africa,[131] where imprisoned members of the ANC refused to

[128] Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 *Columbia Human Rights Law Review* 661, 721.

[129] For a more in-depth discussion of the way in which amnesty canw be related to other transitional justice mechanisms, see ch 4.

[130] Mark Evans, '*Senegal: Mouvement des Force Démocratiques de la Casamance*', (Chatham House, 2004) AFP BP 04/02, 15.

[131] Indemnity Act No 35 1990, as amended by Indemnity Amendment Act, No 124 1992 (S Afr).

apply for indemnity 'arguing that this implied they had accepted guilt in their opposition to an unjust system'.[132] The problem was worsened by the forms that the applicants for indemnity had to complete, as

> one of the questions in the application asked prisoners if they subscribed to 'peaceful solutions and development' if the organisation of which they were a member did not.

Many prisoners refused to answer this question and had to be encouraged to do so by the ANC leadership.[133]

The question of appeal mechanisms against the granting of amnesty (as opposed to the refusal of an amnesty) is not generally addressed in the terms of an amnesty law, although there have been a few exceptions. For example, the 1951 French amnesty law declared that amnesty could not constitute an obstacle for someone wishing to prove his or her innocence.[134] The 1991 Rwandan amnesty law contained a similar provision.[135] Even where such provisions are excluded, individuals may still be able to bring legal challenges. For example, Valentin Varennikov, a leader in the 1991 coup attempt in Russia refused to accept the 1994 amnesty,[136] saying he wanted to be tried so he could be vindicated in court. He maintained that he had done nothing wrong because he had been trying to save the crumbling Soviet Union. Varennikov was acquitted by the military branch of the Supreme Court of charges of high treason in August 1994.[137]

As everyone has 'the right to be presumed innocent until proved guilty according to law'[138] under international law, in addition to most domestic legal systems, it is desirable that future amnesty laws incorporate provisions to enable individuals to prove their innocence. This view was expressed in the *Updated Set of Principles on impunity*, which provided:

> (c) Insofar as it may be interpreted as an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for acts connected with the peaceful exercise of their right to freedom of opinion and expression. When they have merely exercised this legitimate right, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, the law shall consider any

[132] Kate Savage, 'Negotiating the Release of Political Prisoners' (Research report written for the Northern Ireland Programme at the Kennedy School of Government at Harvard, 2000).

[133] *Ibid*.

[134] *Loi No 51-18 portant amnistie, instituant un régime de libération anticipée, limitant les effets de la dégradation nationale et réprimant les activités antinationales* 1951 (Fr) art 19.

[135] *Loi no. 60/91, Amnistie générale et voie de solution au problème des réfugiés* (JO 1991, p 1930) 1991 (Rwanda) art 3.

[136] Decree, On Declaring an Amnesty in Connection With the Adoption of the Constitution of the Russian Federation, 1994 (Russ).

[137] ——, 'Russian Court Acquits Last 1991 Coup Defendant' *Facts on File Inc* (18 August 1994) 587.

[138] ICCPR art 14.

judicial or other decision concerning them to be null and void; their detention shall be ended unconditionally and without delay;

(d) Any individual convicted of offences other than those to which paragraph (c) of this principle refers who comes within the scope of an amnesty is entitled to refuse it and request a retrial, if he or she has been tried without benefit of the right to a fair hearing guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights, or if he or she was convicted on the basis of a statement established to have been made as a result of inhuman or degrading interrogation, especially under torture.[139]

Amnesty should not be imposed on any individuals and, instead, individuals should retain their right to trial to prove their innocence. However, this may be difficult to implement in practice, due to the fragile legal infrastructure that exists in most transitional states, and the right of states under international human rights law to limit the right to freedom of opinion and expression in times of public emergency.

CONCLUSION

This chapter has explored the legal considerations that can influence a state's decision on whom to amnesty. First, a state is required under domestic and international law to treat all its citizens equally. This position is undermined by the inherent inequality that usually exists between state forces and opposition groups. Where amnesty is introduced into situations of pre-existing inequality, it can either contribute to restoring equality or worsen the imbalances that already exist. The situation can be improved where an amnesty is granted only to opponents of the state to award them similar favourable legal conditions to state agents who have already been granted impunity through measures such as indemnity laws. Inequality can be worsened, however, where amnesty is only granted to state agents or the winning side in a conflict. Where an amnesty worsens inequality, it may undermine any attempts to promote reconciliation by increasing tensions and bitterness between the parties.

Secondly, perpetrators are not a homogenous group and within groups of wrongdoers, there are divergent levels of involvement in the commission of crimes, with higher-ranking officials issuing orders and designing policies and lower-level agents executing the orders.[140] Furthermore,

[139] UNCHR 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN4/2005/102/Add1 (*prepared* by Diane Orentlicher), Princ 24. These principles are not binding on states but are intended to reflect international standards on impunity.

[140] Elster (n 16) 119.

offenders may have differing levels of autonomy when committing their actions, with some offenders being subjected to duress in order to force them to commit crimes. When deciding whom to amnesty, states should be influenced by the international legal doctrines of superior orders and command responsibility. These principles provide that individuals who have committed or ordered crimes under international law should be held accountable, but that the existence of superior orders could be a mitigating factor during sentencing. This could perhaps allow for individuals who were following orders to be investigated or required to participate in truth-recovery mechanisms, but to benefit subsequently from an amnesty to shield them from penal sanctions. Such a policy could even complement selective prosecutions of those who are 'most responsible', with the testimony of subordinates contributing to the evidence against their superiors.

Using the Amnesty Law Database, this chapter has demonstrated that states are more inclined to introduce amnesty laws to benefit their opponents than their own personnel;[141] and that, in the majority of cases where state agents were offered protection, this was combined with protection for their adversaries. This decision to move away from self-amnesties can positively affect the domestic and international legitimacy of an amnesty. Furthermore, it appears that states are becoming increasingly likely to differentiate between the perceived levels of culpability, with those who are deemed 'most responsible' facing more severe sanctions than lower level offenders, although this is not yet an overwhelming trend.

The assessment of which groups of offenders benefit from amnesty laws is essential to any analysis of the permissibility of amnesties under international law, as decisions to grant blanket amnesty to groups of offenders could violate international law, where the targeted groups are responsible for perpetrating crimes under international law. Furthermore, the inclusions of the leaders of state and non-state forces within the scope of amnesty laws could affect the status of the principles of command responsibility under international law.

In addition to the legal implications of the personal scope of the amnesty, the decisions on who to include or exclude from an amnesty's scope could have political repercussions. For example, where there are many child soldiers in a conflict, public opinion may be supportive of an amnesty, and indeed campaign for the government to introduce one. In contrast, where state agents are responsible for a campaign of repression and violence, a self-amnesty to benefit them could provoke further unrest. Furthermore, as this chapter has argued, amnesties can provide recognition that individuals who commit human rights violations are not a monolithic group, and that in some instances, victims and perpetrators may

[141] Although state agents may benefit from other measures, such as indemnity laws.

overlap, particularly where individuals commit crimes under duress. In this way, an amnesty that is coupled with truth-recovery mechanisms could help rival communities within a transitional society accept that their opponents also suffered, and that not every member of the rival community represents a dangerous threat. It is hoped that the growth of such understanding could pave the way for reconciliation.

3

Granting Immunity? The Material Scope of Amnesty Laws

INTRODUCTION

THE MATERIAL SCOPE of amnesty laws is the most contentious issue relating to their introduction, with amnesty laws that cover serious human rights violations often provoking heavy domestic and international criticism. Furthermore, this aspect of amnesty laws has the greatest potential to contribute to the development of customary international law and hence produce binding obligations on national governments.

When introducing an amnesty, a government must decide carefully which crimes to include or exclude from its provisions. This decision can be influenced by the law's objectives, the domestic legal rules on amnesties and the state's obligations under international law. Although, as this chapter will argue, political concerns often take precedence over legal obligations. Furthermore, when describing the material scope of the amnesty in the legislation, the case studies explored in this research indicate several potential approaches available to governments. First, the amnesty could apply broadly to all crimes committed within specified dates or connected to the dictatorship or conflict. This broad approach could be restricted, however, by including a list of crimes for which the amnesty does not apply, such as crimes under international law. Secondly, the amnesty could be restricted to 'political' and related crimes. The criteria for determining what constitutes a political crime will be explored below. Where the amnesty covers only political crimes, the most serious actions could be excluded on the grounds of proportionality. Thirdly, the amnesty could be restricted by specifying that it can only be granted for a specific list of offences. Typically, these lists would cover offences such as draft-dodging and desertion, illegal possession of weapons or distribution of propaganda. Each of these different approaches and the crimes that are amnestied could affect the efficacy and legitimacy of the amnesty process.

This chapter will begin by explaining how crimes have been categorised within the Amnesty Law Database, before providing a statistical overview of the trends in amnestying each category of crimes. Subsequently, the legal obligations on states for each category and the related state practice will be considered, using treaty and customary international law and case studies.[1] There will also be a discussion of the ways the material scope of amnesty can be restricted, for example, with geographic or temporal constraints.

This chapter will argue that the scope of amnesty and the context in which the crimes occurred can have differing implications for a state's obligations, as, although crimes under international law can impose a duty on states to prosecute or extradite, not all political transitions are characterised by abuses reaching the threshold of crimes under international law. It will further argue that not all amnesties are problematic under international law, as states have standing to amnesty political crimes against themselves, although defining which crimes are political can be a complex issue and will be explored further below. Finally, the chapter will demonstrate that although states are increasingly excluding crimes under international law from their amnesty laws, this behaviour is not yet sufficiently widespread to be considered as state practice for customary international law.

WHICH CRIMES ARE GRANTED AMNESTY?

Defining which actions are criminal can be highly ideological and political, both under international law and within any national jurisdiction. Critical criminological studies have revealed the

> power of the state in criminalising particular behaviour (usually the 'crimes' of the weak and the poor) while condoning or even in some instances encouraging the 'crimes' of the rich and powerful.[2]

Similarly, political forces can influence which crimes are included within the terms of an amnesty.

To analyse the crimes that states choose to amnesty, the crimes were allocated to the following categories in the Amnesty Law Database: crimes under international law; political crimes; crimes against civilians; and economic crimes. For each of these categories, information was compiled on whether the amnesty included or excluded the relevant crimes, and

[1] The domestic and international case law relating to the duty to prosecute will be considered in greater depth in Part II.

[2] Kieran McEvoy, Kirsten McConnachie and Ruth Jamieson, 'Political Imprisonment and the "War on Terror"' in Yvonne Jewkes (ed), *Handbook on Prisons* (Willan Publishing, Cullompton 2007).

whether the crimes must have occurred within specific regions or between specific dates. These categorisations were identified using the academic literature on amnesties, which focuses predominantly on the duty to prosecute crimes under international law.

Each amnesty law can apply to either one or several of these categories, and these categories can overlap. Furthermore, when amnesties are introduced within dictatorial, conflict or transitional contexts, they can be designed to cover the crimes within one or several of the categories, with blanket amnesties commonly covering all types of crimes.

The typology is further complicated as many crimes fall between different categories. For example, crimes against civilians can, when particularly severe, also be crimes under international law. Furthermore, it is often problematic to determine which category of crimes is applicable to particular actions. For example, if several civilian deaths occur, should they be treated as murder or crimes against humanity? It can also be difficult to distinguish between economic crimes and political crimes. For example, non-state actors often commit economic crimes, such as robbery and extortion to raise funds for their political struggle. Such crimes, although economic, have clear political objectives. Within the Amnesty Law Database, any crime with economic consequences is recorded as an economic crime, but where it was also political, this has been noted.

Furthermore, distinguishing between political crimes and common crimes that are committed by members of political organisations or within political contexts can be very contentious, as any determination often involves a degree of subjectivity. Different amnesties have taken different approaches to this issue, as will be discussed below.[3] Within the database, crimes have been recorded according to the terms of the amnesty itself and how it was implemented. However, where there is uncertainty due to a lack of specificity in the amnesty itself, common crimes that do not appear to be political have been recorded as crimes against civilians, whereas offences committed against public institutions or officials were treated as political. For example, if an insurgent murdered an off-duty police officer, this would be considered political for the purposes of the database, although the police officer was not acting in an official capacity at the time of his death.

Categorising amnesty laws can be further complicated, where there are difficulties in obtaining the full text of the legislation (where such a text exists), or where the terms of the amnesty law itself were deliberately ambiguous. For example, even when it can be proven that crimes under international law did take place, it can be difficult to ascertain whether the government's deliberations took the international character of the crimes into account, thereby deliberately amnestying or excluding crimes under

[3] For a more in-depth discussion of political crimes, see pp 135ff.

international law, or whether the government simply considered the domestic legal system and political constraints. This can be particularly problematic when amnesties for crimes committed during a civil war provide immunity for actions that are characterised as domestic crimes, rather than as crimes under international law. For example, in a conflict where murders of civilians were widespread and systematic, the amnesty text may cover murder, but not crimes against humanity. This means that perpetrators of crimes under international law can benefit from the amnesty, without the nature of the crimes that they committed being recognised or acknowledged by the state.[4] States can also create ambiguity in the terms of the amnesty by using phrases such as 'ferocious and barbarous acts',[5] 'atrocious' acts,[6] or 'blood crimes', but failing to define these terms. This ambiguity contributes to concealing the truth about events and denies acknowledgement to the victims. Further ambiguity can occur when, rather than explicitly listing all crimes that fall within its scope, amnesties cover all crimes that occurred between certain dates, which enables states to avoid explicitly declaring that they are amnestying *génocidaires* or torturers. For the purposes of this book, amnesties have been described as including crimes under international law only where conflicts that were characterised by crimes under international law resulted in blanket amnesties for all crimes that occurred;[7] or where there is specific evidence, such as court proceedings, to demonstrate that the amnesty was applied to crimes under international law. For this reason, the proportion of laws granting amnesty for crimes under international law is probably underrepresented in the data.

Finally, difficulties can be encountered when an amnesty law is designed to cover a category of crimes, but specifically excludes certain actions that would fall within this category. For example, an amnesty may cover political crimes but exclude economic crimes with political objectives such as drug trafficking to raise funds for an insurgency. Where this occurs the amnesty is treated as including the relevant category of crimes,

[4] Cassese, discussing prosecutions for crimes that are classed as 'ordinary' crimes although they are of sufficient gravity to be classed as 'crimes under international law', argues that 'the classification of the offence as an ordinary crime presupposes a deliberate (or unconscious) proclivity to *misrepresent* the very nature, hence to *belittle the seriousness*, of international crimes. In other words, the national court shows that, either intentionally or unwittingly, it is not cognizant of both the international dimension and the gravity of the criminal offence'. See Antonio Cassese, *International Criminal Law* (Oxford University Press, Oxford 2003) 349–50.

[5] *Ley 37 de 1981 por la cual se declara una amnistía conditional, Diario Official No 35760*, 14 May 1981, p 442 (Colom).

[6] *Ley 35, Diario Official No 36133 bis, p 529 'por la cual se decreta una amnistía y se dictan normas tendientes al restablecimiento y preservación de la paz'*, 19 November 1982 (Colom) (This amnesty provided immunity to torturers, despite exempting 'atrocious crimes').

[7] See eg Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone ('Lomé Accord') 1999 (Sierra Leone) art IX(2).

and the specific exceptions are detailed in the Amnesty Law Database within the exclusion section, so one amnesty can simultaneously include and exclude the same category of crimes.

The distribution of the inclusion and exclusion of each category of crimes in 494[8] amnesty laws is shown in Figure 7. As described above, one amnesty may cover several categories of crimes and consequently be counted within multiple columns in this Figure. From this, it is clear that the vast majority of amnesty laws were offered for political crimes, although 22 per cent of amnesties excluded all or some political crimes.[9] Immunity for crimes against civilians was granted in 24 per cent of amnesties; however, an almost equal number of amnesties excluded some form of these crimes. This meant usually amnestying lower-level offences against civilians, but denying immunity for serious crimes such as murder or sexual violence. Only 19 per cent of the amnesties included in the database have explicitly included protection for some or all of the crimes under international law, although, for many amnesties the crimes occurring, although serious, did not reach the threshold of crimes under international law. This means that, of the amnesties where crimes under international law were a factor, the proportion granting amnesty for crimes under international law would be higher. Among amnesties for crimes under international law, there have been some disparities between

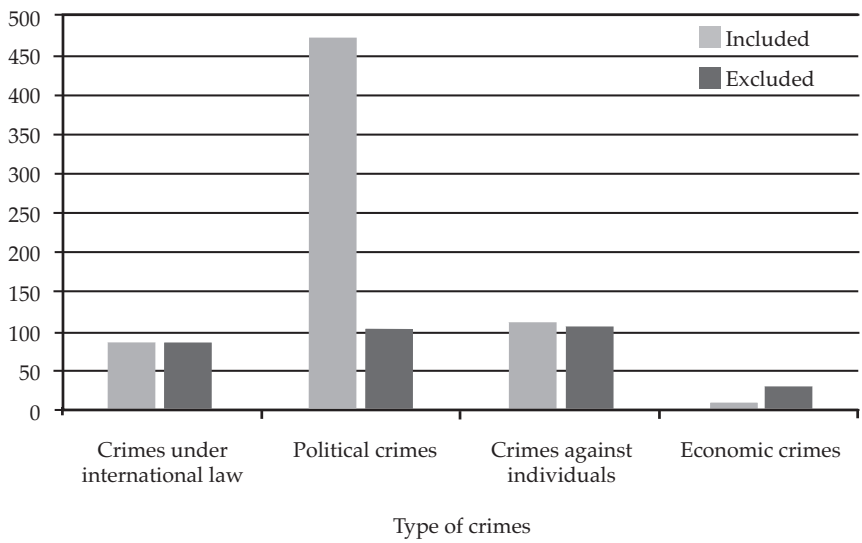

Figure 7: Treatment of categories of crimes in amnesty laws

[8] Crimes could not be clearly ascribed to a category for 12 amnesties of the 506 in the database, due to a paucity of data on the amnesty processes concerned.

[9] That is, 108 amnesties out of 494 excluded political crimes.

the regions. For example, 36 per cent of amnesties excluding crimes under international law were enacted in Europe and Central Asia, whereas only 18 per cent of amnesties including crimes under international law occurred in this region. In contrast, 35 per cent of amnesties for crimes under international law were enacted in Sub-Saharan Africa and only 20 per cent of the amnesties excluding crimes under international law came from this region.

When the patterns relating to amnestying crimes under international law are looked at over time, it becomes apparent that the number of amnesties, both including protection for crimes under international law and excluding immunity for them, has increased since the Second World War, particularly after 1985, as shown in Figure 8 below. Perhaps the most significant period in the relationship between crimes under international law and amnesties is after the UN changed its approach to amnesty laws with the signing of the Lomé Accord on 7 July 1999.[10] Between this date and the end of December 2007, 34 amnesty laws have excluded some form of crimes under international law, which has inspired human rights activists to point to a growing trend to prohibit impunity for these crimes. This research has found, however, that during the same period, 28 amnesty laws have granted immunity to perpetrators of crimes under international law, and that consequently it is too early to suggest that an international custom has emerged.

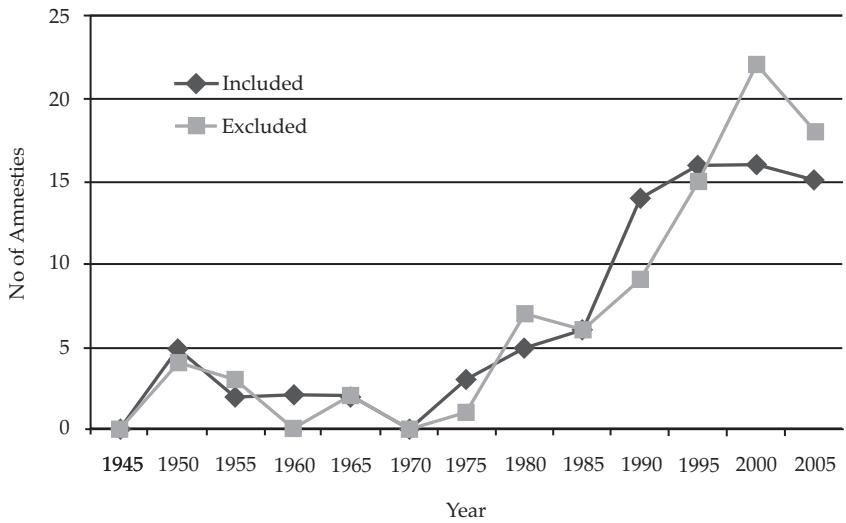

Figure 8: Relationship of amnesties to crimes under international law Jan 1980–Dec 2005

[10] For a discussion of the approach of the UN to amnesty laws, see ch 8.

Amnestying Atrocities? Can States Amnesty Crimes Under International Law?

Of all the categories of crimes to be considered, those which have been designated as 'international' cause the most concern to policy makers and human rights activists, and place the most restrictions on those who wish to introduce amnesty laws. Crimes under international law are crimes which emanate from a treaty or customary international law and are binding 'on individuals without intermediate provisions of municipal law'.[11] They focus on prohibiting the most serious violations of international humanitarian and human rights law and, due to their severity, have been described as affecting

> the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity.[12]

These crimes subject states to *obligatio erga omnes*[13] to prosecute or extradite perpetrators.

There is no widely accepted list of current crimes under international law, with some experts such as Bassiouni identifying 22 crimes under international law,[14] and others a much more limited list. For the purpose of this research, 'crimes under international law' will refer to genocide, war crimes, crimes against humanity, torture, and disappearances, as these have the most relevance to amnesties in the context of political transitions. For each of these crimes, the extent of states' obligations can vary according to each state's treaty ratifications, the status of the crime under customary international law, the nature of the violence, and the context in which it occurs.

Furthermore, as discussed in the introduction, there are different types of amnesty, and consequently, any assessment of whether an individual state has breached its obligations under international law could depend on whether the amnesty is accompanied by other mechanisms. In addition,

[11] *The Encyclopedia of Public International Law*, cited in Kristin Henrard, 'The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law' (1999) 8 *MSU-DCL Journal of International Law* 595, 606. These crimes also give rise to universal jurisdiction, which will be discussed in ch 7.

[12] M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63, 68.

[13] '[Latin: towards all] (in international law) Obligations in whose fulfilment all states have a legal interest because their subject matter is of importance to the international community as a whole. It follows from this that the breach of such an obligation is of concern not only to the victimized state but also to all other members of the international community. Thus, in the event of a breach of these obligations, every state must be considered justified in invoking the responsibility of the guilty state committing an internationally wrongful act.' Definition from Elizabeth A Martin (ed), *A Dictionary of Law* (Oxford Paperback Reference, 5th edn Oxford University Press, Oxford 2002).

[14] Cited in Henrard (n 11) 607.

the motivation for the amnesty would also be significant where a state was consciously balancing its duty to prosecute against its other international duties, such as the duty to prevent further human rights violations in its attempts to end the violence.[15] Where this is the case, it is not apparent that the duty to prosecute should trump the duty to protect. Indeed, the current UN Secretary General has repeatedly emphasised in his speeches the importance of the responsibility to protect,[16] and in December 2007, he underlined this point by appointing a special adviser on the issue.[17] This duty to prevent violations is contained in the international treaties relating to serious violations, but has frequently been overlooked in favour of requirements to prosecute, which will be explored below.

International humanitarian law has outlined the duty of states to prosecute serious war crimes that occur during international conflicts in the four Geneva Conventions of 1949 and Additional Protocol I of 1977. The conventions require each state party to criminalise 'grave breaches',[18] and stipulate that each party

> shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.[19]

Alternatively, each party has the option to extradite the accused to face prosecution in the territory of another state party.[20] This wording places a clear obligation on state parties to prosecute or extradite those responsible for ordering or committing serious war crimes during international conflicts. Scharf claims the commentary to the conventions confirms that this obligation to prosecute is 'absolute', meaning inter alia 'that states parties can under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches'.[21]

[15] The notion of balancing the duty to prosecute against other international duties, such as the duty to prevent, is taken from the following conference presentation: Mark Freeman, 'Debating the New Intolerance for Amnesties', *Transitional Justice and International Law* conference (Oxford, 23 June 2007).

[16] See, eg, Ban Ki-Moon, press release, 'Secretary-General's UN Day Speech' (3 October 2007) UN Doc SG/SM/11203.

[17] UNSC, 'Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council' (7 December 2007) UN Doc S/2007/721.

[18] Each convention lists its own grave breaches, and they include crimes such as wilful killing of protected persons, torture or inhuman treatment, wilfully causing suffering or serious injury to body or health, extensive destruction of property not justified by military necessity, wilfully depriving a civilian of the right to a fair and regular trial, and unlawful confinement of civilians. For a discussion, see Michael P Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41, 43.

[19] Geneva Conventions (adopted 12 August 1949, entered into force 21 October 1950), common arts 49 (Geneva I), 50 (Geneva II), 129 (Geneva III), and 146 (Geneva IV).

[20] *Ibid*.

[21] *Ibid* 44.

The situation is less clear regarding internal conflicts, as common article 3 of the Geneva Conventions, relating to non-international conflicts, does not contain an explicit duty to prosecute.[22] Furthermore, Additional Protocol II, which regulates warfare in non-international conflicts that meet strict criteria[23] provides that:

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[24]

The Commentary on the Additional Protocols asserts that this provision is intended

> to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided.[25]

According to the International Committee of the Red Cross (ICRC), this amnesty should only cover 'combat immunity', which would ensure that a combatant cannot be punished simply for participating in the conflict, 'including killing enemy combatants, as long as he respected international humanitarian law'.[26] This means that, where war crimes were committed, for example, by a failure to apply the minimum standards of common article 3 of the Geneva Conventions,[27] the ICRC argues it was still intended that the perpetrators would be prosecuted, and that an amnesty law

[22] Henrard (n 11) 617.

[23] Additional Protocol II only applies to conflicts that 'take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. In fact, it specifically excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977 art 1.

[24] *Ibid* art 6(5).

[25] Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, Geneva 1987) [4618].

[26] Letter from Dr Toni Pfanner, Head of the Legal Division, ICRC Headquarters, Geneva, cited in Douglass Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities' (1996) 59 *Law and Contemporary Problems* 197, 218. For a discussion, see Ronald C Slye, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* 173, 178.

[27] These minimum standards prohibit the following crimes against protected persons (ie, civilians and combatants who are *hors de combat*): '(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.' Common art 3 of Geneva Conventions 1949.

would not cover such crimes even during an internal conflict. The ICRC recently reiterated this position in their study of customary international humanitarian law, although this study considered only a small number of amnesty laws.[28] The duty to prosecute war crimes occurring during internal conflicts has been reinforced by the jurisprudence of the ad hoc tribunals and the provisions of the Rome Statute of the ICC.[29]

In contrast, the Plenary Meeting Notes for Additional Protocol II seem to show that the provision was regarded as a recommendation designed to promote reconciliation in post-conflict societies[30] and that a proposal to exclude individuals who committed crimes against humanity from any amnesty was rejected.[31] Therefore, it would appear that the duty to prosecute serious war crimes occurring during non-international armed conflicts, remains permissive rather than mandatory. This view has been supported by the South African Constitutional Court in the *AZAPO* case[32] and the Salvadorean Supreme Court of Justice in its decision on the Amnesty Law.[33]

Since the Second World War, several subject-specific conventions relating to crimes under international law have been formulated to combat impunity, beginning with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[34] This convention requires contracting parties to enact appropriate legislation to enforce the convention and to provide effective penalties for those guilty of committing acts of genocide.[35] It provides that prosecutions would be conducted either before the national courts of the state where the crime occurred or before a competent international tribunal.[36] Although this international tribunal did not exist for most of the time this convention has been in force,[37] the

[28] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol 1: Rules (ICRC and Cambridge University Press, Cambridge 2005), rule 159. Volume Two of this study looks at 'Practice' and discusses six treaties (Additional Protocol II, plus five peace treaties), which provide for amnesty; and 17 amnesty laws from 11 states. In addition, it looks to other sources of practice including national legal provisions governing the grant of amnesty, military manuals, national and international case law and UN resolutions. However, in each case, the number of sources employed is comparatively small.

[29] ICC St art 8(2)(c).

[30] Karen Gallagher, 'No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone' (2000) 23 *Thomas Jefferson Law Review* 149, 177.

[31] *Ibid* 177–8.

[32] *Azanian Peoples Organization* (*AZAPO) v the President of the Republic of South Africa* (CCT 17/96) (8) BCLR 1015 (CC) [30–32] (S Afr).

[33] Corte Suprema de Justicia, 20/05/93, '*Resolución de la Demanda de Inconstitucionalidad presentada por Joaquín Antonio Cáceres Hernández*', No 10-93 [1993] (El Sal)

[34] There are a number of other subject-specific conventions relating to international crimes, such as those that address apartheid or terrorism.

[35] Convention on the Prevention and Punishment of the Crime of Genocide 1948 (opened for signature 9 December 1948, entered into force 12 January 1951) 78 UNTS 1021, (Genocide Convention) art 5.

[36] *Ibid* art 6.

[37] The ICC will now perform the role of the envisaged international tribunal.

duty to prosecute contained in the convention's provisions is undeniable and cannot be avoided by introducing amnesty laws. The scope of the Genocide Convention to address situations of serious human rights violations is, however, limited, as the definition of genocide is restricted to actions taken with an 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[38] This definition suggests two limitations. First, the requirement of 'specific intent literally to destroy a substantial portion of the population of a target group'[39] does not necessarily apply to many conflict situations. Secondly, the omission of acts directed against 'political groups',[40] means that many situations of mass violence, such as South America's 'dirty wars', are not included in the scope of the Genocide Convention, and hence excluded from its obligation to prosecute.

The 1984 Convention Against Torture or Inhuman or Degrading Treatment or Punishment places an obligation on each state party to criminalise torture in its legal system and impose appropriate penalties on perpetrators.[41] According to the convention, torture can only be committed

> by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[42]

Therefore, acts which may commonly be described as torture but are perpetrated by members of armed groups fighting against the state do not trigger an obligation to prosecute under this convention. The convention requires any state party, in which an alleged torturer is present, to investigate the facts[43] and, if appropriate, 'submit the case to its competent authorities for the purpose of prosecution' or extradite the suspect.[44] This wording is more ambiguous than the explicit obligations outlined in the Genocide Convention, and consequently has caused many commentators to argue that there is a degree of permissiveness regarding the manner in which a state must carry out its duties under the Convention Against Torture, as it 'does not explicitly require a prosecution to take place, let alone that punishment be imposed and served'.[45] It seems, instead, to leave the decision on whether to prosecute alleged torturers to the prosecutorial

[38] Genocide Convention, art 2.
[39] Scharf (n 18) 45.
[40] *Ibid* 47.
[41] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), art 4.
[42] *Ibid* art 1(1). This understanding of torture as a discrete crime applies in peacetime. In contrast, when torture occurs during a conflict and can be treated as a war crime, or where it is sufficiently systematic and widespread to be considered a crime against humanity, private individuals can be held accountable. See Antonio Cassese, *International Criminal Law* (Oxford University Press, Oxford 2003) 118.
[43] Convention Against Torture, art 6(2).
[44] *Ibid* art 7(1).
[45] Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537, 2604.

authorities. The prosecutors may, after considering the case, decide not to proceed for a number of reasons such as a lack of evidence, or because they believe that the prosecution would not be in the public interest, perhaps because it would risk instigating further violence. The scope for prosecutorial determinations on whether to proceed indicate that the duty to prosecute torture, although explicit, is not mandatory.

Forced disappearance has recently moved towards recognition as an international crime. It was first prohibited by the Inter-American Convention on Forced Disappearances of Persons, in which state parties undertook

> to punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories.[46]

The UN has recently created a Convention for the Protection of All Persons from Enforced Disappearance, which was approved by the UN Human Rights Council on 23 June 2006,[47] and has been signed by 72 states, with one ratification.[48] This convention will require each state party to 'take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law',[49] and if it has 'a person alleged to have committed an offence of enforced disappearance' within its territory to extradite the person or 'submit the case to its competent authorities for the purpose of prosecution'.[50] It continues that the authorities should take their decision on whether to proceed with the prosecution 'in the same manner as in the case of any ordinary offence of a serious nature' under the state's domestic law.[51] Furthermore, the Convention allows for

> [m]itigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance.[52]

These mitigating circumstances may, 'depending on the precise operation of national law, have an impact on the penalty imposed'.[53] Therefore, it

[46] Inter-American Convention on Forced Disappearance of Persons, 1994 art 1.

[47] UNHRC 'International Convention for the Protection of All Persons from Enforced Disappearance' Res 2006/. . . (23 June 2006) UN Doc A/HRC/1/L.2.

[48] OHCHR, 'International Convention for the Protection of All Persons from Enforced Disappearance: Ratifications and Reservations' (19 April 2007) <http://www.ohchr.org/english/countries/ratification/16.htm> accessed 27 January 2007.

[49] 'International Convention for the Protection of All Persons from Enforced Disappearance' art 4.

[50] *Ibid* art 11.

[51] *Ibid* art 11.

[52] *Ibid* art 7(2).

[53] Susan McCrory, 'The International for the Protection of all Persons from Enforced Disappearance' (2007) 7 *Human Rights Law Review* 545, 553.

appears that the duty to prosecute disappearances under this convention will be similar to the obligations imposed by the Convention Against Torture.

The relationship between amnesties and crimes under international law is significant for the development of customary international law, and particularly for understanding the extent of the duty to prosecute crimes against humanity, as this group of offences has not been codified. The recognition of the criminality of crimes against humanity under international law does not automatically imply a duty to prosecute.[54] This duty must be found by considering the existence or absence of relevant domestic legislation; UN General Assembly resolutions; and the judgments of domestic courts. Whilst strong support for this duty might resonate from some sources, such as the UN General Assembly resolutions, these resolutions are not binding. Indeed, states continue to introduce amnesty laws for crimes against humanity. For example, on 10 November 2000 Angolan president, José Eduardo dos Santos, stated 'I am presenting a law to the National Assembly, to grant amnesty to individuals, who have committed crimes against humanity in armed conflict, if they renounce the war'.[55] The law was approved by the Angolan parliament on 29 November 2000, with 112 votes in favour and 16 against.[56]

In addition to states introducing amnesties for crimes that occurred within their jurisdiction, state practice is also evident from the involvement of states in peace agreement mediations or treaty negotiations. As will be explored further in chapter 8, there are numerous examples where states and international organisations have supported negotiations and peace agreements which offered amnesties to combatants. Indeed, many international actors have offered financial or material support to amnesty processes following their implementation.[57] Furthermore, the lack of consensus on the issue of amnesty among the states negotiating the Rome Statute of the International Criminal Court illustrates that a firm state practice has not yet been established.[58]

Therefore, whilst there might be a permissive duty to prosecute, it cannot yet be said to be mandatory, as state practice does not reflect a general recognition of the norm. Furthermore, for much of the period since the Nuremberg judgments, 'crimes against humanity' have been understood

[54] Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International, The Hague 2002) 205.

[55] ——, 'Angola; President Offers Amnesty' *Angola Peace Monitor* (London 30 November 2000).

[56] ——, 'Parliament passes amnesty bill' *BBC Summary of World Broadcasts* (2 December 2000).

[57] For a detailed analysis of state practice in relation to amnesties, see Charles P Trumbull, 'Giving Amnesties a Second Chance' (2007) 25 *Berkeley Journal of International Law* 283, 296–9.

[58] The negotiations on amnesty at the Rome Conference will be discussed in more depth in ch 6.

to require a nexus to armed conflict, although the International Criminal Tribunal for the Former Yugoslavia (ICTY) has moved away from this position and delegates at the Rome Conference declined to include it in the ICC Statute.[59] Nonetheless, this nexus may still apply for crimes against humanity committed during much of the post-war period.

When individual case studies are analysed to determine the impact that a state's perception of its legal obligations had on the scope of its amnesty, it appears that amnesties for crimes under international law have often been specifically designed to fulfil political objectives, without regard for legal duties. For example, the 1972 Simla Agreement[60] between India and Pakistan provided inter alia amnesty for 195 Pakistani soldiers who had been accused of crimes against humanity and genocide. In this instance, the amnesty was used as a trade-off to obtain Pakistan's recognition of Bangladesh's independence and to persuade Pakistan to drop its case against India at the International Court of Justice.[61] Here it is clear that the perpetrators of crimes under international law were used as pawns in a wider political dispute, and that consequently the states concerned felt that they did not have to prosecute these individuals, if doing so conflicted with their other goals. Political objectives were also paramount in the introduction of the 1953 French amnesty law,[62] which was specifically designed to grant immunity to French citizens who had been conscripted into the German army and then forced to perpetrate massacres. Here, the state was willing to amnesty crimes against humanity to promote national unity. Amnesty for crimes under international law was also regarded as a precondition for peace in South Africa, where amnesty[63] was applied to apartheid-era crimes that could be described as crimes against humanity provided they were viewed as having political motives (although the crime of apartheid itself was not addressed). Here, it was considered necessary to amnesty these crimes to ensure a stable transition to democracy, as explored in Case Study 9.

In contrast to amnesties that are designed to grant immunity for crimes under international law, there are an increasing number that exclude some or all of such crimes. For example, crimes against humanity were explicitly excluded in the 1987 Nicaraguan amnesty law.[64] In this instance, there were political benefits for the Sandinista government in denying amnesty for these crimes, as its opponents had been convicted of crimes under

[59] Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *American Journal of International Law* 43, 45–6.

[60] Simla Agreement on Bilateral Relations between India and Pakistan 1972.

[61] Scharf (n 18) fn 100.

[62] *Loi No 53-112 portant amnistie en faveur des Français incorporés de force dans les formations militaires ennemies*, 1953 (Fr).

[63] Promotion of National Unity and Reconciliation Act, 1995 (S Afr).

[64] *Ley de Amnistía para Detenidos por Violación de la Ley de Mantenimiento del Orden y Seguridad Pública*, 1987 (Nicar) art 2.

Case Study 9: Amnesty in Exchange for Truth in South Africa

From 1948 South Africa was ruled by a white minority government, which enforced a brutal policy called apartheid based on the separation of individuals of different races. This resulted in hundreds of thousands of individuals being resettled and suffering discrimination. Those who opposed the regime were tortured and murdered. The repression was so severe that apartheid itself has been outlawed as a crime against humanity in an international convention. Despite the repression, armed opposition groups did arise, including the African National Congress (ANC), and these groups also engaged in crimes under international law, such as torture and disappearances, albeit on a smaller scale than the state violence.

In 1990, negotiations began between the government and the ANC to ensure a transition to democratic rule. In order to facilitate these talks, the government released many members of the ANC from prison and granted temporary immunity from prosecution to ANC members in exile. The talks resulted in the creation of an interim constitution, which initially did not mention an amnesty. But, as a result of a last-minute compromise between the outgoing and incoming governments, and in response to threats of violence from extreme right-wing groups, provisions for amnesty and the South African Truth and Reconciliation Commission (TRC) were added in an epilogue.

Following the adoption of the interim constitution, efforts were made to engage with the public by conducting consultations across South Africa with individuals, community groups, and political parties, before the enactment of the legislation to create the TRC.

The Promotion of National Unity and Reconciliation Act came into effect on 15 December 1995. It differed from previous truth commissions by comprising three committees: (1) Committee on Human Rights Violations, to hear the testimony of victims; (2) Committee on Amnesty, to decide whether to grant amnesty following individual applications; and (3) Committee on Reparation and Rehabilitation, to recommend reparations measures to the government. It was intended that amnesty would only be offered for acts 'associated with a political objective' in exchange for 'full disclosure of the facts'. The scope of political crimes was viewed as including crimes under international law. This was seemingly the most contentious aspect of the TRC's work and has been debated in many academic papers and newspaper articles both within and outside South Africa.

The process of exchanging amnesty for truth meant that although, like many other amnesty processes the South African amnesty was born from a political comprise during a transition in which none of the parties had a monopoly on power, amnesty came to be viewed not simply a necessary compromise, but also as a virtuous action. This perception was based on a number of factors, including a perception that granting truth in exchange for amnesty rather than formal prosecutions offered a more inclusive, restorative approach to

past crimes that could foster reconciliation, rather than reinforcing differences between communities. It was also argued that granting amnesty resonated more closely with indigenous cultural traditions, such as *ubuntu*, which call for tolerance rather than retribution. The work of the TRC was also viewed as essential in establishing a common history, and the amnesty was seen as a necessary part of the process of memorialisation, without which only a limited or partial truth would be revealed. The chair of the TRC, Archbishop Desmond Tutu, was instrumental in developing these conceptions of the TRC's work.

The Amnesty Committee received 7,116 applications, mostly from lower-level offenders, and granted amnesty to 16 per cent of the applicants. The majority of the applications denied were refused because they related to common crimes, rather than political offences, and therefore were ineligible.

To be effective, the bargain of amnesty in exchange for truth requires that eligible offenders who do not apply for amnesty or fail to comply with its conditions will face prosecution. However, since the Amnesty Committee held its final public hearings in 2000, very few prosecutions have been pursued. And now, it seems highly unlikely that any will take place as the National Prosecuting Authority has issued a prosecution policy for past crimes, which resembles the mechanisms in place under the Amnesty Committee, but with broader criteria for who is eligible, and without a requirement that the information revealed be made public. At the time of writing, this prosecution policy was the subject of legal challenges launched by victims and human rights organisations before the domestic courts in South Africa.

***Sources**: John Dugard, 'Retrospective Justice: International Law and the South African Model' in A James McAdams (ed), Transitional Justice and the Rule of law in New Democracies (University of Notre Dame Press, Notre Dame IN, 1997); John Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question' (1997) 13 South Africa Journal of Human Rights 258; John Dugard, 'Reconciliation and Justice: The South African Experience' (1998) 8 Transnational Law and Contemporary Problems 277; Desmond Tutu, No Future without Forgiveness (Rider, London 1999); Antjie Krog, Country of my Skull (Jonathan Cape, London 1999); Charles Villa-Vicencio and Wilhelm Verwoerd (eds), 'Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa' (Zed Books, London 2000); Alex Boraine, A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission (Oxford University Press, Cape Town 2000); Richard A Wilson, The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State (Cambridge University Press, Cambridge 2001); Jeremy Sarkin, Carrots and Sticks: The TRC and the South African Amnesty Process (Intersentia, Antwerp 2004); Antje Pedain, 'Was Amnesty a Lottery? An Empirical Study of the Decisions of the Truth and Reconciliation Commission's Committee on Amnesty' (2004) 121 South African Law Journal 785; Graeme Simpson and Nahla Valji, 'Backroom Deals with Apartheid Perpetrators undermine TRC Rationale' The Sunday Independent (South Africa 29 July 2007).*

international law committed before July 1979, and the Sandinistas were reluctant to release them from prison.[65] More recently, in the amnesty process in Afghanistan in 2005, immunity was offered to 'rank and file' members of the Taliban provided they were not linked to al-Qaeda or responsible for crimes against humanity.[66] Here, the amnesty was used to weaken the Taliban, but it is possible that by excluding the perpetrators of crimes against humanity, the Afghani government was seeking to re-emphasise the organisation's responsibility for these crimes whilst failing to address similar crimes committed by other actors, who are supportive of the regime. This viewpoint is reinforced by the introduction of a further amnesty in Afghanistan in March 2007, which granted impunity for the serious human rights violations committed by warlords, many of whom were in the government or parliament.[67]

Where a regime chooses to exclude crimes under international law from an amnesty, it is not always possible to tell whether it is doing so to comply with its international obligations or simply to respond to domestic pressures. Similarly, where the text of an amnesty law states that it specifically excludes crimes that are contrary to international law, the exclusion may be a response to international pressure. For example, the limited amnesty laws which have been introduced in the Balkans following the conflicts in the region were often the result of international pressure to create amnesties to encourage refugees to return home, but also to co-operate with the work of the ICTY.[68] Similarly, the 1999 Lusaka Agreement provided amnesty for combatants in the Democratic Republic of Congo, but excluded *génocidaires*,[69] mass killers and perpetrators of crimes against humanity[70] who had to be handed over to the ICTR.

A further problem with the exclusion of crimes under international law is that many amnesties will exclude crimes that resulted in the death of the victim, but will allow amnesty for torturers where the victim survived. For example, the 1991 Angolan amnesty law simply excluded 'crimes leading to death committed by members of the armed forces'.[71] Similarly, the 1987

[65] John J Moore Jr, Note, 'Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador' (1991) 43 *Stanford Law Review* 733.

[66] Carlotta Gall, 'Afghanistan Offers Amnesty to Wanted Taliban Rebels' *The New York Times* (Kabul, Afghanistan 9 May 2005); Ron Synovitz, 'Afghanistan: Karzai Confirms Amnesty Offer is for all Willing Afghans' *Radio Free Europe* (Prague 10 May 2005).

[67] National Reconciliation Charter (March 2007) (Afghanistan).

[68] An obligation to cooperate with the ICTY was contained in the amnesties in Bosnia-Herzegovina; Croatia; FYR Macedonia; and Kosovo. In addition, the 2001 amnesty in Yugoslavia exempted crimes against humanity, although it did not make a specific reference to the ICTY.

[69] Lusaka Ceasefire Agreement, 1999 (Dem Rep Congo) ch 8.2.2. This provision related to members of the Interahamwe, armed militias who carried out genocide in Rwanda in 1994, before fleeing to the DRC.

[70] *Ibid* Annex A, ch 9.2. 'Other war criminals' just had to be 'handled'.

[71] ——, 'Angola Decrees Amnesty to Criminals' *Xinhua News Agency* (Luanda 16 July 1991).

Ugandan amnesty law excluded murder, kidnapping, genocide and rape, but did provide immunity to torturers.[72] Although Angola has yet to ratify the Convention Against Torture, Uganda became a state party the year before it introduced the amnesty law, but nonetheless felt able to amnesty torturers.

Even where crimes under international law are clearly excluded from the provisions of an amnesty, the process can be further complicated during implementation. First, as discussed in chapter 2, where there are large numbers of offenders, it is unlikely that every perpetrator of crimes under international law will be investigated and prosecuted. Secondly, the excluded crimes under international law are often not fully incorporated into domestic law, which may permit individuals to benefit from an amnesty under national law when it would have been denied using the broader definitions recognised in international law.[73] This is particularly likely where the judiciary were corrupted by the former regime, causing them to interpret amnesty laws in as wide a manner as possible to benefit more perpetrators than was intended.

Where the screening process of those eligible for amnesty is conducted by an independent commission, there can also be difficulties when dealing with the complex definitions of crimes under international law, particularly where the commissioners are not appropriately trained legal professionals. This problem arose in Algeria after the 1999 amnesty,[74] where, although serious human rights violations were officially excluded from the law, 'in practice, the probation committees tended to exonerate *repentis* after a cursory examination', according to victims' rights groups.[75] Furthermore, screening processes to exclude perpetrators of crimes under international law may be constrained by many of the same difficulties that can afflict courts during transitional periods, such as a lack of evidence and personnel. Furthermore, where an independent amnesty commission is granted wider powers, such as administering DDR programmes, there may be an incentive for the amnesty applicant to lie and therefore obtain amnesty and the benefits of the programme.[76] As will be explored in the next chapter, these problems could potentially be alleviated by offering amnesty in exchange for full disclosure before a truth commission, although problems remain, however, where prosecution for those who

[72] Amnesty Statute, 1987 (Uganda).

[73] For a more detailed discussion of national jurisprudence, see ch 5.

[74] *Loi relative au rétablissement de la Concorde civile, Loi No 98-08, 1999* (Alg).

[75] Human Rights Watch, *World Report 2002: Algeria* (Human Rights Watch, New York 2002). The probation committees were presided over by the general prosecutor responsible for the area and composed of representatives of the Ministries of Defence and of the Interior, the commander of the gendarmerie for the *wilaya*, the chief of security for the *wilaya*, and the head of the Bar Council or his or her representative.

[76] See the introduction for a discussion of the difficulties of trials during transitional periods.

refuse to participate is not pursued, or where the investigative powers of the commission are curtailed. Finally, where amnesty laws exclude crimes under international law, perpetrators of these crimes should face prosecution, but this rarely occurs, and consequently the theoretical denial of amnesty for crimes under international law often becomes de facto impunity.

This section has argued that although crimes under international law such as genocide and grave breaches of the Geneva Conventions may impose a mandatory duty on states that are parties to the relevant treaties to prosecute or extradite offenders, such a duty may not always apply to crimes committed under dictatorships or during internal conflicts, due to the restricted definitions of the crimes. For these situations, the provisions of Additional Protocol II or the customary international law obligations on crimes against humanity may be applicable, but this section has argued that these obligations only impose a permissive, rather than mandatory, duty on states. This more lenient understanding is illustrated by state practice, which shows that although states are increasingly willing to exclude crimes under international law from amnesty laws, they tend to do so when the exclusion complements their domestic or international policy objectives. In contrast, where their political objectives, such as securing a peace treaty following an internal conflict, may be better served by amnestying crimes under international law, states continue to do so, regardless of the development of international law. Therefore, it is not yet possible to assert that state practice established an absolute prohibition on amnesties for crimes under international law.

Should Amnesties Treat Political Crimes Differently?

Political crimes are frequently included in amnesty laws; indeed, offering protection to political offenders is often the purpose of an amnesty. The concept of political offences has been described as 'elastic' by Van den Wyngaert, as it can encompass a wide range of behaviours and offences that stretch across a 'spectrum' from 'extreme purely passive offences such as political dissidence' to 'other active offences of opposition against the prevailing social order or against the ruling group in power'.[77] The few 'purely' political crimes that are traditionally recognised by state practice are those that are 'exclusively directed against the state or the political organisation without injuring private persons, property or interests', and offering an amnesty for such crimes is not contentious under international

[77] Christine van den Wyngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (Kluwer, The Hague 1980) 95.

law.[78] Amnesties for purely political crimes usually include the following activities: treason, sedition, subversion, rebellion, using false documents, forgery, anti-government propaganda, possessing illegal weapons, espionage, membership of banned political or religious organisations, desertion and defamation. A political amnesty may only cover the less serious of these offences, for example, it could grant immunity for the authors of illegal or defamatory publications, whilst permitting criminal prosecutions of individuals accused of espionage. When granting amnesty for purely political crimes, it is usual for the state to specify certain provisions of its penal code or particular pieces of legislation. For example, the 1987 Indo-Sri Lanka Accord required that Sri Lanka release individuals who had been detained under the 1979 Prevention of Terrorism Act and other emergency legislation,[79] which provided for the prosecution of any person who inter alia 'causes the death of any specified person, or kidnaps or abducts a specified person'.[80]

As argued in chapter 2, there are justifications for treating political offenders differently to common criminals. This has meant that the special status of political crimes has been recognised in refugee law[81] and extradition law;[82] however, both extradition and refugee law prohibit recognising genocide and war crimes as political.[83] In contrast, as will be shown in the case studies below, national amnesties have offered immunity for crimes under international law where they are deemed to have been committed with political motives.[84]

Defining political crimes is further complicated by common offences which are related to political crimes, as most common crimes

[78] Christine van den Wyngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (Kluwer, The Hague 1980) 95.

[79] Indo-Sri Lanka Accord 1987 [2.11].

[80] Prevention of Terrorism (Temporary Provisions) Act, No 48 1979 (Sri Lanka) art 1. Here 'specified person' means '(a) the President; (b) a Judge of the Supreme Court, Court of Appeal, High Court, District Court, Magistrate's Court, Primary Court or any other Court of First Instance; (c) any representative or official of a foreign State or any official or other agent of an international organisation of an inter-governmental character; (d) a member of Parliament or of a local authority; (e) any member of a commission established under the Special Presidential Commissions of Inquiry Law, No 7 of 1978, or under the Commissions of Inquiry Act; (f) juror, counsel or officer of court; and (g) any member of the Armed Forces, Police Force and any other Forces charged with the maintenance of public order' (art 31(1)).

[81] See Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 ('Refugee Convention'), arts 1 and 33. For a detailed discussion, see Van den Wyngaert (n 77) 74–89.

[82] Van den Wyngaert states that 'extradition acts and treaties usually refer to the term "political offence" without further specifying or defining it', Van den Wyngaert (n 77) 103. See also Ronald C Slye, 'Justice and Amnesty' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, London 2000) 179–80 and Colm Campbell, 'Extradition to Northern Ireland: Prospects and Problems' (1989) 52 *Modern Law Review* 585.

[83] For a discussion of the relevant treaty provisions, see Campbell (n 82) 588–9.

[84] Van den Wyngaert (n 77) 139–62.

> can, as a matter of fact, be considered as political crimes under certain circumstances, namely when they are committed with a political purpose or when they have political consequences.[85]

There has been disagreement in extradition law on how to distinguish between common crimes and political offences, with states favouring either subjective,[86] objective[87] or mixed[88] approaches. When a state is deciding to amnesty political crimes, it may pursue a broad approach and grant amnesty for both 'political crimes and related common crimes'.[89] Often when a state does this, it simply amnesties the crimes without explicitly defining which actions are included in this description. In such cases, it is the role of the courts to determine whether amnesty should be applied to specific acts.

Alternatively, a state could provide more guidance in the legislation. For example, in the 1996 Guatemalan amnesty law, criminal and human rights violations are grouped into three categories: (1) clearly political crimes, such as sedition and treason, for which amnesty is granted;[90] (2) serious human rights violations which remain liable for prosecution;[91] and (3) common crimes which are 'directly, objectively, intentionally and causally' linked to war-related political acts.[92] For this final category, the appellate courts must determine on a case-by-case basis whether to grant amnesty by considering whether there is a 'rational and objective relation between the goal of the crime and the crime committed'.[93] For this decision, the burden of proof is on the person opposing the amnesty.[94] As the focus here is on the perpetrator's intentions, rather than the outcome of the act, it appears that the Guatemalan amnesty adheres to the 'subjective'

[85] *Ibid* 95.

[86] The 'subjective approach' which 'emphasises the intentions of the perpetrator' to determine whether he or she was politically motivated, 'regardless of whether the act had a political outcome'. Also known as the 'predominant motive test'. See Van den Wyngaert (n 77) 109 and Anurima Bhargava, Note, 'Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission' (2002) 102 *Columbia Law Review* 1304, 1329.

[87] The 'objective approach', which focuses instead on the 'political context of the act and its actual outcome or consequences'. In this instance, if there is a political outcome, the act is considered a political crime, 'regardless of the intentions of the perpetrator'. See Van den Wyngaert (n 77) 109.

[88] The 'mixed approach' combines the other two approaches 'requiring that in order to be political, the offence should be at the same time subjectively and objectively a political crime'. See Van den Wyngaert (n 77) 109.

[89] Such language has been used in many amnesties; eg the 1996 Angolan amnesty granted immunity for 'all crimes against the internal security of the state and all related crimes committed by national citizens in the framework of the armed conflict'. See *Lei* 11/96 1996 (Angl).

[90] *Ley de Reconciliación Nacional*, 1996 (Guat), art 2.

[91] *Ibid* art 8.

[92] *Ibid* art 5. For discussion of the legislation, see Inter-Am. CHR, 'Annual Report 1996: Guatemala' (14 March 1997) OEA/SerL/V/II95 Doc 7 rev [30].

[93] Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 *Human Rights Quarterly* 843, 852.

[94] *Ibid* 852.

approach to determining whether common crimes should be treated as political crimes. This approach was also pursued in 1946 Czechoslovak amnesty which granted impunity to

> any act committed between 30 September 1938 and 28 October 1945, the object of which was to aid the struggle for liberty of the Czechs and Slovaks, or which represented just reprisals for actions of the occupation forces and their accomplices.[95]

Similarly, under the 1985 Uruguayan amnesty law,[96] political crimes were considered to be 'those committed for motives which were directly or indirectly political' and common crimes were

> those that were committed with a political purpose as with the political crimes or were committed to facilitate them, to prepare them, to complete them, to aggravate their effects or to prevent their punishment.[97]

The objective approach is often used in self-amnesties to protect state agents from prosecution for any actions they might have taken in accordance with an official policy of repression or armed conflict against insurgents. For example, the 1975 Bangladeshi amnesty, which benefited state agents who had participated in a successful coup, granted immunity for

> any act, matter, or thing done or step taken by such person in connection with, or in preparation or execution of any plan for, or as, necessary steps towards, the change of government of the People's Republic of Bangladesh and the proclamation of Martial Law on the morning of 15 August 1975.[98]

Similarly, the 1995 Peruvian amnesty law granted amnesty for 'common or military crimes, whether under the jurisdiction of civil or military courts', but it required that the crime 'derived, originated from, or [was] a consequence of the fight against terrorism . . . between May 1980 and June 1995'.[99] As applied, the only significant restriction this imposed is temporal.[100]

The objective approach has also been used to grant amnesty for conflict-related crimes, meaning all crimes that occurred within a particular context and had a political outcome, regardless of whether there was a political intent. For example, the 1994 Lusaka Protocol granted amnesty for 'illegal acts committed by anyone . . . in the context of the current

[95] Law 'concerning the legality of actions related to the fight for renewed freedom of the Czechs and Slovaks and the exemption of certain crimes from the statute of limitations', 1946 (Czechoslovakia).

[96] Ley No 15.737—*Se aprueba la Ley de amnistía*, 1985 (Uru).

[97] *Ibid* art 2.

[98] Indemnity Ordinance Act, 1975 (Bangl) art 2(a).

[99] *Ley conceden amnistía general a personal militar, political y civil para diversos casos*, 1995 (Peru) art 1.

[100] William W Burke-White, 'Protecting the Minority: A Place for Impunity? An Illustrated Survey of Amnesty Legislation, Its Conformity with International Legal Obligations, and Its Potential as a Tool for Minority-Majority Reconciliation' (2000) *Journal of Ethnopolitics and Minority Issues in Europe*, 10.

conflict'.[101] Angola continued to use similar wording in its subsequent amnesty laws. The same approach was also employed by France to address crimes which had occurred during the Algerian war of independence. Here, the French government granted amnesty in 1966 for 'crimes and misdemeanours committed in direct relation to the events in Algeria'.[102] The provisions were even wider for the 1946 Italian amnesty law,[103] which granted amnesty for wartime crimes connected in any way to the official policies of Fascism, or indeed, any such crime committed at any time before 1946.

Amnesty laws that have applied a more mixed approach to defining political crimes can also be identified. For example, the 1987 Salvadorean amnesty law recognised a political crime could be committed by

> any person with motive, occasion, in reason or as a consequence of the armed conflict, without taking into account militancy, affiliation, political status or ideological beliefs of one or other parties.[104]

It has been argued that 'motive', 'occasion', and 'consequence' each offer broad loopholes 'as they appear to permit amnesty for any crimes proximate to war, which in El Salvador, probably covers everything'.[105] Similarly, the 2000 Immunity Decree in Fiji declared that a political offence is

> an offence allegedly committed by any person or persons between the 19th day of May, 2000 and the 13th day of July, 2000 (both dates inclusive), such offence being either directly or indirectly prompted and motivated by the attempted illegal takeover of the Government on the 19th day of May, 2000 and the political developments during that period and including any offence which has been subject of police complaint, which was prompted or motivated by the political developments during the relevant period.[106]

It is clear that in this instance, the crime must both have political motives and occur within a specified political context.

To date, the most thorough consideration of political crimes relating to amnesty laws occurred in South Africa.[107] This process began in 1990, when the South African government requested Carl Norgaard, a Danish jurist who was then president of the European Commission on Human Rights, to compile a list of principles to determine which common crimes

[101] Lusaka Protocol, 1994 (Angl) Annex 6, s I, art 5.

[102] *Loi portant amnistie d'infractions contre la sûreté de l'Etat ou commises en relation avec les événements d'Algérie*, 1966 (Fr) art 1.

[103] *Decreto Presidenziale 22 giugno 1946, No 4. Amnistia e indulto per reati comuni, politici e militari* (known as '*Amnistia Togliatti*'), 1946 (Italy).

[104] *Ley de Amnistía para el Logro de la Reconciliación Nacional, Decreto No 805, Diario Oficial No 199*, 1987 (El Sal) art 2.

[105] Moore (n 65) 766.

[106] Immunity Decree, 2000, s 2 (Fiji).

[107] For an overview of the South African amnesty, see case study 9.

should be treated as political offences.[108] Norgaard based his principles on the political offence exception in extradition law, and they were enacted in the Indemnity Act of 1990,[109] which provided for the release of political prisoners. These principles listed factors to be considered when determining whether a crime was a political one or not, including:

> (a) whether the motive was political or private; (b) the context in which the offence occurred especially if it was part of a political uprising or disturbance; (c) the nature of the political objective; (d) the legal and actual nature of the offence (rape could never be regarded as a political offence); (e) the object of the offence (committed against the state or private property); (f) the relationship between the offence and the political objective being pursued; and (g) whether the offence was committed in the execution of an order or with the approval of the organization concerned.[110]

These principles subsequently formed the basis for the treatment of political crimes before the Amnesty Committee of the South African TRC. In its constituent legislation, the criteria for determining political crimes are outlined as follows:

> Whether a particular act, omission or offence contemplated in subsection (2) is an act associated with a political objective, shall be decided with reference to the following criteria:
>
> (a) The motive of the person who committed the act, omission or offence;
> (b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
> (c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
> (d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
> (e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
> (f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective

[108] Bhargava (n 86) 1311.

[109] Indemnity Act No 35, as amended by Indemnity Amendment Act, No 124 (1992), 1990 (S. Afr).

[110] Kate Savage, 'Negotiating the Release of Political Prisoners' (Research report written for the Northern Ireland Programme at the Kennedy School of Government at Harvard, 2000). See also Raylene Keightley, 'Political Offences and Indemnity in South Africa' (1993) 9 *South African Journal on Human Rights* 334, 344–7.

> pursued, but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted—
>
> (i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or
> (ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed.[111]

As Sarkin demonstrates in his study on the workings of the Amnesty Committee, these criteria were not uniformly applied, with some provisions such as target of the attack[112] often being ignored in favour of other criteria. Slye suggests that the criterion that was particularly overemphasised was whether

> an authorised superior in a recognised political organization ordered the act, or whether the act was closely related to an explicit programmatic statement of an established political organization.[113]

Slye views this as problematic as it grants power to 'the state, political parties and other political organisations in decisions concerning amnesty' as an individual's application for amnesty may depend on whether the organisation admits to having ordered the act in question.[114] In practice, many superiors would be reluctant to admit ordering acts if doing so would make them liable to prosecution. This could lead to a false conclusion that 'many of the atrocities against civilians were not in pursuit of any legitimate military objective', and a wrongful denial of amnesty.[115] Furthermore, this requirement denies the possibility that certain actions could be classified as political crimes where the perpetrator acted individually or for a political organisation that is not publicly recognised.[116] Finally, it has also been argued that the focus on obeying orders has overshadowed the proportionality requirement.[117]

The potential to recognise an action as a political crime is generally limited under extradition law by the requirement that the action be proportional

[111] Promotion of National Unity and Reconciliation Act, 1995, s 20.3 (S Afr).

[112] Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, Antwerp 2004) 288–98. This book provides a thorough overview of the decisions of the Amnesty Committee on the notion of 'Political Objective'. Sarkin argues that the approach of the committee is inconsistent and he partially credits this to the lack of resources and non-application of precedent.

[113] Slye (n 82) 179–80.

[114] *Ibid* 180.

[115] Gallagher (n 30) 163.

[116] Bhargava (n 86) 1329–30. For a discussion of the committee's application of the criteria of membership, see Sarkin (n 112) 280–8.

[117] Rosemary Nagy, 'Violence, Amnesty and Transitional Law: "Private" Acts and "Public" Truth in South Africa' (2004) 1 *African Journal of Legal Studies*, 15.

to its objectives.[118] Consequently, the principle of proportionality can be applied to extremely serious crimes to prevent the extradition of the accused, where it is deemed the violence used exceeded what was necessary to achieve the political objective. Applying this to human rights crimes can be difficult, however, as it is problematic to determine 'when and how torture and murder *ever* constitute a proportional means to a political objective', and 'how to measure proportionality'.[119] In the context of the South African Amnesty Committee, when the principle was used, 'the proportionality of the act was determined on the basis of the stated objective'.[120] This meant, for example, that torture was deemed disproportionate where there was no reasonable hope of obtaining information,[121] but that there were occasions where the committee felt that serious human rights violations had been proportional to the objectives pursued.[122] In reviewing the decisions of the Amnesty Committee, Sarkin found that the issue of proportionality was a 'central question' in only a minority of cases; and that more often when it was raised 'it generally did not form part of the reasoning of the decisions', and

> was usually only called upon to add weight to the way in which the Committee determined the outcome of the decision.[123]

The requirement of proportionality has arisen in relation to amnesty laws elsewhere; for example, the 1945 Greek amnesty excluded 'common law offences against life and property which were not absolutely necessary to the achievement of the political crime concerned'.[124] There have also been amnesties that have attempted to solve the issue of proportionality by simply excluding all crimes that resulted in death or injury to civilians. For example, 1991 Albanian amnesty excluded persons convicted of terrorist acts that resulted in deaths or serious consequences.[125] Alternatively, amnesties have excluded crimes where the applicable penalties exceeded a defined limit, such as 10 years' imprisonment. For example, the 1946 French amnesty covered

> all offences committed before 8 May 1945 which were or are punished: 1. With penalties of imprisonment less than or equal to two months or a fine less than or equal to 6,000 francs . . .; [or] 2. Penalties of imprisonment less than or equal to

[118] Andreas O'Shea, 'Pinochet and Beyond: The International Implications of Amnesty' (2000) 16 *South African Journal on Human Rights* 642, 660–1.
[119] Nagy (n 117) 15–16.
[120] *Ibid* 15–16.
[121] *Ibid* 15–16.
[122] Emily H McCarthy, Note, 'South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation?' (1997) 3 *Michigan Journal of Law and Race* 183, 213–14.
[123] Sarkin (n 112) 319.
[124] Varkiza Agreement, 1945 (Greece).
[125] Law 'On the Innocence and Amnesty of those formerly Convicted and Political Persecuted', No 7516, 1991 (Albania), art 3.

> six months with application of the law of reprieve and a fine less than or equal to 6,000 francs . . .[126]

A final complication with the criteria of the South African Amnesty Committee is the exemption of crimes committed for personal gain. Whilst it is a recognised principle that political crimes are not personal, problems arose for acts of racial hatred. Here the approach taken by the Amnesty Committee was somewhat inconsistent, as the murder of black people by white people was regarded as personal malice and not a political crime, whereas black people killing white people was viewed as political.[127] Wilson has argued that,

> [g]iven the history of apartheid and degree to which racism is at the centre of state policies of racial superiority, segregation and denationalisation of blacks, it would seem fairly obvious that racism constituted a political motivation per se.[128]

This highlights a difficult issue, as during a conflict situation or oppressive regime most crimes can result from the political context in indirect ways, although to recognise all these actions as political would dilute the political offence exception.

In contrast to the South African approach, which tried to address the question of defining political crimes, there have been a number of amnesties that have made no attempt to distinguish between political and common crimes. For example, the 1978 Chilean amnesty 'applies equally if the crimes were committed out of personal animosity or state policy'.[129] Similarly, the 1988 and 2000 Ugandan amnesties, although directed at offences of a political nature, refrain from expressly requiring that the crimes covered are political. This reluctance to label the actions of amnesty beneficiaries as 'political' could emanate from a fear on behalf of the state that to do so would award the actions of their opponents a degree of legitimacy.

This section has argued that it is an established principle of international law that politically-motivated crimes should be treated differently to other crimes. However, common crimes that are related to political crimes can be treated in a similar fashion, although there is no clear formula yet under international law to determine when such relationships are sufficiently linked. Consequently, states introducing amnesty laws have implemented a number of different approaches to the problem, which place differing

[126] *Law no 46-729 du 16 avril 1946 Loi Portant Amnistie*, (Fr) art 2. These restrictions were loosened in subsequent amnesty laws.

[127] Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, Cambridge 2004) 119. See also Sarkin (n 112) 302–8.

[128] Richard A Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State* (Cambridge Studies in Law and Society, Cambridge University Press, Cambridge 2001) 84. This book provides a thorough discussion of the implications of the failure of the South African TRC to define racism as a political crime.

[129] Burke-White (n 100) 7.

degrees of emphasis on the objectives and outcome of the crimes. Furthermore, states have been willing to include factors such as proportionality and the organisational membership of the accused when outlining the scope of political crimes. The criteria of proportionality could be used to exclude crimes under international law from being labelled as political, which would coincide with the political exception to extradition law. However, it appears that states have been reluctant to pursue this approach explicitly. States have been more willing to exclude crimes that are committed for personal gain, particularly where such crimes are economic.

Impinging On Individual Rights: Amnesties For Crimes Against Civilians and Combatants Who Are *Hors de Combat*

As described in the previous section, when a state is choosing to grant an amnesty, it can decide to include only the crimes committed against itself (ie purely political crimes), which it has standing to amnesty. Alternatively, it could also provide immunity to those persons who committed crimes against individuals who were not involved in violent activities, such as civilians or former combatants who were *hors de combat* due to 'sickness, wounds, detention, or any other cause' and hence entitled to 'be treated humanely' according to common Article 3 of the Geneva Conventions.[130] Although the language used here is borrowed from international humanitarian law, it is envisaged that this category of crimes also applies to individuals who suffer at the hands of a dictatorship, where no conflict exists.

By amnestying crimes against civilians, states deny victims the possibility of seeing those who harmed them brought to justice. Clearly, where states grant such amnesties they cede particular citizen rights, which are enshrined in international treaties and domestic laws, 'to bring justice to past wrongs'.[131] The issue becomes especially contentious when the state itself is responsible for the crimes committed against its citizens, and consequently the government by introducing amnesty is absolving itself of its own sins. In contrast, it is a well-established concept in most legal systems that victims should allow the state to determine which remedies are suitable, rather than the victims themselves pursuing justice, which could result in vigilantism and further injustices. If the prerogative of the state were completely removed in the sphere of human rights violations, it

[130] Geneva Conventions, common art 3.

[131] William W Burke-White, 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' (2001) 42 *Harvard International Law Journal* 467, 470–1. This argument is premised on the notion that formal prosecutions are required to ensure the victims' rights, but it is possible to reason that other forms of justice, such as restorative justice processes that have non-criminal sanctions, could be more effective in meeting the needs of victims. For a discussion of restorative justice processes, see ch 4.

could enable some victims to effectively veto any peace process by threatening to hold perpetrators legally accountable. This could result in the continuation of violence and the creation of more victims, rather than the healing of those who have already suffered. Therefore, it seems advisable that states should be able to grant amnesty for crimes against civilians, provided that they establish consultation mechanisms and alternative processes to meet the needs of victims,[132] and are not simply granting themselves impunity for their own actions.

Crimes against civilians is an extremely broad category of crimes, which can cover a range of activities from theft to serious crimes of physical or sexual violence. It is distinct from crimes under international law, as, although crimes under international law are often perpetrated against civilians, civilians also endure a much broader spectrum of crimes, which should be dealt with separately. In dictatorial or conflict situations, it is likely that crimes against civilians will occur and, as illustrated above; they often subsequently benefit from amnesty. But, it is common for amnesty laws that prevent prosecution for crimes against civilians to make exceptions for certain crimes, the most common of which being rape, murder, kidnapping, and theft.

Do States Amnesty Economic Crimes?

In many situations of mass human rights violations, there are also concurrent epidemics of economic crime, whether in terms of the members of the ruling elite using their power to enrich themselves; foreign corporations exploiting (or perhaps even instigating) political instability for profit; corruption by state officials, usually by extracting bribes or expropriating property; collaboration with enemies by business people; or simply engagement in black market trade by ordinary civilians. In contrast to political crimes, these crimes are usually committed for personal gain, although there can be a degree of pressure on individuals to participate in the lower-level crimes. However, as discussed above, economic crimes can occasionally have political motivations, for example, where extortion and robbery are used to raise funds for an insurgency.

The more serious of these offences, such as the plundering of a state by a kleptocratic government, can affect the legitimacy of the regime whilst in power. It can also have serious implications on the ability of a transitional state to recover from the abusive period, as they will often have large debts to service and few resources available for reconstruction and development. Furthermore, it can have implications for any transitional justice programmes, as the attempts to address the crimes of the past have

[132] For a discussion of the needs of victims, see ch 9.

to compete with projects to ensure a better standard of living for the future. This can be particularly important when it comes to awarding financial compensation to victims of human rights abuses. The exposure of extensive greed and plunder by a former regime can also contribute to undermining any lingering support that it might have as a dictator can usually claim that human rights abuses result from a selfless desire to eradicate the dangers to the state; but there can be no such defence for corruption.[133] Furthermore, 'with crimes of corruption, the public may collectively feel that they are the victims of theft', whereas

> human rights violations generally lack this sense of collective victimisation because in most cases the violations have not affected the majority of the public.[134]

A recent example of the negative impact of economic crimes on public opinion would be the reaction in Chile to the exposure of Pinochet's secret bank accounts.[135]

The risks posed by committing and concealing economic crimes could explain why many repressive governments have chosen not to include them in their amnesty laws, preferring instead to try to distance themselves from the commission of such crimes. For example, the 1978 Chilean amnesty law pardons a wide range of crimes committed by state agents including murder and physical injury, but it excludes inter alia fraudulent crimes committed by public officials.[136] It is accepted that such crimes were committed by state agents, but yet the state appeared unwilling to amnesty their perpetrators. It seems likely that the state wanted to deny its involvement in such crimes as it felt that acknowledging them would undermine its legitimacy and tarnish the image the state was trying to project, namely that it was waging a selfless battle to protect the nation against left-wing extremists. Several amnesties excluded economic crimes, such as embezzlement of public funds, extortion, and bribery.[137] These exclusions have applied both to crimes of corruption committed by state officials and criminal fund-raising activities of opposition groups. Economic crimes were also barred from amnesties by regimes that viewed them as subvert-

[133] Mark Freeman, 'Lessons Learned from Amnesties for Human Rights Crimes', *Transparency International Newsletter* (December 2001).

[134] *Ibid*.

[135] Federico Quilodran, 'Chile's high court strips former dictator Augusto Pinochet of immunity from prosecution in human rights case' *Associated Press* (Santiago 26 August 2004); Adam Thomson 'Pinochet Stripped of Prestige' *Financial Times* (London 15 December 2004); James Cavallaro and Sebastián Albuja, 'The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below* (Hart Publishing, Oxford 2008).

[136] *Decreto Ley de Amnistía*, 1978 (Chile) art 3.

[137] Eg, extortion was excluded from the 1987 Salvadorean amnesty. See *Ley de Amnistía para el Logro de la Reconciliación Nacional, Decreto No 805, Diario Oficial No 199*, 1987 (El Salv) art 3.

ing the political (usually socialist) order, as economic control was viewed as fundamental to the entire social system. For example, the 1989 Albanian amnesty excluded

> illicit appropriation of socialist property according to arts 61–68 of the Penal Code; appropriation of private property according to arts 101–102 of the Penal Code; as well as those persons who have been given uncommutable sentences for various repeated penal offences.[138]

Finally, serious offences for personal enrichment such as drug trafficking seem to be consistently barred from national amnesty laws. For example, the 1997 Tajik amnesty proclaimed:

> Those accused under the following articles of the criminal code of the Republic of Tajikistan are not freed from punishment or criminal liability: 76 [smuggling of narcotics, powerful drugs and poisonous substances], . . . 240 [illegal manufacture, acquisition, storage, transport, dispatch or sale of narcotics], 240/1 [theft of narcotics], 241 [illegal sowing or cultivation of narcotic plants].[139]

Such exemptions could be due, not just to the concept of excluding crimes for personal gain, but also to the negative consequences of such crimes on society as a whole including social mores on drug use, to international pressure to curtail the drugs trade and the recognition by national governments that such transnational criminality often provides a means for non-state actors to obtain currency to buy weapons.

Nonetheless, in many transitional contexts, amnesties have been granted for economic crimes, often recognising that under the previous regime, obtaining basic necessities was hard and individuals were forced to engage in smuggling, black market purchasing or breaking rationing rules. The recognition of these conditions have provided the justification for amnesties following the resolution of conflicts, for example, the 1946 French amnesty following the Second World War covered

1. Individuals convicted for black market purchases or smuggling, the acquisition or utilization of undue rations, when these infractions applied to foodstuffs, clothes, heating or lighting;
2. The first time offenders convicted of theft, hijacking, or concealment of foodstuffs, clothing, heating or lighting.

> The benefits of this amnesty only apply when the crimes are committed with the aim of personal gain: a) The personal or familial needs of the authors or persons living under their roof; b) The needs of the resistance, or escaped prisoners; c) The needs of salaried persons living outside their family.[140]

[138] Decree No 7338, 1989 (Albania), art 1(1).

[139] Law 'On Amnesty for Participants in the Political and Military Confrontation in the Republic of Tajikistan', 1997 (Tajikistan) art 4.

[140] *Law no 46-729 du 16 avril 1946 Loi Portant Amnistie*, (Fr).

Even where the crimes are more serious, such as business people trading with the enemy, amnesty is sometimes granted as the support of the business community is necessary for national reconstruction. This occurred in several countries in Europe after 1945. For example, the 1953 French amnesty covered 'those convicted of trading with the enemy, if their sentences did not exceed five years of prison and a 20,000 franc fine'.[141] Amnesties for economic crimes were also granted during the transition from socialist regimes. For example, the 1989 Czechoslovak amnesty by outgoing President Husak amnestied crimes such as 'unauthorised business activity' which had been outlawed under the repressive communist system.[142]

RESTRICTING AMNESTIES AND THE SCOPE OF THE DUTY TO PROSECUTE

In many amnesty laws, the subject-matter jurisdiction is restricted by geographic and temporal limitations. First, in terms of geographic scope, a state introducing an amnesty law can choose to apply it to the whole of its territory. For example, the 1996 Croatian amnesty covered all

> criminal acts [committed] during the aggression, armed rebellion or armed conflicts, in or relating to the aggression, armed rebellion or armed conflicts in the Republic of Croatia . . . during the period from 17 August 1990 to 23 August 1996.[143]

Alternatively, an amnesty can simply cover the region in which the crimes were concentrated. For example, the 1994 Mexican amnesty applied only to the Chiapas region.[144] A choice of location can be strategic; for example, the Russian amnesty laws for the Chechen conflict apply to Chechnya and its surrounding regions (Daghestan, North Ossetia and Stavropol), but exclude crimes that occurred elsewhere in the Russian Federation. This means that notorious crimes committed in the heartland of Russia, such as the Moscow theatre hostage crisis in October 2002, are excluded, and therefore can still be prosecuted.

Furthermore, states have occasionally chosen to amnesty crimes that were committed outside its borders, particularly where insurgents were based across a frontier. For example, the 2002 Ivorian amnesty applied to 'Ivorian nationals whether they are on the territory or in exile during the events cited'.[145] Similarly, France introduced a series of amnesty laws after

[141] *Loi no 53-681 portant amnistie*, 1953 (Fr).
[142] ——, 'President Husak Declares Major Amnesty' *BBC Summary of World Broadcasts* (11 December 1989).
[143] Law on General Amnesty, No 80/96, 1996 (Croatia).
[144] *Ley de Amnistía*, 1994 (Mexico).
[145] *Loi portant amnistie*, 2003 (Côte d'Ivoire) art 1.

Indochina and Algeria became independent to cover the actions of its agents in those territories.[146] Furthermore, Sarkin asserts that

> when dealing with incidents that occurred outside South Africa, the [Amnesty] Committee generally did not see this factor as an obstacle to amnesty.[147]

It should be noted, however, that the extraterritorial application of these laws is only valid before the courts of the territorial state, and can be disregarded by international courts or courts in third states.[148]

Secondly, the scope of amnesties can be limited by requiring the crimes to have been committed within a specific period. Depending on the purpose of the law, the period can be extremely brief, perhaps just a few days. For example, the 2000 amnesty in Ecuador applied to civilians, and military and police personnel who joined in the indigenous 'uprising' against the government of Jamil Mahuad on 21 January 2000.[149] Alternatively, it can be very long, for example, covering all crimes committed before the amnesty law entered into force. For example, the 1991 Angolan amnesty covered all crimes contravening the internal security of the state and other offences committed prior to 31 May 1991, when the Bicesse Accords were signed.[150] Usually, however, an amnesty covers a period of several years, perhaps from the start of the conflict or a *coup d'état*, or the date of promulgation of the previous amnesty law. Sometimes the choice of dates appears to be self-evident due to the political events that occurred; however, in other instances it can be strategic. For example, the 1987 Salvadorean amnesty excludes crimes that were committed after 22 October 1987 to exempt the murderers of Herbert Anaya, the head of the non-governmental Human Rights Commission.[151] In contrast, the time limit for the 1995 South African amnesty was extended by President Mandela, following the start of the TRC's work, to include atrocities committed by members of the right-wing white Afrikaner Weerstandsbeweging and the Azanian People's Liberation Movement.[152]

The choice of dates to include within the temporal jurisdiction of the amnesty can be very contentious in contexts where there is a long history of abuse. This was illustrated recently in a judgment of the Timorese Court of Appeal. The case was referred to the court by the Timorese President,

[146] Eg, *Loi No 66-396 de 17 juin 1966 portant amnistie d'infractions contre la sûreté de l'Etat ou commises en relation avec les événements d'Algérie* (Fr).

[147] Sarkin (n 112) 345.

[148] For a discussion of the extraterritorial application of amnesty laws, see Chs 6 and 7 respectively.

[149] US Department of State, 'Country Reports on Human Rights Practices 2000: El Salvador'.

[150] *Lei No 24/91* (Angola).

[151] Moore (n 65) 766.

[152] Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press, Cape Town 2000) 70–71.

who requested that it consider the constitutionality of the proposed Law on Truth and Measures of Clemency for Diverse Offences. This law, which had been approved by parliament, but not signed by the president, was intended to offer amnesty 'only to offences committed between 20 April 2006 and 30 April 2007'. This would have meant that perpetrators of violent crimes committed during this period would have been treated differently to perpetrators of similar crimes that occurred during Indonesian occupation. In its judgment, the court found that

> [i]t is manifest that such provisions would result in an unequal handling of individuals who face similar circumstances, without there being any serious, legitimate and reasonable grounds to do so.[153]

The court argued that, in

> [t]he absence of any serious, legitimate and reasonable grounds for the unequal handling of perpetrators of offences committed during the abovementioned time period and the perpetrators of offences committed before said period makes the unequal treatment conspicuous, intolerable and lays bare a violation of the principle of equality.[154]

The court consequently found the law to be in violation of the principle of equality enshrined in the Timorese constitution. At the time of writing, the future of this proposed amnesty legislation was uncertain.

CONCLUSION

This chapter has explored the idea that extending the scope of an amnesty to crimes under international law can breach a state's obligation to prosecute or extradite such crimes. It has found that this obligation is mandatory for grave breaches of the Geneva Conventions and genocide, but the obligation to prosecute crimes against humanity under customary international law is permissive. Furthermore, it has argued that these obligations do not apply in every instance of serious human rights violations, particularly where the violence did not occur within an international conflict or have genocidal intent. Indeed, where less serious crimes are committed with political objectives, there is even a well-established legal tradition of 'political exception' that enables the offenders to evade punishment. This has frequently been reflected in the implementation of amnesty laws. The application of this exception is particularly desirable in the case of 'purely' political crimes that have been committed against a state, and which a state has standing to forgive. However, even where the crimes have been committed against individuals, an amnesty that offers

[153] Court of Appeal, Case No 02/ACC/2007 (16 August 2007) (Timor-Leste).
[154] *Ibid*.

alternative transitional justice mechanisms might satisfy the needs of victims and fulfil a state's obligations under international law. Such individualised, conditional amnesties will be explored in the next chapter.

The Amnesty Law Database has enabled trends in state practice to be identified relating to each category of crimes. It has shown that since July 1999, when the UN publicly stated its opposition to amnesties for crimes under international law, some states have adhered to the UN position and excluded such crimes from their amnesty laws. However, other states have continued to include them, particularly where the UN was not involved in the decisions leading to the amnesty. This means that it is too early to say that a state practice has developed for the purpose of identifying a rule of customary international law. Furthermore, the Amnesty Law Database has shown that the majority of amnesty laws recognise the political nature of the crimes that they cover, although few attempt to define these crimes.

These findings indicate that, despite the developments in international law during the post-war period, some states continue to view their obligations to prosecute certain crimes under international law as permissive, and that consequently, state practice has not yet reached a point where the duty to prosecute can be argued to be customary, and hence binding on all nations. This more permissive understanding can be argued to grant states more space in addressing the crimes of the past. For example, if a state pursues prosecutions of those who are deemed 'most responsible' whilst creating alternative justice mechanisms for lower-level offenders, this could potentially be argued to have fulfilled the state's international obligations. Allowing transitional states this flexibility to address the unique circumstances that they face has the potential to foster greater innovation and the creation of justice processes that are more resonant with the conceptions of justice among the local communities. The next chapter will explore the range of alternative transitional justice mechanisms that have been employed to date, and assess how an amnesty can complement the work of such processes.

4

Towards Greater Accountability: The Role of Conditional Amnesties

INTRODUCTION

EXPLORING HOW THE grant of amnesty can be made conditional on various factors is a crucial element in assessing whether amnesties can move towards greater accountability. This chapter will consider how states can avoid using amnesties to offer blanket impunity, and instead employ amnesties to contribute to wider efforts to address the needs of victims and rebuild transitional states through programmes such as disarmament and institutional reform.

States frequently grant amnesty on the stipulation that the beneficiaries adhere, either individually or in groups, to certain conditions. These conditions could be an integral part of the amnesty process, for example, surrendering to state agents to make the amnesty application. Alternatively, the conditions could correspond to mechanisms which accompany the amnesty law, for example, requiring amnesty beneficiaries, as a consequence of their status, to participate in vetting procedures before being appointed to public sector jobs. This chapter, by considering case studies, will explore the nature of the conditions attached to amnesty laws. It will consider conditions which are 'tactical', in that they can contribute to the efficacy of an amnesty in restoring peace and stability for society as a whole, such as requiring amnesty beneficiaries to surrender and disarm. It will also consider conditions that are more 'reparative' and focus more on addressing individual victims' rights to truth and reparations, by designing amnesty processes to complement other transitional justice processes, such as truth commissions and community-based justice mechanisms. This chapter will explore how such complementary relationships can be established.

The chapter will begin by discussing how conditional amnesties have been classified in this research and the frequency with which states rely on each classification. Each of these categories will then be discussed in detail, using the case studies from the Amnesty Law Database and, where appropriate, the prescriptions of international law, such as the rights to truth and reparations. For conditional amnesties to be effective, they must be

adhered to. Consequently, the final section will consider how they should be enforced, with particular focus on potential responses to failures to fulfil conditions. This discussion will also consider the role of temporary immunity laws as an alternative to permanent amnesties. This chapter will argue that states are increasingly willing to make amnesty beneficiaries more accountable for their crimes by attaching conditions to the amnesty. It will further argue that such conditions can be beneficial in reducing the level of violence and recidivism rates within a state and in improving relationships between rival communities.

WHICH CONDITIONS ARE ATTACHED TO AMNESTIES?

In researching conditional amnesties, the following classifications were identified, using the text of the amnesty laws and academic literature on individual amnesty processes and transitional justice mechanisms: surrendering and disarming; applying within prescribed time limits; repenting and providing information on comrades; telling the truth; repairing the harm; participating in community-based justice mechanisms; and submitting to lustration and vetting procedures. These conditions can either be an integral part of the amnesty process, such as surrendering, or they can be independent yet complementary mechanisms that are introduced at the same time as the amnesty, or possibly some time afterwards in order to lessen its negative impact on victims and society. On occasion, this distinction between integral and independent can become muddled. For example, although truth commissions are usually independent yet complementary mechanisms, in the case of the South African TRC, telling the truth to the Amnesty Committee was an integral part of the amnesty process.

In practice, many of the categories can overlap. For example, a requirement to repent for past crimes could be a stand-alone obligation to be carried out before a state official in exchange for amnesty, or it could require applicants to participate in a truth commission or community-based justice mechanism and confess their actions. Similarly, truth-telling can have an intrinsic value, but it can also be a form of reparations for victims who wish to discover the truth about their own or their relatives' suffering. Furthermore, tactical conditions can also be inter-related. For example, the requirement to apply individually for an amnesty can be dependent upon adhering to conditions such as applying before a deadline or surrendering to particular institutions.

The conditions that are attached to amnesties can vary between extremes, with some amnesties being unconditional, others imposing very few conditions, and others introducing nearly all possible measures by, for example, combining amnesty with processes such as truth commissions

and reparations programmes. Often, however, conditions are simply not described in the amnesty law, although they may be created by subsequent implementing regulations. Due to this disparity in practice (and also the exclusion of reparative amnesties from this analysis), information has only been gathered on the conditions attached to 278 amnesty laws.[1] The distribution of these conditions is illustrated in Figure 9 below. This shows that the most popular conditions are the requirement to surrender, the obligation to comply with the conditions with a prescribed time period and to provide reparations. As will be discussed in detail below, the term reparations describes an extremely broad range of actions from compensation to institutional reform and public apologies. This breadth indicates why reparations measures so often accompany amnesty laws. From Figure 9, it is possible to argue that states are increasingly attaching restorative conditions to their amnesties, rather than focusing simply on tactical measures. Furthermore, within this data it is interesting to note that some conditions, such as the surrender of weapons have been relied upon throughout the history of warfare whereas others are recent innovations. Perhaps the most significant recent development has been the growth of truth commissions, which will be discussed in more depth below. Overall, the data on conditional amnesties appears to show that all forms of conditional amnesty have increased in popularity since the Second World War.

Each of these conditions will be explored below, using case studies. It should be noted, however, that each of the transitional justice mechanisms

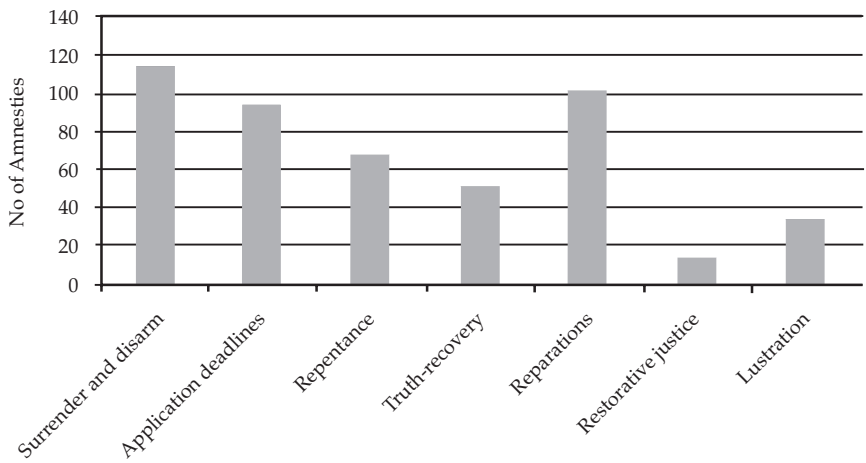

Figure 9: Distribution of conditions attached to amnesty laws

[1] Reparative amnesties were excluded, as the figure is intended to illustrate the frequency with which non-reparative amnesties have conditions attached.

discussed and their relationships to amnesties warrant extensive further study, which is beyond the scope of this book. For example, when information has been gathered within the database on lustration processes, it has merely focused on whether they exist and how they are sequenced with amnesty laws, rather than amassing procedural data on how the lustration was implemented.

Amnesty for Surrender and Disarmament

The obligation to surrender and hand over weapons to the authorities is a long-standing condition of peace initiatives following conflicts or internal unrest.[2] It can contribute positively to attempts to achieve stability, by inter alia: providing a symbol that the violence is finished; reducing the potential of rebel forces to cause disruption; facilitating trust-building initiatives to enable different stakeholder groups to work together in rebuilding the country; contributing to a general demilitarisation of society; and boosting 'the local community's confidence that progress could be made in restoring law and order'.[3]

The requirement to surrender often stipulates that combatants must do so voluntarily to benefit from the amnesty, although it can be accompanied by threats of further legal or military action against those who refuse to turn themselves in. For example, in 1997, the Taliban chief in Afghanistan asked all opposition forces to surrender, and offered them amnesty, warning that those who did not would be tried by Islamic courts.[4] The process of surrendering varies between different conflicts. For example, in some conflicts, combatants can be required to surrender to civilian authorities, whereas in others they may have to present themselves to the security forces. Occasionally, insurgents can surrender to more neutral institutions. For example, under the 1983 Bangladeshi amnesty for insurgents in the Chittagong Hill Tracts, individuals could surrender to inter alia leading members of their locality, and in the Indo-Sri Lanka Accord 1987 it was agreed that

> Tamil militants shall surrender their arms to authorities . . . The surrender shall take place in the presence of one senior representative each of the Sri Lanka Red Cross and the Indian Red Cross.[5]

[2] This section addresses only surrendering and disarming; for a discussion of disarmament, demobilisation and reintegration (DDR) programmes, see ch 10.

[3] James Watson, 'A Model Pacific Solution? A Study of the Deployment of the Regional Assistance Mission to Solomon Islands' *Working Paper No 126* (Land Warfare Studies Centre, Australian Army, Duntroon, ACT 2005) 11.

[4] ——, 'Afghan Taliban chief asks rivals to surrender, offers amnesty' *Agence France Presse* (Islamabad 20 May 1997).

[5] Indo–Sri Lanka Accord (1987), annex 7.

Most often, they can surrender before a range of government bodies depending on their preference and location. For example, the Civil Harmony Law 1999 in Algeria permitted insurgents to surrender to military, civilian, administrative or judicial authorities.[6]

In many amnesty processes, insurgents do not simply have to turn themselves in, but are also encouraged or required to surrender their weapons, ammunitions and explosives. Sometimes, cash incentives, known as 'buy back' programmes, are introduced. These offer payments usually on a varying scale depending on the type of weaponry that is surrendered.[7] For example, under the 2006 Nepalese amnesty, Maoist guerrillas were to be paid between NRS 500 (£3.86) for surrendering with plastic grenades, to NRS 500,000 (£3,855) for giving themselves up with mortars.[8] In addition to contributing to disarmament, such programmes can provide financial resources to insurgents to help them establish their new lives. Buy-back programmes can, however, cause difficulties where a state has only limited resources, particularly where financial rewards are given to the combatants but the victims receive little support.[9] Furthermore, if such programmes establish a high price for weapons, rather than promoting disarmament as intended, they risk instead creating an 'artificial market' and sparking 'an overwhelming movement of weapons into the country and surrounding region'.[10] Furthermore, financial incentives to surrender weapons can exclude particularly vulnerable groups of former combatants, such as female combatants or child soldiers, as they carry weaponry less frequently.[11]

Disarmament need not always be a pre-requisite for amnesty and, on occasion, the annulment of punishment and the surrender of weapons have been treated as distinct issues. This occurred under the early release scheme in Northern Ireland, which, although not included in the Amnesty Law Database,[12] can illustrate an alternative approach to disarmament. Under this scheme, prisoners were released before their organisations had

[6] *Loi sur la concorde civil* (1999) art 30 (Alg).

[7] For a discussion of other cash incentives offered to individuals who have surrendered, see ch 10.

[8] ——, 'Nepal Government Offers Surrender Bait as Maoists start Blockade' *Indo-Asian News Service* (Kathmandu 14 March 2006). This amnesty was not implemented, as Maoists declined to take advantage of the offer.

[9] For a discussion of this issue, see ch 10.

[10] UNSC, 'Report of the Secretary-General on the Role of United Nations Peacekeeping in Disarmament, Demobilization and Reintegration' (11 February 2000) UN Doc S/2000/101 [38] and Jeffrey Isima, 'Cash Payments in Disarmament, Demobilisation and Reintegration Programmes in Africa' (2004) 2 *Journal of Security Sector Management* <http://www.ssronline.org/jofssm/index.cfm?iss=6&pre=true> accessed 29 April 2008.

[11] For a discussion of the difficulties faced by female combatants and child soldiers, see ch 2.

[12] The Early Release Scheme in Northern Ireland is excluded from the Amnesty Law Database, as the beneficiaries had already been convicted and they retained their criminal record once they were released on license. In this way the scheme more closely resembles a pardon than amnesty. For greater detail on this distinction, see Introduction.

decommissioned, provided their organisations had proclaimed a ceasefire. The early release was conditional on the released individuals refraining from supporting paramilitary organisations or becoming involved in acts which endanger the public.[13] Furthermore, the releases were designed to occur incrementally, with the possibility that they would be halted for members of individual organisations if their organisation breached their ceasefire. Smyth has claimed that

> in the earlier stages of the peace process, retention of weapons was necessary in order to prevent a split with those Republicans within the ranks of the IRA who feared a sell-out

and that 'protracted negotiations' on the issue 'provided Sinn Féin with the time to persuade their grass roots of the merits of decommissioning'.[14] By separating the prison releases from disarmament, the releases could be used to build trust between the British government and members of the IRA, which eventually contributed to the Republicans decommissioning their weapons. However, it is important to note that in this example, the releases were conditional on non-recidivism and were revoked for individuals who breached the terms of their license. As discussed below, amnesties should have similar mechanisms to enforce compliance with the terms of the amnesty.

In addition to handing over weaponry, in some conflicts amnesty is also conditional on the surrender of hostages. For example, following the attempted coup in Fiji in May 2000 in which Prime Minister Chaudhry and his cabinet were taken hostage, the negotiated Maunikau Accord 2000 required George Speight and his followers to release the hostages before benefiting from the amnesty.[15] Such releases seem to reflect a military tradition of exchanging prisoners at the end of a conflict, particularly where the release of hostages is timed to coincide with the release of detained insurgents.

Despite the difficulties that can result from a disarmament programme, demilitarising society and reducing the level of violence are essential objectives in most transitional states. Where amnesty is used to encourage the surrender of weapons, the author argues that the process needs to be

[13] The Northern Ireland (Sentences) Act 1998, 1998 (UK) s 16. For discussion, see Daniel F Mulvihill, Note, 'The Legality of the Pardoning of Paramilitaries under the Early Release Provisions of Northern Ireland's Good Friday Agreement' (2001) 34 *Cornell International Law Journal* 227. Prisoner releases have also preceded disarmament in South Africa, Spain and Israel/Palestine, see Kieran McEvoy, 'Prisoner Release and Conflict Resolution: International Lessons for Northern Ireland' (1998) 8 *International Criminal Justice Review* 33.

[14] Marie Smyth, 'The Process of Demilitarization and the Reversibility of the Peace Process' (2004) 16 *Terrorism and Political Violence* 544, 554. See also Kris Brown and Corinna Hauswedell, 'Burying the Hatchet: The Decommissioning of Paramilitary Arms in Northern Ireland' *Brief* 22 (Bonn International Center for Conversion, Bonn 2002).

[15] Maunikau Accord (2000) (Fiji).

implemented early in the transition, possibly according to the provisions of a peace agreement. To encourage the targeted group to come forward, it is preferable, based on the experiences described above, that they are permitted to surrender to a range of governmental and non-governmental institutions, rather than simply the state's armed forces, which could seem unattractive to insurgents and may lead them to believe that the amnesty is a trap to capture them rather than to reintegrate them into society. Furthermore, where financial rewards are promised in exchange for weapons, according to Isima, these must be paid promptly as delays could cause combatants to withdraw their trust from the process.[16] Finally, whichever process a state decides upon, it should inform the insurgents on where and how to surrender through newspapers, leaflet drops or radio broadcasts, as without such awareness-raising measures, few insurgents are likely to come forward.[17]

Application Deadlines for Amnesties

It is common practice for amnesty laws to impose time limits for surrendering and/or submitting applications. These limits can increase pressure on the targeted groups to participate in an amnesty process while the option is available to them, which may help the peace process to progress. Furthermore, time limits on amnesty processes emanating from peace treaties are often integrated into overall time frames to establish democratic rule. They may also be designed to coincide with religious festivals or political events, such as elections.

The amount of time available for people to apply for amnesty can affect the contribution of the process to the establishment of peace and stability. For example, if the period is too short, it may undermine the potential of the amnesty to create a space for trust building, as some targeted groups may be reluctant to come forward and lay down their weapons until they have sufficient reassurances that their security will be guaranteed. In many contexts a longer period may be needed to raise awareness among insurgents that the offer is available and to allow time for them to travel to the surrender points, given that insurgents are often based in remote areas. Furthermore, if new institutions are to be created to implement the amnesty, it will take time to allocate the resources, recruit and train the personnel, establish offices and create modes of working.

The time limits that are imposed have ranged from 15 days in the Central African Republic in 1997, to two years in South Africa.[18]

[16] Isima (n 10).

[17] For a detailed discussion on publicising amnesties, see ch 10.

[18] The deadline for the submission of applications was extended from 6 December 1996 to 30 September 1997.

Furthermore, as discussed in chapter 1, the limits have frequently been lengthened either by an extension as provided for in the text of the amnesty, an amendment to the original law, or by the introduction of subsequent amnesty laws, which can extend the amnesty for several years. For example, the Amnesty Act 2000 in Uganda, which was originally intended to be available only for six months, has been repeatedly extended and is still operating at the time of writing. However, problems may arise where an amnesty is frequently extended or renewed, as such activity may create an expectation among insurgents that they can benefit from an amnesty at any time, and can therefore take a 'wait and see' approach rather than engaging with the process.

This section has argued that time limits can have a significant impact on the efficacy of amnesty processes, by encouraging targeted groups to respond promptly by creating an incentive for participation. However, where the time limits are too short, practical difficulties, such as travelling long distances, may reduce the ability of insurgents to participate, and where the limits are too long or repeatedly extended, the incentive created by the limits will be undermined.

Amnesty and Repentance

The concept of repentance has a long lineage in philosophy and theology, which is beyond the scope of this book to recount. However, drawing on these literatures, repentance can be defined as a process where a wrongdoer gains 'recognition of and regret for his action, and [is] willing to make amends'.[19] Clearly, in this sense, repentance requires the wrongdoers to change their feelings about their past actions. It can be difficult to judge whether an individual is sincerely repenting for his behaviour, but the idea of repentance being a necessary prerequisite for amnesty has been employed in many countries, usually for opponents of the state. These repentance requirements can take a number of forms, such as publicly renouncing previous actions, admitting guilt, demonstrating remorse, providing information on former comrades or participating in re-education programmes.

First, repentance requirements can make amnesties conditional on the beneficiaries signing written documents or making public statements in which they renounce their political or violent activities and swear loyalty to the state and its laws. For example, the 1981 amnesty in Colombia required each beneficiary to 'make an express and individual statement to

[19] Joanna North, 'Wrongdoing and Forgiveness' (1987) 62 *Philosophy* 499, 503. See also Amitai Etzioni and David Carney (eds), *Repentance: A Comparative Perspective* (Rowman and Littlefield Publishers Inc, Oxford 1997).

cease his participation in the punishable acts'.[20] Similarly, the amnesty laws of South Korea in the 1980s required beneficiaries, mostly communists, to sign statements renouncing their political beliefs.[21] This policy was replaced in 1998 by a requirement that they pledge to obey the law, including the National Security Law, and to recognise the Republic of Korea.[22] It has been suggested that amnesty should not be exchanged for a 'pre-existing duty (such as the duty to obey the law)'.[23] But for insurgents who were willing to risk their life and liberty to fight the central government, any public statement of recognition of the legitimacy of the state can be of major symbolic importance.

In certain states, individuals who have promised to obey these conditions can face stiff penalties for recidivism. For example, the 1990 extension of the 1989 Angolan amnesty stated amnesty was 'conditional on the beneficiary not repeating his crime or committing any other serious crime'.[24] The 1991 Lebanese amnesty went further, by stating that

> those committing crimes covered by the amnesty, after the date of its promulgation, will be liable for prosecution and will also be liable for all the offences they committed during the war.[25]

These conditions resemble the licence scheme in Northern Ireland outlined above.

Alternatively, amnesty processes may require applicants to admit their guilt. For example, Sarkin highlights that the Amnesty Committee of the South African TRC 'deemed denial of guilt to be an obstacle to the granting of amnesty'.[26] He comments that this can be problematic where 'people might be guilty, but believe that they are not, since they view the acts they admittedly performed as legitimate'.[27] Furthermore, conditioning amnesty on admissions of guilt does not provide any assistance for people who are innocent, but were found guilty by the apartheid-era judiciary.[28] Indeed, it is alleged that the plea bargaining system in Rwanda[29]

[20] *Ley 37 de 1981 por la cual se declara una amnistía conditional, Diario Official No 35760*, p 442, 1981 (Colom) art 3.

[21] Nicholas D Kristof, 'New South Korea Leader Grants Sweeping Amnesty to 5.5 Million' *New York Times* (Tokyo 13 March 1998) 1.

[22] ——, 'South Korea Relaxes Rules on Amnesty' *Washington Post* (Seoul 2 July 1998) A24.

[23] Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 *Columbia Human Rights Law Review* 661, 722.

[24] ——, 'Angola: Dos Santos Approves Extension of the Amnesty Law, Issues Decree on State Crimes' *BBC Summary of World Broadcasts* (6 February 1990).

[25] *Loi d'amnistie générale No 84/91* (1991) art 2 (Lebanon).

[26] Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, Antwerp 2004) 237.

[27] *Ibid* 238.

[28] *Ibid* 245.

[29] The plea bargaining system, pre-dated the current *gacaca* arrangements. It was made available to all perpetrators except the very 'most responsible' category. However, it did enable Category One offenders to benefit from reduced sentencs, but only if their confessions

which allowed for sentence reductions or prison releases for those who pleaded guilty, encouraged innocent people to plead guilty to escape the horrendous conditions in Rwanda's prisons.

Amnesty applicants in other processes have been required to show remorse. For example, in Timor-Leste, individuals who participate in the Community Reconciliation Process could be required to perform an act of reconciliation, such as a public apology.[30] Although determining the sincerity of any such proclamations is difficult and insincere apologies risk devaluing genuine expressions of remorse, it may be of symbolic importance for victims to see those who tortured them admit that their actions were wrong. It can also be beneficial for societies which have been exposed to prolonged periods of propaganda to help dispel the myths and prejudices that had been created and to contribute to establishing a common history.

Amnesty applicants may also be required to demonstrate that they have turned their backs on their past organisations, by providing information on their former comrades. For example, under a series of 'Repentance Laws' in Turkey, those who surrendered were required to provide information on the identities and whereabouts of fellow fighters who had not surrendered.[31] Whilst such evidence would clearly be of value to counter-insurgency forces, the requirement is problematic. Requiring individuals wishing to obtain amnesty to provide information risks false evidence being given to security forces, which could lead to innocent people being falsely accused and detained.

Finally, some states have decided to try to ensure that repentance is genuine by requiring beneficiaries of the amnesty to participate in re-education programmes. For example, Eritrean secessionist guerrillas who received amnesty in Ethiopia in 1978 and 1980 were required to attend briefings on 'Ethiopia's long-recorded unity, the theory of Marxism-Leninism and the process of the Ethiopian revolution'.[32]

This section has argued that states can encourage amnesty beneficiaries to show their repentance for their previous actions in a number of ways,

are made prior to their names being listed in the Official Gazette. See Organic Law No 08/1996 of 30/8/1996 Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990, ch III. For discussion, see Coel Kirkby, 'Rwanda's *Gacaca* Courts: A Preliminary Critique' (2006) 50 *Journal of African Law* 94; Philip J Drew, 'Dealing with Mass Atrocities and Ethnic Violence: Can Alternative Forms of Justice be Effective? A Case Study of Rwanda' (Access to Justice Network, 2000).

[30] UNTAET, Regulation No 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, 2001 (E. Timor) s 27.7. See ch 2 for a discussion of the Community Reconciliation Process.

[31] Amberin Zaman, 'Turkish Parliament Approves Amnesty for Kurdish Rebels' *Voice of America News* (Ankara 29 July 2003).

[32] ——, 'Amnesty for "Several Hundred" in Eritrea' *BBC Summary of World Broadcasts* (Addis Ababa 26 April 1980). The concept of 're-education' is discussed further in ch 10.

with each approach having different implications for states and for victims. For example, requiring insurgents to provide information on their former comrades to receive amnesty can be viewed by a state as a tool to assist in its campaign to end an insurgency. In contrast, conditioning amnesty on applicants apologising directly to their victims within the context of a truth commission or community-based justice mechanism could be viewed as pre-dominantly of benefit to individual victims and their families. For all forms of repentance, however, the benefits are primarily symbolic, as it can be difficult to ascertain the sincerity of an apology, and even where individuals genuinely swear to uphold the law, they may reverse their position if they feel that their former enemies are failing to fulfil their obligations within a peace process. Despite these difficulties, the symbolism of public displays of repentance from belligerent institutions or individual amnesty applicants can contribute to repudiating the crimes of the past and demonstrating an intention to adhere to the rule of law. Where this occurs, such proclamations, although symbolic, may be necessary to build trust in the fledgling institutions of a transitional state and reduce enmity between previously warring factions.

Amnesty and the Search for Truth

The right to truth applies to both the right of individuals to know the truth about their suffering and the right of society as a whole to know the truth about past events. The victim's right to truth is not explicitly referred to in the general human rights instruments or subject-specific conventions, with the possible exception of the right of every individual to 'receive information' that is articulated in the African Charter on Human and Peoples' Rights.[33] However, all major human rights treaties articulate the state's duty to investigate human rights violations and Hayner asserts that within this duty 'is the inherent right of the citizenry to know the results of such investigations'.[34] The content of the right to truth has been outlined in the UN General Assembly's *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. These principles, which are not binding on states but are intended to reflect international standards on the right to a remedy, state that to ensure satisfaction and guarantees of non-repetition, there must be

[33] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), art 19(1).

[34] Priscilla B Hayner, '15 Truth Commissions—1974 to 1994: A Comparative Study' (1994) 16 *Human Rights Quarterly* 597, 611.

> Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations.[35]

The *Basic Principles and Guidelines* further state that

> Victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.[36]

From this, it is clear that the right to truth is regarded as a fundamental component in ensuring victims' right to reparations for gross violations of human rights law, which can be viewed as equivalent to crimes under international law. It can be inferred that, for less serious crimes, the duty to investigate is not mandatory under international law.

The right of a society to know the truth about 'serious human rights violations' was recognised by the Inter-American Commission on Human Rights in 1986, which asserted that

> every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future.[37]

The *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* has recently reaffirmed this idea for crimes under international law by proclaiming:

> Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.[38]

Such support for an obligation to investigate crimes under international law was also given by the other treaty-monitoring bodies. For example, in the *Hugh Jordan v United Kingdom* case before the European Court of

[35] UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Res 60/147 (16 December 2005) Princ 22(b).

[36] *Ibid* Princ 24.

[37] Inter-Am CHR, 'Annual Report 1985–6: Chapter V "Areas in which Steps need to be taken towards full Observance of the Human Rights set forth in the American Declaration of Human Rights and Duties of Man and the American Convention of Human Rights"', OEA/SerL/V/II 68 (26 September 1986).

[38] UNCHR 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add1 (*prepared by* Diane Orentlicher), Princ 2. These principles have a similar non-binding status to the *Basic Principles and Guidelines*.

Human Rights, the court analysed the minutiae of the domestic investigation process into violations of the right to life, before finding that families are entitled to thorough information into the planning and decision-making resulting in the death of their relatives at the hands of the state or state-sponsored paramilitaries.[39]

Amnesty laws do not automatically deny victims their right to truth, and in fact can often co-exist with truth commissions. This relationship can take many forms.[40] First, an amnesty can be introduced before the establishment of the truth commission. This was the case in Chile, where the military junta had promulgated an amnesty law in 1978 to shield members of the armed forces from prosecution for serious crimes that they had committed during the 'dirty war'. When the democratic government subsequently came to power in 1990, it found for a number of reasons that the amnesty law was impossible to repeal. This led the then president, Patricio Aylwin, to inaugurate a truth commission to achieve 'justice inasmuch as was possible'.[41] Secondly, an amnesty can be introduced following a truth commission, as occurred in El Salvador as is illustrated in Case Study 10.

Case Study 10: Sequencing amnesty and truth in El Salvador

A violent civil war raged in El Salvador between 1980 and 1991, which pitted left-wing insurgents against the military-backed governments, supported by the United States. All parties to the conflict were engaged in atrocities and the government forces employed 'death squads'. The conflict resulted in 75,000 deaths.

During the fighting there were several attempts to reach a peaceful settlement, but the transition began in earnest following the 1992 Chapultepec Accords, which were brokered by the UN. The accords called for the

[39] *Hugh Jordan v United Kingdom* (App No 24746/94), Eur Ct Hum Rts, ECHR 2001-III. For a discussion of this case, see Fionnuala Ní Aoláin, 'Truth Telling, Accountability and the Right to Life in Northern Ireland' (2002) 5 *European Human Rights Law Review* 572; and Christine Bell and Johanna Keenan, 'Lost on the Way Home? The Right to Life in Northern Ireland' 32 *Journal of Law and Society* 68. For an overview of the jurisprudence of international courts relating to a state's duty to investigate, see ch 6.

[40] For a discussion of the impact of the amnesty in exchange for truth model, see literature on the South African TRC, such as Sarkin (n 26); Peter A Schey, Dinah L Shelton and Naomi Roht-Arriaza, 'Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty' (1997) 19 *Whittier Law Review* 325; Lyn S Graybill, 'Pardon, Punishment and Amnesia: Three African Post-conflict Methods' (2004) 25 *Third World Quarterly* 1117; Kader Asmal, 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63 *Modern Law Review* 1; Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press, Cape Town 2000).

[41] Cited in Terence S Coonan, 'Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable' (1996) 20 *Fordham International Law Journal* 512, 539. For a description of the Chilean amnesty process, see case study 5.

establishment of an Ad Hoc Commission to consider military reform and a truth commission to be staffed by international personnel. The commission's mandate was to investigate the 'serious acts of violence that occurred since 1980 and whose impact on society urgently demands that the public should know the truth'.[42]

Following the peace agreements, the Salvadorean legislature passed a limited amnesty in 1992, which granted immunity to those responsible in any way for political crimes or any deeds with political ramifications, and for those who participated in common crimes committed by no less than 20 people, before 1 January 1992.[43] However, it exempted individuals who had been convicted by juries and persons whose alleged crimes fell within the jurisdiction of the truth commission. This provision meant that any individuals named as perpetrators in the commission's report were to be deprived on the benefits of the 1992 amnesty.

The commission's final report, which was made public on 15 March 1993, named 40 high-level officials comprising members of the armed forces and the president of the Supreme Court. It also named 11 Frente Farabundo Martí para la Liberación Nacional (FLMN) members. The government responded to this report, and related threats from the military, by enacting an amnesty to protect those who had been named and to broaden the definition of political crimes.[44] This 1993 amnesty, however, retained the clause from the 1992 amnesty, which excluded crimes committed by more than 20 people and it also excluded acts of terrorism, where the offender 'deprives third parties of their freedom, threatens or causes death' for profit, and drug-related crimes, kidnapping and extortion.

Since 1993, the transition has been comparatively stable, although in recent years there has been a rise in the numbers of murders and forced disappearances. The main insurgent group, the FMLN, became one of the two major political parties. Furthermore, the amnesty has remained in tact and there has been no official investigation or memorialisation of past crimes in El Salvador. However, civil society groups have continued campaigning.

***Sources**: Amnesty International, 'El Salvador: Peace can only be achieved with justice' AI Index AMR 29/001/2001 (2001); Margarita S Studemeister (ed), El Salvador: Implementation of the Peace Accords (US Institute of Peace, Washington DC 2001); Mike Kaye, 'The Role of Truth Commissions in the Search for Justice, Reconciliation and Democratisation: The Salvadorean and Honduran Cases' (1997) 29 Journal of Latin American Studies 693; Margaret Popkin, 'Latin American Amnesties in Comparative Perspective: Can the Past be Buried?' (1999) 13 Ethics and International Affairs 99.*

[42] Chapultepec Agreement 1992, art 2 (El Sal).

[43] Law of National Reconciliation, Legislative Decree 147, Official Journal 14, Vol 314 (23 January 1992) (El Sal).

[44] *Ley de Amnistía General para la Consolidación de la Paz, Decreto No 486* (20 March 1993) (El Sal).

Finally, an amnesty can be introduced in conjunction with a truth commission. This could mean either two independent mechanisms that are introduced simultaneously as, for example, under the 1999 Lomé Accord that aimed to end the conflict in Sierra Leone;[45] or a truth commission that has the power to grant or recommend amnesty. It is this latter relationship between the two forms of transitional justice that has sparked the most debate in recent years, following the establishment of the South African TRC.[46]

The appeal of the South African TRC is based on the belief that providing amnesty encourages the involvement of perpetrators in revealing the truth, thereby contributing to the establishment of a more balanced historical account than would be the case if only the stories of the victims were heard.[47] This truth-recovery role is further enhanced in comparison to trials, as truth commissions explore the crimes in a wider political context.[48] Furthermore, as truth commission hearings are often in public and televised, and their reports are widely distributed, the truth can be revealed to society as a whole, making it harder for the abuses to be denied and increasing the possibility that an accepted common history can be established. For this goal to be achieved, however, the commission must be viewed as representative and unbiased. Truth commissions can also be attractive where they are seen as more victim-centred than trials, as they provide space for victims to recount their stories and have their suffering acknowledged.[49] Furthermore, the participation of both victims and perpetrators in truth commissions can help to foster a climate of reconciliation between their

[45] 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone ('Lomé Accord') (Sierra Leone).

[46] See case study 13.

[47] For a discussion see Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, Boston 1998) 88–9. See also Richard Mosier, 'Truth Commissions: Peddling Impunity?' (2003) 6 *HRF*; Daan Bronkhorst, 'Truth and Reconciliation: Obstacles and Opportunities for Human Rights' (Amnesty International Dutch Section, Amsterdam, 1995); Tom Winslow, 'Reconciliation: The Road to Healing? Collective Good, Individual Harm?' (1997) 6 *Track Two*; Brandon Hamber, 'Do Sleeping Dogs Lie? The Psychological Implications of the Truth and Reconciliation Commission in South Africa' (Seminar No 5, Center for the Study of Violence and Reconciliation, Johannesburg 1995); Anita Isaacs, ''The Therapeutic Benefits of Truth: Insights from Guatemala' (Presentation at Conference on Reconciliation, University of Western Ontario, 14–15 May 2005); Sam Garkawe, 'The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?' (2003) 27 *Melbourne University Law Review* 334.

[48] Neil J Kritz, 'Dealing with the Legacy of Past Abuses: An Overview of the Options and their Relationship to the Promotion of Peace' in Mô Bleeker Massard and Jonathan Paige Sisson (eds), *Dealing with the Past: Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy* (Swiss Peace Foundation, Bern, Switzerland 2004) 22.

[49] Jeremy Sarkin, 'The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda' (1999) 21 *Human Rights Quarterly* 767, 799 and Priscilla B Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge, New York 2001) 26. For a discussion of the attitudes of victims towards truth commissions, see ch 9.

communities.[50] Truth commissions may also be a more appropriate response to the difficult conditions faced by a transitional state where resources are limited and an appropriately trained and impartial legal community is absent,[51] making it impossible to hold fair legal proceedings, and where former combatants are threatening further violence if prosecuted. For these reasons, truth commissions are increasingly implemented in conjunction with amnesties, as is shown in Figure 10 below. This figure shows that although truth commissions were used before the fall of apartheid in South Africa in the early 1990s, in the period after the Human Rights Violations Committee of the South African TRC submitted its report in October 1998, the popularity of truth commissions accompanying amnesty processes increased. However, none has exactly replicated the South African approach, with truth commissions in Liberia, Aceh, Indonesia and Timor-Leste, instead being given the power to recommend amnesty. Since the beginning of 2005, 41 amnesty processes have been introduced, of which four have been accompanied by truth-recovery mechanisms.

For a truth commission that offers amnesty in exchange for truth to be an adequate alternative to formal justice, there are a number of key

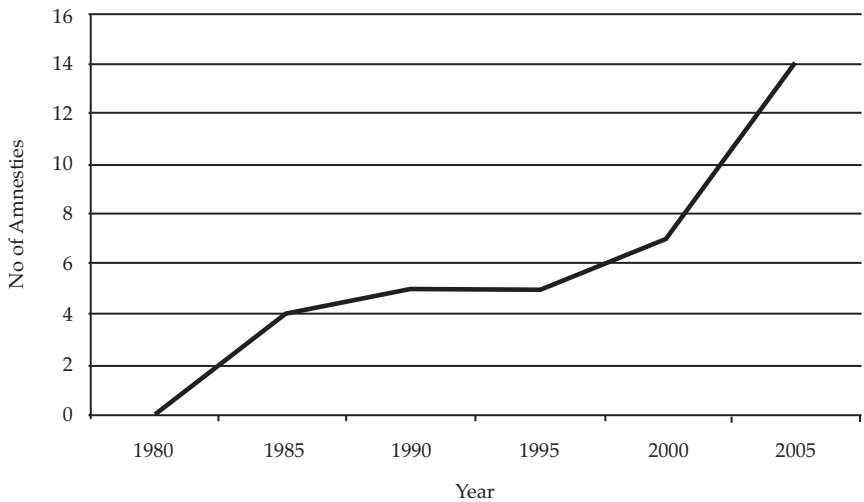

Figure 10: Truth commissions coinciding with amnesties between 1980 and 2005

[50] Sarkin (n 49) 799–800.

[51] Gunnar Theissen, 'Supporting Justice, Co-existence and Reconciliation after Armed Conflict: Strategies for Dealing with the Past' in David Bloomfield, Martina Fischer and Beatrix Schmelzle (eds), *Berghof Handbook for Conflict Transformation* (Berghof Research Center for Constructive Conflict Management, Berlin 2005) 6; Sarkin (n 49) 800.

requirements that have been identified from the experience of the commissions which have operated to date. First, the truth commission must be a separate institution created formally by law, rather than established through executive policy, as

> if the government were to create the commission, the life and work of the commission would be at the whim of the government.[52]

Secondly, the truth commission should pursue 'a restorative conception of justice that involves revealing the truth, repairing victim's harm and promoting reconciliation'.[53] For the commission to achieve this, it 'should accommodate all those affected by the conflict: offenders, victims and their respective families and supporters, and the wider community'.[54] By involving perpetrators and their communities, and granting the perpetrators amnesties rather than prison sentences, truth commissions may 'reduce the likelihood that they will provoke the offender and their communities into restoring hostilities in the future'.[55] Thirdly, the commissioners who are appointed should be 'perceived as above politics'[56] or, if political commissioners are included, the composition should be balanced so that the truth commission is not viewed as biased. Fourthly, the mandate of the truth commission should be broad enough 'to provide a more complete picture of the past',[57] and it should select representative cases to appear in the public hearings to reconcile limited resources with the need to present a clear history. Where decisions are made to focus on particular events rather than all incidents, the factors influencing the decision should be transparent.

Once a truth commission has been established, any amnesties should be granted individually to encourage each applicant to fulfil the necessary conditions, particularly the requirement to tell the truth. For those individuals who fail to adhere to the conditions, prosecutions should be pursued. Truth commissions should name the individuals responsible for the violations, even when they have received an amnesty. In order not to conflict with the applicant's rights, any allegations should be substantiated by the commission, and the individual who has been named should

[52] Sarkin (n 49) 805.

[53] Declan Roche, 'Truth Commission Amnesties and the International Criminal Court' (2005) 45 *British Journal of Criminology* 565, 569. To date, the truth commission that has most clearly associated itself with the principles of restorative justice is the South African TRC. For more information see Jennifer J Llewellyn and Robert Howse, 'Institutions for Restorative Justice: The South African Truth and Reconciliation Commission' (1999) 49 *University of Toronto Law Journal* 355; Desmond Tutu, *No Future without Forgiveness* (Rider, London 1999); Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, London 2000).

[54] Roche (n 53) 570; Sarkin (n 49) 803.

[55] Roche (n 53) 574.

[56] Eric Brahm, 'Truth Commissions' June 2004 <www.beyondintractability.org/essay/truth_commissions> accessed 20 February 2008; Sarkin (n 49) 803 and 805–10.

[57] Brahm (n 56).

be given the opportunity to reply in either an oral statement before the commission or a written submission that will be included in the 'commission's file'.[58] The publication of names is important, as, although amnesties result in the perpetrators evading criminal sanctions, naming names exposes the truth and holds perpetrators accountable for their actions.[59] By identifying individual perpetrators in publicised sessions or in the commission's report, there is the possibility that they will face some 'mental anguish in owning up to what one has been capable of'.[60] Furthermore, they may have to carry 'the burden of potential or real social ostracism', which could be a form of punishment.[61] Truth commissions should not impose more serious punishments, as they do not have the same standards of proof or evidence as courts.[62] Consequently, as Freeman argues, 'it would be unreasonable, as well as illogical, to hold truth commissions up to the standards of full due process'.[63] However, he continues:

> Where a right or legal entitlement implicated in a trial closely overlaps with one implicated in a truth commission procedure (eg the right against compelled self-incrimination), due process standards provides a useful benchmark of fairness.[64]

Furthermore, Sarkin has advocated in his study of the Amnesty Committee of the South African TRC that legal standards such as the use of precedent should be employed to ensure that amnesty is granted fairly, and that 'procedures are being consistently applied to all'.[65]

In conclusion, this discussion has argued that amnesties need not prevent victims and societies learning the truth about past events, and in fact, where amnesties are used to entice offenders to admit the truth about their actions, they may contribute to the uncovering of more information on the past than would have been possible under formal criminal proceedings. In this way, offering amnesties in exchange for truth can contribute to repairing the harm suffered by the victims.

[58] UNCHR (n 38) Princ 9.
[59] Hayner (n 49) 132.
[60] Stephen A Garrett, 'Models of Transitional Justice—A Comparative Analysis', (presentation at International Studies Association 41st Annual Convention, Los Angeles, CA, 14/18 March 2000).
[61] *Ibid*.
[62] Brahm (n 56).
[63] Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press, Cambridge 2006) 109.
[64] *Ibid* 110.
[65] Sarkin (n 26) 181.

Amnesty and Repairing the Harm

The right to reparations is not specifically addressed under the international human rights conventions,[66] although all the main instruments affirm a 'right to a remedy',[67] which contains inter alia the right to reparations for the harm suffered.[68] The importance of the right to reparations has been supported in the decisions of the international courts,[69] and it has been recognised in Rule 106 of the Rules of Procedure and Evidence of the ad hoc tribunals, which establishes:

> pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.[70]

In addition, Article 75 of the Rome Statute of the ICC makes provision for reparations to be paid either by the convicted person or, where that person lacks the necessary funds, the Victims Trust Fund,[71] which can receive grants from governments, international organisations or individuals.

In addition to international courts, the right to reparations was explicitly elaborated in the unanimously adopted UN General Assembly Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power 1985,[72] although its language 'lacks potency'.[73] More recently, the *Basic Principles and Guidelines* declared that reparations are integral to a victim's right to a remedy.[74] These principles stipulate that reparations should be 'adequate, effective and prompt'; should seek to redress 'gross violations of

[66] However, some subject-specific conventions, such as the Convention Against Torture 1984; the International Convention on the Elimination of all forms of Racial Discrimination 1969, and other regional human rights treaties do explicitly recognise the right to reparations.

[67] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 8; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2; Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (European Convention on Human Rights) (ECHR) 1950 art 13; and African Charter art 25. For a discussion of the right to a remedy, see ch 6.

[68] 'Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms'. See UNGA (n 78) Princ 11.

[69] *Aloeboetoe et al v Suriname*, Inter-Am. Ct HR (ser C) No 11 (1991). For an overview of the jurisprudence of the treaty-monitoring bodies in relation to reparations see ch 6.

[70] ICTY, 'Rules of Procedure and Evidence' 29 March 2006 <http://www.un.org/icty/legaldoc-e/basic/rpe/procedureindex.htm> accessed 21 April 2006, Rule 106(b).

[71] ICC St art 75.

[72] UNGA, 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (29 November 1985) Res 40/34.

[73] Chante Lasco, 'Repairing the Irreparable: Current and Future Approaches to Reparations' (2003) 10 *Human Rights Brief* 18.

[74] UNGA (n 78) Princ 11.

human rights'; and must be 'proportional to the gravity of the violations and the harm suffered'.[75] Finally, the principles provide that, where the state is responsible for the violations, it must make reparations to the victims or their families, and where an individual is found to be responsible, that individual should 'provide reparation to the victim or compensate the state if the state has already provided reparation to the victim'.[76] However, as will be discussed below, most offenders, except the former elite or insurgency leaders, will not have sufficient financial resources to be able to pay, and indeed, some former combatants may be in need of financial assistance themselves whilst they attempt to demobilise and reintegrate into society.[77]

Amnesty laws raise various issues relating to the right to reparations. First, as discussed in chapter 1, amnesties can be a form of reparation to individuals who have been penalised or imprisoned by the state for their alleged political or religious beliefs. In these instances, the granting of amnesty could restore the dignity and status of those who have been oppressed and remove their criminal record, which might be a barrier to full participation in society.

In contrast, amnesty laws that are issued to perpetrators of crimes under international law could constitute a violation of the victim's right to a remedy, which should then itself be remedied. For example, the amnesty law could work to prevent victims obtaining reparations for the suffering they endured, by prohibiting civil proceedings or by making investigations too difficult to enable such civil proceedings to succeed. An amnesty law could, however, include provision for reparations, or could be accompanied by legislation to provide financial compensation for victims and their families. Furthermore, amnesties can be accompanied by measures to facilitate the victims' right to file a civil suit or participate in truth-recovery mechanisms, and by measures to memorialise the suffering of the victims and prevent such violations recurring. Such measures could potentially mean that a state could satisfy its obligation to provide a remedy, even where it has introduced an amnesty.

As the category of reparations is extremely broad, it has been divided into the following sub-categories: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, using the definition of reparations in the *Basic Principles and Guidelines*.[78] In addition, the right of individuals to regain property that was confiscated or that they had been forced to abandon whilst fleeing violence could be regarded as a form of restitution, it has been treated as a separate category in the database, due to the complex issues related to it. Finally, in analysing the relationship of reparations to amnesty, reparative amnesties are excluded from the data

[75] UNGA (n 78) Princ 15.
[76] *Ibid* Princ 15.
[77] For a discussion of the provision of financial incentives to former combatants, see ch 10.
[78] UNGA (n 35) Princs 19–23.

discussing trends, as they would skew the results. They will, however, be referred to in the discussion of case studies below. This restriction, plus the fact that not all amnesties have conditions attached, has limited the identification of amnesties with accompanying reparations measures to 151 amnesty laws. The distribution of each form of reparations among these amnesties is shown in Figure 11 below. This distribution perhaps reflects the differing natures of each form of reparations, with measures to provide satisfaction and guarantees of non-repetition often being less expensive to implement and potentially beneficial for more individuals than, for example, efforts to promote rehabilitation. Indeed, although some of the reparation measures can be expensive for the state to provide, others can occur without any financial burden, for example, an official apology. This flexibility in the forms of reparations that can be implemented can perhaps explain why, when comparing the patterns across regions, there is little difference in the number of amnesty laws that are related to reparations in each region, despite the wide disparities in wealth in the different parts of the world. Related reparations and amnesties were introduced in 30 countries in Europe and Central Asia, and in 53 countries in Sub-Saharan Africa. Overall, the introduction of reparation measures has grown in popularity during the period since the Second World War with 90 amnesty laws having complementary reparation measures since 1990. This increase in popularity has included all forms of reparations, with the most dramatic growth in recent years occurring in measures to ensure satisfaction and guarantees of non-repetition. These developments are to be welcomed as they illustrate that, although states are introducing amnesties, such

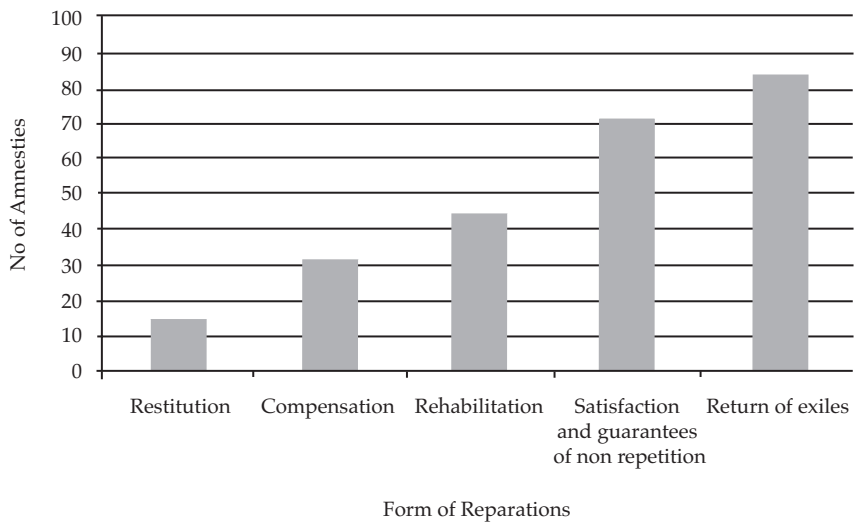

Figure 11: Amnesties and reparations programmes

amnesties are increasingly moving away from blanket approaches which overlook the rights and needs of victims.

Restitution

The duty of the state to provide restitution has been described as follows:

> Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.[79]

Some of these measures were implemented in the amnesty laws studied for this research. First, as discussed previously, many amnesty laws have provided for the release of political prisoners, which is an act of restitution that restores the liberty of those who were imprisoned. For example, the 1990 Romanian amnesty included measures to release those who had been imprisoned; to establish committees of inquiry and ad hoc committees to settle cases of persons claiming to have been wronged; to re-examine certain verdicts; and to grant compensation.[80] Secondly, some amnesties have also sought to restore individuals' civil and political rights. For example, the 1979 Brazilian amnesty law[81] introduced by the ruling military junta in response to demands from the opposition movement, allowed previously disenfranchised politicians to re-engage in politics in return for tacitly agreeing not to challenge the impunity granted to the armed forces by the same law.[82]

Individuals' right to employment has also been restored in several amnesties which aimed to reintegrate those who had lost their jobs due to their political or religious beliefs. For example, the 2002 Angolan amnesty resulting from the Luena peace agreement provided for the reinstatement into the police force of officers who had received amnesties for crimes

[79] UNGA (n 78) Princ 19.

[80] Joby Warrick, 'Ceausescu's Political Prisoners Freed' *United Press International* (Bucharest 5 January 1990); Jan Krcmar, 'New Leadership Grants Amnesty to Political Prisoners' *The Independent* (6 January 1990) 15; ——, 'Decree on Amnesty Adopted' *ITAR-TASS* (6 January 1990).

[81] *Lei Concede anistia e dá outras providências*, 1979 (Braz).

[82] For a discussion of the Brazilian transition, see Guillermo O'Donnell, Philippe C Schmitter and Laurence Whitehead (eds), *Transitions from Authoritarian Rule: Prospects for Democracy—Latin America* (John Hopkins University Press, Baltimore 1986); Jorge Zaverucha, 'The Degree of Military Autonomy During the Spanish, Argentine and Brazilian Transitions' (1993) 25 *Journal of Latin American Studies* 283; Brian Loveman, '"Protected Democracies" and Military Guardianship: Political Transitions in Latin America, 1978–1993' (1994) 36 *Journal of Interamerican Studies and World Affairs* 105; Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* (University of Chicago Press, Chicago, Ill 1998).

against state security.[83] In other cases, governments have offered to provide support in finding new employment. For example, in the 2005 peace agreement for Aceh the Indonesian government undertook to provide jobs or farming land for GAM fighters, political prisoners and 'all civilians who have suffered a demonstrable loss due to the conflict'.[84] However, this would clearly be a difficult and expensive policy for many transitional governments to pursue.

Restitution has also been offered in many amnesties that allowed for the return of property or where that was no longer possible, compensation for the loss. For example, the 1991 Bulgarian amnesty law provided that

> [r]eal property . . . that has been confiscated shall be returned to the persons from whom it was confiscated or to their legal heirs if it is in the possession of the state or in the possession of a state or municipal company in which the state owns at least a 51 per cent share before this Law goes into effect.
>
> If the conditions of the preceding paragraph have ceased to exist or if the property has been destroyed, demolished or rebuilt, said convicted individuals shall be compensated with another piece of real property of equal value or with monetary compensation under rules and procedures determined by the Council of Ministers . . .[85]

Instituting policies of restitution can be problematic. For example, when considerable time has passed since the original violations occurred, new patterns of ownership and distribution of resources may have been established, and attempts to redress past violations would lead to the creation of new groups of victims.[86] Nonetheless, restitution, where possible, can help to mitigate the negative consequences of an amnesty for human rights abusers by going some way to restoring victims to their former state.

Compensation

According to the *Basic Principles and Guidelines*:

> Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

[83] Law No 4/02 (Angola). For a description see ——, 'Angolan government urged to speed up reintegration of amnestied police' *BBC Worldwide Monitoring* (Luanda 18 February 2004).

[84] Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement, 2005 (Indon) s 3.2.5.

[85] Law on Amnesty and Restoration of Confiscated Property and Implementing Regulations, 1991 (Bulg) art 5.

[86] For a discussion of the risks inherent in any approach to restitution, see Minow (n 47) 107–112.

(a) Physical or mental harm;
(b) Lost opportunities, including employment, education and social benefits;
(c) Material damages and loss of earnings, including loss of earning potential;
(d) Moral damage;
(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.[87]

In dispersing this compensation, the mechanisms employed by states with amnesty laws have varied between establishing independent commissions to administer the provision of compensation, as in Chile,[88] or relying on the judiciary through civil suits, as was the case in Peru, before the government launched its state-wide compensation programme.[89] However, the latter approach created difficulties for victims where thorough investigations were not conducted. When awarding monetary reparations, there are a number of factors that states have chosen to consider, for example, the type of physical or psychological harm endured and how long it lasted; and the loss of earning potential or pension. For example, under the 1993 Albanian amnesty, the compensation granted to former political prisoners was proportionate to 'every day of imprisonment not being guilty'.[90] In making financial compensation, some states have chosen to pay a lump sum in a single payment, sometimes with the condition that victims who accept the payment surrender their right to make any further complaints, whereas other states have chosen to pay reparations in the form of monthly pensions. Each of these approaches has some difficulties. For example, making large-scale one-off payments can prove very costly at a time when a state needs to invest in infrastructure and development. In contrast, making monthly payments to victims and their relatives can prove more expensive in the long term, and it would be difficult to estimate the final cost of the programme. Furthermore, both approaches can face logistical difficulties in distributing payments, particularly where there are few functioning banks or financial institutions.

Whereas some states are willing to provide compensation for crimes committed by their agents, others have also compensated for crimes committed by non-state forces. For example, the United Kingdom paid compensation to victims and their relatives for harm resulting from terrorist activities relating to the conflict in Northern Ireland.[91] In other instances,

[87] UNGA (n 35) Princ 20.

[88] See eg Hayner (n 34); Margaret Popkin and Naomi Roht-Arriaza, 'Truth as Justice: Investigatory Commissions in Latin America' (1995) 20 *Law and Social Inquiry* 79.

[89] UNHRC 'Summary Record of the 1521st meeting: Peru' (23 October 1996) UN Doc CCPR/C/SR 152 [33].

[90] Law on the Status of Politically Ex-Convicted and Prosecuted People by the Communist Regime, Law No 7748 (29 July 1993), amended by the law No 7771 (7 December 1993) art 9 amended (Alb).

[91] Nigel Biggar (ed), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press, Washington, DC 2003) 15.

non-state actors or private entities that supported perpetrators (either terrorist groups or dictatorial regimes) have been required to contribute to compensation programmes. For example, on 25 February 2005, Riggs Bank, which had been sued in a Spanish court for helping Pinochet to launder money, agreed to pay $8 million to a fund established to assist persons who suffered human rights violations under Pinochet.[92] Furthermore, under the recent *Ley de Justicia y Paz* 2005 in Colombia, perpetrators can be required to contribute to the victims' reparations as a more reconciliatory form of punishment. Where non-state actors are required to contribute to reparations programmes, this is not to excuse the state from its responsibility to pay reparations for crimes committed by state agents, or to contribute to reparations programmes where offenders are unable to make a sufficient financial contribution.

Case Study 11: Colombia's Justice and Peace Law (Law 975) 2005

Colombia's civil war is the longest running conflict in the Americas, beginning in 1948 and continuing to the present day. It is a complex conflict with multiple actors and widespread human rights violations. Amnesty International claims that 70,000 people have been killed in the past 20 years and thousands more have disappeared or have suffered violations of their fundamental rights.

During the conflict, there have been many attempts to reach a negotiated settlement. The current process began following the election of President Alvaro Uribe in 2002 and applies only to the *Autodefensas Unidas de Colombia* (AUC), a right-wing, paramilitary, 'self-defence' organisation, which is involved in drug-trafficking and is alleged to have close ties to the armed forces and intelligence organisations. Tentative talks on a ceasefire are underway with the left-wing *Ejército de Liberación Nacional* (ELN), but the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) is not involved in current peace talks.

During the peace negotiations with the AUC, there has been a series of accords in which the paramilitaries agreed to disarm and demobilise. Under Colombia's scheme, lower-level combatants are granted amnesty for political crimes under Decree 128 (2003), but individuals accused or sentenced *in absentia* for crimes against humanity or drug trafficking are excluded from this law. Decree 128 was found not to apply to AUC members by the Supreme Court in July 2007, as the court held that they could not have committed political crimes such as sedition, since they had not been working against the state, but rather had co-operated with some state officials.[93]

To address this 'gap' in the programme of re-integrating former members of the AUC, the government created the Justice and Peace Law 2005. Under its

[92] Saul Hansell, 'Riggs National Will Settle Spanish Suit Linked to Pinochet', *New York Times* (26 February 2005). Press Release from Spanish Legal Team, 'August Pinochet and Riggs Bank' (25 February 2005).

[93] ——, 'Demob Unhappy' *The Economist* (Bogota 2 August 2007).

terms, the individuals excluded from Decree 128 will receive reduced sentences that will be served in 'concentration zones', which are the areas in which the demobilising combatants are required to assemble.

Many concerns have been raised domestically and internationally about the Justice and Peace Law's approach including the security in the concentration zones and the lack of initiatives to disable the criminal infrastructure of the paramilitaries, which, if it remains in place, will provide them with the means to simply buy more weapons if they were to return to violence. Furthermore, during the debates preceding the law's enactment, civil society organisations argued that the law should have provisions to protect victims' rights to truth, justice and reparations, a position that was arguably strengthened by the fact that the ICC could exercise its jurisdiction over crimes against humanity committed since July 2002.

The resulting law requires offenders to face prosecution, but permits the judge to suspend sentences if the offender agrees inter alia to refrain from further criminality and to contribute to the victims' reparations. In the original text of the law, this provision only related to the offender's illicitly acquired assets, but in a May 2006 judgment, the Constitutional Court ruled that paramilitaries could also be required to pay reparations from their legally acquired assets.[94] Finally, the law requires judges to impose alternative sanctions, such as a denial of political rights or a prohibition on living in certain areas where victims reside.[95]

***Sources**: Amnesty International, 'Colombia: The Paramilitaries of Medellín: Demobilization or Legalization?' AI Index AMR 23/019/2005 (2005); Human Rights Watch, 'Colombia: Letting Paramilitaries Off the Hook' (2005); Markus Koth, 'To End a War: Demobilization and Reintegration of Paramilitaries in Colombia' (Bonn International Center for Conversion, Bonn 2005); José E Arvelo, Note, 'International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process' (2006) 37 Georgetown Journal of International Law 411; International Crisis Group, 'Colombia: Towards Peace and Justice?' (2006); Lisa Laplante, 'Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz' (2006) 28 Michigan Journal of International Law 108; Timothy Posnanski, Note, '"Colombia Weeps but Doesn't Surrender": The Battle for Peace in Colombia's Civil War and the Problematic Solutions of President Alvaro Uribe' (2005) 4 Washington University Global Studies Law Review 719; Inter-American Commission on Human Rights, 'Report on Demobilization in Colombia', OEA/Ser.L/V/II.120 (2004); Catalina Díaz, 'Colombia's Bid for Justice and Peace' in Kai Ambos, Judith Large and Marieke Wierda (eds) Building a future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development (Springer, Heidelberg 2008)*

[94] Corte Constitucional, 18/05/06, 'Sentencia C-370/06' (Colom).

[95] Amnesty International, *Colombia: The Paramilitaries of Medellín: Demobilization or Legalization?* (Report) (September 2005) AI Index AMR 23/019/2005.

Rehabilitation

The *Basic Principles and Guidelines* state that 'rehabilitation should include medical and psychological care as well as legal and social services'.[96] In the amnesty laws studied for this book, including both reparative amnesties and those for offenders, rehabilitation has more commonly consisted of economic and social support to help the victims to become fully functioning members of society again. The economic and social measures have consisted of policies to find employment for former prisoners, to provide economic support and housing assistance, and to provide medical care and education. For example, the 1987 East German amnesty provided for

> the reintegration of the amnestied citizens in social life through integration on an equal footing in the work process while observing the existing qualification, the support for the start and execution of training measures, housing accommodation, and the organisation of social care and support.[97]

Such services, particularly health and education programmes, should be an essential component of any rehabilitation programme, although it may not be possible for a transitional state to introduce a widespread programme immediately if there are large numbers of victims and few trained personnel. Furthermore, where programmes are introduced to create the necessary infrastructure to provide rehabilitation, it can be difficult to distinguish reparations for individual victims from development work to benefit society as a whole. Nonetheless, rehabilitation programmes can form an important component in addressing victims' needs.

Satisfaction

The *Basic Principles and Guidelines* treat measures to ensure satisfaction and provide guarantees of non-repetition as a single form of reparations, but due to their differing natures, they will be treated separately here. The list of possible measures that could be introduced to provide victims with satisfaction contained in the *Basic Principles and Guidelines* is as follows:

(a) Effective measures aimed at the cessation of continuing violations;
(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

[96] UNGA (n 35) Princ 21.
[97] 'Resolution of the Council of State of the German Democratic Republic on a general amnesty on 17th July 1987, on the occasion of the 38th anniversary of the founding of the German Democratic Republic' 1987 (East Germany).

(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
(f) Judicial and administrative sanctions against persons liable for the violations;
(g) Commemorations and tributes to the victims;
(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.[98]

Many of these measures are collective reparations to benefit a society as a whole, rather than solely individual victims, which differs from the approach pursued under the other forms of reparations outlined above. Furthermore, this list can be argued to lack coherence as some of these measures overlap with those suggested under restitution or guarantees of non-repetition. In addition, where tension exists between need to pursue 'effective measures aimed at the cessation of continuing violations' and the other suggested measures, there is little guidance on which form of satisfaction should have priority. Despite these difficulties, the *Basic Principles and Guidelines* still provide a useful indication of the form measures to ensure satisfaction could take.

There have been several amnesties that were accompanied by measures to provide satisfaction to victims. Indeed, as satisfaction could include 'effective measures aimed at the cessation of continuing violations',[99] an amnesty that is tied to peace negotiations could itself, if genuine, be viewed as a form of satisfaction. In addition, truth commissions and community-based justice mechanisms represent a means of offering satisfaction to the victims. Similarly, there have been amnesties which have been accompanied by measures to investigate disappearances and, in some cases, return the remains of the victims to their families. As discussed above, amnesty laws could also satisfy victims' needs when they are intended to restore the 'dignity, reputation and the rights of the victim' by, for example, releasing those who were imprisoned by an oppressive regime and proclaiming their innocence. Furthermore, in several countries that have introduced amnesty laws, the lack of criminal responsibility has not prevented representatives of both governments and non-state actors who are responsible for human rights violations, publicly admitting their

[98] UNGA (n 35) Princ 22.
[99] *Ibid* Princ 22(a).

responsibility and in some cases apologising for their actions.[100] For example, in Argentina in April 1995, General Martín Balza, chief of the Argentine army, apologised to the nation for the military's crimes during the 'dirty war' and in March 2004 President Kircher said:

> As president of the nation I come here today to ask forgiveness for the shame of a democracy which stayed silent on these atrocities during the past twenty years.[101]

Measures of atonement and acknowledgement have also been pursued through commemorations and tributes to the victims, such as instituting national days of memorial and transforming former torture centres into museums. For example, in Benin, Decree No 91–95 of 27 May 1991 led to the establishment of a national day for the victims of torture or corporal punishment,[102] and in South Africa, there were a variety of commemorative measures, including erecting tombstones, memorials or monuments, and renaming streets or public facilities. In addition to states acknowledging their responsibility, an amnesty can also be accompanied by programmes to ensure individual accountability, through either selective prosecutions or non-criminal sanctions, such as lustration programmes as discussed below.

Guarantees of Non-Repetition

According to the *Basic Principles and Guidelines*:

> Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:
>
> (a) Ensuring effective civilian control of military and security forces;
> (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
> (c) Strengthening the independence of the judiciary;
> (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
> (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
> (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

[100] For a discussion of the impact of such apologies see Biggar (n 91).

[101] David Pilling, 'Argentine Army Chief Apologises' *Financial Times* (Buenos Aires 27 April 1995) 7; Michael McCaughan, 'Argentina Expunges past in Navy School of Horrors' *The Irish Times* (Dublin 29 March 2004) 13.

[102] UNHRC, 'Consideration of Reports submitted by States Parties under Article 40 of the Covenant: Interim Report: Benin', UN Doc CCPR/C/BEN/2004/1, 16 February 2004 [65].

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.[103]

Although amnesty is often criticised for eliminating both specific and general deterrence for those who commit human rights violations, thereby increasing the risk that similar crimes will re-occur,[104] an amnesty programme can be linked to measures to ensure non-repetition, for example, the 1992 peace accords in El Salvador, which offered limited amnesty to individuals accused of political crimes, also recognised that the military was subordinate to civilian control.[105]

Right of Return

The *Basic Principles and Guidelines* do not explicitly provide for a right of return, other than to state that restitution should include where appropriate 'return to one's place of residence'.[106] However, due to the unique issues that can result from large numbers of refugees or internally displaced people attempting to return to the homes they were forced to abandon, it was felt that the issue should be considered separately within the Amnesty Law Database. As discussed in chapter 2, amnesties frequently provide for the safe return of exiles and refugees. For transitional states, such returns can be positive, as they can help to: reverse the consequences of the conflict, particularly where there has been ethnic cleansing;[107] provide a symbol that the violence has ended; and, where the exile community has been politically active, provide greater stability for a peace process.[108] Such returns can be complicated by measures to restore the former land and property of the returnees, particularly where they have been absent for long periods and new patterns of ownership have been established. In this regard, Bell asserts that, although 'international law does not make direct provision for a right of return to former homes or home areas', it can be argued that

[103] UNGA (n 35) Princ 23.
[104] David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 *Fordham International Law Journal* 473. For a discussion of amnesties relationship to deterrence, see ch 2.
[105] *Acuerdos de Chapultepec 1992*, (El Sal), chs 1 & 6.
[106] UNGA (n 35) Princ 19.
[107] Rhodri C Williams, 'The Contemporary Right to Property Restitution in the Context of Transitional Justice' (International Center for Transitional Justice, New York 2007) 11.
[108] Christine Bell, 'Negotiating Justice? Human Rights and Peace Agreements' (International Council on Human Rights Policy, Versoix, Switzerland 2006) 57–8.

> such a right can be inferred from the right to liberty of movement and the right to enter one's 'own country'.[109]

The approach taken by the states in the Amnesty Law Database has varied with some agreements, such as the Dayton Peace Accords 1995 for Bosnia-Herzegovina providing the right of refugees and displaced persons 'to return to their homes of origin'.[110] Other amnesties also specified that where return was no longer possible, the returnees would be given support in finding alternative accommodation and compensation for their loss. For example, the 1993 Albanian amnesty stipulated that the government would

> through special acts . . . guarantee to all those persons [granted amnesty] facilities and priorities for their individual or collective requests in the following fields of economical, financial and social activities . . . c) In the field of construction and accommodation.[111]

Similarly, the 1991 amnesty process in Bulgaria provided that

> if the property has been destroyed, demolished or rebuilt, said convicted individuals shall be compensated with another piece of real property of equal value or with monetary compensation under rules and procedures determined by the Council of Ministers.[112]

Clearly, where there has been widespread destruction of property, such policies can be costly for a transitional government and, if new patterns of ownership have been established, can risk inflaming tensions between communities, particularly where there are large numbers of displaced people. Therefore, the decision whether to allow people to return to their home or region of origin may have to be balanced against whether finding alternative accommodation for them in other regions might be more practical and could offer them greater guarantees of safety.

From this discussion of reparations, it is clear that amnesties can be related to reparations in several ways. For example, an amnesty for political prisoners could itself be viewed as restitution, and amnesties which attempt to end violence and prevent further human rights violations could be viewed as a form of satisfaction. Furthermore, even where an amnesty benefits former combatants and human rights abusers, it can be accompanied by measures to compensate for the harm endured, investigate the crimes of the past and prevent the violations re-occurring. The

[109] *Ibid* 61.

[110] Dayton Peace Agreement (1995) Annex 7, art 1(1) (Bosn. & Herz). For a description of this process, see case study 6.

[111] Law on the Status of Politically Ex-Convicted and Prosecuted People by the Communist Regime, Law No 7748 (29 July 1993), amended by the law No 7771 (7 December 1993) art 12 (Alb).

[112] Law on Amnesty and Restoration of Confiscated Property and Implementing Regulations, Law No 167 (1991) art 5 (Bulg).

relationship between amnesties and reparations could be particularly strengthened where the amnesty is integrated into restorative justice processes.

Amnesty and Restorative Approaches to Justice

In much of the academic literature relating to amnesties, there is a focus on whether amnesties represent a denial of victims' rights to justice. This debate is typically focused on retributive approaches to justice which entail criminal prosecutions and penal sanctions. For example, this was the approach pursued in the *Basic Principles and Guidelines*' description of appropriate forms of remedy for human rights violations. However, in both transitional justice literature and the field of criminal justice more widely, there is an increasing recognition of the significant role that can be played by more restorative approaches to justice.[113] Whilst more retributive systems focus on the crime and the appropriate punishment, restorative approaches emphasise the harm and the need to repair relationships. Minow describes the aim of restorative justice as

> to repair the injustice, to make up for it, and to effect corrective changes in the record, in relationships and in future behaviour.[114]

From this it is clear that the objectives of restorative justice are both backward-looking, in that it addresses past crimes, and forward-looking, as it does not simply seek to restore the status quo ante, but to contribute to the establishment of a more equal and harmonious society.[115] Restorative approaches can be suitable where formal Western-style retributive prosecutions are not possible due to practical and political constraints, or where restorative mechanisms are the preferred approach to justice, which is the case in many societies in Africa and elsewhere.

[113] For a critique of the problems of state-centric approaches to justice, see Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2008) 34 *Journal of Law and Society* 411; Phil Clark, 'Recreating Tradition: Assessing Community-Based Transitional Justice in Northern Uganda' in Tim Allen and K Vlassenroot (eds), *The Lord's Resistance Army: War, Peace and Reconciliation* (James Currey, Oxford 2008); OHCHR *Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (OHCHR, Geneva 2007); Victor Igreja, 'Gamba Spirits and the Homines Aperti: Socio-Cultural Approaches to Deal with Legacies of the Civil War in Gorongosa, Mozambique' in Kai Ambos, Judith Large, and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development* (Springer, Heidelberg 2008); Stef Vanderginste, 'Transitional Justice for Burundi: A Long and Winding Road' in Kai Ambos, Judith Large and Marieke Wierda, (eds) *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development* (Springer, Heidelberg 2008).

[114] Minow (n 47) 91.

[115] Guillermo Kerber, 'Overcoming Violence and Pursuing Justice: An Introduction to Restorative Justice Procedures' (2003) *Ecumenical Review*. See also Llewellyn & Howse (n 53) 374–5 and Sarkin & Daly (n 23) 693.

To date, there have been several examples of situations where amnesty laws have been introduced in conjunction with more restorative approaches to justice. For example, the Acholi people of northern Uganda,[116] who have suffered greatly from the acts of the Lord's Resistance Army (LRA), use their traditional dispute resolution mechanisms, known as *nyouo tong gweno, mato oput* and *gomo tong* as a means of reintegrating into society former combatants who have been amnestied.[117]

Nyouo tong gweno is a cleansing ritual that is used to purify anyone who has been away from home for a long period and can occur soon after his or her return. When the individual who is returning is a wrongdoer, the ceremony is 'a necessary precondition before the reconciliation ceremony', but if the returnee was simply an individual who was abducted, this ceremony is considered sufficient.[118] *Nyouo tong gweno* is a public event which members of the community travel to watch. It can last several hours and has multiple stages: first, it requires former combatants to place their bare right feet into a freshly cracked egg.[119] Here, the egg symbolises innocent life and by dabbing themselves in it the combatants are 'restoring themselves to the way they used to be'.[120] Next, they are brushed by a twig of an opobo tree, which symbolically cleanses them. Finally, after stepping over the twig, they are welcomed back into the community by the elders.[121]

At this stage, where former combatants are considered to have committed murder, they have to participate in the *mato oput* ceremony. This process begins with lengthy mediation by elders from neutral clans who determine the appropriate compensation to be paid by the offender's clan and whether 'emotions have sufficiently cooled and the parties are ready to communicate'.[122] This mediation may take years before the affected

[116] The Acholi are just one tribe living within northern Uganda who have suffered from the conflict. For an overview of the amnesty process in Uganda, see case study 2.

[117] There is some dispute over the extent to which these rituals have been used in recent decades following the erosion of customary leadership under Obote and Amin and the dislocation caused by the conflict, but in a 2007 study, the OHCHR reports that 'overall, use of key Acholi rituals has increased in recent years, though to what extent remains unclear. Based on limited surveys, usually of several hundred respondents, several commentators report that between 28 and 50 per cent of returned combatants have participated in some form of ritual, usually welcoming or cleansing ceremonies such as *nyono tong gweno*'. See OHCHR (n 113). See also Thomas Harlacher and others, Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War (CARITAS, Kampala 2006).

[118] Lucy Hovil and Joanna R Quinn, 'Peace First, Justice Later: Traditional Justice in Northern Uganda' (2005) Working Paper No 17 (Refugee Law Project, Faculty of Law, Makerere University, Kampala, Uganda) 24.

[119] Amy Colleen Finnegan, 'A Memorable Process in a Forgotten War: Forgiveness within Northern Uganda' (MA in Law and Diplomacy book, Fletcher School, Tufts University 2005), 43.

[120] Marc Lacey, 'Atrocity Victims in Uganda Choose to Forgive' *The New York Times* (Gulu, Uganda 18 April 2005).

[121] *Ibid*.

[122] OHCHR (n 113).

clans are willing to participate and able to pay the compensation.[123] Once the participants are ready, the ceremony will be arranged to take place at a neutral location. During the ceremony, the offenders' clan must announce that 'it is willing to accept responsibility for the crime and to offer restitution'.[124] Then, a drink is prepared from the bitter oput herb, blood of sacrificed livestock and local beer. This mixture is drunk by representatives of both clans 'to show that they accept the bitterness of the past and promise never to taste such bitterness again'.[125] After this, both clans share the meat of the sacrificed livestock. This meal marks the restoration of trust between the clans.[126]

Finally, there are also traditional *gomo tong* ('bending of spears') ceremonies which are collective rituals performed to mark the end of conflict, rather than individual killings. In these ceremonies, the elders from the warring clans

> meet to discuss the cause of the conflict, resolve to end the fighting and command their people to cease all violence.[127]

Gomo tong ceremonies can be performed in isolation or in combination with *mato oput* ceremonies, where 'one side believes they deserve compensation for an initial killing that sparked wider violence'.[128]

For these reconciliation processes, acknowledgement and truth-telling are vital parts of the ritual,[129] and it is expected that individual returnees will accept responsibility for their actions and repent for their crimes.[130] As will be explored in chapter 9, some studies have shown that there are high levels of support for this process among the Acholi community,[131] and following the opening of an investigation of the LRA at the ICC, tribal and religious leaders have lobbied the ICC prosecutor to encourage him to respect their traditions and allow the amnesty law to remain in place.[132] More recently, the Agreement on Accountability and Reconciliation 2007 from the Juba peace talks raises the possibility that these traditional justice rituals will be incorporated into the formal justice system.

[123] OHCHR (n 113).
[124] *Ibid*.
[125] ——, 'Uganda: Traditional Ritual Heals Communities torn Apart by War' *IRIN* (9 June 2005).
[126] *Ibid*.
[127] *Ibid*.
[128] *Ibid*.
[129] Hovil & Quinn (n 118) 34.
[130] —— (n 125).
[131] Hovil & Quinn (n 118) 1. For a more detailed discussion of the attitudes of victims, see ch 9.
[132] The tribal and religious leaders travelled to The Hague and met the ICC Prosecutor. They issued a joint press release, see ICC, 'Press Release: Joint Statement by ICC Chief Prosecutor and the visiting Delegation of Lango, Acholi, Iteso and Madi Community Leaders from Northern Uganda' (16 April 2005) No: ICC-OTP-20050416. 047-EN.

Similar community rituals have been used to address conflict-related crimes in Somalia,[133] Kenya,[134] Mozambique,[135] Sierra Leone,[136] Rwanda,[137] and Angola.[138] They have also been employed in countries outside Africa, such as the Solomon Islands and Papua New Guinea,[139] and even in more developed states which have been confronted by conflict.[140] Restorative justice in transitional states may also be incorporated into the work of a truth commission[141] or take the form of a hybrid between truth commissions and community-based justice mechanisms, as illustrated by the work of the Community Reconciliation Process of the East Timorese Commission for Reception, Truth and Reconciliation.[142]

Amnesty can be related to restorative justice in a number of complementary ways. For example, amnesty could be used in conjunction with a restorative justice mechanism to encourage the perpetrators to participate in the mechanism without inculpating themselves. This was the approach followed by the South African TRC.[143] Furthermore, although punishment is not the objective of restorative justice, it remains possible to look at other forms of punishment such as public identification; or the imposition of obligations to perform community services, to contribute to financial compensation for victims, or to apologise publicly. As discussed above, such measures would help to fulfil the victims' rights to reparations. In these instances, the amnesty could be conditional on the offenders complying with the penalties imposed by the restorative justice mechanism and could therefore work as an enforcement mechanism, and act to reassure the

[133] Lacey (n 120).

[134] *Ibid*.

[135] Ramesh Thakur, 'When Peace and Justice Collide: East Timor' *International Herald Tribune* (Dili 31 August 2005); Graybill (n 40); Dani W Nabudere, '*Ubuntu* Philosophy: Memory and Reconciliation' (Réseau Grands Lacs Africains, Geneva, 1 March 2005).

[136] Rosalind Shaw, 'Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone' *Special Report 130* (United States Institute of Peace, Washington DC 2005).

[137] Jessica Raper, 'The *Gacaca* Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide' (2005) 5 *Pepperdine Dispute Resolution Law Journal* 1; Helena Cobban, *Amnesty After Atrocity? Healing Nations After Genocide and War Crimes* (Paradigm Publishers, Boulder CO 2007); Coel Kirkby, 'Rwanda's *Gacaca* Courts: A Preliminary Critique' (2006) 50 *Journal of African Law* 94; Lars Waldorf, 'Rwanda's Failing Experiment in Restorative Justice' in Dennis Sullivan and Larry Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge International Handbooks, Routledge, London 2006). The Rwandan approach was discussed in case study 8.

[138] Carola Eyber and Alastair Ager, 'Conselho: Psychological Healing in Displaced Communities in Angola' (2002) 360 *Lancet* 871.

[139] Pat Howley, *Breaking Spears and Mending Hearts: Peacemakers and Restorative Justice in Bougainville* (Zed Books, London 2002).

[140] See eg Anna Eriksson, 'Community Restorative Justice in Northern Ireland: Building Bridges and Challenging Cultures of Violence' (PhD in Law, Queen's University Belfast, 2007).

[141] See discussion on truth commissions, pp 163ff.

[142] Erica Harper, 'Delivering Justice in the Wake of Mass Violence: New Approaches to Transitional Justice' (2005) 10 *Journal of Conflict and Security Law* 149. The East Timorese approach was discussed in case study 7.

[143] Sarkin & Daly (n 23) 693.

victims of the genuineness of the process. The flexibility of the restorative justice approach to punishment offers the opportunity for an amnesty to be reconciled with a legitimate justice process in which the needs of the victims are acknowledged. By performing appropriate cultural or religious rituals, perpetrators show their desire to change and to respect the norms of society.[144] This can be particularly beneficial for individual or communal levels of reconciliation outlined in chapter 1. In this way, grass-roots efforts to reintegrate former combatants through community-based approaches to justice can help to address local issues that would be ignored by more top-down, elite driven processes and could enable the amnesty to be granted in a context of societal forgiveness and reconciliation.

In order to achieve its goals, a restorative justice process must to take 'a holistic approach' to crimes by bringing together victims, offenders, and representatives of their respective communities.[145] Victims must be given a central role, be able to describe their suffering and have their pain acknowledged, and be able to receive reparations for the harm they endured. Offenders, whilst being encouraged to take responsibility for their actions, should be treated with respect. The involvement of representatives of the communities to which the victims and offenders belong is desirable, particularly in transitional societies, as restorative justice processes recognise that crime does not simply affect individuals, but society as a whole, with individual members of different communities perpetrating different acts that reflect upon the entire community.[146] It follows from this acknowledgment that any reconciliation process should attempt to recognise the humanity of the opponent by addressing the faults of one's own community. This approach mirrors that of the 'traditional African concept of *Ubuntu*, which translates roughly as "humaneness" or "largeness of spirit"'.[147] This concept aims to

> create an environment where people are able to recognise that their humanity is inextricably bound up in the humanity of others[148]

thereby encouraging individuals to see beyond the crimes of the perpetrators because it seeks to integrate the wrongdoer back into the community, rather than punish them. Creating a more victim-centred approach based on restorative justice principles does not mean that victims have a right to see

[144] M Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9, 21.

[145] Kerber (n 115). See also John Braithwaite, 'Principles of Restorative Justice' in Andrew Von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing, Oxford 2003) 10 and Sarkin & Daly (n 23) 693.

[146] Kerber (n 115) 155–6.

[147] Rian Malan, *My Traitor's Heart: A South African Exile Returns to his Country to Face his Tribe and his Conscience* (Vintage, New York 1990) 227.

[148] Lyn Graybill, 'To Punish or Pardon: A comparison of the international criminal tribunal for Rwanda and the South African truth and reconciliation commission' (2001) 2 *Human Rights Review* 3.

somebody prosecuted or punished: instead, the outcome of the proceedings must be determined either through mediation between the victim, the perpetrator and their respective communities, or by independent adjudicators, who have heard the views of all parties. It is argued by restorative justice advocates that this more holistic approach can contribute to breaking the cycles of power and oppression that frequently exist in transitional societies.

Lustration and Vetting Procedures and Amnesty

Several of the amnesty laws considered for this book have been related to policies that aimed to remove those implicated in the former regime from office, or to bar them and insurgents from certain public sector posts. The removal of existing officials is known as 'lustration',[149] and refers to the process of purifying 'state organisations from their "sins"' by purging them of anyone with close connections to the former regime or who could be responsible for human rights abuses.[150] Similarly, the policy of screening new public officials, known as vetting, seeks to eliminate 'a significant injustice and threat to reform'[151] and create a climate of security for the population. Boed emphasises that such a measure is 'not premised on the criminal responsibility of its targets', but remains a measure that is 'punitive in nature' and

> may have severe consequences on its targets, ranging from a loss of a job and ineligibility for employment in given positions to stigmatisation of the targets and their families.[152]

Such laws can also include restrictions on the accused exercising their civil and political rights, usually for designated periods. For example, the Civil Harmony Law 1999 in Algeria exempted former militants from exercising their civil and political rights for a 10-year period,[153] although this was later rescinded in the Presidential Decree 2000.[154] Subsequently, in the Amnesty Ordinance 2006, the Algerian government banned anyone who had used religion to contribute to the conflict from being politically active. This ban also applies to those who were engaged in terrorism and who refused to recognise their responsibility for the national tragedy.[155]

[149] According to Boed, it comes from the Latin *lustratio* meaning 'purification by sacrifice'. See Roman Boed, 'An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice' (1999) 37 *Columbia Journal of Transitional Law* 357, 358.

[150] *Ibid* 358.

[151] Kritz (n 48) 25.

[152] Boed (n 149) 364–5.

[153] *Loi relative au rétablissement de la Concorde civile*, No 98-08, (1999) art 39 (Alg). See Case Study 4.

[154] Presidential Decree no 2000-03 (2000) (Alg).

[155] *Ordonnance no 06-01 portant mise en oeuvre de la Charte pour la paix et la reconciliation nationale* (2006) art 26 (Alg).

From a human rights perspective, these lustration or vetting laws can be troubling, as they undermine the right of individuals to be free from discrimination,[156] to be free to work,[157] and to have a fair hearing.[158] Despite this, Nanda claims that provided certain safeguards are met, lustration is a 'sound accountability mechanism' as

> it sends a salutary signal to victims in particular and society in general that those responsible for excesses, egregious violations and abuses will not stay in office.[159]

Furthermore, lustration can help to fulfil the victims' rights to reparations by symbolically acknowledging the responsibility of the state for the violations, and by removing from office individuals who pose a risk to civilians.

Amnesty laws can be related to lustration policies in a number of ways. First, a few amnesty laws have followed purges to undo their perceived excesses. For example, immediately following World War Two, there were purges (also known as *épuration*) in Germany,[160] Austria,[161] France[162] and Italy[163] of Nazi and Fascist operatives and collaborators. As time passed,

[156] ICCPR, art 26.

[157] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 6(1).

[158] ICCPR art 14(1). For a fuller discussion of the impact of lustration laws on human rights see Boed (n 149).

[159] Ved P Nanda, 'Civil and Political Sanctions as an Accountability Mechanism for Massive Violations of Human Rights' (1998) 26 *Denver Journal of International Law and Policy* 389, 396.

[160] See eg Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, Cambridge 2004); Norbert Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration* (Columbia University Press, New York 2002); Stein Ugelvik Larsen and Bernt Hagtvet (eds), *Modern Europe after Fascism* (Social Science Monographs, Columbia University Press, Boulder 1998).

[161] See eg Elster (n 160); Siegfried Beer, 'Hunting the Discriminators: Denazification in Austria, 1945–1957' in Guðmundur Hálfdanarson (ed), *Racial Discrimination and Ethnicity in European History* (Edizioni Plus—Università di Pisa, Pisa 2003); John H Herz (ed), *From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism* (Contributions in Political Science, Greenwood Press, Westport, Conn 1982); Winfried R Garscha and Claudia Kuretsidis-Haider, 'War Crimes Trials in Austria' (Presentation at the 21st Annual Conference of the German Studies Association in Washington, 25–28 September 1997); Frederick C Engelmann, 'How Austria has Coped with Two Dictatorial Legacies' in John H Herz (ed), *From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism* (Contributions in Political Science, Greenwood Press, Westport, Conn 1982).

[162] See eg Elster (n 160); Jon Elster, 'Redemption for Wrongdoing: The Fate of Collaborators after 1945' (2006) 50 *Journal of Conflict Resolution* 324; István Deák, Jan Tomasz Gross and Tony Judt, *The Politics of Retribution in Europe: World War II and its Aftermath* (Princeton University Press, Princeton, NJ 2000); Michèle Cointet-Labrousse, 'Between Summary Justice and the Reconstruction of Legality by Decree: The Theory and Practice of French Purge Policy 1943–53' in Stein Ugelvik Larsen and Bernt Hagtvet (eds), *Modern Europe after Fascism* (Social Science Monographs, Columbia University Press, New York 1998).

[163] See, eg, Michele Battini, 'Sins of Memory: Reflections on the lack of an Italian Nuremberg and the Administration of International Justice after 1945' (2004) 9 *Journal of Modern Italian*

these measures became viewed as too severe, and consequently amnesties were introduced to reverse them.

More commonly, however, a lustration policy is implemented in conjunction with amnesty, or soon afterwards, to ensure accountability and institutional reform, in the absence of prosecutions. This can occur in a variety of settings, for example, dictatorial states making the transition to democracy, as in Albania, where the lustration law barred potential candidates for political and judicial posts due to their links to the former communist regime, whilst an amnesty was granted to former political prisoners.[164] A similar approach was followed in Bulgaria, where lustration laws required the screening of

> all members and persons seeking positions in the governing bodies of universities and research institutes, as well as the central academic examining and degree awarding body, to certify that they had not been closely affiliated with the former communist regime.[165]

States wishing to purge their armed forces following military coups, as in Haiti and Ecuador, have granted the coup participants amnesty, but then forced the leaders into retirement. Amnesty and lustration have also coexisted in states seeking to resolve civil conflict as in El Salvador, where the peace accords provided guidelines on the purification of the armed forces and an ad hoc commission was set up to investigate human rights abuses which recommended the removal or transferral of military personnel. However, its recommendations were only enforced after considerable delay.[166]

Lustration is not without dangers, however, as depriving

> large numbers of people of their position in the security forces, social status, source of livelihood or rights of political participation

can encourage them to resort to criminality or political violence,[167] as is vividly illustrated by the results of the recent de-Baathification process in Iraq.[168] Furthermore, if large swathes of public officials are removed from office, the new government will be faced with a dearth of expertise at a

Studies 349; Jon Elster, 'A Framework for the Study of Transitional Justice' (16 August 2001) <http://www.media.uio.no/forskning/prosjekter/1945/artikler/framework1.shtml> accessed 31 January 2008; Franco Ferraresi, 'The Radical Right in Postwar Italy' in Stein Ugelvik Larsen and Bernt Hagtvet (eds), *Modern Europe after Fascism* (Social Science Monographs, Columbia University Press, New York 1998); Roy Palmer Domenico, *Italian Fascists on Trial, 1943–1948* (University of North Carolina Press, Chapel Hill 1991); Herz (n 161).

[164] See eg US Department of State, 'Country Report on Human Rights Practices 1997: Albania' (30 January 1998). This law was amended twice in 1997, once prior to the June elections, to allow additional groups and individuals to run for office, and again in August to lessen its impact further.

[165] Boed (n 149) 361.

[166] Nanda (n 159) 393.

[167] Kritz (n 48) 25.

[168] Larry Diamond, 'What Went Wrong in Iraq' *Foreign Affairs* (September/October 2004).

time when creativity and knowledge are very much in demand. The stakes are particularly high where the policy consists of a blanket removal of party members rather than individualised screening processes. It is also preferable that any lustration or vetting process is individualised and operates according to standards of procedural fairness.[169] It has even been advocated that 'soft approaches' such as 'early retirement or the appointment of new officials to strategic posts' may in some instances be 'more suitable to ensure that unreliable officials are replaced'.[170] Nonetheless, combining amnesties with programmes to remove those associated with abusive policies from office can provide a form of accountability for perpetrators, can meet the needs of victims that their former oppressors do not continue to benefit from their crimes,[171] and can help to restore faith in government institutions.

ENFORCING CONDITIONS AND THE POTENTIAL OF TEMPORARY AMNESTIES

When a conditional amnesty is granted it represents a quid pro quo between the parties to the conflict, whereby amnesty is awarded on the understanding that the recipients will fulfil the necessary conditions. This can give rise to several problems. First there is the issue of timing. If insurgents are called upon to disarm in exchange for amnesty, are they required to do this immediately, or should it be a gradual process? In some cases, disarmament plans may be delayed by the need to establish institutions to oversee the process. Furthermore, internally within the insurgent group, it may take time for the leaders to convince their followers of the need to disarm and participate in the peace process. In the *Prosecutor v Allieu Kondewa* case at the Special Court of Sierra Leone, Justice Robertson considered conditional amnesties in his separate opinion and declared that

> insurgents, terrorists and common criminals who want to obtain the protection of a pardon must comply promptly with its conditions or else it becomes valueless.[172]

In the uncertain conditions that accompany any transition, however, the notion of what is 'prompt' should be assessed according to the conditions at the time.

[169] For a detailed discussion of procedural fairness, see Freeman (n 63).

[170] Theissen (n 51) 5.

[171] For a discussion of victims' needs in relation to the position and financial status of their former oppressors see ch 9.

[172] Decision on Lack of Jurisdiction / Abuse of Process: Amnesty Provided by the Lomé Accord—*Prosecutor v Allieu Kondewa*, SCSL-04-14-T-128-7347 (25 May 2004), Separate Opinion [24].

A further issue concerns who should be held responsible for breaches of a conditional amnesty. As discussed in chapter 2, amnesties are generally granted to categories of individuals based on their common identity, such as membership of a political organisation. The individuals are then required to comply with the conditions, either individually or as a group, in order to be granted immunity. A problem arises where certain members of an organisation choose to breach the conditions: should this have repercussions for the entire group? Where the conditions are broken by an individual whose organisation remains committed to the process, it seems reasonable that only the individual be denied the benefits of the amnesty, if investigations are undertaken to prove that the individual acted without the support of the organisation and the organisation publicly repudiates the individual's actions. Conversely, where a group violates the terms of the amnesty, should those individuals who have already, in good faith, made efforts to comply be penalised? Although applying the resulting penalties to all the organisation's members would have negative repercussions on those who have made efforts in good faith, such severe penalties would, it is hoped, encourage the organisation to adhere to its commitments and strengthen its members in holding the leadership to account. Furthermore, where sufficient resources are available, appeal procedures could be created for individuals whose amnesty status is removed. Alternatively, such individuals could face temporary sanctions for breaches, such as a suspension of the benefits of a disarmament, demobilisation and reintegration (DDR) programme. Where the amnesty benefits multiple groups in a society, if one group breaches its amnesty conditions, where possible, the amnesty should continue to apply to the other groups. As Schabas argues:

> the suggestion that an amnesty in a peace agreement becomes null and void, or that it is voidable, because some parties later violate the agreement does not seem to be sustainable.[173]

This position seems to be particularly relevant when extremists splinter from parties to the peace process with the explicit aim of returning to armed conflict. Generally, such splinter groups only have small numbers of members, and whilst they can be capable of extreme acts of violence, they should not be permitted to derail the peace initiatives.

In contrast to the approaches discussed above, which would require monitoring and, where appropriate, revoking amnesties throughout the transition, an alternative would be to grant temporary immunity, which would then be reassessed at the end of an agreed period. Such temporary laws contradict the traditional assumption that an amnesty law is a

[173] William A Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 11 *UC Davis Journal of International Law and Policy* 145, 160.

permanent closing of the books on the past, but it reflects an approach pursued by some states. The granting of temporary immunity relates to the practice of allowing free passage for negotiators, so as to enable peace talks to occur, except that it stretches the period of immunity from just the duration of the talks to a longer prescribed period, such as the duration of a transitional government. Here, the immunity allows negotiations to occur, but it also aims to ensure some stability whilst the fruits of the negotiations are implemented. This was the justification for the 2003 temporary immunity law in Burundi that shields political leaders who returned from exile to participate in the negotiations and the transitional government from prosecution for the duration of that government.[174] It is envisaged that, once the transitional period is complete and provided no new amnesty is agreed, these leaders will be eligible for prosecution. A similar time limited amnesty was introduced in the Democratic Republic of Congo in 2003. It provided temporary immunity for 'facts of war, political and opinion offences', but excluded war crimes, genocide and crimes against humanity.[175]

Temporary immunity is therefore not an amnesty in the traditional sense, as it simply defers the decision on prosecutions until a time when conditions are hopefully more stable. This approach may be attractive for negotiators as it recognises the realities within a transitional state where the political situation is precarious and the legal infrastructure compromised. Temporary immunity may create a space for democratic and legal institutions to become entrenched and it leaves open the possibility that prosecutions can be pursued once the government is 'secure enough to take action against members of the former regime' and the judiciary is capable of conducting high-profile prosecutions in a 'fair and effective' manner.[176]

A delay in deciding whether to prosecute is justified by Scharf and Rodley, who argued that the doctrine of *force majeure* 'can warrant temporary postponement of prosecutions, provided steps are taken without delay to collect and preserve relevant evidence'.[177] Similarly, temporary immunity may be conceptualised as a form of derogation, whereby the victims' rights to justice are exceptionally and temporarily limited in response to serious conditions threatening the life of the nation, with the intention of

[174] Law 'relating to the judicial proceedings for provisional immunity of political leaders returning from exile', 2003 (Burundi). For discussion, see ——, 'Burundi: Approval of Temporary Immunity Law Sparks Heated Debate' *IRINnews.org* (3 September 2003).

[175] *Decret-Loi portant amnistie pour faits de guerre, infractions politiques et d'opinion* (2003) (Dem Rep Congo). This law was subsequently made permanent in *Loi portant amnistie des personnes responsables de faits de guerre, des infractions politiques et de délits d'opinion* (2005) (Dem Rep Congo).

[176] Michael P Scharf and Nigel Rodley, 'International Law Principles on Accountability' in M Cherif Bassiouni (ed), *Post-Conflict Justice* (International and Comparative Criminal Law Series, Transnational Publishers, Ardsley, NY 2002) 96.

[177] *Ibid* 96.

fully restoring these rights at a later date.[178] Even though international actions have been pushing for prosecutions of crimes under international law, Article 16 of the Rome Statute recognises that it may occasionally be necessary to defer prosecutions in the interests of peace and security,[179]

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.[180]

The provision was included to enable the Security Council to encourage a party to a conflict to participate in peace negotiations by temporarily removing the threat of prosecution. This would appear to signify that the international community deems it acceptable and sometimes necessary to delay prosecution to ensure international peace and stability.

There are, however, dangers with delayed accountability. For example, temporary immunity is likely to be less attractive to perpetrators than permanent shielding from prosecution, and the uncertainty surrounding their treatment following the end of the transition period may create instability and reduce incentives to establish viable political institutions. Furthermore, the victims may suffer due to the delay in bringing charges and, particularly when the immunity lasts for a lengthy period, some may die before seeing their oppressors on trial. Finally, the longer the time between the commission of the crimes and the court proceedings, the more difficult it becomes obtain evidence and reliable witness testimony. These difficulties indicate that temporary immunity may not be practical to implement, and indeed, the experiences in Burundi and the Democratic Republic of Congo are, thus far, very discouraging. Furthermore, it may possible to minimise some of the problems by the manner in which the temporary immunity law is designed.

If a government decides to rely upon a temporary immunity it should outline initially that the amnesty will only be in place for a specified time, perhaps five years. Slye has suggested that a period of at least this length is necessary

> both to provide a sweet enough 'carrot' to induce the recipient to give up power and to provide enough time for the beneficiary to demonstrate more than a superficial commitment to human rights and the rule of law.[181]

[178] *Ibid* 96.

[179] Yasmin Naqvi, 'Amnesty for war crimes: Defining the limits of international recognition' (2003) 85 *International Review of the Red Cross* 583, 592.

[180] ICC St art 16. See also the discussion of this art in ch 6.

[181] Ronald C Slye, 'The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights' (2004) 22 *Wisconsin Journal of International Law* 99, 119–20.

Slye argued that

> at the end of this period, an evaluation could be made to determine whether the beneficiary of the amnesty is entitled to a permanent amnesty or something less[182]

such as a mitigated prison sentence. These determinations should be individualised and based upon the actions of the beneficiary during the 'probationary' limited amnesty period,[183] to enable those who made a good faith effort to contribute to reconciliation to be reintegrated into society.

For all forms of conditional or temporary amnesty, the determination whether a beneficiary has fulfilled the conditions for amnesty must be free from political control. To ensure this, there must be clear guidelines as to what is necessary to demonstrate adherence to the conditions and what methods will be employed to assess compliance. Ideally, the decision-making body should be independent, as the state itself is usually an actor in political transitions and should not be in a position where it can, or at least be perceived to, undermine its opponents by accusing them of breaching the terms of the agreement, particularly where there is no equivalent institution capable of monitoring the state's behaviour. Furthermore, to allow politicians to influence the decisions would reduce their imperative to commit firmly to a peaceful society, and could create the appearance that the criminals had been able to amnesty themselves. To ensure independence, the commission should have its own access to resources and personnel, possibly with the support of international organisations or states.

Where an amnesty has been withdrawn because an individual or group did not adhere to its conditions, this implies that they should then be eligible for prosecution and punishment both for the original crime and for the breach. Such prosecutions should be pursued, to encourage other amnesty applicants to engage with the process and to bring those individuals who are not committed to peace and stability to justice for their past crimes. Difficulties arise, however, when considering whether the information that these individuals provided in their amnesty applications can be used as evidence in their prosecution. This would probably depend on the objectives of the amnesty processes, with processes that emphasise engaging perpetrators in truth-recovery mechanisms providing greater safeguards to ensure more information is provided than processes that simply ask amnesty applicants to provide basic personal details. Furthermore, even where prosecutions are postponed by a temporary

[182] Ronald C Slye, 'The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights' (2004) 22 *Wisconsin Journal of International Law* 99, 119.

[183] *Ibid* 120.

immunity law, archives must be preserved and investigations conducted, possibly by truth commissions, even while the immunity is in place.

Finally, where time limits are imposed on the duration of the immunity, it is advisable that these limits be sequenced with the work of complementary transitional justice mechanisms, such as truth commissions, in order to encourage former combatants to engage with the transitional justice projects during the early stages of their work.

CONCLUSION

This chapter has explored the conditions that can be attached to an amnesty, including tactical conditions to improve the law's efficacy and more reparative conditions which aim to fulfil the state's obligations to ensure the victims' rights to truth and reparations. By using the examples in the Amnesty Law Database, this chapter has argued that states are often willing to impose practical conditions such as requiring combatants to surrender and lay down their weapons within a specified time period before being considered eligible for amnesty. Where an amnesty aims to promote peace and stability within a war-torn society, such conditions can create an incentive for former combatants to engage promptly with a peace process, and can contribute to the gradual demilitarisation of the society and a reduction in violence.

The Amnesty Law Database has also revealed that states are becoming increasingly willing to attach more reparative conditions to the grant of amnesty, including showing remorse, telling the truth, participating in restorative justice mechanisms, or paying reparations. This chapter has argued that such conditions can help to reconcile a national amnesty with a state's international obligations to ensure the victims' rights to truth and reparations. These obligations require the state to conduct investigations and inform the victims of their results, and to provide victims with appropriate reparations, including compensation and restitution, whilst working towards establishing a society in which the suffering of the victims is memorialised and measures are taken to prevent a repetition of the crimes that they endured. Clearly, these obligations would be breached by amnesty processes that offer blanket impunity to perpetrators in an attempt to bury their past crimes. However, such breaches can be avoided by amnesties that are combined with alternative justice processes, which aim to reveal the truth and respond to the needs of the victims. Studying the patterns revealed by the Amnesty Law Database has shown that states are increasingly willing to do this, with large numbers of amnesties now granting some form of reparation, although the approaches followed by states differ considerably due to the nature of the violations that occurred and the resources available to the government. Furthermore, since the

work of the South African TRC, it appears that states are more willing to establish truth commissions in conjunction with amnesties.

In its analysis of the conditions attached to amnesties, this chapter has made a number of recommendations that could contribute to enhancing the legitimacy and efficacy of the amnesty process. First, it has been argued that, where amnesty is designed to persuade insurgents to surrender, they should be permitted to surrender to a range of governmental and non-governmental institutions, rather than simply the state's armed forces, and where 'buy-back' programmes are offered for weapons, the payments must be made promptly and should be publicised clearly. Furthermore, the cut-off date for applications should allow a sufficient period for potential applicants to debate the amnesty with their comrades and families, and to travel often considerable distances to apply.

Secondly, this chapter has contended that, where a truth commission offers amnesty in exchange for truth, the commission should involve victims, offenders and their communities in its decisions; its commissioners should be perceived as representative and unbiased; and its mandate should be broad enough to enable a complete picture of the past to be revealed. Where individuals fail to comply with the requirements of the truth commission, prosecution should be pursued, and for those who are granted amnesty, their names and actions should be revealed in the commission's report.

Similarly, where a government relies on restorative justice processes to address past crimes, victims should be given a central role, although there should also be participation from offenders, plus representatives of the communities to which the victims and offenders belong. The processes should be mediated or arbitrated by individuals who are independent representatives of all participants, and where punishments are imposed, they should take into account the needs of the victims and the community.

Thirdly, to meet international legal standards, all amnesties should be accompanied by reparations programmes which take into account the needs of the victims and the wider society, and the nature of the violations that occurred. Whilst states have considerable discretion in designing their reparations programmes, it is essential that they encompass measures to ensure the crimes are not repeated and the suffering is not forgotten.

Fourthly, this chapter has argued that lustration or vetting processes should be individualised, operate according to procedural fairness,[184] and avoid casting the net too wide, which could deny the state access to individuals with expertise in carrying out public policy and could create resentment and instability that could threaten the transition.

Finally, the chapter has asserted that adherence to the conditions attached to an amnesty should be enforced by means of the state remov-

[184] Freeman (n 63).

ing the amnesty from those who breach the conditions and exposing them to prosecution. Alternatively, this chapter has explored the possibility of provisional immunity and suggested that, if a government decides to pursue such immunity for the duration of a transitional government, it should state an upper time limit after which prosecutions will be pursued, unless efforts are made in good faith to establish democratic government, so that the beneficiaries are not encouraged to delay establishing permanent institutions. Furthermore, determinations on whether to offer permanent amnesty at the end of the temporary immunity should be free from political control.

Although these conditions appear stringent, it may not be necessary for a state to fulfil all of them. For example, if community-based justice mechanisms are implemented, they may reduce the need to also create a truth commission. Furthermore, the precise scope of the conditions may be dictated by the unique circumstances of each transition, for example, whether the crimes were predominantly committed by secretive state forces or whether there were multiple parties perpetrating atrocities. Similarly, the nature of the crimes committed and the level of violence occurring when the amnesty is introduced may influence the conditions attached to it. For all conditional amnesties, however, it is necessary that reparations be made to the victims. Even this does not create strict guidelines, however, as international law permits states some discretion when designing their reparations programmes in recognition of the disparities that can occur between states due to factors such as divergent levels of resources and numbers of victims seeking reparation. In this way, the development of conditional forms of amnesty appears to enable transitional governments to tailor their approach to past crimes by balancing their obligations under international law against the political and economic conditions faced by their country. The following chapters will argue that this flexibility can be recognised both by the courts in the territorial state and by international courts.

Part II

Approach of Courts to Amnesties

5

Implementing the Amnesty: The Approach of National Courts

INTRODUCTION

PART I OF THIS book focused on the process of introducing amnesty laws, and their relationship to states' obligations under international humanitarian and human rights law. In Part II, the discussion will concentrate on how these amnesty laws are addressed at the different levels within the international criminal justice system, namely: the national courts of the territory where the crime occurred; international or hybrid courts and human rights treaty-monitoring bodies; and courts in third states operating under the principles of extraterritorial jurisdiction. This chapter will begin with an analysis of the judgments of national courts relating to amnesty laws introduced by the governments of their states.

This chapter will explore whether there are any trends in the behaviour of national courts, for example: are they more likely to uphold or overturn an amnesty? Have their attitudes changed over time? Are there differences between the approaches followed by higher and lower courts, and by military and civilian courts? Do national courts alter their approach for amnesty laws which grant impunity for international crimes? This chapter will also analyse the judgments of courts to determine how they view the legality of amnesty laws under national and international law, and to investigate whether other considerations such as the political situation in the state influence their decisions. This chapter will consider both rulings on judicial review and the application of amnesty laws. It will begin with a brief overview of trends in the attitudes of the courts to permitting or denying amnesty laws, both in general terms and in relation to specific issues such as the granting of amnesty for international crimes. This will be followed by an in-depth discussion of the legal reasoning used by the courts in reaching their decisions. This analysis aims to provide further clarity on the characteristics of the amnesty laws under investigation and explain the factors that influence the decisions of the courts relating to amnesties in order to identify practices that could offer greater protection to victims.

TRENDS IN THE RESPONSES OF NATIONAL COURTS TO AMNESTY LAWS

This research has compiled varying degrees of information on 315 cases before national courts. Of these, it has been possible to state the outcome in 257 cases relating to 77 amnesty processes.[1] Within the national cases, there are several ways in which an amnesty be considered. First, depending on the powers of the judiciary within the domestic legal system, a court could be asked to review the amnesty judicially, based on either domestic legal provisions or applicable international treaties, in order to decide whether it conflicts with a state's pre-existing legal obligations. If the law is found to be in conflict, the court must then decide whether the amnesty can take precedence over the pre-existing obligations.

If an amnesty is found to be valid, the courts may subsequently have to decide whether to permit investigations. A court may determine that, rather than applying a blanket amnesty, it should conduct investigations into individual cases, in order to determine the applicability of the amnesty law in each case, depending on whether the crime falls within the scope of the amnesty or on whether the applicant has adhered to the amnesty's conditions. If it is determined that an investigation should take place, depending on the jurisdiction, it could be conducted by either the police or investigating judges or magistrates. These investigations would try to establish whether a crime had occurred, who was responsible, and whether the actions fell within the scope of the amnesty, for example, whether the crime was political[2] and whether it had occurred within the prescribed time limits. Even if the court decides that the amnesty should be applied and that the perpetrator cannot be prosecuted, the court may still assert its power by ruling that the victim or their family should be compensated for their suffering.

Cases relating to amnesty can also arise where political opponents of a regime petition to be granted the benefits of an amnesty, or where individuals appeal against the grant of an amnesty, because they wish to have court proceedings in order to prove their innocence. Finally, there have been some amnesty laws which have benefited individuals when they are convicted or whilst they are serving their sentence. Whilst such measures

[1] As explored in Part I, these amnesty processes differ considerably, as some cover crimes under international law, whereas others liberate non-violent political prisoners. Where it has not been possible to state the outcome of a case, it is due to a variety of factors including linguistic difficulties (the author could only read in English, French and Spanish), the time since the judgment was issued (for example, making it harder to find the full text of the judgment online), and the fact that not all judgments were published. Furthermore, for several amnesty processes, the decision of whether to grant amnesty to individual applicants was made by an independent commission, rather than by courts.

[2] See discussion on political crimes, ch 3.

are, strictly speaking, pardons, as discussed in the introduction, they have been included in the database to illustrate amnesty processes that also provide for prisoner releases.[3]

Each of the cases for which information on the outcome is available has been allocated to one of the following categories: upheld/applied; limited; overturned; or non-applicable. The 'upheld/applied' category covers cases that adhere to the amnesty law by either: (1) finding the amnesty constitutional and in accordance with international law;[4] or (2) granting amnesty to the defendant according to the terms of the law, including where the defendant has already been convicted. The 'overturned' category covers cases where the court found the amnesty law itself to be unconstitutional or in conflict with the state's obligations under international law. The 'limited' category applies to cases where a court limits the application of the amnesty law by interpreting it in such a way as to enable it to refuse to apply it to specific cases, for example, by classifying disappearances as continuous crimes and therefore outside the time limits of the amnesty, or where the crimes are held to be common crimes rather than political crimes. This category could also apply where a court accepts the concept of amnesty per se as legal, but reinterprets certain provisions. Finally, the 'non-applicable' category includes cases where the court refuses to apply the amnesty outside the law's stated terms, for example, for crimes that occurred outside its time limits.

The process of categorising the outcomes of national cases has been problematic, as there is overlap between the categories. For example, it can be difficult to distinguish between cases where an amnesty has been overturned or where it has merely been limited, particularly as many of the cases discussed in this chapter are still under consideration for final appeals; and certain cases where the amnesty law was originally applied have been reopened.[5] Furthermore, the ability of courts to overturn amnesty laws differs between jurisdictions, with supreme courts in some states having more power than others. Therefore, these categorisations should not be viewed as an exact science, but rather merely as a tool to identify trends.

The results for the each category of outcomes of national cases are shown in Figure 12 below.[6] This illustrates the fact that domestic courts

[3] For a discussion of the distinction between 'amnesty' and 'pardon', see Introduction.

[4] These two issues are separate legal tasks and will be analysed in separately below. However, they are grouped together here for illustrative purposes.

[5] This is particularly the case in Chile, where the Pinochet Affair sparked renewed judicial activity in cases that were previously considered to be closed (as discussed in ch 7), and in Argentina, where the repeal of the amnesty laws has led to hundreds of cases being reopened. For a detailed overview of this process, see José Sebastián Elías, 'Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina's "Amnesty" Laws" *Yale Law School Student Scholarship Series*, Paper 57 (Yale Law School, November 2007).

[6] For these results, rather than counting each case individually, all cases with a particular result that fall within each amnesty process are counted as one, regardless of the number of cases that occurred relating to that process.

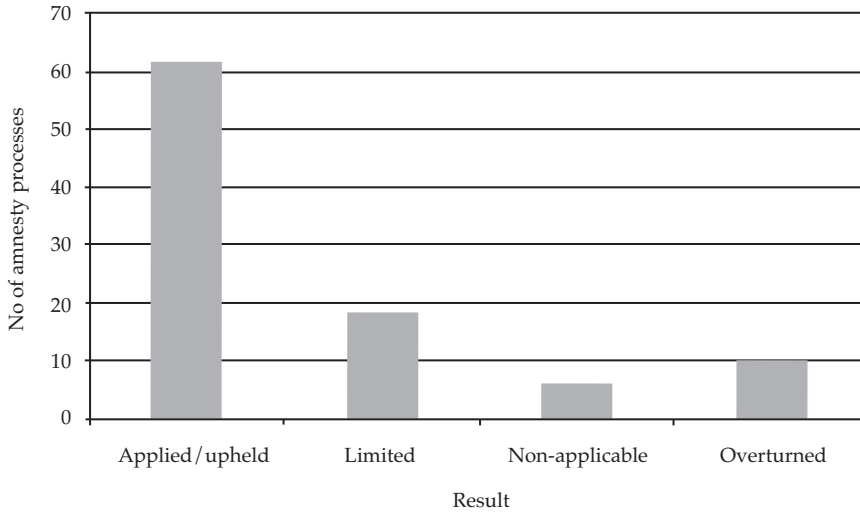

Figure 12: Results of national cases

are much more likely to uphold amnesty laws than to limit or overturn them. It should be noted, however, that certain amnesty processes will appear in multiple categories, as their national courts changed their position on the amnesties over time, usually being more willing to apply the amnesty unquestionably in the early days of the transition, but becoming more willing to challenge or restrict it as time progressed and the political conditions became more stable. The changes of over time for each category are shown in Figure 13 below. This shows that the number of amnesty processes where amnesty is applied or upheld by national courts increased until 1995, before beginning to drop gradually, as the other possible outcomes increased in frequency. However, as it has been easier to obtain information on judgments since the 1990s than it has been for the earlier period, these figures may exaggerate these trends. It will be interesting to observe how this pattern develops during the next decade, as the implementing legislation for the ICC comes into effect within the national legal systems of states parties.

The actions of national courts can also be assessed, in order to investigate whether the approaches of lower and higher courts have differed when addressing amnesty processes. The results of this research have shown that, in the majority of cases, both the lower and upper courts applied the amnesty. There were a few instances where only the upper courts applied an amnesty, thereby overruling an earlier judgment by a lower court that had overturned or limited it. Finally, there are a few examples where both the lower and upper courts overturned or limited

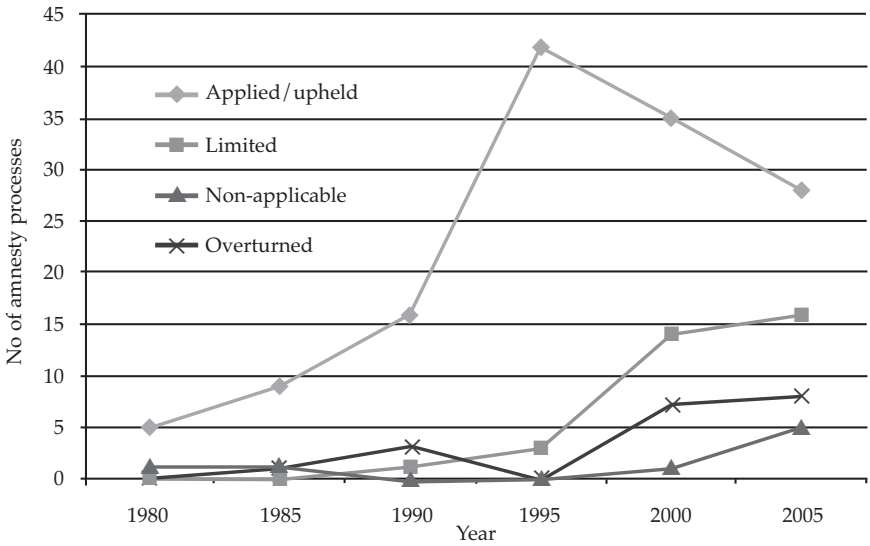

Figure 13: National cases results by time

the amnesty. These results indicate that the higher courts are more likely to apply amnesty laws, which could be due to a number of factors such as a greater susceptibility to political pressure or a propensity to defer to the government on issues of national security.[7] Where the decision whether to apply an amnesty was granted to military courts, usually resulting from national legislation or the rulings of higher courts granting them jurisdiction, it appears they were far more likely to enforce amnesty laws to protect members of the armed forces than civilian courts. This only occurred in a small number of states, however, most notably in South America.

When the outcomes of national cases are considered in relation to the crimes covered by the amnesty, it appears that, for amnesty processes that have covered crimes under international law, many national courts have been willing to uphold and apply the amnesty, as shown in Figure 14 below. Where the courts have been willing to uphold such amnesties, they have often limited their recognition of the applicability of international law within their national legal system. However, Figure 14 also reveals a similar pattern of outcomes where the amnesty law explicitly excluded some or all crimes under international law, with the majority of cases being applied or upheld. Even where some crimes under international law are excluded, however, courts have in a few cases been willing to limit or overturn the amnesty. Here, the justification could be that not all

[7] For a discussion on the motivations of the judiciary, see under 'Adhering to the Separation of Powers Doctrine', below.

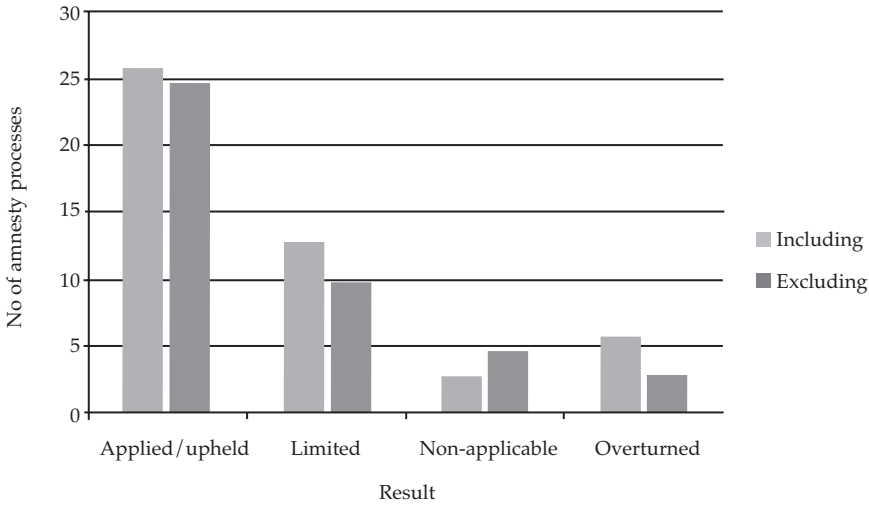

Figure 14: Results of cases in according to the treatment of crimes under international law within the amnesty

crimes under international law were excluded, or that the amnesty was unconstitutional in its application by, for example, excluding certain groups of offenders.

Finally, when considering the type of challenge that is brought against the amnesty law and the outcome that results from it, it appears that judicial review proceedings are less likely to result in the amnesty law being limited or overturned than case-specific challenges as shown in Figure 15 below. From this figure, it is clear that many more amnesties are upheld in response to individual investigations than as a result of judicial review proceedings. This is unsurprising as judicial review proceedings are rare in comparison to case-specific proceedings. Interestingly, however, the courts seem more willing to limit amnesties in response to individual applications. This more incremental approach may result from a fear amongst the judiciary that, to find an amnesty law invalid in a judicial review case would bring them into direct conflict with the government and possibly destabilise the peace process or transition, whereas to gradually undermine the amnesty law and limit its effects would have less serious political penalties, whilst simultaneously lessening the scope of the amnesty.

This overview of the case law on amnesties is useful for identifying trends in the attitudes of national courts to amnesty laws. It is, however, open to criticism, as it ignores the detailed issues on which the outcomes of the proceedings were based. Therefore, the arguments underpinning these rulings will be explored below.

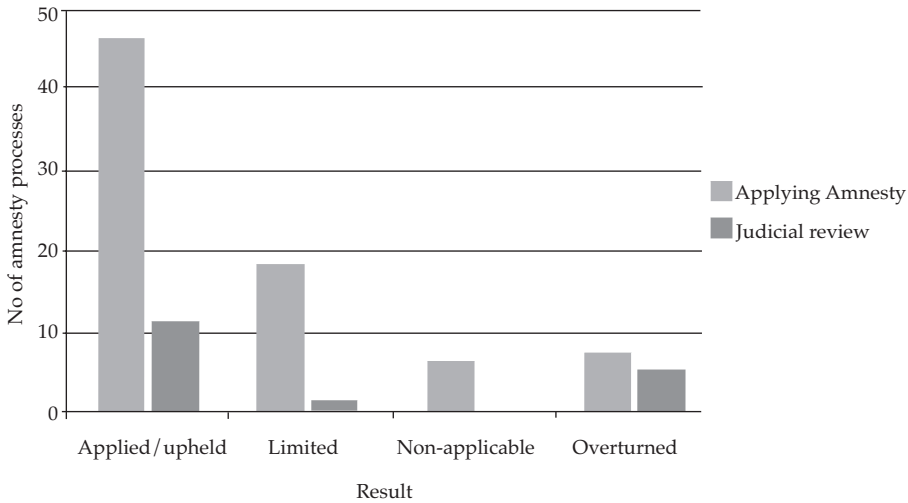

Figure 15: Outcomes of judicial review cases

HOW HAVE NATIONAL COURTS EXPLAINED THEIR APPROACH TO AMNESTY LAWS?

In analysing the judgements of national courts relating to amnesty laws, rather than simply providing an overview of the case law within each jurisdiction, the following themes have been identified from the jurisprudence: legality under municipal law; legality under international law, including the position of international law within the domestic legal system; adhering to the separation of powers doctrine; promoting peace and reconciliation; disclosing or concealing the truth; and learning from experiences elsewhere. The selection of these themes was based upon legal principles and aspects of the judgment that correspond with some of the motivations for introducing amnesty laws that were outlined in chapter 1. There can be overlap between these themes. For example, national constitutions are most often discussed when considering legality under municipal law, but the text of the constitution can also be significant for considering the place of international law in the domestic legal system, or for the role of the judiciary under the separation of powers doctrine. Nonetheless, the themes are sufficiently distinct to warrant individual analysis.

Before launching into the case law, it should be noted that the domestic cases discussed in this chapter relate to a variety of amnesty laws, some of which cover crimes under international law, whereas others grant immunity for political and related common crimes. Furthermore, as this book is

analysing amnesty laws that have been introduced over several decades, the discussion will refer to cases that are now dated and may have been decided by courts of limited legitimacy, particularly, as will be discussed below, where judges share ideological and political views with the politicians who appointed them. Where such concerns arise, they will be highlighted.

Legality of Amnesty Processes Under Municipal Law

When a national court is considering the legality of an amnesty law, it will undoubtedly look to pre-existing domestic laws, particularly the constitution, in order to assess whether the amnesty conforms or conflicts with them. If a conflict between the amnesty and a pre-existing law is identified, the court then has to determine which law has primacy. Generally, the constitution should have precedence over other types of legislation, although in some cases, an amnesty law could form part of the transitional constitution itself,[8] as occurred in South Africa.[9] In addition, many constitutions provide rules governing the use of amnesties within that country. These guidelines can stipulate which crimes an amnesty is permitted to cover, who can grant amnesty, and which groups of perpetrators can be amnestied. Finally, an amnesty can come into conflict with a national constitution where it breaches the fundamental rights enshrined in the constitution.

This issue of whether an amnesty law adheres to the constitutional rules governing its use has arisen in several cases in relation to the crimes covered by the amnesty. First, in the *General Ramón J Camps* case,[10] concerning allegations of acts of torture committed against political prisoners by a medical officer and several police officers on the orders of General Ramón Juan Alberto Camps when he was the Chief of Police in Buenos Aires, the Dissenting Opinion of Judge JA Bacqué stated that the Law on Due Obedience was unconstitutional because it covered crimes of such severity that they could not be categorised as common or political crimes 'for no political goals may justify that sort of criminal offence'. He found therefore these crimes could not be amnestied in accordance with the constitution. Judge Bacqué was overruled, however, and the Supreme Court upheld the

[8] For a discussion of constitutionalism during transitions, see Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformations' (1997) 106 *Yale Law Journal* 2009, 2062.

[9] See Interim Constitution of South Africa, 1994, Postamble.

[10] Corte Suprema de Justicia [CSJN], 22/6/1987, '*General Ramón J Camps, incoada en virtud del Decreto No 280/84 del Poder Ejecutivo Nacional* (Decision on the Law of Due Obedience)' (Arg) (No 547) 8 *Human Rights Law Journal* (1987); Dissenting Opinion of Judge Bacqué.

amnesty and ordered the release of the three defendants, who had been sentenced to imprisonment in December 1986.[11]

An argument similar to Judge Bacqué's was used successfully by the Honduran Supreme Court in a case concerning the kidnapping, torture and attempted murder of six students in 1982 by members of Battalion 316.[12] The court ruled that the 1987 and 1991 amnesty decrees that cover common crimes committed by members of the military were unconstitutional, as they could not be considered political crimes.[13] Similarly, in the *Barrios Altos* case,[14] concerning a massacre in November 1991 in Barrios Altos, a district near Lima, Peru, of 15 people by military officers,[15] Judge Antonia Saquicuray of the Sixteenth Criminal Court of Lima held that the amnesty law violated constitutional guarantees when it was applied to crimes against humanity. This ruling was subsequently overturned by the Superior Court of Lima on 14 July 1995, which found that the amnesty did not violate international or domestic law. However, the case was reopened by the Supreme Court in 2001 and at the time of writing, former Peruvian president Alberto Fujimori is on trial for the Barrios Altos massacre and other human rights violations and corruption in Peru.[16]

Although these cases illustrate how constitutional provisions can work to restrict amnesty laws applying to serious human rights violations, constitutional provisions can on occasion have more negative effects. For example, a military court in Bolivia on 30 October 1984 refused to order the release of seven alleged insurgents in accordance with a presidential

[11] General Camps died in 1994, but in 1999 the case was sent to the Attorney General's Office. Following the annulment of the Argentine amnesty laws by the Senate in August 2003, the case was reopened by a federal court in Buenos Aires on 16 March 2004. Following the June 2005 *Simón* case (which will be discussed below), in which the Argentine Supreme Court ruled that the amnesty laws were unconstitutional, Miguel Osvaldo Etchecolatz, who had been convicted in the 1987 Camps case was found guilty of crimes against humanity. On 19 September 2006, he was sentenced to life in prison. At the time of writing, several more defendants related to this case are currently in detention in Argentina.

[12] A US-sponsored counter-insurgency group within the Honduran armed forces which became notorious for committing human rights violations during the 1980s.

[13] Corte Suprema de Justicia, 27/06/00, 'Petition for Declaration of Unconstitutionality' (No 20-99) (Hond) partially reproduced at: <http://www.uc3m.es/uc3m/inst/MGP/JCI/04-noticias-ho-amnist_a.htm> accessed 12 September 2006.

[14] This case is also known as the *Salazar Monroe* case and its references are: *16º Juzgado Especializado en lo Penal, Lima*, 16/06/95, '*Caso Salazar Monroe y otros*' (Peru) and *Décima Primera Sala Penal de la Corte Superior de Lima*, 14/07/95, *'Caso Salazar Monroe*' 999 UNTS 171, 6 *International Legal Materials* 368 (Peru). There were also rulings before a Higher Criminal Court on 18 October 1995 and finally before the Supreme Court on 27 March 2001. As will be discussed in ch 6, the Inter-American Court when hearing a case on events at Barrios Altos found that the Peruvian amnesty law violated international law.

[15] Evidence suggests that the officers were members of *Grupo Colina*, Peru's death squad attached to the intelligence services. The victims were accused of being members of *Sendero Luminoso* ('Shining Path').

[16] The progress of this prosecution can be tracked at *Asociación Pro Derechos Humanos* 'Trial of Alberto Fujimori' available at <http://www.juicioysancionafujimori.org/ingles/alberto-fujimori.htm> (accessed 1 February 2008).

amnesty decree. The detainees had been arrested by members of the armed forces on 24 October 1983 in the neighbourhood of Luribay, held incommunicado for 44 days and subjected to severe torture whilst in detention. Here, the military court refused to release the detainees, when it ruled that the amnesty decree was unconstitutional as the president could only grant amnesties for political and not, as in this case, military crimes.[17]

Constitutional guidelines on which body can grant an amnesty were raised in several cases. For example, the Constitutional Court of Serbia and Montenegro, where the court ruled that a law introduced by the government of Montenegro that granted amnesty to 14,000 men for allegedly draft-dodging during the 78-day NATO bombing campaign was unconstitutional.[18] Here, the court found that the government of Montenegro did not have the authority to introduce this amnesty, as amnesties were a federal issue.[19] Similarly, in the *Simón and Del Cerro* case,[20] concerning the torture and disappearance of José Liborio Poblete Roa and Gertrudis Marta Hlaczik, and the concealment their eight-month-old daughter, Claudia Victoria, a federal judge, Gabriel R Cavallo, found that he could issue charges against the accused despite the existence of amnesty laws. He held that Article 29 of the Argentine Constitution prohibits the legislature from granting the executive powers that place the 'life, honour, and fortunes of Argentines at the mercy of whatever government or persons'. Consequently, any legislative act that fails to adhere to Article 29 would be void and anyone responsible for their proposal or who signed them would be guilty of 'infamous treason'.[21] Judge Cavallo reasoned that amnesty laws that deny the courts their powers to provide remedy and justice to the victims of the dictatorship are examples of legislation that is in violation of Article 29. This view was upheld by an Appeals Court[22] and on 4 August 2006, Julio Héctor Simón was sentenced to 25 years in prison for the disappearances by a federal court in Buenos Aires.[23]

[17] ——, 'Bolivian Affairs' *BBC Summary of World Broadcasts* (2 November 1984). See also *Walter Lafuente Peñarrieta et al v Bolivia*, Comm No 176/1984, UNHRC, UN Doc CCPR/C/OP/2 (1990).

[18] ——, 'Yugoslav Constitutional Court rules against Montenegrin Laws' *BBC Worldwide Monitoring* (26 January 2002).

[19] The Constitutional Court's decision may have been influenced by moves towards Montenegrin independence. Montenegro eventually became independent after a referendum in 2006.

[20] *Juzgado Nacional en lo Criminal y Correccional Federal No 4 Buenos Aires, 6/03/01, Resolución del Juez Federal Gabriel R Cavallo declarando la inconstitucionalidad y la nulidad insanable de los arts 1 de la Ley de Punto Final y 1, 3 y 4 de la Ley de Obediencia Debida* ('Simón Julio') (No 17.768), No 4, Sec No 7, Reg 19.193 (Arg).

[21] Human Rights Watch, *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators* (Report) (December 2001) Vol. 13, No 5(B).

[22] Court II of the *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires, 9/11/01, 'Del Cerro, JAs/ queja', Causa nº 17.890, Nº 4, Sec. Nº 7*.

[23] Human Rights Watch, *Argentina: Court Convicts 'Dirty War' Torturer* (Report) (4 August 2006).

In contrast, when the Papua New Guinean Attorney General challenged the granting of amnesty to those involved in the Bougainville conflict, including those responsible for torture and disappearances, the Supreme Court of Papua New Guinea, declared on 18 January 2002, that Sections 176 and 179[24] of the Constitution did not prevent parliament from granting amnesty, either before or after conviction, to a group of individuals for acts or omissions that could constitute criminal offences.[25] The issue of whether the amnesty could be granted before conviction was central in the *Barzilai v Government of Israel* case. Here, petitions to the Israeli Supreme Court challenged the decision of the Israeli president to pardon the head of the General Security Service and three of his assistants for their involvement in the 'Bus No 300' incident.[26] The 'pre-conviction pardons' were granted by the president under section 11(b) of the Basic Law which empowers him 'to pardon offenders and to lighten penalties by the reduction or commutation thereof'. The petitioners argued that the president did not have the power to award pardons before conviction and that the incident should be investigated by competent authorities. The Supreme Court held that

[24] Constitution of the Independent State of Papua New Guinea (Consolidated to Amendment No 22), 15 August 1975, (Papua NG): '176(3) Subject to this Constitution—(a) in the performance of his functions under this Constitution the Public Prosecutor is not subject to direction or control by any person or authority; but (b) *nothing in paragraph (a) prevents the Head of State, acting with, and in accordance with, the advice of the National Executive Council, giving a direction to the Public Prosecutor on any matter that might prejudice the security, defence or international relations of Papua New Guinea* (including Papua New Guinea's relations with the Government of any other country or with any international organisation). (4) The Prime Minister shall table in the National Parliament any direction to the Public Prosecutor at the next sitting of the Parliament after the direction is given unless, after consultation with the Leader of the Opposition, he considers that tabling of the direction is likely to prejudice the security, defence or international relations of Papua New Guinea . . .' (Emphasis added).

'179. Removal from office of Chief Justice. (1) If the National Executive Council is satisfied that the question of the removal from office of the Chief Justice should be investigated, the Head of State, acting with, and in accordance with, the advice of the National Executive Council, may— (a) appoint a tribunal under Section 181 (*constitution, etc., of tribunals*); and (b) refer the matter, together with a statement of the reasons for its opinion, to the tribunal for investigation and report to it. (2) If the tribunal reports that there are good grounds for removing the Chief Justice from office, the Head of State, acting with, and in accordance with, the advice of the National Executive Council, may, by notice in writing to the Chief Justice, remove him from office . . .'

[25] ——, 'Amnesty Ruling "Major Boost" for Bougainville Peace Process' *BBC Worldwide Monitoring* (21 January 2002) and Eric Kone, 'No Answer on Amnesty Query' *PNG Post-Courier* (23 January 2002) 6.

[26] Also known as the 'Shin Bet Affair', this incident involved the clubbing to death of two captured Palestinian bus hijackers—two cousins, Majdi and Subhi Abu Jamas—in April 1984 and the subsequent cover up of these actions. Officials first claimed that all of the hijackers were killed in the initial attack, but photographs published in violation of military censorship showed two being led away from the bus, and it was later revealed that they had been taken in handcuffs to a nearby field, where they were beaten to death by Shin Bet interrogators. Shin Bet officials later implied that the government had a standing policy of taking no prisoners in terrorist incidents—a suggestion civilian officials have denied.

> in granting the pardons, the State President was acting in a manner 'connected with his functions and powers' as provided in Section 13 of the Basic Law.[27]

Similar findings were made in the *Guevara Portillo* case,[28] concerning the assassination of US military advisers, Lt Col David Henry Pickett and Pvt Ernest Gean Dawson, in El Salvador. The officers were flying in a helicopter from Honduras to Lolotique in El Salvador in 1991 when it was shot down by a rocket fired by guerrillas. After the helicopter crashed, the officers were shot and a third soldier was also killed. It was believed that rebels from the Farabundo Martí National Liberation Front[29] were responsible as they controlled much of the region. The Salvadorean Supreme Court, considering a challenge of the basis of the Geneva Conventions, Additional Protocol II and the Convention on Internationally Protected Persons, found that the amnesty law was consistent with the constitution, because it had been enacted by the legislature through the sovereign power granted to it in the constitution. However, it has been argued that

> the Court went further in seeming to ascribe constitutional force to the amnesty, describing it as a manifestation of sovereignty granted by the Constitution, which prevails over all treaties and international laws.[30]

The court subsequently limited this position in a 2000 ruling,[31] when it held that, in cases involving military officials or civil servants who between 1989 and 1994 had committed crimes in contravention of the constitution, the judiciary should decide in each individual case whether to prosecute by investigating to determine whether the crime fell within the scope of the amnesty.[32] The Court found that the decision was consistent with Article 244 of the Salvadorean Constitution.[33]

The content of an amnesty law may come into conflict with the constitution, not just by violating the constitutional rules governing the use of

[27] HCJ 428/86 *Barzilai v Government of Israel* ('Shin Bet Affair') [1986] IsrSC 40(3), 505 (Isr).

[28] *Corte Suprema de Justicia*, 16/08/95, 'Guevara Portillo' (El Sal).

[29] *Frente Farabundo Martí para la Liberación Nacional* (FMLN) is an umbrella organisation comprising five groups. The organisation at this time had radical left-wing objectives and used extreme violence during the conflict.

[30] '*Esa Ley es una manifestación de la voluntad soberana y por la preeminencia que tiene la Constitución, prevalece sobre cualquier Tratado o Convenio Internacional y sobre cualquier Ley Ordinaria de la República*'. Translated in Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 *Human Rights. Quarterly* 843, 871.

[31] *Corte Suprema de Justicia*, 05/10/00, 'Ruling on the Constitutionality of the 1993 Amnesty Law' (El Sal).

[32] The *Ley de Amnistía General para la Consolidación de la Paz* could only apply to political crimes or related crimes, or common crimes committed by no less than 20 persons before 1 January 1992 (art 1).

[33] Art 244 of the Constitution of El Salvador states, 'Violations, infractions or alterations of the constitutional provisions specially will be punished by the law, and the civil or penal responsibilities which are incurred by government, civilians or military officials, with such motivation, will not admit amnesty, commutation or pardon, during the presidential period within which they were committed.'

amnesties, but also by providing impunity for violations of the fundamental rights enshrined in the constitution. For example, in its 2000 judgment, the Salvadorean Supreme Court ruled that in accordance with Article 2 of the Salvadorean Constitution,[34] amnesty could not be granted if its application would deny the possibility of reparation for violations of fundamental rights.[35]

The opposite conclusion was reached by the Chilean Supreme Court[36] in the 1990 *Insunza Bascuñán* case, concerning the disappearances of 70 persons in Chile between 1973 and 1977. Here, the petitioners asked the court to rule the 1978 Amnesty Law in violation of the following articles of the Chilean Constitution: Article 5 (supremacy of international human rights treaties); Article 19(1) (right to life); Article 19(2) (right to a remedy); Article 19(7) (individual freedom); and Articles 19 (23–24) (right to property).[37] In this instance, as will be discussed below, the court found that international law did not apply and that the law did not violate Article 5 of the constitution[38] by breaching the state's duty to prosecute under international human rights treaties. This position has now been reversed. For example, in the March 2007 *Pinto Pérez* case concerning the 1973 murder of an army reservist by Brigadier General Victor Pinto Pérez, the Chilean Supreme Court found Article 5 of the Constitution gave

> constitutional status to treaties that guarantee respect for human rights, granting them rank higher than the other international treaties, as regulating the essential rights emanating from human nature.[39]

The court unanimously overturned a decision by a lower court to grant amnesty to the defendant.

[34] Art 2 of the Constitution of El Salvador states, 'All persons have right to life, to physical and moral integrity, to freedom of security, work, and possession of property, and are protected in the conservation and defence of such. The right to honour, personal and family privacy and own identity is guaranteed. This indemnification establishes, according to law, damages of moral character.'

[35] Ruling on the Constitutionality of the 1993 Amnesty Law (n 31).

[36] During this period, the independence and legitimacy of the Supreme Court was questionable, particularly since the army general auditor, a ranking general, still sat on the Court. See Alexandra Barahona de Brito, 'The Southern Cone' in Alexandra Barahona de Brito, Carmen Gonzaléz-Enríquez and Paloma Aguilar (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford Studies in Democratization, Oxford University Press, Oxford 2001) 132, n 11.

[37] Corte Suprema, 28/09/90, '*Decisión sobre recurso de aclaración del 28 de septiembre de 1990*' (Rol No 533–78) (1990) *Revista de Derecho y Jurisprudencia y Gaceta de los Tribunales*, pt 2 § 4, at 64 (Chile). For a discussion of this case, see Alfonson Insunza Bascuñan, 'The 1978 Amnesty Law and International Treaties' 1 *Revista Juridica* ARCIS . This case subsequently went to the Inter-American Commission on Human Rights, see *Garay Hermosilla et al v Chile*, Case 10.843, Report 36/96, OEA/SerL/V/II/95 (1996).

[38] Article 5 of the Constitution stated, 'the exercise of sovereignty is limited with respect to the essential rights that emanate from the nature of humanity'.

[39] *Corte Suprema*, 13/03/07, 'Sentencia' (Rol No 3125-04) (2007) [39] (Chile).

The two areas of fundamental rights that seemed to be most contested are the right to a remedy and the right to equality. The former arose in the *AZAPO* case,[40] where the Constitutional Court declared:

> The effect of an amnesty undoubtedly impacts upon very fundamental rights. All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right to respect for and protection of dignity and their right not to be subject to torture of any kind. When those rights are invaded those aggrieved by such invasion have the right to obtain redress in the ordinary courts of law and those guilty of perpetrating such violations are answerable before such courts, both civilly and criminally. An amnesty to the wrongdoer effectively obliterates such rights.[41]

Despite this very candid recognition of the harsh impact of an amnesty law, the court decided that the amnesty was constitutional as it was a political matter for the parliament to decide:

> [Parliament] could have chosen to insist that a comprehensive amnesty manifestly involved an inequality of sacrifice between the victims and the perpetrators of invasions into the fundamental rights of such victims and their families, and that, for this reason, the terms of the amnesty should leave intact the claims which some of these victims might have been able to pursue against those responsible for authorizing, permitting or colluding in such acts.[42]

The court asserted that the fact that it chose not to do this did not affect its constitutionality.

The question of the relationship between amnesty laws and a constitutionally enshrined right to equality[43] was also discussed by Federal Judge Juan Ramos Padilla in Argentina on 10 June 1987, when he ruled that

> the [Due Obedience] law was a flagrant violation of the constitutional provisions guaranteeing equal treatment of all citizens before the law.[44]

This idea was contradicted a couple of weeks later by the Argentine Supreme Court when it ruled against a plaintiff arguing that a conflict existed between the Due Obedience law and the constitutional principle of equality of treatment (Article 16 of the Argentine Constitution):

> Congress has the power . . . to seek its policy objectives in a reasonable manner through the enactment of laws. In this particular case, the purpose of the law is to exempt from punishment and prosecution those persons who held the indicated military rank and discharged the duties described by law at the time such

[40] *Azanian Peoples Organization* (*AZAPO) v the President of the Republic of South Africa* (CCT 17/96) (8) BCLR 1015 (CC) (S. Afr). For an overview of this case, see Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, Antwerp 2004).

[41] *AZAPO* (n 40) [9].

[42] *Ibid* [50].

[43] For a discussion of the relationship between amnesty and equality, see ch 2.

[44] ——, 'Argentina Amnesty Laws Ruled Illegal' *St Petersburg Times* (Florida) (Buenos Aires 12 June 1987) 17A.

> law was enacted. This provision does not contradict the principle of equal protection, because this Court has repeatedly held that the legislator may treat different situations in different ways, provided that the discrimination is not unfair or invidious, and that it does not imply hostility against, or undue privileges in favour of, certain persons. The right to equal protection of the law does not require that laws treat everyone the same way; it simply establishes a prohibition to enact laws reflecting hostile purposes towards people or groups of people.[45]

The opposite conclusion on this law was reached some years later by a federal judge in the *Margarita Belén Massacre* case,[46] relating to the murder of 22 political prisoners. Here, Judge Carlos Skidelsky, ruled that

> These laws mean that the deaths of thousands of Argentine citizens and foreigners over a specific period of time (1976 to 1983), and for that period only, will go completely unpunished and, as a consequence, create a special category of people who have no right to the protection of that most sacred of possessions, human life. In other words, they allow a perverse inequality to be enshrined in law.[47]

The question of equality also came before the Constitutional Court of Burundi in a case related to the abortive military coup of 3 July 1993, where the suspects were accused of desertion and endangering state security. Here, the court declared that the amnesty law was unconstitutional for not covering everyone in the entire period before 9 September 1993.[48]

This overview of case law has shown that amnesties can come into conflict with national constitutions either by breaching constitutional guidelines governing the use of amnesties or by violating fundamental rights guaranteed by the constitution. It appears that no coherent approach has been developed by national judges on either question, with the judgments varying between jurisdictions and between different levels within national judicial hierarchies. In some cases, national supreme courts have even reversed their earlier positions in later judgments. This appears to indicate that, when faced with a national amnesty, judges often take an ad hoc approach to fit their needs and the political situation within the country, including direct political pressure on the judiciary, at the time when they are hearing the case. In this way, internal conditions may influence their judgments, although in many cases, judges will also have to consider international legal standards.

[45] *General Ramón J Camps* (n 10).

[46] Juez Federal de Primera Instancia de Resistencia, Dr. Carlos Skidelsky, 7/03/03, '*Causa Margarita Belén*', Discussed in Amnesty International, *Argentina: Legal Memorandum on the Full Stop and Due Obedience Laws Submitted by Amnesty International and the International Commission of Jurists* (Report) (1 December 2003) AI Index AMR 13/018/2003.

[47] Cited in Amnesty International (n 46) 7. Following the Senate's annulment of the amnesty laws in 2003, this case was reopened and at the time to of writing eight military and two police officers have been indicted.

[48] Constitutional Court, 10/03/96, 'Niyingaba and Company' (Burundi).

Legality of Amnesty Processes Under International Law

Analysing the views expressed by national courts when assessing the legality of an amnesty law relating to international law has revealed that there are two main areas for consideration: (1) the position of international law within the domestic legal system; and (2) the extent to which an amnesty law conforms with international human rights and humanitarian law.

International Law Within Domestic Legal Systems

The relationship between international and municipal law varies depending on the legal provisions in the state in question and the source of the relevant international legal obligations upon the state. Newman and Weissbrodt assert that

> International human rights law can be applied [within a domestic legal system] in four ways: (1) by the enactment of legislation which specifically incorporates international law into domestic law; (2) through the direct application of treaties in domestic law as self-executing; (3) through the interpretation and application of existing legislative or constitutional provisions; and (4) as customary international law.[49]

The first two methods illustrate how states can respond to obligations arising from treaties and conventions through either 'monist'[50] or 'dualist' approaches.[51] According to Conforti, pursuing a dualist approach can create an obstacle for the full application of international conventions as 'courts tend to lean in the direction of the non-self-executing character of the conventions',[52] causing them to view international obligations as 'entirely a matter of a government's relations with other nations', whereby 'a government may violate its international obligations but such a violation would not have any domestic impact'.[53] This can result in situations where amnesties are upheld by the courts for complying with domestic

[49] Frank C Newman and David Weissbrodt, *International Human Rights: Law, Policy, and Process* (2nd edn Anderson Pub. Co, Cincinnati, Ohio 1996) 23. For a discussion of the theories underlying monism and dualism, see David J Harris, *Cases and Materials on International Law* (5th edn Sweet & Maxwell, London 1998); Malcolm N Shaw, *International Law* (5th edn Cambridge University Press, Cambridge 2003).

[50] In countries operating a monist system, the courts accept 'international law, including particular treaty obligations, as an integral part of domestic law'.

[51] States where the dualist system is employed require national legislation (sometimes called an 'act of transformation') to be introduced which reflects the terms of the treaty, in order to bring its provisions into force within the national legal system.

[52] Benedetto Conforti, 'National Courts and the International Law of Human Rights' in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (International Studies in Human Rights, Vol. 49, Martinus Nijhoff Publishers, Hague 1997) 7.

[53] Newman & Weissbrodt (n 49) 21–2.

legal requirements, despite breaching the enacting states' obligations under international law.

In many of the national cases under consideration in this chapter, the court was requested to rule on whether the state's obligations under international law invalidated the amnesty law. Before the court could pronounce on this issue, it was first required to elucidate the position of international law within the domestic legal system. In doing this '[t]hose courts upholding amnesties tended to devalue the role of international law in the domestic constitutional scheme'.[54] For example, the South African Constitutional Court in the *AZAPO* case considered whether treaties signed by South Africa had precedence over domestic laws, and found, in this instance, that the discussion of international obligations on South Africa was 'irrelevant', as

> [i]nternational law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorize any law which might constitute a breach of the obligations of the state in terms of international law. International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.[55]

The court supported this assertion by citing Section 231(3) of the South African Constitution which provides that treaties can only become part of the national law if parliament 'expressly so provides and the agreement is not inconsistent with the Constitution'.[56] The judgment continues by citing Section 35(1) which instructs a court of law 'where applicable, to have regard to public international law applicable to the protection of the rights entrenched in this Chapter'.[57] The court believed that the direction to 'have regard' does not require it to apply international law at all times, and, furthermore, it felt that it should only consider international law relating to the rights in the chapter.[58] Similarly, in *General Ramón J Camps* case,[59] Justice Carlos S Fayt of the Argentine Supreme Court asserted in his Concurring Opinion that although the Convention Against Torture had been ratified in a domestic law in 1986, 'it does not yet seem part of our municipal law'.[60] He nonetheless argued that Argentina was obliged to abide by the convention according to the 1969 Vienna Convention on the Law of Treaties. This

[54] Roht-Arriaza & Gibson (n 30) 870.
[55] *AZAPO* (n 40) [26].
[56] *Ibid* [27].
[57] *Ibid* [27].
[58] *Ibid* [27].
[59] *General Ramón J Camps* (n 10).
[60] *Ibid*, Concurring Opinion of Justice Fayt.

idea was supported in the Dissenting Opinion of Judge Petracchi, who emphasised Article 18 of the Vienna Convention[61] to argue that Argentina should not act in violation of the Convention Against Torture.

The opposite approach was pursued in a more recent case from Bosnia-Herzegovina, *TK from Sarajevo*.[62] In this case, TK was accused of breaking into a garage and stealing a car, which would constitute an offence of grand larceny under Article 148 of the Criminal Law of Bosnia and Herzegovina. Subsequently, the criminal proceedings against TK were suspended by the Municipal Court II of Sarajevo in accordance with the Federal Law on Amnesty for crimes committed during the conflict.[63] In response, TK lodged an appeal with the Cantonal Court of Sarajevo, saying that he could not have committed the offence, as he was living elsewhere at the time, and he felt that the application of the amnesty law had denied him the opportunity to prove his innocence. The Cantonal Court dismissed his appeal in November 2000, causing TK to launch a subsequent appeal to the Constitutional Court. In this appeal, relating to the position of international human rights law in the municipal legal system, the court declared that international law not only had effect within the domestic legal system, but also had primacy over domestic laws:

> The Constitutional Court notes that according to art. II.1 of the Constitution, Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. According to art. I.2 of the Constitution, the rights and freedoms set forth in the European Convention on Human Rights and Fundamental Freedoms . . . shall apply directly in Bosnia and Herzegovina and shall have priority over all other law.[64]

The court subsequently ruled, however, that the disputed provisions of the European Convention on Human Rights were not violated in this case, as Article 6(1), relating to a defendant's right to have charges against him or her determined by a court, ceased to apply once the charges had been dropped as a result of the amnesty.

Many courts ruling in support of amnesty laws have taken a different approach to the Bosnian court, determining instead that the provisions of their domestic law have primacy over international obligations. For example, in the 1995 *Barrios Altos* case[65] the Lima Superior Court of Justice held

[61] Art 18 of the VCLT provides '*A State is obliged to refrain from acts which would defeat the object and purpose of a treaty* when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.' (emphasis added).

[62] Constitutional Court, 29/09/01, '*TK from Sarajevo*' (No 24/01) (Bosn & Herz).

[63] Municipal Court II of Sarajevo, 11/12/99 'Ruling No Kv-745/99 (K-682/96)' (Bosn & Herz).

[64] *TK from Sarajevo* (n 62) [20].

[65] This case is also known as the *Salazar Monroe* (n 14).

that although international treaties were part of the Peruvian domestic legal order through Article 55 of the Peruvian Constitution,[66] they had a lesser status than both constitutional norms and even domestic laws. This appears to be a very restrictive interpretation of the constitutional provisions. However, following the Inter-American Court's 2001 decision in the *Barrios Altos* case, it appears that the Peruvian judiciary are gradually moving away from applying the amnesty for 'serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance'.[67]

A narrow interpretation was also taken by the Argentine Supreme Court in 1988 in *Raffo, José Antonio y otros*,[68] a case relating to torture accusations. Here, the court concluded that the constitution did not give precedence to treaties over national laws and both are considered to be the 'Supreme Law of the Nation'. This argument was contested, however, in the dissenting opinion of Judge JA Bacqué, who stated that Article 2(3) of the Convention Against Torture should have primacy over the Law of Due Obedience, since the former was a treaty norm.[69] As discussed previously, following the annulment of the Argentine amnesty laws many cases have now been reopened and at the time of writing José Antonio Raffo was being investigated as part of the ongoing 'Camps II' case.

A broader approach was followed in Chile in the 1994 *Bárbara Uribe Tamblay and Edwin Van Yurick Altamirano* case,[70] which concerned the disappearance of a married couple in Santiago on 10 July 1974, along with Edwin's brother, Cristián Van Yurick. They were all active members of the Movement of the Revolutionary Left (MIR).[71] It is alleged that they were abducted by the Chilean Intelligence Agency (DINA)[72] and that Osvaldo Romo Mena was implicated. The case faced long delays, but on 3 October 1994, the Santiago Court of Appeals ruled to keep it open. The court found

[66] Constitution of Peru art 55 states '*Los tratados celebrados por el Estado y en vigor forman parte del derecho nacional*' ('Treaties concluded by the government and now in effect are part of national law').

[67] A study by the Ombudman's Office cited in Lisa Magarell and Leonardo Filippini (eds) *The Legacy of Truth: Criminal Justice in the Peruvian Transition* (International Center for Transitional Justice, New York 2006) 18.

[68] Corte Suprema de Justicia [CSJN], 28/04/1988, 'Raffo, José Antonio y otros s/tormentos' R 453. XXI (Arg).

[69] *Ibid* Dissenting Opinion of Judge Bacqué.

[70] *Corte de Apelaciones de Santiago*, 03/10/94, 'Bárbara Uribe Tamblay and Edwin van Yurick Altamirano', Rol 38-683-94, *Boletín, Comisión Andina de Juristas*, 43, 1994, pp 43–55 and *Revista Estudios* (edited by the *Sociedad Chilena de Derecho Internacional*), 1995, pp 179–91; *Gaceta Jurídica* Magazine, 1994, No 171, pp 126–36 (Chile).

[71] The *Movimiento de la Izquierda Revolucionaria* is a revolutionary group formed in the 1960s by left-wing university students. Its members were targeted by the military juntas as part of their Cold War fight against communism and their attempts to suppress the Chilean population.

[72] Directorate of National Intelligence (*Dirección Nacional de Inteligencia*)—Chile's now disbanded secret police.

that under Article 5 of the Chilean Constitution, international treaties were 'hierarchically pre-eminent over national legislation', and accordingly declared that the Geneva Conventions were applicable, as they had been ratified by Chile in 1951 and thus were incorporated before the 1978 Amnesty Law. The Court of Appeals also found that international human rights law applied. Subsequently on 26 October 1995, the Supreme Court held that international law was applicable, but made a different determination from the Court of Appeals regarding the status of individual treaties. For example, it held that the ICCPR, the ACHR and the CAT did not apply, as they had not been ratified when the crimes were committed. The court cited Article 28 of the Vienna Convention to support its conclusions.[73]

Support for the human rights protections contained in international treaties was also articulated in the 1998 *Pedro Enrique Poblete Córdova* case,[74] relating to the 1974 disappearance of a member of MIR. Here, the Chilean Supreme Court looked at Article 5 of the Chilean Constitution, as amended in 1989, which reads:

> The exercise of sovereignty recognizes as its limit the respect of those essential rights that emanate from human nature. The Organs of the State must respect and promote such rights, guaranteed by this constitution, as well as by international treaties ratified by Chile that have entered into force.

The court interpreted this provision to mean that it could directly apply the provisions of international treaties to which Chile is a party and which are in force. It subsequently used this argument to emphasise Chile's obligations under the Geneva Conventions. It further supported the application of these conventions by declaring

> As regards the Convention its aim is to guarantee the basic rights emanating from human nature, its application should be pre-eminent, since this Supreme Court has repeatedly recognized when passing sentence 'that, as is clearly shown in the official historical record of how the constitutional norm contained in article 5 of the Fundamental Charter was established, the internal sovereignty of the State of Chile is limited by the rights which emanate from human nature: values which stand above any law which the State authorities, including the Constituent Power itself, might pass, and which means that they cannot be disregarded'.[75]

[73] Art 28 of the VCLT provides, 'Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.'

[74] *Corte Suprema*, 09/09/98, *Pedro Enrique Poblete Córdova*, Rol 469-98, *Revista Fallos del Mes*, No 478, pp 1760–9 (decision No 3) (1998); English translation is in 2 *Yearbook of International Humanitarian Law* 485 (1999) (Chile).

[75] *Ibid*.

This determination supports an earlier ruling in the *Insunza Bascuñán* case,[76] although in the earlier case, the Supreme Court refused to apply the Geneva Conventions as it felt that a state of war did not exist in Chile at the time when the violations were committed.[77]

In the 2001 *Simón and Del Cerro* case in Argentina,[78] Judge Cavallo looked both at constitutional provisions relating to international law and to domestic precedents to prove that international law had force in this case. First, he determined that the crimes against Poblete and Hlaczik were crimes against humanity, and then he considered Article 118 of the Argentinian Constitution, which states:

> All ordinary criminal trials not resulting from the power of impeachment granted to the Chamber of Deputies shall be concluded by juries, once this institution is established in the Republic. The proceedings in these trials shall take place in the same Province where the crime was committed; but when the crime is committed outside the borders of the Nation, in violation of international norms, Congress shall determine by a special law the place where the trial is to be held.

He asserted that the reference to 'international norms' (*derecho de gentes*) demonstrates the imperative to prosecute crimes against humanity within the Argentinian legal system, even if they occurred outside Argentina. Judge Cavallo then used domestic precedents relating to the extradition hearings of former Nazis, Franz Schwammberger[79] and Erich Priebke,[80] where the judges in both courts relied upon the recognition of crimes against humanity in Article 118 to justify the extraditions. In addition, Cavallo argued that international law and treaty obligations were awarded precedence over domestic laws in Argentina by explicit provision of the reforms introduced in the constitution in 1994, and by the Supreme Court's reliance on Article 27 of the Vienna Convention[81] to stress the importance of international law in various rulings.[82] This argument was upheld by the Appeals Court of Buenos Aires on 9 November 2001.[83] It was also supported more recently by Judge Claudio Bonadío in

[76] *Manuel Contreras et al* (n 37).

[77] Robert J Quinn, 'Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model' (1994) 62 *Fordham Law Review* 905, 927.

[78] *Resolución del Juez Federal Gabriel R Cavallo* (n 20).

[79] This decision was granted in August 1989 at the Federal Appeals Court of La Plata.

[80] This decision was granted by the Supreme Court in 1995. Following Priebke's extradition to Italy, the judicial proceedings involved a decision on an Italian amnesty law that has been included in the Amnesty Law Database.

[81] VCLT art 27 states that 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.'

[82] Human Rights Watch (n 21).

[83] *Simón, Julio* case (n 22).

the *Scagliusi* case[84] and by Judge Carlos Skidelsky in the *Margarita Belén Massacre* case.[85]

A different approach was taken in the *Guevara Portillo* case. Initially, the three guerrillas accused of the assassination of US military advisers were put on trial in El Salvador, but were released by the First Criminal Court pursuant to the amnesty law. The US challenged the ruling, insisting that the military officers should have diplomatic immunity,[86] but on 16 August 1995, a three-judge panel of the Supreme Court upheld the amnesty. The court ruled that although according to the Article 144 of the Salvadorean Constitution,[87] international law did prevail over ordinary domestic laws, the amnesty law was not an ordinary law, but rather had been enacted by the sovereign powers in accordance with the constitution, which meant that the amnesty law prevailed. This appears to be a restricted interpretation of the constitution.

This section has argued that, for domestic courts to rule on whether national amnesties comply with international law, the courts must first determine the position of international law within the domestic legal system. In making such determinations, the case law shows that national courts have adopted positions ranging from affording international treaties no weight in domestic legal systems other than as a guide to interpreting the constitution; to declaring that international law is part of domestic law, but with a lesser status than constitutional laws; to finally declaring that international law is hierarchically pre-eminent over domestic laws. Once a court has adopted one of these positions, further variations can occur, depending on whether the amnesty is viewed as having constitutional status and on the date that the relevant treaties were ratified within the domestic legal system. As with the previous section on domestic laws, it appears here that courts within the same jurisdiction reached different conclusions on this matter, which could be viewed as evidence that their determinations were influenced by conditions within the state at the time of the judgment.

[84] *Juzgado Nacional en lo Criminal y Correccional Federal No 11 de Buenos Aires*, 12/09/02, '*Scagliusi, Claudio Gustavo y otros s/privación ilegal de la libertad*', No 6869/98, causa No 6.859/98 (Arg), Discussed in Amnesty International (n 46).

[85] *Margarita Belén Massacre* (n 46).

[86] The recognition of diplomatic immunity for the American military personnel would mean that they were protected persons, rather than combatants, and hence that their assassination could not be lawful under international humanitarian law.

[87] Art 144 of the Constitution of El Salvador, as amended in 2000, states, 'The international treaties made by El Salvador with other states or international organisations, constitute laws from the Republic upon entering into force, according to the provisions of the treaty itself and this Constitution. The law will not be able to modify or to derogate from the law agreed to in the treaty in force in El Salvador. In case of conflict between the treaty and the law, the treaty will prevail.'

Conformity of Amnesty Processes with International Human Rights and Humanitarian Law

If a national court rules that international law is applicable and must be implemented in the case that it is considering, the court must then decide which parts of international law apply to the crimes that have given rise to the legal proceedings. The court's decision could involve the status of the state's treaty ratifications, whether the treaties were ratified before the amnesty was introduced; and the nature of the obligations upon the state. For example, in the 1990 *Insunza Bascuñán* case,[88] the Chilean Supreme Court declared that

> In conformance with what is set forth in articles 2 and 3 which are common to the four [Geneva] conventions ratified, it is clear that its application is specifically limited to cases of declared international war and to armed conflicts that arise within the territory of some of the Parties. It is evident that its provisions in reference to this latter situation concern an internal armed conflict or war between well-armed sides over whom its provisions are binding.[89]

The court then determined that the requirements of the conventions to punish those responsible for grave breaches were not applicable to the case in question as, while the convention requirements were relevant to the state of siege which existed in Chile at the time the crimes occurred,[90] the crimes did not appear to be a consequence of an internal armed conflict.[91] In addition, the court ruled that the ICCPR was not applicable, as it could not be applied retroactively. These findings were used to determine that the amnesty did not breach Chile's international obligations.

In contrast, a few years later, in the 1994 *Bárbara Uribe Tamblay and Edwin Van Yurick Altamirano* case, the Santiago Court of Appeals used the argument that Chile was in a state of internal war to rule that international humanitarian law applied. The court found that this meant that the 1978 Amnesty Law could not be used to close cases, arguing that under the Geneva Conventions, war crimes and crimes against humanity can have no statute of limitations. It further argued that the ICCPR, the ACHR, and the CAT applied.[92] The court cited Article 28 of the Vienna Convention to support its ruling. The decision was appealed to the Chilean Supreme Court, which reversed the lower court's decision, ruling that the amnesty was valid, as Chile was not in a state of armed conflict when the crimes occurred and that therefore the terms of the 1949 Geneva Conventions

[88] *Manuel Contreras et al* (n 37).
[89] *Ibid* Clause 26.
[90] Other cases where the courts ruled upon the existence or absence of conflict in relation to the application of amnesty laws include: *Pedro Enrique Poblete Córdova* (n 74); *Corte Suprema*, 12/11/92, '*Alfonso René Chanfeau Orayce*' (Chile).
[91] Quinn (n 77) 927.
[92] *Bárbara Uribe Tamblay* (n 70) [13].

did not apply. In addition, the human rights standards applied by the Santiago Appeals Court were found to be inapplicable, as they had not been ratified when the crimes occurred.[93]

During the same period, in the 1994 *Lumi Videla Moya* case before the Santiago Appeals Court, the court applied the provisions of international humanitarian law. This case concerned the 1974 torture and murder of Lumi Videla Moya, leader of the MIR, at the hands of Osvaldo Romo Mena. In this instance, the court declared that due to the existence of a state of siege, Chile could be argued to have been in a state of internal war when the crimes were committed and therefore the provisions of international humanitarian law applied. This led to the court making some strong pronouncements against the amnesty law, for example,

> [a]ny failure to comply with the content of an international treaty not only constitutes an infringement of international law which casts doubt on the honour or trustworthiness of the Chilean State but, in addition, is a clear infringement of its own national legislation.[94]

The court further stated, with reference to Common Article 3 of the Geneva Conventions; Articles 146–7 of Geneva Convention IV; and Article 148 of Additional Protocol II, that

> such offences as constitute grave breaches of the Convention are imprescriptible and unamenable to amnesty; . . . nor is it appropriate to apply amnesty as a way of extinguishing criminal liability. Any attempt by a state to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the rights of persons in wartime is beyond a state's competence while it is a party to the Geneva Conventions of humanitarian law. Such an attempt would be more serious still if it sought to cover up not only individual liability but also that of agents of the state or public officials, since that would be tantamount to self-absolution which is repugnant to every basic notion of justice for respecting human rights and international common and treaty human rights law.[95]

The accused subsequently challenged this ruling and on 30 January 1996, the Supreme Court granted the appeal, finding that international humanitarian law did not apply, annulled the decision of the Appeals Court and upheld the dismissal of the trial on the basis of the amnesty law.[96] However, in the 1998 *Poblete Córdova* case, the Supreme Court reversed its position and found that international humanitarian law did apply, and that the amnesty

[93] *Bárbara Uribe Tamblay* (n 70) [13].

[94] *Corte de Apelaciones de Santiago*, 26/09/94, '*Lumi Videla Moya*', No 13.597-94 (Chile), Reproduced in Marco Sassòli and Antoine A Bouvier, *How does law protect in war? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* (International Committee of the Red Cross, Geneva 1999) [9(n)].

[95] *Ibid* [12].

[96] *Corte Suprema*, 30/01/96, '*Lumi Videla Moya*' Rol 5.476-94 (*Recurso de queja*); *Revista Estudios* (edited by the *Sociedad Chilena de Derecho Internacional*), 1995, pp 198–201; *Revista Fallos del Mes*, No 446, pp 2063–7 (decision No 1) (Chile).

law breached Chile's obligations to prosecute and punish grave breaches and violations of Common Article 3 of the Geneva Conventions.[97]

In the *AZAPO* case, the South African Constitutional Court declined to apply international humanitarian law, asserting

> it is doubtful whether the Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which this country found itself during the years of the conflict.[98]

The reason it gives for this doubt is that the conflict occurred within the territory of the state between the state's armed forces and dissidents and therefore would not fall within the criteria for the Geneva Conventions, which apply to international conflicts; and Additional Protocol II does not apply as it was never signed nor ratified by South Africa. Despite this, the court refers to Article 6(5) of Additional Protocol II to justify the amnesty by stating that for non-international conflicts

> [T]here is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterized as serious invasions of human rights. On the contrary, article 6(5) of Protocol II to the Geneva Conventions of 1949 provides that '[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'.[99]

The Constitutional Chamber in El Salvador expressed a similar understanding of Article 6(5) in its brief discussion of it in the *Decision on the Amnesty Law, Proceedings No 10-93*,[100] as did the Salvadorean Supreme Court in the later ruling in the *Guevara Portillo* case.[101] As discussed in chapter 3, these decisions, whilst differing from the view expressed by the ICRC on this provision, do seem to reflect the intentions of states when drafting Additional Protocol II.[102]

A controversial interpretation of treaty provisions was also made by the Lima Superior Court of Justice in 1998 in the *Barrios Altos* case,[103] where the court relied upon the provisions of the Article 6(4) of the ICCPR[104] and

[97] *Pedro Enrique Poblete Córdova* (n 74).

[98] *AZAPO* (n 40) [29].

[99] *Ibid* [30]. For a discussion of Article 6(5) of Additional Protocol II, see ch 3.

[100] *Corte Suprema de Justicia*, 20/05/93, '*Resolución de la Demanda de Inconstitucionalidad presentada por Joaquín Antonio Cáceres Hernández*', No 10-93.

[101] *Guevara Portillo* (n 28).

[102] For a discussion of the duty to prosecute in non-international conflicts, see ch 3.

[103] *Décima Primera Sala Penal de la Corte Superior de Lima*, 14/07/95, '*Caso Salazar Monroe*' 999 UNTS 171, 6 *International Legal Materials* 368 (Peru).

[104] Art 6(4) of the ICCPR states, '[a]nyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.'

Article 4(6) of the ACHR[105] that allow post-conviction pardon from sentence of death, to argue in favour of the existence of a right to obtain amnesty.[106] This unorthodox interpretation was used to support their argument that the amnesty law was valid. Subsequently, following a ruling by the Inter-American Court of Human Rights on the case, the Peruvian Supreme Court in 2001 reopened the investigation and at the time of writing, former president Alberto Fujimori was on trial for his role in this massacre, along with other crimes.

In contrast, there have been cases where attempts by judges to use international human rights or humanitarian law to limit or overturn amnesties have succeeded. For example, in Uruguay in the 1997 *Zanahoria* case,[107] the judge, Dr Reyes of the Criminal Court of Montevideo, referred to the fact that Uruguay had recently ratified the Inter-American Convention on Forced Disappearances to justify his decision to order an investigation into the disappearance of 150 people who were detained during the dictatorship. He did, however, assert that the aim of the investigation was only 'to determine the existence of the clandestine cemetery, exhume the bodies and return them to their families', rather than 'to instigate punitive action against the perpetrators'.[108] The obligation of the state to investigate human rights abuses was reaffirmed in Uruguay in the *Elena Quinteros Almeida* case[109] in 2000 and in the *José Nino Gavazzo* case[110] in 2002. Furthermore, at the time of writing, former civilian president Juan María Bordaberry is on trial on charges of 'aggravated homicide' for the murder of two Uruguayan congressmen in Argentina. The prosecutors are asserting that the 1986 amnesty law applies neither to civilian defendants, nor to crimes committed outside Uruguayan territory.

Similarly, in Argentina, in the 1997 *Privaciones Illegales de Libertad en el centro clandestine de detención 'Club Athlético'* case,[111] the court cited the

[105] Art 4(6) of the ACHR states, '[e]very person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.'

[106] Naomi Roht-Arriaza, 'Combating Impunity: Some Thoughts on the Way Forward' (1996) 59 *Law and Contemporary Problems* 93, 93.

[107] Criminal Court of Montevideo, 15/04/97, '*Zanahoria*' case (Uru).

[108] Elin Skaar, 'Legal Development and Human Rights in Uruguay 1985–2002' (2007) 8 *Human Rights Review* 52.

[109] Judge Jubette of the First Instance Civil Court in Montevideo ruled in May 2000 that, under international law, the executive was obliged to investigate disappearances. See First Instance Civil Court in Montevideo, 10/05/00, '*Almeida de Quinteros, María del Carmen c/Poder Ejecutivo (Ministerio de Defensa Nacional)', Amparo (Sentencia No 28) Ficha 216/99* (Uru). Subsequently, the Appellate Court of Montevideo upheld Judge Jubette's ruling: Appellate Court of Montevideo, 31/05/00, '*Almeida de Quinteros, María del Carmen c/Poder Ejecutivo (Ministerio de Defensa Nacional)*' (No 98) (Uru).

[110] *Tribunal en lo Penal de 6° Turno*, 02/03/02, '*José Nino Gavazzo*' (Uru).

[111] *Cámara en lo Criminal y Correccional Federal, Sala II*, Buenos Aires, 14/10/97, 'Privaciones Illegales de Libertad en el centro clandestine de detención "Club Athlético"' (Arg).

ACHR as 'imposing duties on the state to ensure the rights to mourn, to bodily integrity, and to the truth'.[112] The court further emphasised that to guarantee these rights, the state was obliged to conduct full investigations into the allegations of torture and disappearances.[113] This ruling was reaffirmed by Judge Cavallo in the *Simón and Del Cerro* case,[114] who stated that the ICCPR, ACHR, CAT and the American Declaration on the Rights and Duties of Man all imposed duties on states parties to guarantee and protect human rights and to adapt their internal legislation to comply with that objective.[115] However, recognising the duty of the state to investigate human rights violations does not equal a duty to prosecute those violations following the investigations, which means that for these judgements amnesties and investigations can co-exist.

The Chilean Supreme Court has also begun to move away from its earlier reluctance to recognise Chile's obligations under international law. For example, in its 10 September 1998 decision in the *Pedro Enrique Poblete Córdova* case,[116] the Chilean Supreme Court ordered the reopening of the case on the basis of Common Article 3 of the Geneva Conventions. The court found that this provision applied as the military government had declared itself to be in a state of war in September 1973. The court then cited the *aut dedere aut judiciare* provisions common to all four Geneva Conventions, before declaring that the failure of the government to investigate the disappearances

> constitutes an error in law which must be corrected by means of this appeal, especially if it is borne in mind that, under the principles of international law, international treaties must be interpreted and applied by States in good faith; from which it there follows that, unless the respective Conventions have been denounced, domestic law should comply with them and that the legislator should ensure that any new laws comply with the said international instruments so that any transgression of their principles is avoided.[117]

The court therefore ruled that in this case the investigation should be conducted. Similarly, in the 1998 *Caravan of Death* case,[118] concerning one of the worst episodes of human rights abuses in Chile's history, where 75 political prisoners were executed and thrown from helicopters into the sea in October 1973, the Supreme Court ordered that the case be reopened on the grounds that Common Article 3 of the Geneva Conventions was

[112] Roht-Arriaza & Gibson (n 30) 866.
[113] *Ibid* 866.
[114] *Resolución del Juez Federal Gabriel R Cavallo* (n 20).
[115] Human Rights Watch (n 21).
[116] *Pedro Enrique Poblete Córdova* (n 74).
[117] *Pedro Enrique Poblete Córdova* (n 74).
[118] Corte Suprema, September 1998, 'General Sergio Arellano Stark, Marcel Moren Brito and Armando Fernández Larios ("*La Caravana de la Muerte*")' (Chile).

applicable. Then on the 20 June 1999, the Supreme Court relied on the concept of disappearances as an ongoing crime to uphold the prosecutions of the accused. However, in March 2006 Judge Victor Montiglio changed the charges in the case from kidnapping, which would be a continuous crime for disappearances, to murder, which enables application of the Amnesty Law. Subsequently, in April 2006, Judge Montiglio acquitted one defendant and applied the amnesty law to the others after finding that international law did not apply to the 'murders'.[119]

In 2004, the Santiago Appeals Court addressed the question of disappearances in the *Miguel Ángel Sandoval Rodríguez* case.[120] The court referred to the Inter-American Convention on Forced Disappearances of Persons,[121] which although signed, has yet to be ratified by Chile, to justify its ruling to uphold the prison sentences that had been imposed on Manuel Contreras and four other DINA operatives. The court found that Chile had obligations under the Vienna Convention

> not to frustrate the purpose and objective of the said convention, in accordance with Article 18 prior to its entrance into force[122]

and that to permit disappearances to remain unsolved would violate the 'object and purpose of the Convention'.[123] The court also referred to the jurisprudence of the Inter-American Court of Human Rights and the Chilean Supreme Court to justify its conclusions. The Santiago Appeals Court affirmed its ruling on 18 May 2004, in the case of the disappearance of *Diana Frida Aron Svigilsky*,[124] when Judge Solís held that amnesty could not apply to the case because of Chile's obligations under international human rights law to investigate the disappearance. The *Sandoval* case was subsequently upheld by the Chilean Supreme Court in November 2004,[125] but the *Diana Frida Aron Svigilsky* was overturned on 1 June 2005, and has subsequently been appealed to the Supreme Court.

In addition to the obligations placed upon states by treaties, states can be argued to be subject to duties imposed by customary international law, particularly for crimes against humanity.[126] In some of the national cases

[119] ——, 'Judge in Chile applies Amnesty Law to Caravan of Death Case' *Santiago Times* (Santiago 14 April 2006); ——, '12 indicted in "Caravan of Death" case' *CNN* (Santiago 21 March 2006).

[120] *Corte de Apelaciones de Santiago*, 17/11/04, '*Miguel Ángel Sandoval Rodríguez*' (Chile).

[121] Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) 33 *International Legal Materials* 1429 ('Pará Convention').

[122] *Miguel Ángel Sandoval Rodríguez* (n 120) [35].

[123] *Ibid* [36].

[124] *Corte de Apelaciones de Santiago*, 18/05/04, '*Diana Frida Aron Svigilsky*' (Chile).

[125] For an overview of this case, see 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.

[126] For a discussion of the obligations placed upon states by customary international law, see ch 3.

under discussion, the judges have sought to classify the crimes under investigation as crimes against humanity, to force the state to investigate the alleged violations.[127] However, in other cases, the courts have sought to avoid the obligation to investigate by applying a restricted definition of crimes against humanity. For example, in the 2003 *General Aussaresses* case,[128] concerning torture ordered by the defendant between 1955 and 1957 during the conflict in Algeria, the French *Cour de Cassation* employed a very restricted definition of crimes against humanity to apply the 1968 amnesty law to this case. The court considered that a 1964 law providing for the prosecution of crimes against humanity referred to the Statute of the International Military Tribunal in Nuremberg and thus only to crimes committed by the Axis powers during the Second World War. The 1964 law was therefore deemed not to cover crimes against humanity committed after the end of war, such as those perpetrated in Indochina and Algeria. In addition, the court ruled that a French law of 1994 providing for the prosecution of crimes against humanity could not be applied retroactively. The court also emphasised that its ruling complied with customary international law. Thus, the court felt that the acts of torture ordered by General Aussaresses could be described as crimes against humanity and could therefore be subject to the amnesty law.[129] In this instance, therefore, the court used customary international law to justify its interpretation of a pre-existing French statute, although the position that the court took on customary international law could be described as contentious.

These cases appear to indicate that national courts are increasingly willing to rely on international law to justify ordering investigations into human rights violations, even where the amnesty is held to prevent prosecutions. Furthermore, some courts have relied upon international treaties to support their decisions to order investigations, even before those treaties have been ratified by the state. This flexibility of the courts' approach seems to indicate that courts are willing to use international law to support their position rather than international law being applied as a universal standard in all states.

[127] This occurred in Colombia in the *Corte Supreme de Justicia*, 07/02/99, '*Alonso de Jesus Posada Espinosa and Martin Alonso Velasquez Zapata*' (Colom) and in Guatemala in *Corte Suprema de Justicia*, 01/09/01, '*El Aguacate Massacre*' (Guat).

[128] Cass, '*General Aussaresses*' case (2003) Bull Crim 122, 465–469 (Fr). For a discussion of this case, see Juliette Lelieur-Fischer, 'Prosecuting the Crimes Against Humanity Committed during the Algerian War: An Impossible Endeavour? The 2003 Decision of the French Court of Cassation in *Aussaresses*' (2004) 2 *Journal of International Criminal Justice* 231.

[129] This ruling conformed to and expanded upon earlier decisions such as Cass, '*Affaire Boudarel*' (1993) 1992 Bull Crim, No 143, 351, 354–55

Adhering to the Separation of Powers Doctrine

When deciding whether to implement or apply an amnesty law, the court, in addition to determining the legality of the amnesty, must also elucidate its own jurisdiction to rule in the case. This generally requires the court to consider the constitutional provisions relating to the separation of powers doctrine to determine whether it is able to rule on the legality of the amnesty, or whether the amnesty is a purely political question that should be resolved solely by the executive, without judicial oversight. Teitel explains that in 'ordinary times' this doctrine seeks to restrict 'activist judicial decision making', as 'retroactivity in judicial decision making challenges the rule of law as settled law'; and 'judicial decision making is thought to interfere with democracy', as judges lack the legitimacy of elected representatives.[130] According to this doctrine, amnesty laws which are deemed entirely political should be exempt from consideration by the judiciary. Even where judges find that they have the jurisdiction to intervene, in times of national crimes which typically precede amnesty laws, judges tend to grant governments a wider margin of appreciation concerning their actions.

This reluctant approach by judges to political amnesties has been criticised by several commentators. For example, Roht-Arriaza and Gibson claim that decisions where the political question doctrine is applied

> reflect a crabbed, nineteenth century civil law view of judges who merely apply written law. The function of the judiciary as guardians of fundamental rights and arbiters of constitutional meaning, central to contemporary constitutional theory and practice, is completely absent in this view.[131]

This protective role of the judiciary is also emphasised by Teitel who argues that during transitional periods, when the

> transitional legislature frequently is not freely elected and, further, lacks the experience and legitimacy of the legislature operating in ordinary times,[132]

a more activist stance from the courts may be more acceptable. This acceptability could be strengthened by the fact that

> in transitional times, judicial decision making is often relatively faster than the legislative process, which may be slowed down by a compromised past or political inexperience.[133]

In addition, Teitel contends that during the political instability that usually accompanies transitions, 'the judiciary may well be comparatively

[130] Ruti G Teitel, *Transitional Justice* (Oxford University Press, Oxford 2000) 23.
[131] Roht-Arriaza & Gibson (n 30) 879.
[132] Teitel (n 8) 2033.
[133] *Ibid* 2033.

more competent for nuanced, case-by-case, resolution of transitional controversies'.[134] Finally, Teitel asserts that, by assuming a more activist stance, judges and courts which were 'compromised by their decision making under prior rule can transform themselves', thereby enhancing their perceived legitimacy.[135] The question of whether legislatures or the judges are better suited to developing law within a transitional context will of course 'depend on the particular predecessor legacies of injustice in that country'.[136]

With regards to the separation of powers doctrine, there are several examples where the court declined to rule upon an amnesty law due to its political nature. For example, in the 1987 *General Ramón J Camps* case, the majority decision of the Argentine Supreme Court declared that 'Congress has the power . . . to seek its policy objectives in a reasonable manner through the enactment of laws' and it found that the Due Obedience Law was such a reasonable manner. This idea was supported by Judge Fayt, in his Concurring Opinion, when he declared

> [w]hereas other values and solutions may be preferable to the one embodied in this Law, it is not the province of this Court but of Congress to decide on the path to take under the present circumstances.[137]

In El Salvador, the Supreme Court held in 2000 that it did not have jurisdiction over an 'eminently political act'.[138] The court emphasised the importance of the separation of powers doctrine in the following statement:

> [T]he fundamental mission of the competence of the Judicial Organ, is that of being a severe guardian on the acts of the public powers, thus deterring the invasion of the space reserved to liberty by the arbitrary and abusive exercise of power; for if governmental ordainment and the individual liberties contained in the constitution precepts would be no more than theoretical or ethical enunciations . . . [B]oth legislative and executive branches require a certain margin of arbitrary power to conduct the affairs of the state; we must therefore conclude that the Judicial Organ lacks competence to deal with affairs purely political, the nature of which are completely different to the essence of the jurisdictional function; and therefore, their elucidation is exclusively of the competence of the political powers; the legislative and executive branches.[139]

The court therefore concluded that it was unable to rule on the amnesty law in this case, as to do so

[134] *Ibid* 2033.
[135] *Ibid* 2034.
[136] Teitel (n 130) 24.
[137] *General Ramón J Camps* (n 10) Concurring Opinion of Judge Fayt [14].
[138] *Resolución de la Demanda de Inconstitucionalidad* (n 100).
[139] *Ibid*.

> would surpass the orbit of competence that had been delimited to it by the Fundamental Charter, and would invade the sphere of the powers of the state.[140]

The court did, however, concede that the ruling should 'not be [assessed] in absolute terms', because it was 'evident that there are cases where there is constitutional jurisdiction over the amnesty'.[141] A similar conclusion was reached in the *Barrios Altos* case by the Eleventh Criminal Chamber of the Lima Superior Court of Justice on 14 July 1995, although as discussed previously, this case has now been reopened following the judgment of the Inter-American Court.[142]

In the *AZAPO* case, the South African Constitutional Court held that the decision to introduce the amnesty law was a 'difficult, sensitive, perhaps even agonising, balancing act' between the needs for justice and for reconciliation, truth and reparations, and accountability and development.[143] The difficulty of the decision-making process meant that it falls 'substantially within the domain of those entrusted with lawmaking in the era preceding and during the transition period'.[144] The court continued that although

> [t]he results may well often be imperfect and the pursuit of the act might inherently support the message of Kant that 'out of the crooked timber of humanity no straight thing was ever made'

it was not within the domain of the court to question the 'methods and mechanisms' chosen by the lawmaker, but rather simply to consider the law's constitutionality.[145] Similarly, in Uruguay, in the *Zanahoria* case, the Appeals Court held that it was the responsibility of the executive, rather than the judiciary, to order investigations into disappearances, as such investigations were political, not juridical matters.[146]

In contrast, in the 1994 *Lumi Videla Moya* case, the Santiago Appeals Court used the separation of powers doctrine to show that the judiciary can be compelled to act when politicians fail to fulfil their duties:

> Any clash or conflict between the principles of legal soundness and justice and the binding force of human rights necessarily forces the judiciary to declare invalid, or inapplicable, acts or rules handed down by political authorities who fail to recognize them or which reflect procedures in which such essential rights have been ignored.[147]

[140] *Resolución de la Demanda de Inconstitucionalidad* (n 100).
[141] Test of judgment cited in Roht-Arriaza & Gibson (n 30) 878.
[142] *Caso Salazar Monroe* 999 UNTS 171, 6 *International Legal Materials* 368 [1995].
[143] *AZAPO* (n 40) [21].
[144] *Ibid* [21].
[145] *Ibid* [21].
[146] *Zanahoria* (n 107).
[147] *Lumi Videla Moya* (n 94) [10(1)].

In addition, in the 1996 Guatemalan *Lacán Chaclán* case,[148] which concerned the ability of military courts to hear cases of common crimes committed by soldiers against civilians, the court relied on international treaties to emphasise the right to an independent judiciary, as opposed to one that will automatically defer to the wishes of the executive.[149]

Where courts choose to defer to governments they may do so on the basis of their impartial interpretation of the constitution. However, it is possible that they may also be influenced by political considerations. For example, in many jurisdictions, politicians control the appointment and promotion of members of the judiciary, which may affect the relationship between politicians and the courts. This situation can result either in judges being reluctant to displease the politicians and risk damaging their own career prospects, or in judges having no desire to come into conflict with the politicians who appointed them, as their appointment was a result of their holding political views sympathetic to those of the politicians.[150] Where judges are susceptible to such considerations they may be unwilling to order investigations into human rights abuses committed by state agents, because they supported the actions of those agents. Alternatively, judges may uphold an amnesty as they believe that amnesty represents the appropriate mechanism to bring peace and stability to the country.[151] More sinisterly, in transitional societies, the politicians are frequently in a position to use force, either from the national security forces or from paramilitary groups, to intimidate or eliminate those members of society, including the judiciary, who oppose them.[152] Furthermore, judges may be reluctant to intervene in laws enacted by the legislature, due to: (i) a tradition of approaching the law in a positivistic manner to merely mechanically apply statutes; and (ii) a lack of practice in exercising review over the decisions of the executive or legislative bodies.[153] This view often excludes all considerations of morality or practicality, but rather treats the law as an abstract entity.

In contrast, a court may decide to refuse to apply an amnesty for reasons such as a moral imperative to help victims; a desire to uphold the constitution;[154] a desire to uphold international law;[155] a desire to exercise the

[148] *Sala Quinta de la Corte de Apelaciones, Jalapa*, 22/01/96, '*Lacán Chaclán*' case (Guat).

[149] Roht-Arriaza & Gibson (n 30) 872.

[150] See, eg, the attitudes of judges who were appointed by and supported the National Party in apartheid-era South Africa, described in David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing, Oxford 1998) 168.

[151] Roht-Arriaza & Gibson (n 30) 884. For a discussion of judgments emphasising the role of amnesty in promoting peace and reconciliation, see 174.

[152] For monitoring of harassment of judges and legal professionals by national governments, see the International Commission of Jurists website, <http://www.icj.org/> accessed 31 January 2008.

[153] Roht-Arriaza & Gibson (n 30) 884.

[154] Although this can have the opposite impact in instances where the amnesty is prescribed in a constitution, eg, in South Africa. See under 'Legality of Amnesty Processes Under Municipal Law', above.

[155] See under 'Legality of Amnesty Processes Under Municipal Law', above.

powers of the judicial organ by pursuing an interpretivist approach; and a refusal to apply contradictory laws, for example, where someone who commits an economic crime is prosecuted, but an individual who tortures and kills is freed. Therefore, the approach of the judiciary to amnesty laws introduced by their governments may be influenced by much more than merely the conformity of that law with domestic or international legal obligations. Indeed, in addition to the domestic pressures outlined above, judges may also draw conclusions from experiences elsewhere.

Learning From Experiences Elsewhere

Over a decade ago, Slaughter exclaimed that 'courts are talking to one another all over the world'.[156] She described this discourse as 'transnational judicial dialogue'[157] and explained that it could occur at the horizontal level, between courts of the same status across borders,[158] or at the vertical level, between national and supranational courts, particularly in the 'framework of a treaty establishing a supranational tribunal with a specialised jurisdiction that overlaps the jurisdiction of national courts'.[159] McCrudden has asserted that this dialogue is particularly prevalent in the field of human rights.[160] Whilst such developments can potentially contribute to universalising human rights protections, McCrudden cautions that

> substantial 'cherry picking' of which jurisdictions to cite occurs, and that those jurisdictions chosen will be those which are likely to support the conclusion sought, leading to arbitrary decision-making, not legitimate judging.[161]

In this way, the practice

> can function equally to weaken or at least hinder enforcement of international obligations where evidence of reciprocal acceptance of such obligations is lacking.[162]

For transitional states, it appears more likely that they will look outside their borders for guidance, where there is a vacuum of national justice, or

[156] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, 99.

[157] For a discussion of transnational judicial dialogue, see Melissa A Waters, 'Mediating Norms and Identity: The Role of Transjudicial Dialogue in Creating and Enforcing International Law' (2005) 93 *Georgetown Law Journal* 487; Christopher McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *Oxford Journal of Legal Studies* 499; Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273.

[158] Slaughter (n 156) 103–6.

[159] *Ibid* 106–7.

[160] McCrudden (n 157) 506.

[161] *Ibid* 507.

[162] Slaughter (n 156) 117.

where the domestic legal system is being rewritten,[163] and as they do so, they too might be susceptible to 'cherry picking'.

Despite this, only a few judgments have been identified that cite either precedents concerning reliance on amnesties or precedents where amnesty was not granted as a justification to either uphold or deny the amnesty. This practice could develop further in the future, enabling judgments on amnesty laws to contribute to a 'convergence of norms and practices in the enforcement of amnesty laws'.[164] Burke-White asserts that

> [w]hen a court decides on the validity of an amnesty law . . ., it signals to other judiciaries how questions of similarly situated amnesties should be decided in the future.[165]

Therefore, the judgments of national courts have the potential to have significant impact, not just within their state, but in courtrooms around the world.

The practice in foreign jurisdictions was relied upon to support the use of an amnesty in the *AZAPO* case, where the South African Constitutional Court ruled:

> South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have in modern times been confronted with a similar need. Although the mechanisms adopted to facilitate that process have differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries.[166]

The court then briefly examined the specific mechanisms that were relied upon in Chile, Argentina and El Salvador, before continuing:

> What emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule, is that there is no single or uniform international practice in relation to amnesty. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity. In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all

[163] McCrudden (n 157) 523.

[164] William W Burke-White, 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' (2001) 42 *Harvard International Law Journal* 467, 532.

[165] William W Burke-White, 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' (2001) 42 *Harvard International Law Journal* 467, 533.

[166] *AZAPO* (n 40) [22].

> sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses.[167]

This shows that the court was attempting to justify the amnesty in South Africa by highlighting that: (1) South Africa was not alone in relying upon amnesty for human rights violators; and (2) the option followed by South Africa was neither an instance of 'blanket amnesty' nor a 'self amnesty', but rather the result of a considered process that aimed to facilitate national peace and reconciliation.

In the *Barrios Altos* case in Peru,[168] the Lima Superior Court of Justice on 14 July 1995 noted:

> political custom shows that amnesties have consistently been executed by legislatures and governments when they take into account the social needs and exceptional circumstances that make such laws necessary.[169]

This statement, in conjunction with the rest of the arguments used by the court, appears to be a justification of the decision to uphold the amnesty, rather than using the practice of other states to influence the decision of the courts. The practice of other states was also looked at in the *Barzilai* case.[170]

There has also been some vertical dialogue between national courts and international human rights institutions, which unsurprisingly was used as an argument against amnesty. For example, in the 1994 *Lumi Videla Moya* case,[171] the decision of the Santiago Appeals Court referred to judgments of the Inter-American Court of Human Rights, such as the *Velásquez Rodríguez* case, to support its decision to overturn the amnesty law.

These cases have shown that national courts are willing to look beyond the borders of their states to identify practice that can support their decisions to either uphold or overturn national amnesty laws. As states appear to be increasingly moving away from blanket amnesty laws towards individualised, conditional amnesties, such transnational judicial dialogue may contribute to the creation of an international consensus on amnesties. In the cases cited above, these courts seemed particularly willing to highlight the use of amnesty elsewhere as a response to 'exceptional' circumstances that were comparable to those faced by their state. Such 'exceptional' circumstances have also been considered as an independent factor in upholding amnesties.

[167] *Ibid* [24].
[168] *Caso Salazar Monroe* (999 UNTS 171, 6 *International Legal Materials* 368) [1995].
[169] Roht-Arriaza & Gibson (n 30) 879.
[170] *'Shin Bet Affair'* (n 177).
[171] *Lumi Videla Moya* (n 94) [16].

Promoting Peace and Reconciliation

As discussed in the outline of the motivations for amnesty laws in chapter 1, amnesties can play a highly significant role in peace settlements or political transitions. The judiciaries in several jurisdictions have considered this role and the political situation in the country at the time the amnesty was introduced. Such considerations result in discussions of substantive arguments rather than simply relying upon the separation of powers doctrine to evade discussing the amnesty.

The promotion of peace and reconciliation was a factor in the 1994 *Bárbara Uribe Tamblay and Edwin Van Yurick Altamirano* case,[172] where the Chilean Supreme Court emphasised the need for amnesty under Additional Protocol II 'in order to relieve the grave political tension from which Chile was suffering and to restore social tranquillity'.[173] Similarly, in 1993 in El Salvador, the Supreme Court denied itself jurisdiction due to perceived political necessity:

> The seriousness of the tragedy in which the Nation has been immersed during the last twelve years is not something strange to this Tribunal, nor are the efforts realized by the totality of the Salvadorean people to find a way out of it through civilized channels and the commonplace acceptance, that should allow for the obtainment of social peace, of which political sovereignty, now being considered by us, is one of them, thus making effective the values of justice, juridical security and commonwealth established by the constitution.[174]

In 1995, the court confirmed this ruling in the *Guevara Portillo* case,[175] where it emphasised the amnesty was required for reconstruction to occur after years of bloody civil war. The court also stressed that the amnesty was part of a negotiated peace agreement.[176] The Supreme Court of Israel made a similar determination in the *Barzilai v Government of Israel* case,[177] when it upheld the president's right to grant pardons for security or political reasons. In writing for the majority, the Supreme Court President, Meir Shamgar, said the case fitted the necessary criterion of occurring in wholly exceptional circumstances in which a supreme public interest arises and in which no other reasonable solution presents itself.[178] In addition, in his Concurring Opinion Judge Ben-Porat argued that,

> [t]he grant of pardon involves a conflict between two very important interests: one—equality before the law, which requires that every offender against the law

[172] *Bárbara Uribe Tamblay* (n 70).
[173] Roht-Arriaza & Gibson (n 30) 864.
[174] *Resolución de la Demanda de Inconstitucionalidad* (n 100).
[175] *Guevara Portillo* (n 28).
[176] Roht-Arriaza & Gibson (n 30) 864.
[177] *Barzilai v Government of Israel* (n 27).
[178] *Ibid*. In considering the reasonableness of the amnesty, the court considered the case law from other jurisdictions.

> should answer for his conduct; the other—the safeguarding of a vital public interest. The proper balance between the two is the determining factor and the State President was faced with the same predicament when making his pardoning decision.[179]

Judge Ben-Porat continued that if it is conceded that the power to pardon before conviction exists, then 'the considerations weighed by the President at the time of granting the pardons are valid'.[180]

The political situation in the country was also considered in the *AZAPO* case. In this case, the court found that the amnesty was necessary to promote peaceful reconciliation and reconstruction, and it cited Article 6(5) of Additional Protocol II in support of its conclusion. The court provided a detailed discussion of the 'deep conflict' that had existed in South Africa prior to the introduction of the National Unity and Reconciliation Act and considered the political realities faced by the country when making its determination:

> It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realized that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past.[181]

The court later stated:

> If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, *ubuntu* over victimization.[182]

In addition, the necessity of interpreting the amnesty laws in light of the political situation was discussed in the 1987 *General Ramón J Camps* case. In his concurring opinion, Judge Fayt highlighted that 'the statement of legislative intent accompanying this law refers to very serious circumstances prompting its enactment'.[183] He further declared:

> In light of the gravity of the situation, the Supreme Court cannot disregard the reasons which motivated the enactment of the Law . . . It becomes necessary to recall that our Constitution is the result of a long history of sacrifice and glory

[179] *Barzilai v Government of Israel* (n 27).
[180] *Ibid*.
[181] *AZAPO* (n 40) [2].
[182] *Ibid* [19].
[183] *General Ramón J Camps* (n 10) Concurring Opinion of Judge Fayt [14].

> . . ., and this historical process has long terminated with the enactment of the constitution. Consequently, constitutional interpretation as well as the Court's efforts to insure its survival cannot be divorced from the realities of the present time . . ., no matter how bitter such reality proves to be.[184]

This idea was also supported in the Dissenting Opinion of Judge Petracchi, who asserted that

> the interpretation of laws cannot be undertaken without considering the particular context in which they are enacted, nor may such interpretation be indifferent to the possible effects ensuing from a declaration of unconstitutionality.[185]

In contrast, in the *Scagliusi* case, Argentine Federal Court Judge, Claudio Bonadío, looked at the political situation in which the amnesty was introduced to highlight its erroneousness. He established that

> Acts which are the subject of the proceedings in this case took place within the framework of a systematic plan of unlawful repression ordered and organized [by] the authorities of the military government that usurped the institutional power between 24 March 1976 and 10 December 1973.[186]

He subsequently asserted that, due to this systematic plan, the crimes under investigation in the case could be classified as crimes against humanity and therefore not subject to the amnesty.[187]

The cases discussed above clearly highlight that, rather than assessing the legality of amnesty laws in the abstract, some national courts have felt obliged to consider the political circumstances in which the amnesty law was introduced in order to determine whether the amnesty is an appropriate response. Clearly, such considerations involve the judiciary in political decisions, where their findings could be influenced by their views of the human rights abuses and the goals of the peace processes, rather than purely legal questions.

Disclosing or Concealing the Truth

As discussed earlier, the courts can intervene at various stages during the investigation to promote the victim's access to the truth.[188] Roht-Arriaza and Gibson explain that courts that insist upon an investigatory phase before applying the amnesty may do so for the following reasons: (1) 'these results allow judges to assert their proper power and role in a modest, and therefore tenable, fashion'; (2)

[184] *Ibid*, Concurring Opinion of Judge Fayt [14].
[185] *Ibid*, Dissenting Opinion of Judge Petracchi [34].
[186] *Scagliusi, Claudio Gustavo and others—unlawful imprisonment* (n 84) point 7.4.
[187] *Ibid* point 7.4.
[188] For a discussion of the nature of the right to truth, see ch 4.

> judges, especially lower court judges who disagree with the decision to uphold the legality of an amnesty, may look to these mechanisms as a way of discomforting alleged perpetrators, who are forced to respond to requests for testimony. They may also be seen as providing at least some closure, or solace, to the families of the victims;

and (3) judges may have become receptive to the argument

> that 'truth' is an important value in itself. By allowing charges to be filed, witnesses to be subpoenaed, and testimony to be taken, some limited version of 'truth telling' is achieved.[189]

In considering the right to truth, courts have looked to the obligations of the state under both domestic and international law. One such case concerned *Mónica María Candelaria Mignone*,[190] who disappeared after being abducted on 14 May 1976 and taken to the *Escuela de mecánica de la armada* (ESMA).[191] In April 1995, the Federal Court of Buenos Aires acknowledged that under both international and domestic law and jurisprudence, victims have the right to know the truth and the court had a duty to use its powers to assist them. Therefore, the court ordered the Naval Chief of Staff to locate documents relating to the operations in the ESMA or to reconstruct the data and make it available to the court, including the names and fates of infants born in captivity. The scope of information requested by the court in this instance went far beyond the requirements of the immediate case. Subsequently, the progress made was undermined, as the judges, faced with a refusal to co-operate from the Navy and a lack of independence among the judiciary, decided not to continue the investigation.[192]

In a case involving another notorious Argentine detention centre, the *Privaciones Illegales de Libertad en el centro clandestine de detención 'Club Athlético'* case of 14 October 1997,[193] the Federal Court of Buenos Aires focused on crimes committed at the Athletic Club during 1976 and 1977 to determine the fate of those who disappeared there. In this instance, the court relied upon the ACHR to argue for the victims' and their families' rights to mourn, to bodily integrity, and to truth. It was contended that in this instance the right to truth required the state to pursue every means possible to determine the final whereabouts of those disappeared between 1976 and 1983,

[189] Roht-Arriaza & Gibson (n 30) 885. For a discussion of the right to truth, see ch 4.

[190] *Juzgado Nacional en lo Criminal y Correccional Federal No 4 Buenos Aires [Juzg Fed]*, April 1995, '*Mónica María Candelaria Mignone*' (Arg)

[191] *Escuela de mecánica de la armada* (ESMA), Naval School of Mechanics, was a notorious torture centre in Buenos Aires during the military dictatorship.

[192] Human Rights Watch (n 21).

[193] *'Club Athlético'* (n 111).

> in order to discover the reality of what really happened and thus give an answer to the family members and the society.[194]

Other cases where a court ruled that the case could not be dismissed before an investigation was carried out include the 1998 *Pedro Enrique Poblete Córdova* case,[195] where the Chilean Supreme Court argued that disappearance was a crime of ongoing nature and therefore the amnesty could not be applied until the fate or whereabouts of the victim was known. Similarly, in the 2000 *Elena Quinteros Almeida* case, concerning a teacher and leftist activist who was arrested on 24 June 1976, escaped from detention to the Embassy of Venezuela on 28 June 1976, before being swiftly recaptured by Uruguayan military personnel who forcibly entered the embassy, Judge Jubette of the Court of First Instance concluded that the Ministry of Defence

> should fulfil Article 4 of Law 16.724, and order the start of administrative research aiming at clarifying the circumstances in which the teacher Elena Quinteros disappeared and where she is now.[196]

This verdict was upheld by the Appeals Court on 31 May 2000,[197] and subsequently, some of the civilians implicated in the case have been convicted.[198]

In contrast, there have been many examples where the victim or their family have been denied the right to truth by the courts, even when they were not seeking the prosecution of the perpetrators. For example, in the 1998 *Carmen Aguiar de Lapacó* case,[199] concerning the 1977 detention and disappearance at the '*Club Athlético*' of Alejandra Lapacó, the victim's mother requested access to official documents to determine the fate of her daughter. The Argentine Supreme Court denied access on the grounds that 'the case had been legally closed, although prosecution was stated not to be the aim of the plaintiff'.[200]

In the *AZAPO* case, the South African Constitutional Court justified the amnesty as a means of guaranteeing the right to truth when it found that 'wrongdoers would be discouraged from revealing the truth if there was a threat of potentially substantial civil damages claims':[201]

[194] Roht-Arriaza & Gibson (n 30) 867.
[195] *Pedro Enrique Poblete Córdova* (n 74).
[196] *Almeida de Quinteros* (n 109).
[197] *Ibid*.
[198] ——, 'Human Rights Victory', *Latinamerica Press* (21 November 2002).
[199] *Corte Suprema de Justicia [CSJN]*, 13/8/98, '*Aguiar de Lapacó Carmen s/ recurso extraordinario (causa nº 450) Suárez MasonSuarez Mason, Carlos Guillermo s/ homicidio, privación ilegal de la libertad, etc'* (Arg).
[200] Human Rights Watch, *World Report 1999: Argentina* (Human Rights Watch, New York, 1999). As discussed previously, in subsequent years following the annulment of the amnesty laws, this position has been overturned and criminal investigations are now ongoing.
[201] Jeremy Sarkin, 'The Truth and Reconciliation Commission in South Africa' (1997) 23 *Commonwealth Law Bulletin* 528, 533.

> Central to the justification of amnesty in respect of the criminal prosecution for offences committed during the prescribed period with political objectives, is the appreciation that the truth will not effectively be revealed by the wrongdoers if they are to be prosecuted for such acts. That justification must necessarily and unavoidably apply to the need to indemnify such wrongdoers against civil claims for payment of damages. Without that incentive the wrongdoer cannot be encouraged to reveal the whole truth which might inherently be against his or her material or proprietary interests. There is nothing in the language of the epilogue which persuades me that what the makers of the Constitution intended to do was to encourage wrongdoers to reveal the truth by providing for amnesty against criminal prosecution in respect of their acts but simultaneously to discourage them from revealing that truth by keeping intact the threat that such revelations might be visited with what might in many cases be very substantial claims for civil damages.[202]

These cases illustrate that national courts are moving towards recognising the duty of states to investigate serious human rights violations under international law, even where the amnesty is held to bar prosecution. Such judgments, as a form of *opinio juris*, could be argued to support the proposition of this book that individualised, conditional amnesties should be respected by international courts and courts in third states.

CONCLUSION

The judgments of national courts relating to amnesty laws have been investigated to determine whether national courts tend to uphold or overturn amnesty laws introduced by their governments or parliaments, and how these courts justify their decisions. This chapter has revealed that, to date, national courts are substantially more likely to uphold an amnesty law, regardless of the crimes within the scope of that law, although there has been some convergence during the past decade. Throughout the period under consideration, there were differences, however, between levels within national hierarchies of courts, as higher courts were more inclined to apply amnesty than lower courts, and military courts granted impunity more readily than civilian courts. Where national courts were willing to uphold or apply an amnesty, their decisions were most often based on the legality of the law, under either domestic or international law. The legality of the amnesty was also a commonly used factor in overturning amnesty laws, where the courts found that an amnesty violated the state's constitution or international obligations.

The legality of amnesty according to a state's constitution focused on whether the amnesty was introduced according to the rules outlined in the constitution, whether it violated the fundamental rights guaranteed by

[202] *AZAPO* (n 40) [36].

the constitution, and whether the judges had the jurisdiction to consider the amnesty under the separation of powers doctrine. Under international law, a court's determination of an amnesty's legality was dependent on whether the state was under an obligation to investigate or prosecute crimes that are prohibited in the treaties to which it is a party. When determining the existence of such an obligation, the courts looked at the position of international law within their domestic legal system, whether the treaty had been ratified when the crimes occurred, and whether the country had been in a state of conflict when the violations occurred, and hence, subject to the provisions of international humanitarian law. Within these legal arguments, the courts had a degree of flexibility in their actions. For example, in determining whether the amnesty was a political issue and therefore wholly within the realm of the government; or in considering the nature of the threat faced by the state and whether the 'exceptional' circumstances justified awarding the government a wide margin of appreciation. This chapter has argued, based on the diverse and sometimes contradictory approaches pursued by national courts to these issues, that the judges were often influenced by political considerations, rather than simply considering the legality of the amnesty as an abstract legal question.

Researching the approach of national courts to amnesty laws can significantly contribute to the understanding of amnesty laws and the wider fields of transitional justice and international law in a number of ways. First, through the implementation of amnesty laws in national courts, the scope of the amnesty and the practicalities of its enforcement can be clearly revealed. Furthermore, studying national judgments can contribute to attempts to assess the efficacy of amnesty laws in contributing to peace and reconciliation by revealing how the law is implemented.[203] Secondly, the rationales expounded by judges in their decisions can reveal their views of the strength of the constitutional protections of human rights within that country. Similarly, the judgments can elucidate the place of international law within the domestic legal system and contribute to *opinio juris* on the legality of amnesty laws, which can potentially contribute to the development of customary international law. Such judgments can furthermore influence the decision-making processes of other states and can consequently have an impact on the rights of victims outside the territory where the amnesty was introduced.

This analysis of national cases has, however, been hampered by: the time that has elapsed since many amnesty processes were introduced, making it difficult to obtain the texts of the judgments; lack of access to the jurisprudence of some distant countries; and linguistic difficulties. Therefore, it has not been possible to provide a complete overview of all

[203] For a discussion of the relationship of amnesty laws and reconciliation, see ch 1.

cases that have occurred relating to the amnesties in the Amnesty Law Database, or even for all cases within each jurisdiction. Furthermore, the legal powers of the courts within each jurisdiction differ, as do the conditions giving rise to the amnesty laws, which means that the categorisation of the outcomes of the cases and the themes selected to analyse the jurisprudence, whilst helpful, only provide general overview of the issues.

This research could be developed by investigating why judges, once they recognise that international law is part of the domestic body of laws, are reluctant to apply its provisions, particularly those relating to the duty to prosecute serious human rights violations or war crimes. In addition, the impact of judicial activism on limiting amnesty laws needs further consideration, as it could reveal a developing state practice on issues such as the duty to investigate, even if there are no subsequent prosecutions, which will allow the victims to learn the truth whilst permitting the amnesty to play a role in stabilising the country during a transition. Greater awareness-raising work amongst judiciaries in the countries where amnesty laws are introduced is advisable, as it could make the judges more conscious of the rights of the victims, not just to justice, but also to truth and reparations, and provide greater international moral and political support for judges who choose to overturn amnesties for perpetrators of international crimes.

In future years, judges in national courts will possibly pursue a more restrictive approach to amnesty laws, requiring that any measure that suspends punishment for those who have committed human rights violations, war crimes or political crimes, be accompanied by alternative measures to promote the rights of the victims and comply with the state's international obligations. This is particularly likely if the process of transnational judicial dialogue continues among national courts and international human rights monitoring bodies. International courts, particularly the ICC, will also have an impact through the enforcement of provisions of the ICC implementing legislation within national legal systems. Furthermore, if more universal jurisdiction investigations are opened, it might encourage national courts to address impunity internally rather than outsourcing accountability beyond their borders.

6

International Courts and National Amnesty Laws

INTRODUCTION

THE INTERNATIONAL COMMUNITY has designed a complicated network of institutions to protect human rights, each with a distinct status and jurisdiction.[1] These variations result from the different routes that led to the establishment of each body. The broadest mandates have been awarded to the UN and regional human rights bodies that were established as permanent institutions to hold state parties accountable for violations of the wide range of rights protected in their constituent treaties. In contrast, following particular crises, temporary courts have been created to prosecute individual perpetrators and therefore have more limited forms of jurisdiction. This category includes the ad hoc tribunals for the former Yugoslavia and Rwanda, and the hybrid tribunals. In addition, the ICC has been established as a permanent court to try those individuals responsible for the most serious human rights violations in all parts of the world.[2] These jurisdictional differences can have a significant impact on the approach taken by the international courts to national amnesty laws, particularly the distinction between courts that hold states to account, which must consider whether an amnesty breaches the enacting state's international obligations, and courts that prosecute individuals, which must consider whether an amnesty can be a bar to prosecution. This chapter will explore the relationship between international courts and national amnesty laws to consider when and how the courts can intervene in national amnesty processes and whether there can be occasions where the courts should refrain from intervention. It will argue that, although international courts should disregard blanket,

[1] For an overview of the origins and jurisdiction of each international court and quasi-judicial body, see App 3. Throughout this chapter, the terms 'international courts', 'international tribunals', 'international institutions' and 'international bodies' will be used to refer to all the institutions under consideration.

[2] The territorial jurisdiction of the court usually applies to the territory and nationals of state parties but it can be expanded by a UN Security Council referral or by a non-state party making a declaration pursuant to Article 12(3) of the Rome Statute to recognise the jurisdiction of the court 'in respect to the crime in question'.

unconditional amnesties for perpetrators of international crimes, they should take a more nuanced approach where amnesties designed to promote peace and reconciliation are accompanied by selective prosecutions or alternatives to formal criminal prosecutions, such as truth commissions or community-based justice systems.

This analysis of the relationship between international courts and national amnesty laws will begin by considering the impact of the differing *ratione personae*[3] of the courts. Subsequently, other aspects of the courts' jurisdiction will be considered, including who has standing, when the court has jurisdiction to rule over a national amnesty law, and whether the judgments of the courts are binding. Next, the views of the international institutions on how an amnesty affects the state's duties to provide a remedy, investigate, prosecute and punish, and repair harm will be assessed. Finally, the provisions of the Rome Statute of the ICC and the practice of the court to date will be analysed to suggest the approach that the court might take when confronted by an amnesty law.

WHOM DO INTERNATIONAL COURTS HOLD ACCOUNTABLE?

When considering the attitudes of international courts to amnesty laws, perhaps the most significant distinction is between the institutions which hold states to account, and those which prosecute individuals for crimes under international law. To date, most international judgments that discuss the legitimacy of amnesty laws have fallen within the former category, focusing on the obligations of states to adhere to their commitments under international human rights law, rather than individual criminal prosecutions. A state can be held accountable by the relevant treaty-monitoring body for violating the terms of a human rights treaty to which it is a party. These bodies can find that states have breached their international obligations by their actions or omissions, including 'where, although the breach was conducted by a private party, the state had nevertheless the duty to prevent that breach'.[4] Where a state has introduced an amnesty, the question for the treaty-monitoring bodies is whether the amnesty violates the state's international obligations, particularly the duties to provide a remedy, to investigate, to prosecute and punish, and to repair harm.[5] This is possible even where the amnesty is valid under national law.

In recent years, efforts have increasingly been made to hold individuals

[3] Personal jurisdiction.

[4] Javaid Rehman, *International Human Rights Law: A Practical Approach* (Longman, New York 2002) 95–6.

[5] The approach of the international courts to each of these obligations will be explored below, pp 262ff.

to account, first with the establishment of the ad hoc tribunals, then the development of the hybrid courts, and finally the creation of the ICC. These institutions hold 'natural persons' to account, but not 'government entities, political parties, corporations, or non-governmental entities'.[6] When amnesty arises before these courts, the issue is not whether the state has violated its international obligations by introducing the amnesty, but rather whether the accused is entitled to rely upon it to avoid prosecution. In these determinations, the courts frequently focus on the duty to prosecute particular types of violations rather than the overall legitimacy of an amnesty law itself.[7] This approach could emanate from a fear that condemning an amnesty entirely could destabilise the political transition under consideration, or inhibit the freedom of other governments to choose their own path through a political transition, particularly in response to the recent trend, explored in chapter 4, for amnesty processes to include mechanisms to fulfil the rights of victims to truth and reparations. The position of the courts could, however, simply imply that they view an amnesty as an incidental question to be addressed before the case can proceed to the consideration of the merits.[8] This emphasis by international courts on considering the amnesty only in relation to particular events or violations is coupled with a prosecutorial strategy of targeting prosecutions, rather than attempting to bring all perpetrators to justice.

The international and hybrid tribunals focus their prosecutorial resources on those who are deemed 'most responsible'.[9] As discussed in chapter 2, this category of individuals is usually considered to include the 'planners, leaders and persons who committed the most serious crimes',[10] and could comprise the 'political, administrative and military leadership'.[11] It is argued that

[6] Statute of the International Criminal Tribunal for the Former Yugoslavia 1993 (as amended 28 February 2006), UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (as amended 28 February 2006) (UNSC Res 827) art 6 ('ICTY St').

[7] To date there have been few cases before international criminal tribunals in which the question of amnesties has been addressed. The cases that have arisen include *Prosecutor v Anto Furundzija*, Case No IT-95-17/1-T, Judgment (10 Dec 1998) [155]. In its judgment, the ICTY limited its analysis to the crime of torture, rather than all international crimes. For a discussion of this case see Simon M Meisenberg, 'Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone' (2004) 86 *International Review of the Red Cross* 837, 843.

[8] See, eg, Decision on challenge to jurisdiction: *Lomé Accord Amnesty in Prosecutor v Morris Kallon, Brima Bazzy Kamara*, SCSL-2004-15-PT-060-I, SCSL-2004-15-PT-060-II, Appeal (13 Mar 2004).

[9] For a discussion of command responsibility, see ch 2.

[10] Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695, 707.

[11] Hassan B Jallow, 'Prosecutorial Discretion and International Criminal Justice' (2005) 3 *Journal of International Criminal Justice* 145, 152.

> any level of participation by any such persons is . . . sufficient to bring them within the category of those to be prosecuted.[12]

This is reflected in the Rules of Procedure and Evidence of the ICTY which require the bureau[13] in reviewing and confirming any new indictments to

> determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal.[14]

If the bureau determines that the indictment 'meets this standard', it will then 'designate one of the permanent Trial Chamber Judges' to review the indictment. However, it the bureau feels that it does not focus on those who are most responsible, it will send it back to the Prosecutor.[15] Hassan Jallow, the Prosecutor at the ICTR, states that the ICTR is following a similar prosecutorial policy to comply with the UN Security Council's completion strategy for the tribunal.[16]

More recently, the requirement that only those persons 'who bear the greatest responsibility for serious violations of international humanitarian law' be prosecuted, has been codified in the Statute of the Special Court of Sierra Leone (SCSL).[17] The UN Secretary General has interpreted the term 'greatest responsibility' as providing a prosecutorial strategy rather than limiting personal jurisdiction to political and military leaders by forming

[12] *Ibid*, 152

[13] A body composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers.

[14] ICTY, 'Rules of Procedure and Evidence' 13 September 2006 <http://www.un.org/icty/legaldoc-e/basic/rpe/IT32_rev39.htm> accessed 10 February 2008, r 28(A). This is a more narrow criterion than was imposed by the court in its original rules of procedure and evidence, which instead provided, 'If in the course of an investigation the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a *suspect has committed a crime within the jurisdiction of the Tribunal*, he shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.' ICTY, 'Rules of Procedure and Evidence, 6 October 1995, r 47. The criterion relating to 'senior leaders' was added in the 2004 revision to the Rules of Evidence and Procedure to comply with the UN Security Council's completion strategy for the ad hoc tribunals. Indeed, in its earliest indictments in the *Nikolić* and *Tadić* cases, the ICTY was criticised for targeting 'low-level officials', rather than more high-ranking and well-known perpetrators such as Milošević, Arkan and Sešelj. See Minna Schrag, 'Lessons Learned from ICTY Experience' (2004) 2 *Journal of International Criminal Justice* 427, 429; and Pierre Hazan, 'The Revolution by the ICTY: The Concept of Justice in Wartime' (2004) 2 *Journal of International Criminal Justice* 533, 537.

[15] *Ibid*, r 28(A).

[16] *Ibid*, 150.

[17] Statute of the Special Court of Sierra Leone, annexed to Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, pursuant to UNSC res 1315 (2000) (16 January 2002) art 1 ('SCSL St'). For an overview of the Sierra Leonean amnesty process, see case study 13. See also the discussion of the categories of offender in Timor-Leste, in case study 7.

[18] Cited in Abdul Tejan-Cole, 'The Complementary and Conflicting Relationships Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission' (2003) 6 *Yale Human Rights & Development Law Journal* 139, 147–8.

an element of the crime that must be proven.[18] However, given the limited resources of the SCSL, it is unlikely that lower-level offenders will be indicted. Instead, they fell within the jurisdiction of the Truth and Reconciliation Commission.[19] The *ratione personae* of the Cambodian Extraordinary Chambers has been similarly limited, according to the law establishing them, to 'senior leaders of Democratic Kampuchea' and those who were 'most responsible' for the crimes falling within the temporal and subject-matter jurisdiction of the Extraordinary Chambers.[20] This wording clearly reveals the targets of investigations.[21]

The ICC is limited to bringing charges only against perpetrators of 'the most serious crimes of concern to the international community as a whole'.[22] This limitation to the court's jurisdiction is bolstered by admissibility requirements in Article 17, which states that the court shall find a case inadmissible where 'the case is not of sufficient gravity to justify further action by the Court'.[23] The Office of the Prosecutor has interpreted this as a requirement to

> focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the state or organisation allegedly responsible for those crimes.[24]

It is not expected that lower-ranking combatants will appear before this court; instead, it is anticipated that they will be dealt with within the state where the crimes occurred. Where formal prosecutions are not possible within the territorial state, due to a lack of resources and trained personnel or political instability, the national government may choose to rely on other forms of transitional justice, including individualised, conditional amnesties. Where this occurs, the policy of targeted prosecutions at the international level for those who are most responsible could complement national amnesty processes for lower-level offenders in conjunction with mechanisms such as lustration and truth commissions to hold these individuals responsible without prosecuting them.

[19] *Ibid* 148–9.

[20] The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 2001 (Cambodia) art 1.

[21] Simon M Meisenberg, 'The Cambodian Extraordinary Chambers' (2004) *Bofaxe* <http://www.ruhr-uni-bochum.de/ifhv/publications/bofaxe/x287E.pdf> accessed 1 February 2008.

[22] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ('ICC St'), Preamble and art 5.

[23] *Ibid* art 17.

[24] Office of the Prosecutor, 'Paper on Some Policy Issues Before the Office of the Prosecutor' (ICC, The Hague September 2003) 7.

WHO HAS STANDING?

Before most of the international institutions[25] that hold states accountable, victims, both direct and indirect, can submit complaints concerning abuses perpetrated by state agents, and in some cases by non-state agents, where the state failed to prevent the crime. Usually, victims need not be nationals of the state which is the subject of the complaint. Furthermore, under some systems, organisations can make applications and *actio popularis* communications are accepted.[26] This can be beneficial to victims who are unable to access the human rights mechanisms themselves due to poverty or fear.[27] Under normal circumstances, communications will only be admissible if the applicants have exhausted all possible domestic remedies,[28] although exceptions can be made where the state has delayed investigations, failed to reveal evidence, intimidated witnesses or introduced amnesty laws. Once a communication has been found admissible, the approach pursued by the monitoring body will differ according to its mandate, with the Inter-American Commission and the African Commission often attempting to broker negotiated settlements between the parties, and only deciding on the merits of the case where it has not been possible to reach an agreement.[29] This is not formal retributive justice and instead could be argued to be more restorative, with the negotiations focusing on addressing the needs of the victims. Furthermore, as formal proceedings into state violations are not the primary goal, it is possible that where the applicants are willing to accept an amnesty provided their other needs are met, the amnesty will be overlooked.[30]

[25] The Inter-American Court does not accept individual applications; instead, victims are required to make complaints to the Inter-American Commission, which may subsequently refer the case to the court.

[26] *Actio popularis* is an action to obtain remedy submitted by a person or a group in the name of the public, without directly representing the victim. For example, if an NGO submitted a legal challenge to the constitutionality of an amnesty law, rather than individual victims or their representatives. The European Court of Human Rights, the Inter-American Commission, and the African Commission accepts such petitions.

[27] Jo M Pasqualucci, 'The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law' (1995) 26 *University of Miami Inter-American Law Review* 297, 315–16.

[28] See, eg, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 26 (European Convention on Human Rights) (ECHR).

[29] See Patricia E Standaert, 'The Friendly Settlement of Human Rights Abuses in the Americas' (1999) 9 *Duke Journal of Comparative and International Law* 519.

[30] An example of such an amnesty being overlooked in favour of a friendly settlement is provided in the *Irma Flaquer v Guatemala* case before the Inter-American Commission relating to the 1985 Guatemalan amnesty for human rights violations by military and police personnel. This case will be discussed in the reparations section below.

In cases relating to amnesties, the complaint is usually brought by individuals who suffered human rights abuses at the hands of perpetrators who are now shielded from justice by amnesty laws. However, the beneficiary of the amnesty can occasionally be the complainant, particularly when amnesties are introduced to reintegrate into society those who were previously excluded by the state.[31] In these instances, the cases are usually brought by individuals who were either formally excluded from the amnesty or were simply denied its benefits, and their complaints typically focus on the principles of equality and fairness. An example of such a case before an international court is the 1985 *RD Stalla Costa v Uruguay* case,[32] in which the applicant petitioned the UN Human Rights Committee (UNHRC), arguing that he had been unfairly denied the benefit of an amnesty law for former state employees who had been dismissed during the military dictatorship. In that instance, the committee found that the applicant had not been the victim of discrimination.[33]

WHEN DO INTERNATIONAL COURTS HAVE JURISDICTION TO RULE ON NATIONAL AMNESTIES?

Each of the international human rights courts and quasi-judicial bodies has a different jurisdictional base, according to how and why the institution was established. An institution that holds states accountable will assert its jurisdiction to consider an amnesty law based on the provisions contained in its constituent instrument.[34] For example, in the 1999 case, *Lucio Parada Cea et al v El Salvador*, the Inter-American Commission stated:

> It should be emphasized that the Commission is competent, in accordance with Articles 41 and 42 of the Convention, to deem any amnesty law or other domestic law of a State Party to be in violation of the obligations assumed by the State on ratifying said Convention.[35]

Once these courts have established that they have jurisdiction to investigate, regardless of a national amnesty law, they must then consider whether the state has breached its obligations to provide a remedy,

[31] See 'Amnesty as Reparations', ch 1.

[32] *RD Stalla Costa v Uruguay*, Comm No 198/1985, UNHRC, UN Doc CCPR/C/30/D/198/1985 (1987).

[33] *Ibid* [10].

[34] Exceptions are that the Inter-American Commission covers violations of the ACHR, for those states which have ratified the convention, otherwise the commission considers violations of the American Declaration on the Rights and Duties of Man; and the African Court of Human and Peoples' Rights will cover any international human rights instrument ratified by the state party, such as environmental treaties or treaties originating from the UN, IHL or the ILO.

[35] *Lucio Parada Cea et al v El Salvador*, Case 10.480, Inter-Am CHR, Report 1/99, OEA/SerL/V/II.102 (1999) [106].

investigate, prosecute and punish, and repair harm. A state could be found to have violated these obligations, even where the amnesty was legal under its domestic laws. This issue was considered in the 1992 case, *Hugo Leonardo de los Santos Mendoza et al v Uruguay*, where the Inter-American Commission declared

> The question in these cases is not the domestic legitimacy of the legislation and other measures adopted by the Government to achieve the effect herein denounced. Under long-standing principles of international law and under specific provisions contained in the Convention, the Commission is obliged to determine whether certain of its effects constitute a violation of the obligation undertaken by the Government under the Convention (Article 27 of the Vienna Convention on the Law of Treaties).[36]

This idea was expanded in 1997 *Gustavo Carranza v Argentina*, where the commission contended that it

> does not have competence to declare per se that a national law or court ruling is either unconstitutional or unlawful . . . However, it does have a fundamental authority to examine whether the effects of a given measure in any way violate the petitioner's human rights recognized in the American Convention.[37]

The commission further added that '[t]his practice is consistent with precedents set by the European Commission of Human Rights'.[38] More recently, in 2000, the commission declared in *Monsignor Oscar Arnulfo Romero y Galdámez v El Salvador* that

> a state cannot rely on the existence of provisions of internal law to elude carrying out its obligation to investigate human rights violations, place on trial the persons responsible, and prevent impunity.[39]

The commission continued that Article 2 of the ACHR places an obligation on state parties both to adopt legislative measures to give effect to the rights and freedoms of the treaty and to refrain from

> adopting laws that do away with, restrict, or render null and void the rights and freedoms, or the effectiveness thereof, set forth in the American Convention.[40]

This view mirrors the approach taken by the Inter-American Court in an advisory opinion issued in response to a request from Argentina and Uruguay. In this opinion, the court declared that where a state has

[36] *Hugo Leonardo de los Santos Mendoza et al v Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Inter-Am CHR, Report No 29/92, OEA/Ser/L/V/II.83 (1992) [30].

[37] *Gustavo Carranza v Argentina*, Case 10.087, Inter-Am CHR, Report No 30/97, OEA/SerL/V/II.95 (1997) [63].

[38] *Ibid* [63].

[39] *Monsignor Oscar Arnulfo Romero and Galdámez et al v El Salvador*, Case 11.481, Inter-Am CHR, Report 37/00, OEA/SerL/V/II.106 (2000) [130].

[40] *Ibid* [136].

adopted 'provisions that do not conform to its obligations under the Convention', regardless of whether they have been 'adopted in conformity with the internal juridical order', the Inter-American Commission has the authority to rule on whether a violation occurred,[41] as such violations trigger the international responsibility of the state. More recently, the Inter-American Court, in the *Loayza Tamayo* case, held that

> [s]tates . . . may not invoke existing provisions of domestic law, such as the Amnesty Law in this case, to avoid complying with their obligations under international law.[42]

Where a dictatorial regime that seized power illegally introduced an amnesty to protect its own agents from prosecution, the Inter-American Commission in cases such as the 1996 case, *Hermosilla et al v Chile*[43] has found that it has the authority to consider the legality of amnesty laws under international law:

> [I]t would be absurd to pretend that the usurper and its successors could invoke the principles of the Constitution, which they themselves violated, in order to enjoy the benefits of security, which are only justified and merited for those who adhere rigorously to the Constitution. The acts of a usurper can have no validity or legitimacy either as regards the usurper himself or for his illegal or de facto functionaries. Because if those who collaborate with such governments are granted and assured impunity for their conduct under a usurping and illegitimate regime, there would be no difference between what is legal and what is illegal, between what is constitutional and what is unconstitutional, or between what is democratic and what is authoritarian.[44]

Self-amnesties were also criticised by the Inter-American Court in the 2006 case, *Almonacid-Arellano et al v Chile*, concerning the murder of a trade union activist characterised by the court as a crime against humanity, in which the Court argued that amnesties

> issued by the military regime to avoid judicial prosecution of its own crimes . . . violate the American Convention when issuing provisions that do not conform to the obligations contemplated in said Convention.[45]

[41] Certain Attributes of the Inter-Am CHR, Advisory Opinion OC-13/93, Inter-Am Ct HR (ser A) No 13 (1993) [26–7].

[42] *Loayza Tamayo v Peru—Reparations*, Inter-Am Ct HR. (ser C) No 42 (1998) [168].

[43] See also *Juan Aniceto Meneses Reyes et al v Chile*, Cases 11.228, 11.229, 11.231 and 11.182, Inter-Am CHR, Report 34/96, OEA/SerL/V/II/95 (1996) [29], and *Alfonso René Chanfeau Orayce et al v Chile*, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675, and 11.705, Inter-Am CHR, Report 28/98, OEA/SerL/V/II.98 (1998) [20].

[44] *Garay Hermosilla et al v Chile*, Case 10.843, Inter-Am CHR, Report 36/96, OEA/SerL/V/II/95 (1996) [30].

[45] *Almonacid-Arellano et al v Chile*, Inter-Am Ct HR (ser C) no 154 (2006) [120]. There is a more detailed discussion of the nature of self-amnesties in the Concurring Opinion of Judge AA Cançado-Trindade.

The situation perhaps becomes more complex where an amnesty law, rather than being introduced by a dictatorship to benefit its own agents, was instead approved by the majority of the population. Referring to the Uruguayan referendum on amnesty, the Inter-American Commission asserted:

> As for the domestic legitimacy and the 'approval of the Caducity Law by a popular referendum', it should be noted that it is not up to the Commission to rule on the domestic legality or constitutionality of national laws. However, application of the Convention and examination of the legal effects of a legislative measure, either judicial or of any other nature, insofar as it has effects incompatible with the rights and guarantees embodied in the Convention or the American Declaration, are within the Commission's competence.[46]

This meant that, despite the apparent democratic support for the amnesty law within Uruguay, the commission was prepared to declare it incompatible with protecting human rights as enshrined in the ACHR. The commission may have been reluctant to consider the domestic legitimacy of the amnesty as a key factor in its acceptability because even where democratic regimes support amnesties, they often do so in response to threats and political pressure from the armed forces or insurgents. If international courts found blanket amnesties introduced in these circumstances valid, it could undermine the position of democratic governments that are trying to avoid legislating for impunity. Democratic legitimacy as evinced by referenda may also be problematic where majority groups within a state are allowed to vote under a majoritarian system for laws which discriminate against a minority group. Despite these difficulties, the position of the Inter-American Commission, which has not been articulated by the other international courts, seems too rigid. Where the majority of the population, including victims' groups, have expressed a clear preference for peace agreements or political reforms that include an amnesty, intervention by international courts could risk destabilising the delicate political transition and open the international court to charges of political bias.[47] These dangers are currently being factored into the prosecutorial policy of the ICC, as will be discussed below.

Where an international court finds that the amnesty law violates the respondent state's international obligations, it has frequently held that, under the principle of continuity of state, the successor government remains liable for the breach. This duty was expressed in the 1999 case, *Carmelo Soria Espinoza v Chile*:

> The State of Chile is responsible for any denial of justice that the Amnesty Law may have caused, irrespective of the regime that issued the Amnesty Law or the branch of the State that applied it or made its application possible. Even though

[46] *Hugo Leonardo de los Santos Mendoza et al v Uruguay* (n 36) [31].
[47] For a discussion of referenda on amnesty laws, see ch 1.

> the abduction and extrajudicial execution took place during the past military government, the State is internationally responsible for fulfilling its obligation to administer justice and punish the agents responsible for these acts.[48]

According to the recent Inter-American Court judgment in the 2006 case, *Almonacid-Arellano et al v Chile*, this is the case even where the amnesty law was introduced before the American Convention had been ratified, as the Article 2 of the convention 'imposes the legislative obligation to annul all legislation which is in violation of the convention'.[49]

For international tribunals that hold individuals accountable, determining the courts' jurisdiction to rule on a national amnesty becomes more complicated. First, hybrid tribunals apply both domestic and international law in their judgments. For example, the SCSL had jurisdiction over international crimes including crimes against humanity, serious violations of Common Article 3 of the Geneva Conventions and Protocol II, and other serious violations of international humanitarian law.[50] The court's mandate also included the following domestic crimes: serious abuse of female children under the Prevention of Cruelty to Children Act 1926[51] and the wanton destruction of property according to certain provisions of the 1861 Malicious Damage Act which covers setting fire to houses and buildings.[52]

Similarly, the Cambodian Extraordinary Chambers has jurisdiction over the international crimes of genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of property as defined by the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and offences against internationally protected persons under the Vienna Convention on Diplomatic Relations (1961). Additionally, it has jurisdiction over homicide and religious persecution as defined under the Criminal Code of Cambodia.[53] Furthermore, the Extraordinary Chambers operates within the Cambodian legal system and its constitutive act is the Law on the Extraordinary Chambers, rather than the bilateral agreement between Cambodia and the UN.[54] This blending of national and international law in the statutes of hybrid tribunals means

[48] *Carmelo Soria Espinoza et al v Chile*, Case 11.725, Inter-Am CHR, Report 133/99, OEA/SerL/V/II.106 (1999) [61]. The Inter-American Commission reiterated this view in *Samuel Alfonso Catalán Lincoleo v Chile*, Case 11.771, Inter-Am CHR, Report No 61/01, OEA/Ser/L/V/II.111 (2001) [44].

[49] *Almonacid-Arellano et al v Chile* (n 45) [121].

[50] SCSL St arts 2–4.

[51] *Ibid* art 5.

[52] *Ibid* art 5. However, it does not seem that these domestic crimes have featured in the indictments issued by the SCSL. This corresponds to the provisions of Article 10 of the Statute of the SCSL, which prevents defendants using the amnesty in the Lomé Accord 1999 to evade prosecution, but does not cover the crimes under Sierra Leonean law outlined in Article 5 of the Statute. See Sarah Williams, 'Amnesties in International Law: The Experience of the Special Court of Sierra Leone' (2005) 5 *Human Rights Law Review* 271, 285.

[53] Meisenberg (n 21).

[54] *Ibid*.

that the position of national amnesty laws before these courts can differ from the other international courts, and a finding that an amnesty is illegitimate by a hybrid court could affect its domestic legality as well as its legitimacy under international law.

Attempts have been made to recognise this difficulty by including explicit provisions on amnesty in the statutes of the hybrid tribunals. For example, the Statute of SCSL provides:

> an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.[55]

A more flexible approach was taken in the Law on the Establishment of the Extraordinary Chambers in Cambodia which states:

> The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.[56]

Whilst prohibiting the enactment of future amnesties for crimes within the jurisdiction of the court, this article grants the Extraordinary Chambers the power to determine the legitimacy of pre-existing amnesty laws.[57] Such provisions could potentially be viewed as an expression of the unacceptability of amnesties under international law or alternatively as a recognition of the existence of a gap in international law, as Naqvi argues:

> the fact that these instruments needed to explicitly rule out recognizing amnesties for international crimes suggests that in the absence of a clause directing a court to disregard such amnesties, the courts would normally be able to recognize an amnesty for international crimes insofar as this was in accordance with international law.[58]

As the hybrid tribunals are relatively new, there is not yet an over-abundance of case law from them relating to amnesties. However, the SCSL has ruled on challenges to its jurisdiction based on the amnesty clause of the Lomé Agreement. On 13 March 2004, the Appeals Chamber[59] of the SCSL heard an appeal from two former members of the RUF, Kallon and

[55] SCSL St art 10.

[56] 2004 Law to amend The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 2004 (Cambodia) art 40.

[57] This provision relates to *Loi Relative à la mise hors-la-loi de la clique du Kampuchéa Démocratique, Loi No 064* (1994) (Cambodia).

[58] Yasmin Naqvi, 'Amnesty for war crimes: Defining the limits of international recognition' (2003) 85 *International Review of the Red Cross* 583, 615–16.

[59] 'The preliminary motion was decided by the Appeals Chamber without a prior decision of a Trial Chamber, since Rule 72(E) of the Rules of Procedure and Evidence of the SCSL (Rules) provides for a referral of preliminary motions to the Appeals Chamber when an issue

Kamara, who were accused of crimes against humanity and war crimes. In their appeal, the accused argued that the amnesty provisions of the Lomé Agreement were binding on the government of Sierra Leone as the agreement constituted an international treaty governed by the Vienna Convention, which could not be altered by a subsequent treaty between the UN and the government of Sierra Leone without the consent of all the parties concerned.[60] The Appeals Chamber began its deliberations by considering the status of the Lomé Agreement. It held that although the agreement was signed by international mediators, including the UN, this did not make it an international treaty.[61] In addition, the court considered it doubtful whether the RUF had treaty-making capacity.[62] Subsequently, the court considered whether it had the

> jurisdiction and inherent powers to review treaty provisions of the Statute or the Agreement on the grounds that they are unlawful.[63]

It found that it did not have the authority 'to declare statutory provisions of its own constitution unlawful', except

> in cases where it could be established that the provisions in question, in terms of Article 53 or Article 64 of the Vienna Convention on the Law of Treaties or under customary international law, were void.[64]

Finally, the Appeals Chamber discussed the legality of amnesties for crimes under international law. The judges relied mainly on the principle of universal jurisdiction to argue that, although a state is entitled to grant amnesty under the principle of state sovereignty, this amnesty does not have to be respected by other states if it covers crimes that are subject to universal jurisdiction.[65] The court interpreted this to mean that it had jurisdiction to prosecute crimes under international law regardless of the domestic legality of the amnesty provisions of the Lomé Agreement.[66] The court further highlighted the international nature of crimes against humanity and war crimes by referring to the *Eichmann* case and the *Hostage* case, but as Meisenberg argues, these cases concerned universal jurisdiction for crimes committed during international armed conflict,

of jurisdiction is concerned.' See Meisenberg (n 8) 839–40. See also Antonio Cassese, 'The Special Court and International Law: The Decision concerning the Lomé Agreement Amnesty' (2004) 2 *Journal of International Criminal Justice* 1130.

[60] Meisenberg (n 8) 840–1. The question of the Lomé Amnesty was also considered by Justice Robertson in his separate opinion in *Prosecutor v Allieu Kondewa*, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, filed under Case No SCSL-2004-14-AR72(E) (25 May 2004).

[61] Decision on challenge to jurisdiction (n 8) [40–1].

[62] Meisenberg (n 8) 841 and Decision on challenge to jurisdiction (n 8).

[63] Meisenberg (n 8) 841.

[64] *Ibid* 841.

[65] Decision on challenge to jurisdiction (n 8) [67].

[66] *Ibid* [88].

rather than internal conflicts, such as that which occurred in Sierra Leone.[67] Furthermore, the court although acknowledged the prosecution's arguments of the existence of a '*crystallising* international norm that a government cannot grant amnesties for serious violations of crimes under international law', it did not concur with the proposition of the *amici curiae* that this norm had *crystallised*.[68]

The jurisdiction of international courts over national amnesty laws has also been briefly considered by the ICTY. In the *Prosecutor v Anto Furundzija* case, where the accused, a military police officer, was found to have committed war crimes, particularly torture and acts of sexual violence, against individuals he interrogated, the tribunal found that an individual could be prosecuted for torture before an international tribunal, a foreign state and a subsequent regime even if the action in question had been the subject of an amnesty. The tribunal based its judgment on the fact that it considered torture to be a 'peremptory norm of international law'. It therefore concluded that

> it would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a state say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law.[69]

It continued that if such a situation did occur, then the national laws would not be accorded any 'international legal recognition', which would enable victims to bring cases before courts where they had *locus standi*, and for perpetrators to be held accountable.[70]

This section has argued that international courts can have jurisdiction to rule on national amnesties, regardless of the domestic legality of the amnesty law. The human rights treaty-monitoring bodies are awarded this jurisdiction by their constituent treaties, which require that the institutions consider whether current or former governments have violated the rights contained in the treaty by introducing the amnesty. The Inter-American Commission has held that it even has the jurisdiction to find amnesty laws that have the democratic support of the population to be in violation of the Inter-American Convention. The chapter has argued, however, that its position may be too rigid and could endanger both the political transitions within territorial states and the perceived impartiality of the court. Instead, where an amnesty has widespread democratic support, including the backing of some victims' groups, international courts

[67] Meisenberg (n 115) 845–6. For a discussion of the duty to prosecute in internal and international conflicts, see ch 3.

[68] Decision on challenge to jurisdiction (n 8) [82]. For a discussion, see Williams (n 52).

[69] Furundzija (n 7) [155].

[70] *Ibid* [155].

should balance this support against the other criteria by which an amnesty is evaluated. Finally, this section has argued that the jurisdiction of hybrid courts differs from other international courts, as the former institutions can apply both domestic and international law, and therefore their judgments can affect the domestic legality of an amnesty. Efforts have been made to address this situation by including specific provisions relating to the legality of amnesties in the statutes of the courts. To date, the SCSL has used such provisions to justify exercising its jurisdiction over the amnesty in the Lomé Accord, thereby preventing its use as a shield from prosecution. It has been argued that the need for explicit provisions granting the court jurisdiction to rule on amnesties for international crimes demonstrates that such jurisdiction was not automatic under international law.

POTENTIAL TO CREATE CHANGE: HOW THE RULINGS OF INTERNATIONAL COURTS CAN AFFECT NATIONAL AMNESTIES?

The 'international courts' considered in this chapter comprise an array of institutions, each with different powers. The quasi-judicial bodies that investigate violations of the general human rights treaties by states cannot issue legally binding opinions, as they are comprised of committees of experts rather than judges. Nonetheless, their views can potentially influence the attitudes of governments or national courts to amnesty laws by clarifying the extent of a state's obligations under international law. Furthermore, an unfavourable ruling by a treaty-monitoring body can result in political pressure being applied to the state by the international community, reshape 'domestic dialogues in law, politics, academia, public consciousness, civil society and the press',[71] and reinforce domestic efforts to combat impunity. According to Pasqualucci, this can even lead to a reduction of violations before the case even gets to the international court.[72]

Although the Inter-American Commission cannot issue binding judgments, it can refer cases to the Inter-American Court which has binding jurisdiction over Organisation of American States (OAS) member states that have expressly consented to such jurisdiction. For most of its history, the commission was reluctant to do this, however; a tendency that Weiner credits to a fear of forcing the court

> to choose between two difficult alternatives—on the one hand, taking the amnesty possibility away from fledgling civilian governments that were slowly trying to ease out from under abusive military rule; or, on the other hand,

[71] Douglass Cassel, 'International Human Rights Law in Practice: Does International Human Rights Law Make a Difference?' (2001) 2 *Chicago Journal of International Law* 121, 122.
[72] Pasqualucci (n 27) 353.

> simply wiping away, without legal process, crimes that deprived those of basic human rights.[73]

There were grave risks to either alternative, so perhaps the preference for non-binding decisions by the commission was a prudent response to the political realities in Latin America,[74] where any attempt to overturn amnesty laws may have been ignored by the states concerned.[75]

In contrast to quasi-judicial bodies, the regional human rights courts have binding jurisdiction. If a case comes before these institutions, the state is obliged to comply with the judgment under the terms of the constituent treaty. Therefore, where an international court rules that an amnesty law denied victims their rights, the state could be required to rectify the situation by, for example, investigating the case and providing reparations. This could cause the state to review the amnesty at the national level and to introduce measures to meet the needs of victims, in order to prevent the adverse ruling being repeated in subsequent cases.

Trials before international courts that hold individuals accountable cannot be conducted *in absentia*, and hence, provided that the indicted individuals can be arrested, the courts can enforce their judgments where they find the accused guilty. Furthermore, the decisions of such courts can affect the efficacy of the amnesty within the territorial state, as prosecution at international level may reduce its perceived value to its beneficiaries. Furthermore, simply issuing an arrest warrant and labelling political leaders as human rights violators can serve to reduce the political support they receive within their own country.[76]

AMNESTIES AND VICTIMS' RIGHTS: THE VERDICTS OF THE INTERNATIONAL COURTS

When considering an amnesty law, international courts that hold states to account can find that the amnesty violates the states' obligations under international law to guarantee the victims' right to a remedy, including their right to truth, to see the offenders prosecuted and punished, and to obtain reparations.[77] Each of these rights will be discussed below.

[73] Robert O Weiner, 'Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties' (1995) 26 *St. Mary's Law Journal* 857, 868–9.

[74] William W Burke-White, 'Protecting the Minority: A Place for Impunity? An Illustrated Survey of Amnesty Legislation, Its Conformity with International Legal Obligations, and Its Potential as a Tool for Minority-Majority Reconciliation' (2000) *Journal on Ethnopolitics and Minority Issues in Europe*, 30–1.

[75] Weiner (n 73) 869.

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

[77] For a discussion of the nature of these rights, see ch 4.

Right to a Remedy

The right to a remedy is a composite right that is contained in the general human rights treaties.[78] It consists of the victim's rights to 'equal and effective access to justice', 'adequate, effective and prompt reparation for harm suffered'; and 'access to relevant information concerning violations and reparation mechanisms'.[79] A state must fulfil each of these elements (justice, reparations and investigations) to avoid breaching a victim's right to a remedy. This view was articulated by the Inter-American Commission, which held that measures to ensure truth and reparations that accompany amnesties

> are not sufficient to guarantee respect for human rights . . . as long as [the victims] are denied the right to justice.[80]

The jurisprudence of the courts does not specify steps that a state must take to ensure a right to a remedy, as the characteristics of a remedy will alter according to the circumstances of each case.[81] Nonetheless, some key elements can be identified from the case law. First, to be considered 'effective', a remedy 'must be substantiated in accordance with the rule of law',[82] and must 'address an infringement of a legal right'.[83] Secondly, victims should be aware that the remedy exists, and be able to access it without fear of intimidation.[84] Thirdly, the exercise of an effective remedy must not 'be unjustifiably hindered by the acts or omissions of the authorities',[85] such as intimidation of witnesses or failure to supply evidence. Fourthly, a remedy should entail access to a competent national organ to conduct a 'thorough and effective investigation'[86] and decide the issue within a 'reasonable time'.[87] Under normal circumstances, the courts would be the appropriate organ to provide a remedy, although the general human rights treaties and their monitoring bodies do allow for 'administrative or legislative authorities, or any other competent authority

[78] See, eg, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2(3).

[79] UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Res 60/147 (16 December 2005), Princ 11.

[80] See, eg, *Garay Hermosilla et al v Chile* (n 44) [58].

[81] Pasqualucci (n 27) 332; *Aksoy v Turkey*, ECHR, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, [95].

[82] *Velásquez Rodríguez v Honduras—Preliminary Objections*, Inter-Am Ct HR (ser C) No 1 (1987) [91].

[83] *Ibid* [91].

[84] Rodolfo Robles Espinoza and Sons, Case 11.317, Inter-Am CHR, Report No 20/99, OEA/SerL/V/II.95 (1999), [116].

[85] See eg *Aksoy v Turkey* (n 81) [95].

[86] See eg *Ibid* [98].

[87] *Castillo Páez v Peru*, Inter-Am Ct HR (ser C) No 34 (1997) [106].

provided for by the legal system of the state'.[88] However, the UNHRC took a more restrictive position in the 1993 case, *Bautista de Arellana v Colombia*. This case, concerning the abduction, torture and murder of a political activist in 1987, although unrelated to an amnesty, is instructive for illustrating the committee's views. The committee argued that

> purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies . . . in the event of particularly serious human rights violations.[89]

It therefore 'urged' the state party

> to open a proper investigation into the disappearance of Ana Rosario Celis Laureano and her fate, to provide for appropriate compensation to the victim and her family, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary.[90]

This seems to be a clear statement that, it is desirable that the state prosecute perpetrators, although the use of the term 'urges' seems to indicate that it is not mandatory.

Fifthly, the European Court of Human Rights in the 2004 case, *Abdülsamet Yaman v Turkey*, which does not deal with a particular amnesty, but rather the concept of amnesty in general relating to torture, declared that

> where a state agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an 'effective remedy' that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.[91]

In addition, the court has held that it is the obligation of the state to guarantee enforcement of the decisions awarding remedies by competent authorities.

Although the right to a remedy contains the rights to truth, justice and reparations, the rights to truth and reparations will be dealt with separately below. The remainder of this section will consider the victim's right to access justice. 'Justice' has been approached by the treaty-monitoring bodies as a composite right involving the right to judicial personality, the right to a fair trial and, in some jurisdictions, the right of a victim to bring a case. The right to judicial personality, which describes the right of every

[88] ICCPR art 2(3)(c).

[89] *Nydia Erika Bautista de Arellana v Colombia*, Comm No 563/1993, UNHRC, UN Doc CCPR/C/55/D/563/1993 (1995) [8.2]; *José Vicente et al v Colombia*, Comm No 612/1995, UNHRC, UN Doc CCPR/C/60/D/612/1995 (1997) [8.2]; and *José Antonio Coronel et al v Colombia*, Comm No 778/1997, UNHRC, UN Doc CCPR/C/76/D/778/1997 (2002) [6.2]. See also UNHRC General Comments discussed in ch 8.

[90] *Nydia Erika Bautista de Arellana* (n 89) [10]. Later reiterated in *Basilio Laureano Atachahua v Peru*, Comm No 540/1993, UNHRC, UN Doc CCPR/C/56/D/540/1993 (1996) [10].

[91] *Abdülsamet Yaman v Turkey* (App No 32446/96), ECHR (2004) [55].

person 'to recognition as a person before the law'[92] was articulated by the Inter-American Commission in the 1992 case, *Alicia Consuelo Herrara et al v Argentina*, where it noted that states parties have a duty to

> ensure that any person claiming such a remedy shall have his rights determined by a competent authority provided for by the legal system.[93]

Therefore, an amnesty which prevents individuals having their rights determined by a competent authority could violate their right to a juridical personality.

The right to fair trial means that everyone is entitled to a hearing with due guarantees within a reasonable time by a competent, independent and impartial tribunal.[94] Although under human rights law these protections are generally interpreted to cover only the rights of the defendant, they could also be employed to provide protection for the victim. For example, in certain jurisdictions, the victim has the right be a party to criminal proceedings. The right of a victim to bring a case has predominantly been considered under the Inter-American system as many criminal law systems in Latin America recognise this right. Where victims have complained of a denial of this right, the Inter-American Commission has tended to rule in favour of the applicants arguing that a violation had occurred, as

> [o]ne of the law's effects was to deny the victim or his rightful claimant the opportunity to participate in the criminal proceedings, which is the appropriate means to investigate the commission of the crimes denounced, determine criminal liability and impose punishment on those responsible, their accomplices and those accessories after the fact.[95]

Amnesty laws would however only violate these provisions in those states 'whose criminal procedures . . . allow such participation'.[96] Where this right does not exist in the domestic legal system, it is the state's duty to investigate on the victim's behalf.

In its approach to the right to fair trial, the Inter-American Commission further held that fair trial guarantees cannot be suspended during periods of emergency.[97] Furthermore, the commission held that, where the state has failed to conduct a thorough investigation, thereby making it impossible for a victim to obtain civil remedies, there was a violation of due

[92] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36 (Pact of San José, Costa Rica) (ACHR) art 3.

[93] *Alicia Consuelo Herrara et al v Argentina*, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Inter-Am CHR, Report 28/92, OEA/Ser/L/V/II.83 (1992) [98].

[94] ACHR art 8(1).

[95] *Hugo Leonardo de los Santos Mendoza et al v Uruguay* (n 36) [40].

[96] Douglass Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities' (1996) 59 *Law and Contemporary Problems* 197, 213.

[97] *Manuel Meneses Sotacuro and Félix Inga Cuya v Peru*, Case 10.904, Inter-Am CHR, Report No 46/00, OEA/SerL/V/II.106 (2000) [66].

process guarantees.[98] Regarding the element of equality in fair trial guarantees, amnesty laws have been deemed to undermine this where certain groups were denied an amnesty as a form of reparation, for example, by not being permitted to return to state employment.[99]

This overview of the case law has shown that, for a remedy to be acceptable it must be in accordance with domestic laws, timely and effective. The remedy should be decided by an independent body, with which the national government must cooperate. The state must also work to ensure that the population is aware of the availability of the remedy. Within the jurisprudence, there is an assumption that, where possible, remedies should take the form of judicial proceedings, although other forms of justice can be acceptable. Indeed, as some international bodies pursue friendly settlement procedures, restorative processes that aim for similar negotiated settlements at the national or local level may be permissible. Indeed, the rights of victims to express their views and have their needs addressed may obtain more recognition under such mechanisms than in formal court proceedings. Therefore, amnesty processes which allow for restorative justice mechanisms, particularly for lower-level offenders, could be viewed as meeting a state's obligation to provide a remedy.[100]

Duty to Investigate

In states where blanket amnesties have been introduced, in practice they often are used to prevent any investigation of past crimes, even where the amnesty itself does not contain an explicit prohibition of investigations. The implementation of these amnesties clearly entails a violation of the state's duty to investigate. The situation becomes more complex, however, where amnesties are accompanied by investigatory procedures, such as truth commissions. Such commissions have usually been looked upon favourably by the Inter-American Commission, referring to them as an 'exemplary measure',[101] important for 'highlighting the facts',[102] carrying out 'a commendable task',[103] and recognising that they were established by 'democratic governments'.[104] Nonetheless, the commission found that the truth commissions established by the governments of Argentina, Chile

[98] See eg Garay Hermosilla *et al* (n 44) [66].

[99] *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*, Comm No 204/97, Afr CHR (2001) [37]. Other cases concerning this issue include *Barberà, Messegué and Jabardo v Spain*, App No 10590/83, ECHR 19 (1988).

[100] For a discussion of amnesty and restorative justice procedures, see ch 4.

[101] *Alicia Consuelo Herrara et al v Argentina* (n 93) [42].

[102] *Lucio Parada Cea et al v El Salvador* (n 35) [146].

[103] *Alfonso René Chanfeau Orayce et al v Chile* (n 43) [97].

[104] See, eg, *Garay Hermosilla et al v Chile* (n 44) [74].

and El Salvador[105] did not fulfil those states' duty to investigate. The reasons given by the commission as to why these institutions were not sufficient include the accompanying lack of any legal recourse;[106] the non-judicial nature of the commission;[107] the limitation of their work to establishing the identity of the victims and not the perpetrators;[108] and their inability to publish the names of perpetrators or to impose any punishment.[109] By examining the jurisprudence, however, it may be possible to design an amnesty that has sufficient provision for the duty to investigate to meet the state's international obligations.

The Inter-American Court has declared that the duty to investigate requires states to provide victims with an explanation of why the events that led to their suffering occurred.[110] The Inter-American Commission has held that 'the government may not elude, under any pretext whatsoever, its duty to investigate',[111] and the duty is non-delegable,[112] which means that states cannot use, for example, investigations conducted by NGOs, such as the *Nunca Mais* process in Brazil,[113] to fulfil their obligations. Similarly, in legal systems where the victims have the right to initiate a prosecution, if they fail to use this right, the government is still obliged to conduct an investigation.

The Inter-American Court has recognised that, when conducting an investigation, 'in certain instances, it may be difficult to investigate acts that violate an individual's rights', but it has emphasised that 'the duty to investigate . . . is not breached merely because the investigation does not produce a satisfactory result'.[114] It continued that investigations 'must be undertaken in a serious manner and not as a mere formality preordained to be ineffective'.[115] In addition, the Inter-American Commission has held that

> judicial investigation must be undertaken in good faith and must be diligent, exhaustive and impartial and geared to exploring all possible lines of investigation that make it possible to identify the perpetrators.[116]

[105] The truth commission in El Salvador did publish the names of the perpetrators.

[106] See, eg, *Garay Hermosilla et al v Chile* (n 44) [74].

[107] *Lucio Parada Cea et al v El Salvador* (n 35) [157].

[108] See, eg, *Garay Hermosilla et al v Chile* (n 44) [75].

[109] See, eg, *ibid* [75].

[110] *Castillo Páez v Peru* (n 87) [90].

[111] See, eg, *Martín Javier Roca Casas v Peru*, Case 11.233, Inter-Am CHR, Report No 39/97, OEA/SerL/V/II.98 (1998) [104].

[112] *Monsignor Oscar Arnulfo Romero and Galdámez et al v El Salvador* (n 39) [150].

[113] See a discussion of this process, see Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* (University of Chicago Press, Chicago, Ill 1998).

[114] *Godínez Cruz v Honduras—Compensatory Damages* Inter-Am Ct HR (ser C) No 8 (1989) [188].

[115] *Velásquez Rodríguez v Honduras* Inter-Am Ct HR (ser C) No 4 (1988) [177]. This was cited in many other decisions.

[116] *Monsignor Oscar Arnulfo Romero and Galdámez et al v El Salvador* (n 39) [80]. Similar wording was used in *Joaquin Herrara Rubio v Colombia*, Comm No 161/1983, UNHRC, UN Doc CCPR/C/31/D/161/1983 (1987) [10.5].

Similarly, the European Court of Human Rights has held that there is

> an obligation on the respondent state to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure.[117]

In addition, the Inter-American Commission found that, when conducting an investigation, a state must guarantee,

> that the victims, denouncers, witnesses, and their lawyers do not suffer reprisals or negative repercussions after reporting crimes committed by public officials.[118]

The commission further relied upon *The Principles Governing the Effective Prevention and Investigation of Extralegal, Arbitrary or Summary Executions* to outline how investigations should be conducted.[119]

In the 1988 *Velásquez Rodríguez* case, the Inter-American Court held that 'the state is obliged to investigate every situation involving a violation of human rights'.[120] The court qualified this, however, by stating that when investigating 'the state must use the means at its disposal'.[121] Clearly new regimes in transitional societies frequently only have very limited resources available, and where widespread investigations could threaten the fledgling democracy, 'the means at a state's disposal may limit it to investigating only the most serious violations'.[122] In their investigations, however, states are obliged to investigate violations perpetrated both by their own agents and by private actors, who cannot be bound by international human rights law treaties, as

> where the acts of private parties are not seriously investigated, those parties are aided in a sense by the government, thereby making the state responsible on the international plane.[123]

[117] *Aksoy v Turkey* (n 81) [98]; and *Selçuk and Asker v Turkey*, ECHR, judgment of 24 April 1998, *Reports of Judgments and Decisions* 1998-II [96].

[118] *Rodolfo Robles Espinoza and Sons v Peru* (n 84) [106].

[119] *Ignacio Ellacuría, SJ et al v El Salvador*, Case 10.488, Inter-Am CHR, Report 136/99, OEA/SerL/V/II.106 (1999) [173].

[120] *Velásquez Rodríguez v Honduras* (n 115) [153].

[121] *Ibid* [174].

[122] Pasqualucci (n 27) 334. It has been argued that rather than *limited resources*, transitional states have *little political will* to allocate the resources to justice, as demonstrated by continued high levels of spending on the military. Whilst it is desirable that military spending is reduced in many countries, particularly those undergoing a transition from conflict, this may not always be possible during the early stages of a transition. For example, peace agreements often require that former combatants become integrated into unified armed forces. Furthermore, efforts to reform and reduce the size of the military need to be conducted with extreme care, as rapid attempts at reform can provoke further violence, as shown by Iraq and Timor-Leste.

[123] *Velásquez Rodríguez v Honduras* (n 115) [177] and *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, Comm No 74/92, Afr CHR (1995) [22].

The court further found that any investigation 'must identify those responsible',[124] and the Inter-American Commission has held that victims should be informed of the names of perpetrators to enable them to access civil remedies.[125]

It has also been found that in the event of a forced disappearance, 'the State is duty-bound to establish the fate and current circumstances of the victim',[126] and to inform the victim's family 'of the whereabouts of the victim or their remains'.[127] The UNHRC has declared that, to conduct such investigations, states should 'establish effective facilities and procedures to investigate thoroughly, by an appropriate and impartial body'.[128] The duty to investigate continues until the person's fate is known.[129]

Finally, the Inter-American Commission held in 1999 in *Carmelo Soria Espinoza v Chile*, concerning the kidnapping and murder of an internationally protected person, that the state is required to amend its domestic legislation and repeal the blanket self-amnesty law enacted in Chile in 1978, so that human rights violations can be investigated and punished.[130] More recently, the Inter-American Court considered Chile's amnesty law in the 2006 *Almonacid-Arrellano* case and found that

> [s]tates cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions.[131]

However, this judgment relates to a self-amnesty law designed to shield the perpetrators of serious human rights violations from investigation and prosecution. It is unclear whether the Inter-American Court or other international courts would rule the same way in relation to amnesty laws which aim to facilitate truth-recovery, such as the amnesty in exchange for truth model in South Africa.

The jurisprudence of the treaty-monitoring bodies reveals the key elements of an investigatory procedure with which a state must comply to fulfil its duty to investigate. These measures may not preclude the introduction of an amnesty law to promote peace and stability, and complement truth-recovery processes; indeed, the Inter-American Commission has recognised that investigations will occasionally need to be conducted within delicate political situations. From the jurisprudence, it appears that

[124] *Velásquez Rodríguez v Honduras* (n 115) [174]. For a discussion on truth commissions naming names, see ch 4.

[125] Pasqualucci (n 27) 331.

[126] See, eg, *Estiles Ruíz Dávila v Peru*, Case No 10.491, Inter-Am CHR, Report No 41/97, OEA/SerL/V/II.98 (1998) [29].

[127] *Castillo Páez v Peru* (n 110) [90].

[128] *Basilio Laureano Atachahua v Peru* (n 90) [8.3].

[129] *Velásquez Rodríguez v Honduras* (n 115) [181].

[130] *Carmelo Soria Espinoza et al v Chile* (n 48) Recommendation 3.

[131] *Almonacid-Arellano et al v Chile* (n 45) [114].

an acceptable investigatory body must be established by the state, regardless of other non-governmental investigations that have been carried out, and that the investigation must be genuine and impartial, and, where appropriate, it should investigate the crimes of both state and non-state actors. The investigations should inform the victims and their relatives of the motives and events that caused their suffering and the state should ensure the security of the victims, witnesses and personnel participating in the process. The investigatory body should have as wide a mandate as possible, to enable it to identify those individuals responsible for the violations and to uncover the fate of the disappeared. Obtaining this information within formal criminal proceedings can be difficult, particularly where considerable time has elapsed since the crimes occurred, as the perpetrators are often unwilling to inculpate themselves. The approach followed by the South African TRC, where perpetrators were granted amnesty in exchange for telling the truth about their actions, could encourage individuals to come forward, leading to the discovery of more information than would otherwise have been possible, provided that it is accompanied by a genuine threat of prosecution for those who do not apply or fulfil the conditions. In this way, an amnesty could in fact help a state to meet its duty to investigate.[132]

Duty to Prosecute and Punish

The duty to prosecute and punish is not explicitly mentioned in the general human rights treaties.[133] Nonetheless, their monitoring bodies have discussed the nature of this obligation in response to individual complaints, usually finding an obligation to punish in the duty of states to respect and ensure respect of human rights. In addition, as discussed in chapter 3, some of the subject-specific conventions impose an obligation on their states parties to prosecute or extradite perpetrators of the crimes prohibited in the treaties. Crimes under international law have further been codified in the statutes of the international criminal tribunals, awarding the tribunals the mandate to consider the obligation to prosecute and punish individual perpetrators of crimes falling under their jurisdiction.

The jurisprudence of the international courts shows that they have not been consistently willing to enforce a duty to prosecute and punish upon states parties that have introduced amnesty laws. The Inter-American Court of Human Rights declared in the 1988 case *Velásquez Rodríguez* case that, in instances of serious human rights violations, 'the state has a legal

[132] For a discussion of the South Africa TRC and amnesty process, see case study 9.

[133] Naomi Roht-Arriaza, 'Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress' in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press, Oxford 1995) 28–9.

duty . . . to impose appropriate punishment'.[134] Nonetheless, the court acknowledged that there might be some legitimate circumstances where a state would be unable to punish.[135] Furthermore, it failed to explore what would be an 'appropriate' punishment and whether this would vary according to the circumstances within the country concerned. In its conclusion, the court did not consider whether Honduras's failure to punish the perpetrators amounted to a violation of the convention, as a violation had already been established by the failure to investigate. Furthermore, when the court was determining a remedy during the reparations stage of this case,[136] it did not accede to the request of the families' lawyers or the Inter-American Commission that it should order the state to prosecute those individuals who were responsible for the violations.[137] Instead, the court restricted itself to ordering financial compensation for the families.[138] Perhaps this course of action is a result of the court's concluding view:

> The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.[139]

This indicates that the court, whilst thinking that punishment was desirable, did not view it as an essential response to human rights violations.

More recently, in the 2001 judgment in the *Barrios Altos* case, the Inter-American Court proclaimed that it

> considers that all amnesty provisions . . . are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance.[140]

The court maintained that the Peruvian amnesty laws violated Article 1(1) of the ACHR because 'they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos'.[141] In making its decision, the court found that Peru

> should investigate the facts to determine the identity of those responsible for the human rights violations referred to in this judgment, and also publish the results of this investigation and punish those responsible.[142]

[134] *Velásquez Rodríguez v Honduras* (n 115) [174]. See also *Castillo Páez v Peru—Reparations* (n 87) [107] and *Loayza Tamayo v Peru—Reparations* (n 42) [170].
[135] *Velásquez Rodríguez v Honduras* (n 115) [177].
[136] *Velásquez Rodríguez v Honduras—Compensatory Damages*, Inter-Am Ct HR (ser C) No 7 (1989).
[137] *Ibid* [7].
[138] *Ibid* [60].
[139] *Velásquez Rodríguez v Honduras* (n 115) [134].
[140] See, eg, *Barrios Altos Case* (*Chumbipuma Aguirre et al v Peru*), Inter-Am Ct HR (ser C) No 74 (2001) [41].
[141] *Ibid* [42].
[142] *Ibid*.

This language does not specify that a criminal prosecution is obligatory; instead, the word 'should' indicates only that it is desirable. However, in the 2003 *Myrna Mack Chang* case, the Inter-American Court declared that states 'must adopt all necessary measures' to 'try and punish deprivation of life as a consequence of criminal act'.[143] Furthermore, in its 2006 judgment on Chilean self-amnesty, in *Almonacid-Arellano et al v Chile*, the court reaffirmed this conclusion when it determined that

> The states cannot neglect their duty to investigate, identify and punish those persons responsible for crimes against humanity by enforcing amnesty laws or other similar domestic provisions.[144]

It continued that

> The state must ensure that Decree Law No 2.191 does not continue to hinder further investigation into the extra-legal executive of Mr. Almonacid-Arellano as well as the identification and, if applicable, punishment of those responsible.[145]

Whilst clearly stating that self-amnesties prevent thorough investigations of the facts and punishment of the individuals responsible, thereby violating the American Convention, these judgments did not stipulate what form of punishment is appropriate. The court, however, provided clearer guidance in the 2007 judgment in the *La Rochela Massacre* case, where it discussed Colombia's Justice and Peace Law.[146] In this judgment, the court found that a punishment or sanction must be proportional to the harm suffered.[147] It referred to previous case law to explain that, for punishment to be proportional, it must address the harm suffered and the culpability with which the perpetrator acted.[148] The court further added that the penalty must be 'issued by a judicial authority'.[149] This formulation is much stricter, as it clearly ties punishment to retributive criminal proceedings. It does not address, however, whether all perpetrators must be subjected to prosecutions, or whether the state will be viewed as fulfilling its obligations if only those deemed most responsible for the policies of repression or individuals who committed the most notorious crimes are put on trial.

The European Court of Human Rights has yet to pronounce an obligation to prosecute and punish. In its judgment in the *Ireland v United Kingdom* case, despite finding that the 'authorities of must prevent or remedy any breach at subordinate levels',[150] the court found itself unable to

[143] *Myrna Mack Chang v Guatemala*, Inter-Am Ct HR (ser C) No 101 (2003) [153].
[144] *Almonacid-Arellano et al v Chile* (n 45) [114].
[145] *Ibid* [171].
[146] *Case of the Rochela Massacre v Colombia* Inter-Am Ct HR (ser C), No 163 (2007). For a discussion of the Justice and Peace Law, see Case Study 11.
[147] *Case of the Rochela Massacre v Colombia* (n 146) [193].
[148] *Ibid* [196].
[149] *Ibid* [196].
[150] *Ireland v the United Kingdom*, ECHR, judgment of 18 January 1978, Series A no 25 [239].

order the criminal or disciplinary proceedings against those state agents who were responsible for the human rights violations or 'who condoned or tolerated them'.[151] In a later decision by the now-defunct European Commission of Human Rights, relating to the death of a man killed by the IRA, the commission held that 'protecting the right to life gives rise to positive obligations on the part the state', but limited those obligations by stating that they 'did not extend beyond criminal prosecution of offenders'.[152] Roht-Arriaza has interpreted this to signify that 'criminal prosecution is part of the obligations the state assumes by signing the Convention'.[153]

In the 1996 *Aksoy v Turkey* case, the European Court of Human Rights said that

> the notion of an 'effective remedy' entails a thorough and effective investigation capable of leading to the identification and punishment of those responsible.[154]

The phrase 'capable of leading to' appears to describe the nature of the investigation, rather than imposing an obligation on the state to prosecute and punish those responsible.

The human rights treaty-monitoring bodies with non-binding jurisdiction have progressively moved towards articulating a duty to prosecute and punish. The Inter-American Commission began its consideration of the issue in relation to amnesty laws in 1992 with a group of cases from El Salvador, Argentina and Uruguay. In the 1992 case, *Masacre Las Hojas v El Salvador*, the commission quoted the *Velásquez Rodríguez* case and then ordered El Salvador to

> [c]arry out an exhaustive, rapid, complete and impartial investigation concerning the events complained of, in order to identify all the victims and those responsible, and submit the latter to justice in order to establish their responsibility so that they receive the sanctions demanded by such serious actions.[155]

The ordering of criminal punishment in this case differs from the approach taken by the commission in the other cases of the same period. In 1992, in the *Alicia Consuelo Herrara v Argentina* case, the commission also quoted the Inter-American Court, but instead of recommending prosecution, the commission congratulated Argentina on its truth commission, limited prosecutions of high-ranking officials, and reparations for the victims, before recommending that the Argentine government

[151] *Ibid* [246].

[152] Naomi Roht-Arriaza, 'Nontreaty Sources of the Obligation to Investigate and Punish' in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press, Oxford 1995) 32 (Referring to *Mrs W v United Kingdom*, application on admissibility, 32 Collection of Decisions 190, 200 (28 February 1983)).

[153] *Ibid* 32.

[154] *Aksoy v Turkey* (n 81) [98]. It has subsequently repeated this formulation in similar judgments.

[155] *Masacre Las Hojas v El Salvador*, Case 10.287, Inter-Am CHR, Report 26/92, OEA/Ser./L/V/II.83 (1992).

> adopt the measures necessary to clarify the facts and identify those responsible for the human rights violations that occurred during the past military dictatorship.[156]

On the same day, in *Hugo Leonardo de los Santos Mendoza et al v Uruguay*, the commission highlighted that the failure of the state to investigate the violations had impeded the victims' ability to obtain civil remedies, before making identical recommendations to those it made in the Argentine case. The inconsistency of the commission's recommendations in these three cases has been interpreted as evidence that states do not always have to institute criminal proceedings, but

> only that they have an obligation to conduct investigations, allow victims to participate in judicial proceedings if national laws so provide, and guarantee compensation to the victims.[157]

Furthermore, the commission's praise of the limited prosecutions in Argentina seems to indicate that selective prosecutions for higher-level offenders, coupled with amnesty for lower-level offenders may be acceptable.

In 1996, the Inter-American Commission moved closer to elaborating a duty to prosecute and punish in *Garay Hermosilla et al v Chile*, concerning the disappearance of 70 individuals. Here, the commission found that 'the Government's recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation' were insufficient to fulfil its obligations under the convention. The commission argued that

> the State has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and ensuring adequate reparations for the victims.[158]

Despite declaring that the state must impose an 'appropriate punishment' on the perpetrators,[159] the commission does not specify that punishment must include criminal sanctions. On the same day, in the *Irma Meneses Reyes* case, the Inter-American Commission recommended that the state of Chile

> adapt its domestic laws to the provisions of the American Convention on Human Rights, in order that violations of human rights by the 'de facto' government may be investigated in such a way that the guilty are singled out, their responsibilities are established and they are effectively punished, thereby

[156] *Alicia Consuelo Herrara et al v Argentina* (n 93).

[157] Claudia Angermaier, 'The ICC and Amnesty: Can the Court Accommodate a Model of Restorative Justice?' (2004) 1 *Eyes on the ICC* 131, 136.

[158] *Garay Hermosilla et al v Chile* (n 44) [77]. Also in *Carmelo Soria Espinoza et al v Chile* (n 48) [105].

[159] Michael P Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41, 50–1.

> guaranteeing to the victims and members of their families the right to justice which is their due.[160]

These recommendations also fail to specify the nature of 'effective' punishment. This begs the question: if there was a clear obligation to prosecute perpetrators, why did the commission not ask the state to carry it out?[161]

In the next few cases in 1998 and 1999 before the Inter-American Commission, the institution followed the same approach by stating that 'amnesty laws frustrate and run contrary to a state's obligation to investigate and punish those responsible for human rights violations'.[162] In the 1999 *Ignacio Ellacuría* case, the commission declared that the state had

> failed to fulfil its obligation to take the necessary steps to impose the penalties provided by law on all those responsible for the extrajudicial executions.[163]

The following year, in *Monsignor Oscar Arnulfo Romero y Galdámez v El Salvador*, concerning an extrajudicial murder, the commission found that

> the State did not undertake an effective investigation nor did it adopt the necessary measures to bring to trial all of the persons implicated. Nor did it act to duly try the accused.[164]

Consequently, the commission ruled that El Salvador had violated the convention,[165] and recommended that the state

> undertake expeditiously a complete, impartial, and effective judicial investigation to identify, try and punish all the direct perpetrators and planners of the violations established in this report, notwithstanding the amnesty that has been decreed.[166]

Clearly, this is a much stronger statement in favour of a duty to prosecute those responsible for extrajudicial executions. It therefore seems apparent that the Inter-American Commission has progressively moved towards reading a far stronger duty to punish into the ACHR than was articulated in their earlier opinions. However, by requiring states to 'identify, try and punish *all* the direct perpetrators and planners', the commission has begun to impose an unrealistic obligation on states, which many transitional states will be unable to fulfil due to large numbers of perpetrators, limited resources and political instability.

[160] *Juan Aniceto Meneses Reyes et al v Chile* (n 43) 109.
[161] Cassel (n 96) 213.
[162] *Hugo Bustios Saavedra v Peru*, Case No 10.548, Inter-Am CHR, Report No 38/97, OEA/SerL/V/II.98 (1998) [48]; *Angel Escobar Jurado v Peru*, Case 10.521, Inter-Am CHR, Report No 42/97, OEA/SerL/V/II.98 (1998) [33]; *Estiles Ruíz Dávila v Peru* (n 126) [34]; and *Pastor Juscamaita Laura v Peru*, Case 10.542, Inter-Am CHR, Report No 19/99, OEA/SerL/V/II.102 (1999) [39].
[163] *Ignacio Ellacuría, SJ et al* (n 119) [186].
[164] *Monsignor Oscar Arnulfo Romero and Galdámez et al* (n 39) [119].
[165] *Ibid* [122].
[166] *Ibid*.

The UNHRC in the 1983 case of *Maria del Carmen Almeida de Quinteros v Uruguay*, concerning a disappearance in Montevideo in 1976, ruled that the state

> should take effective and immediate steps . . . to bring to justice any persons found to be responsible for her disappearance and ill-treatment.[167]

The use of the word 'should' implies that bringing perpetrators to justice is desirable, but not mandatory, according to a state's obligations under the ICCPR. In the 1995 *Bautista* case, the committee explicitly stated that it

> considers that the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified.[168]

Subsequently, the committee urged the state

> to expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of Nydia Bautista.[169]

Therefore, this case clearly asserts an obligation to prosecute and punish following a violation of the right to life.

The amnesties discussed in the above judgments were all broad amnesties covering the most serious human rights abuses. Even so, the jurisprudence has not evolved to the point where states parties are required to prosecute and imprison every perpetrator of international crimes. Indeed, the courts have recognised that political circumstances could render attempts at prosecutions very difficult, and have praised states where only selective prosecutions have been pursued in conjunction with national amnesty laws. In contrast, however, in its recent decisions, the Inter-American Commission has asserted that state parties must 'identify, try and punish *all* . . . perpetrators'. This exceeds the views and judgments expressed by the other international courts, and the author believes that it imposes unrealistic demands on transitional states. Furthermore, where the courts have called upon states to punish perpetrators, they have yet to describe fully what constitutes an 'appropriate' punishment, particularly in the context of massive human rights violations, where there are large numbers of perpetrators, limited financial resources and an overstretched penal infrastructure. In such transitional contexts, it may be more prudent for international courts to recognise processes that impose alternative forms of punishment, such as lustration measures, community

[167] *Maria del Carmen Almeida* (*on behalf of Elena Quinteros Almeida) v Uruguay*, Comm No 107/1981, UNHRC, UN Doc CCPR/C/19/D/107/1981 (1983) [16].

[168] *Nydia Erika Bautista de Arellana v Colombia* (n 89) [8.6].

[169] *Ibid* [10]. This committee has repeated this view in subsequent judgments.

service and publicly naming perpetrators, as fulfilling a state's obligation to punish, rather than imposing requirements to which the states will be unable to adhere. Each of the alternative forms of punishment could be introduced with an amnesty process, and indeed the amnesty could encourage offenders to participate and publicly admit their crimes.

Right to Reparations

The institutions which hold states to account are able to recommend or order, depending on whether their jurisdiction is binding, that states pay compensation and make other forms of reparations[170] to victims of human rights violations. In contrast, the ICC is able to pay compensation directly, and can order defendants to return property that they obtained under duress.

Traditionally, the international courts have followed the approach of the Inter-American Court in the Compensatory Damages phase of the 1988 *Velásquez Rodríguez* case, where it declared:

> Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.[171]

Here, the victims' right to reparations is to be met by monetary damages exclusively. In the 1997 *Castillo Páez* case, relating to a disappearance in Peru, the Inter-American Court held that reparations must be 'proportionate to the violations' that occurred,[172] with 'their quality and amount' being dependent upon 'the damage caused at both the material and moral levels'.[173] In addition, the court specified that it considered that

> effective investigation and punishment of those responsible for the events that prompted the instant case . . . is one reparation measure that those next of kin are due.[174]

Here, the court is beginning to move towards adopting a broader interpretation of 'reparations', comprising monetary and non-monetary measures.[175]

[170] For a discussion of the different forms of reparations, see ch 4.

[171] *Velásquez Rodríguez v Honduras—Compensatory Damages* (n 136) [26]. Also *Godínez Cruz v Honduras—Compensatory Damages* (n 114).

[172] *Castillo Páez v Peru—Reparations* (n 87) [51].

[173] *Ibid* [53].

[174] *Ibid* [70].

[175] This approach mirrors the efforts to develop the *Principles on Impunity* and the *Basic Principles and Guidelines on the Right to a Remedy* discussed in ch 4.

The Inter-American Court expanded its approach in the 2001 reparations phase of the *Barrios Altos* case, where the government of Peru undertook, in addition to financial compensation: to provide health benefits[176] and educational benefits to the victims;[177] to abide by the decision of the court;[178] to define extrajudicial executions as a crime within the domestic legal system; to ratify the International Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity; to make a public apology to the victims for the grave damages incurred; and to erect a memorial to the victims.[179] In the subsequent 2003 *Myrna Mack Chang* case, the Inter-American Court ordered the state, in addition to financial compensation, to introduce similar measures, including: removing de facto and legal obstacles to prosecution; publicly acknowledging its role in the death of the victims; introducing training courses for members of the armed forces and police; establishing a scholarship in honour of the victim; naming a well-known street in Guatemala City after the victim; and placing a plaque where she died.[180]

The Inter-American Commission has also been involved in designing appropriate reparations packages. For example, in the 1999 *Carmelo Soria Espinoza* case, it held inter alia that reparations must be 'adequate and timely'.[181] Furthermore, in the Friendly Settlement in the 2003 *Irma Flaquer v Guatemala* case, concerning the closure of the investigations into 1980 disappearance of a journalist in Guatemala City under Guatemala's 1985 amnesty law, the state agreed to the following forms of reparation: paying compensation; establishing a committee to expedite the judicial proceedings; establishing a scholarship for the study of journalism; erecting a monument to journalists who sacrifice their lives for the right to freedom of expression, symbolised in the person of Irma Marina Flaquer Azurdia; designating a wing of a public library as a repository for all material related to the works of the journalist in question; naming a public street after her; establishing a university chair in journalism history; writing letters to the relatives asking for forgiveness; organising a course for the training and social rehabilitation of inmates in the Women's Correctional Centre (COF); compiling and publishing a book containing a selection of the best columns, writings and articles of the disappeared journalist; producing a documentary; and holding a public ceremony to honour her memory.[182] Here, the reparations measures were tailored to respond to the violation in question.

[176] *Barrios Altos Case* (*Chumbipuma Aguirre et al v Peru*)—*Reparations*, Inter-Am Ct HR (ser C) No 87 (2001) [42].
[177] *Ibid* [43].
[178] *Ibid* [44].
[179] *Ibid* [44].
[180] *Myrna Mack Chang v Guatemala* (n 143).
[181] See, eg, *Carmelo Soria Espinoza et al v Chile* (n 48).
[182] *Irma Flaquer v Guatemala* (n 30) [12].

These judgments show that reparations can take many forms; indeed, as argued in chapter 4, an amnesty to release political prisoners can be a reparative measure itself. Where amnesty releases perpetrators of human rights violations from punishment, the victims of those violations must still receive reparations, which should take monetary and non-monetary forms. Furthermore, according to the jurisprudence of the international courts, such reparations should be timely and proportionate to the harm suffered. The obligation to make reparations rests with the state, although perpetrators can be required to contribute to the reparations by returning the proceeds of their criminality to the victims, which could represent a further form of punishment for these individuals, and could help to redress the inequality between victims and perpetrators.

POTENTIAL APPROACH OF THE INTERNATIONAL CRIMINAL COURT

The decisions of the ICC cannot yet be analysed, as the court has only recently commenced its first trials. But it is possible to speculate on how the court might approach an amnesty for serious human rights violations, based on the provisions of the Rome Statute and the policy papers of the Office of the Prosecutor. The objects and purpose of the Rome Statute are expressed in the Preamble which proclaims that the statute's states parties are 'determined to put an end to impunity' for 'the most serious crimes of concern to the international community' by establishing a 'permanent International Criminal Court with jurisdiction' over such crimes.[183] However, as will be explored below, there is some conflict between the provisions of the Preamble and the rest of the Rome Statute. Scharf attributes this conflict to fact that

> the preambular language and the procedural provisions were negotiated by entirely different drafting groups, and in the rush of the closing days of the Rome Conference, the Drafting Committee never fully integrated and reconciled the separate portions of the Statute.[184]

Furthermore, the provisions of the Rome Statute are deliberately ambiguous on the question of national amnesties. During the preparatory meetings, the US issued an informal 'non paper',[185] that suggested 'the Court should take account of domestic amnesties when deciding whether or not

[183] ICC St, Preamble.

[184] Michael P Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 507, 522.

[185] US Delegation to Preparatory Commission, 'State practice Regarding Amnesties and Pardons' (August 1997).

to exercise jurisdiction'.[186] This proposition was greeted favourably by some of the participants, notably South Africa, which was concerned that processes like its own Truth and Reconciliation Commission would be viewed as evidence of a state's unwillingness to prosecute.[187] However, other delegates expressed the fear that allowing an amnesty to preclude jurisdiction would provide *carte blanche* for perpetrators to exonerate themselves. Finally, the issue was left unresolved and the 'ambiguities and leeway' in the statute mean that the court may be able to defer to certain forms of amnesty.[188] This is a particularly timely discussion, due to current debate on the impact of the ICC indictments for the leaders of the LRA on the peace process for northern Uganda.

As illustrated in Case Study 2, the Ugandan government introduced a blanket amnesty in 2000 to encourage rebel fighters to surrender. Although this has had some success in encouraging members of the LRA and other insurgent groups to lay down their weapons, the conflict in northern Uganda has continued.[189] On 16 December 2003, President Museveni surprised onlookers by referring the situation in northern Uganda to the ICC.[190] The ICC Prosecutor then announced his intention to investigate on 29 January 2004 in a joint press conference with President Museveni.[191] During the months after this announcement there was a peace initiative led by Betty Bigombe 'which peaked between December 2004 and February 2005', but collapsed before the ICC arrest warrants were issued.[192] The International Center for Transitional Justice (ICTJ) has argued that, during these talks

[186] Naomi Roht-Arriaza, 'Amnesty and the International Criminal Court' in Dinah Shelton (ed), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Transnational Publishers, Ardsley, NY 2000). For a discussion of these negotiations see also Ruth Wedgwood, 'The International Criminal Court: An American View' (1999) 10 *European Journal of International Law* 93, and Jessica Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 *International and Comparative Law Quarterly* 91, 107–8.

[187] William A Schabas, *An Introduction to the International Criminal Court* (2nd edn, Cambridge University Press, Cambridge 2004) 87.

[188] Roht-Arriaza (n 186) 78.

[189] For information on the numbers of surrenders from each rebel group between January 2000 and December 2006, see the Ugandan Ministry of Internal Affairs website at <http://www.mia.go.ug/page.php?1=reporters&&2=Reporters%20Granted%20Amnesty> accessed 14 February 2008.

[190] Unlike the Amnesty Act 2000 there was no public consultation before this referral. For a discussion of the politics of self-referrals see Adam Branch, 'Uganda's Uncivil War and the Politics of ICC Intervention' (2007) 21 *Ethics and International Affairs* 179.

[191] ICC, 'The President of Uganda refers the Situation Concerning the Lord's Resistance Army (LRA) to the International Criminal Court' (29 January 2004) pids.001.2004-EN (29 January 2004).

[192] ICTJ Prosecutions Program, 'Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice' (Expert paper presented at 'Building a Future on Peace and Justice', Nuremberg, June 2007) 5.

> the [ICC] Prosecutor chose to proceed with his investigation, [but] he adopted a 'low profile' approach, which entailed refraining from public statements and vocal outreach campaigns.[193]

This seems to illustrate an awareness of the potentially negative impact of ICC investigations on domestic peace initiatives.

Following the collapse of the Betty Bigombe talks, the first ICC indictments, directed against the LRA leadership, were issued under seal on 8 July 2005 and were unsealed on 13 October 2005.[194] Following the opening of the ICC investigation, the Ugandan president asserted that the LRA leadership would be excluded from the amnesty, and on 20 April 2006 the Ugandan parliament passed the Amnesty (Amendment) Act. This Act permits the Minister of Internal Affairs to exclude named individuals, such as Joseph Kony and his top commanders, from the scope of the amnesty. At the time of writing the minister had not yet done this, however, so the leaders of the LRA technically remain eligible for amnesty under the 2000 Act.

The reluctance to implement the exclusions results from the launch of Juba peace talks in summer 2006 under the auspices of the government of Southern Sudan. Whilst these talks have been ongoing, the Ugandan president has publicly stated that Kony himself would benefit from amnesty if he surrendered. Furthermore, phase 3 of the peace talks resulted in the Agreement on Accountability and Reconciliation, signed on 29 June 2007. This Agreement provides that the legacy of the conflict will be addressed by 'national legal arrangements, consisting of formal and non formal institutions',[195] which seem likely to include traditional justice mechanisms and amnesty for many of the LRA combatants. The Agreement does not, however, provide an explicit role for the ICC and instead, President Museveni has said that if the LRA

> conclude a peace deal, that is when the government can write to the ICC to say we have found an alternative solution.[196]

At the time of writing, however, the president has not yet asked for the arrest warrants to be withdrawn and the ICC has stated its intention to continue the investigation.[197] If the situation does arise, there are a

[193] *Ibid* 5.

[194] Lorna McGregor, 'ICC Monitoring and Outreach Programme: First Outreach Report' (International Bar Association, June 2006) 16.

[195] Agreement on Accountability and Reconciliation (29 June 2007) (Uganda) s 2.1.

[196] Felix Osike and Cyprian Musoke, 'We won't lift Kony Arrest yet- Museveni' *New Vision* (Kampala 20 July 2007).

[197] ICC, 'Press release: Statement by the Chief Prosecutor Luis Moreno-Ocampo' (6 July 2006). On 19 February 2008 the delegates for the Ugandan government and the LRA agreed a framework for implementing the Agreement on Accountability and Reconciliation 2007. This framework provides for the establishment of a special division of the High Court and an investigation and prosecution unit to address the crimes resulting from the conflict. The Agreement states that 'Prosecutions shall focus on individuals alleged to have planned or

number of provisions within the Rome Statute which could provide the ICC Prosecutor, subject to the review of the Pre-Trial Chamber, some leeway in deciding whether to suspend investigations in order to allow the peace process to proceed, which will be explored below.

Security Council Deferral (Article 16)

As discussed in chapter 4, Article 16 of the Rome Statute provides the UN Security Council with the power, under Chapter VII of the UN Charter, to request the deferral of an investigation or prosecution for renewable 12-month periods in the interests of peace and security.[198] By temporarily removing the threat of prosecutions, it was thought that the Security Council might be able to encourage parties to conflicts to participate in peace negotiations. This recognises the potentially destabilising impact that prosecutions could have on delicate transition processes.[199] As this provision only relates to 'threats to international peace and security', it may not apply to national amnesties, as these generally result from oppressive regimes and civil wars, which cannot always be viewed as international dangers and are often passed during transition periods when the potential threats to international order have subsided.[200] Roht-Arriaza has argued, however, that 'this requirement has been broadly construed in recent years and [it] would not be problematic' to transitional contexts.[201] As this provision is time limited, it is unlikely that the Security Council would defer prosecutions indefinitely, but deferrals could complement temporary immunity laws.[202]

Complementarity (Article 17)

The principle of complementarity, contained in Article 17 of the Rome Statute, governs the relationship of the ICC to national jurisdictions. It provides that

carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions.' It also provides for the creation of a truth commission and a reparations programme and for traditional justice to be used to address past crimes.

[198] ICC St art 16 provides 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.' For a detailed analysis of Article 16 see Amnesty International, 'International Criminal Court: The Unlawful Attempt by the Security Council to give US Citizens Permanent Impunity from International Justice' (May 2003) AI Index IOR 40/006/2003, 48–58.

[199] Naqvi (n 58) 592.

[200] Gavron (n 186) 109.

[201] Roht-Arriaza (n 186) 80.

[202] See the discussion of temporary immunity laws, ch 4.

> the Court should find a case inadmissible where . . . the case is being investigated or prosecuted by a state which has jurisdiction over it.[203]

Therefore, the ICC can only intervene when the territorial state is unwilling or unable genuinely to either investigate or prosecute.[204] When deciding whether a state is 'unwilling' to investigate or prosecute, the court will consider if it made a 'national decision' for the purpose of 'shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court', permitted an 'unjustified delay in the proceedings',[205] or conducted proceedings which were not independent or impartial.[206] A state will be considered 'unable' to investigate or prosecute if 'due to a total or substantial collapse or unavailability of its national judicial system', it is unable 'to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'.[207]

The principle of complementarity would not permit the ICC to recognise a blanket, automatic, unconditional amnesty as a bar to prosecution. However, the court could potentially rely on this provision when exercising its discretion not to prosecute for an amnesty process similar to the South African model, which facilitated the investigation of crimes committed during the apartheid era and only granted amnesty to individuals who adhered to the conditions imposed by the commission. Indeed, even Kofi Annan, who has often made strong statements against impunity, has stated:

> The purpose of the clause in the Statute is to ensure that mass-murderers and other arch-criminals cannot shelter behind a state run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.[208]

[203] ICC St art 17(1)(a).

[204] Informal Expert Paper, 'The Principle of Complementarity in Practice' (ICC, The Hague 2003) 3. See also Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Michigan Journal of International Law* 869; Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (International and Comparative Criminal Law Series, Transnational Publishers, Ardsley, NY 2002); Jennifer J Llewellyn, 'A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?' (2001) 24 *Dalhousie Law Journal* 192; Dominic McGoldrick, 'The Permanent International Criminal Court: An End to the Culture of Impunity' (1999) *Criminal Law Review* 627.

[205] It is unclear whether this provision, art 17(1)(b), would 'apply where there has been no specific investigation but amnesty law has been passed'. See Gavron (n 186) 110.

[206] ICC St art 17(2).

[207] *Ibid* art 20(3).

[208] Cited in Charles Villa-Vicencio, 'Why Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet' (2000) 49 *Emory Law Journal* 205, 222.

Nonetheless, the argument that the court might interpret the duty on states to genuinely 'investigate or prosecute' as permitting it to refrain from intervention where the state has conducted non-judicial investigations such as truth commissions[209] has attracted some criticism. For example, Roht-Arriaza argues that the requirement that proceedings are 'conducted . . . with an intent to bring the person concerned to justice', suggests that criminal justice is the 'goal of the investigation'.[210] In contrast, Robinson has opined that the court could

> determine that the term 'investigation' also comprises a diligent, methodical effort to gather the evidence and ascertain the facts relating to the conduct in question, in order to make an objective determination in accordance with pertinent criteria (eg sufficiency of evidence, seriousness of the conduct, role of the perpetrator).[211]

This description could be applied, not just to criminal proceedings, but also to truth commissions.[212]

Furthermore, Robinson points to Article 17(1)(b), which states that the ICC will find a case inadmissible if

> the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute,[213]

to argue that it would be possible to satisfy the terms of this article if a truth commission or other investigatory body 'investigated' the matter; this body then 'decided' not to refer the case for prosecution; and its decision 'did not result from the unwillingness or inability of the state to genuinely prosecute'.[214] This requirement would seem to automatically exclude amnesty laws which by their nature exempt the recipients from criminal responsibility. However,

> the affected state could argue that an amnesty was not enacted for the purpose of shielding, but that shielding was merely a by-product of a decision taken for the purpose of national reconciliation.[215]

In addition, Robinson has argued that the term 'decision' is only applicable 'where there is more than one option available to the purported decision-maker', which means that there must be at least a possibility of prosecution.[216]

[209] Scharf (n 184) 524–5.
[210] Roht-Arriaza (n 186) 80.
[211] Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 481, 500.
[212] *Ibid* 500.
[213] ICC St art 17(1)(b).
[214] Robinson (n 211) 499.
[215] Roht-Arriaza (n 186) 79–80.
[216] Robinson (n 211) 500.

Finally, when determining whether a decision was the result of an unwillingness or inability to carry out a genuine prosecution, the ICC would be

> required by its statute to determine whether the system established was a system to shield perpetrators or whether it could be said to be a 'genuine' proceeding aimed at providing justice, given all the relevant circumstances.[217]

Robinson suggested that the court could try to identify 'prosecution-like hallmarks', such as quasi-judicial character, independence, effectiveness, objective of 'bringing to justice', and necessity,[218] when deciding whether to investigate.

As the ICC has the discretion to decide whether to open investigations into situations where the state party has been 'unwilling or unable' to do so, the court could arguably decide to recognise an amnesty law where prosecution remained an option for certain individuals. For example, a situation of 'targeted prosecutions', where individuals are selected for national prosecution based on their level of responsibility for the policies of human rights violations and lower-level perpetrators are dealt with by truth commissions and amnesty, could satisfy the court's mandate to ensure that those who are most responsible are prosecuted. Similarly, the ICC could target its prosecutions to complement national amnesty processes by only indicting individuals who have not applied for amnesty or complied with its conditions. Such complementary processes could enhance both the legitimacy and efficacy of the court and the domestic institutions, encourage perpetrators to participate in transitional justice processes, and make more effective use of limited prosecutorial resources.

Non bis in idem (Article 20)

The principle of *non bis in idem* (or 'double jeopardy') means that the court will not prosecute anyone who has already been tried for the same crime before a national court. This principle does not include, however, individuals whose prosecutions were aimed at shielding them from criminal responsibility, either by finding them innocent despite evidence to the contrary or by prosecuting them on a lesser charge, for example, murder rather than a crime against humanity. The principle also excludes instances where the national court was not independent or impartial.[219]

This principle aims to ensure that those who escape punishment at the national level because of sham trials will not escape justice at the international level. It appears to be focused on criminal prosecutions, and it is

[217] *Ibid* 501.
[218] *Ibid* 501.
[219] ICC St art 17(3).

not apparent whether truth commissions, such as South Africa's, could be interpreted as prosecutions in the context of this article.[220] Furthermore, where suspects rely on previous criminal investigations that were closed according to an amnesty law, it is likely that they would 'confront the prohibition on proceedings that are inconsistent with an intent to bring the person concerned to justice'.[221] This means that the principle would not prevent the court from exercising its jurisdiction.[222]

Prosecutorial Discretion (Article 53)

Article 53 relates to the initiation of an investigation and awards the ICC Prosecutor considerable discretion when deciding whether to proceed.[223] It requires the prosecutor to consider inter alia whether the investigation would 'serve the interests of justice',[224] taking 'into account the gravity of the crime and the interests of victims'.[225] Although the ICC Prosecutor has not yet decided to suspend an investigation or prosecution 'in the interests of justice', this provision has provoked considerable debate. On one side, anti-impunity campaigners argue that, for serious crimes within the jurisdiction of the ICC, the interests of justice will always require prosecution, provided that the necessary conditions for fair trial can be met. On the other side, some commentators argue that in certain transitional contexts, particularly where the political climate remains unstable, local preferences towards justice, including amnesty laws, should be respected, provided that the needs of victims are addressed through other transitional justice measures.[226] For example, Gallavin argues that the inclusion of the possibility of suspending proceedings in the 'interests of justice' in the Rome Statute, shows that

> despite the tests of severity and the interests of victims being satisfied, the interests of justice may 'nonetheless' act to defeat the satisfaction of these and other case-specific criteria.[227]

[220] Gavron (n 186) 109.
[221] Roht-Arriaza (n 186) 80.
[222] *Ibid* 80.
[223] For a detailed analysis of the discretion of ICC Prosecutor, see Alexander KA Greenawalt, 'Justice without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) 39 *New York University Journal of International Law and Politics* 583.
[224] ICC St art 53(1)(c).
[225] *Ibid* art 53(1)(c). This is subject to review by the pre-trial chamber.
[226] See for example, Chris Gallavin, 'Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?' (2004) 14 *King's College Law Journal* 179, 180. See also Villa-Vicencio (n 208); Joseph Yav Katshung, 'The Relationship between the International Criminal Court and Truth Commissions: Some Thoughts on How to Build a Bridge across Retributive and Restorative Justices' (Coalition of the International Criminal Court, May 2005).
[227] Gallavin (n 226) 185.

Furthermore, Bourdon contends that Article 53 allows the prosecutor to make a decision which is 'entirely political', in that

> he would have to weigh the requirement of peace and reconciliation on the one hand against the need for justice on the other.[228]

However, there are clearly risks inherent in permitting the prosecutor to determine when political factors should be considered, 'as it may lead to a judgment on whether a government has acted responsibly by adopting amnesty laws'.[229] In addition, it may cause accusations of bias or politically-motivated prosecutions.

Aware of these risks and following a consultation process on its general prosecutorial strategy,[230] the Office of the Prosecutor published its *Policy Paper on the Interests of Justice* in September 2007.[231] In this paper, the ICC Prosecutor explores the factors that could influence his decision to suspend an investigation or prosecution in the interests of justice. First, the policy paper states that the discretion of the ICC Prosecutor is '*exceptional* in its nature and there is a *presumption* in favour of investigation or prosecution' for cases that would otherwise fall within the jurisdiction of the ICC.[232] The policy paper does not, however, explore what could make a situation 'exceptional', given that all situations that are admissible before the ICC could obviously be described as exceptional, based on the gravity of the crimes and the uniqueness of each political context. Furthermore, in discussing the 'presumption in favour of investigation or prosecution', the policy paper only refers briefly to 'a consistent trend imposing a duty on States to prosecute crimes of international concern within their jurisdiction', without exploring the extent of this trend or whether it reflects customary international law.[233] Nonetheless, despite acknowledging this 'trend', it appears that the ICC Prosecutor would be willing to suspend investigations or prosecutions in exceptional circumstances provided that certain criteria are met, although the nature of these criteria remains largely unexplored in the policy paper.

The paper does assert that these criteria will be influenced by the 'objects and purpose of the Statute'.[234] In its assessment of these objects and purpose, the policy paper refers to the Preamble of the Rome Statute to determine that

[228] William Bourdon, 'Amnesty' in Roy Gutman and David Rieff (eds), *Crimes of War Book* (John Wiley and Sons Limited, Chichester, UK 1999).

[229] Angermaier (n 157) 145.

[230] The ICC Prosecutor received submissions from international NGOs, academics and legal practitioners, many of which discussed the concept of the 'interests of justice'.

[231] Office of the Prosecutor, 'Policy Paper on the Interests of Justice' (ICC, the Hague September 2007).

[232] *Ibid* 1.

[233] *Ibid* 3.

[234] *Ibid* 1.

> considerations of *prevention* of serious crimes and *guaranteeing lasting respect* for international justice may be significant touchstones in assessing the interests of justice. (emphasis added)[235]

With regards to prevention, while this is a frequently stated goal of international criminal justice, as discussed in chapter 2, the deterrent effect of prosecutions for political crimes and serious human rights violations is unclear. Indeed, it is possible to point to cases such as South Africa, Mozambique and Spain, where amnesty laws contributed to peaceful transitions, to argue that in some cases *prevention* may be better served by policies of forgiveness rather than prosecutions. The ICC Prosecutor has, however, restricted his scope to consider such policies by distinguishing in the policy paper between 'the concepts of the interests of justice and the interests of peace' and finding that the latter 'falls within the mandate of institutions *other than* the Office of the Prosecutor' (emphasis added).[236] Furthermore, the policy paper later argues that

> [t]he concept of interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense . . . should not be conceived so broadly as to embrace all issues related to peace and security.[237]

However, it seems clear that even if efforts are made to separate the decision of whether to investigate or prosecute from political concerns by focusing purely on legal goals, the object of the statute to ensure 'lasting respect for international criminal justice' could be undermined by a decision to prosecute that is contrary to the wishes of the local population, particularly where the investigations are viewed as biased. This issue has arisen most strongly in Uganda, where the Amnesty Act 2000 was introduced following a sustained lobbying campaign by civil society and religious groups in northern Uganda in favour of its introduction.[238] This support for the amnesty among the population that suffered most from the conflict was based on a perception that the government's military strategy was failing to end the war, and a recognition that many of the combatants were children. The civil society and religious groups have continued to be vocal supporters of the amnesty following the issuing of the ICC indictments and have campaigned for the ICC Prosecutor to end his investigation.[239] Furthermore, as discussed in chapter 9, attitude sur-

[235] Office of the Prosecutor (n 231) 4.
[236] *Ibid* 1.
[237] *Ibid* 8.
[238] McGregor (n 194) 16–17.
[239] In 2005, Lango, Acholi, Iteso and Madi community leaders travelled to The Hague to meet the ICC Prosecutor. Following the meeting, a joint press release was issued stating that 'in working towards an end to violence, all parties agreed to continue to integrate the dialogue for peace, the ICC and traditional justice and reconciliation processes'. See ICC, 'Press Release: Joint Statement by ICC Chief Prosecutor and the visiting Delegation of Lango, Acholi, Iteso and Madi Community Leaders from Northern Uganda' (16 April 2005) No: ICC-OTP-20050416. 047-EN. See also, Lucy Hovil and Zachary Lomo, 'Whose Justice? Perceptions

veys among victim populations in northern Uganda indicate some continued support for the amnesty.[240] In addition to the support for the amnesty, the ICC has also been criticised in Uganda for the decision of the ICC Prosecutor to only issue warrants for LRA leaders, rather than also investigating security forces and government officials. Branch argues that this has undermined the legitimacy of the court among the peoples of northern Uganda, who view the Ugandan state as equally culpable for their suffering.[241]

Despite the experience to date in Uganda, the policy paper acknowledges the need to engage with victims and their representatives when determining whether an investigation or prosecution is in the interests of justice. It states that, while the statute

> implies that the interests of victims will generally weigh in favour of prosecution, the Office will listen to the views of all parties concerned.[242]

It continues that the Office has 'a duty to be respectful of possibly divergent views' and will give 'due consideration' to the 'different views of victims, their communities and the broader societies in which it may be required to act'.[243] It does not clarify, however, how much weight these views will carry, or whether the Office of the Prosecutor might pursue an investigation in the face of ongoing and widespread opposition from victims and their communities, if it feels that international justice would be undermined by a decision not to prosecute atrocious crimes. Furthermore, the policy paper recognised that victims' interests may not entail simply 'seeing justice done', but also 'other essential interests such as their protection'. Whilst this could entail witness protection and support programmes during and after the investigations and prosecutions, it seems apparent that it should also require the ICC Prosecutor to consider whether the investigation would endanger victims and potential witnesses by causing further conflict.

The policy paper also states that the phrase 'interests of justice' must be interpreted in accordance with the 'ordinary meaning of the words in the light of their context and the objects and purpose of the Statute'.[244]

of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation' (2005) Working Paper No 15 (Refugee Law Project, Faculty of Law, Makerere University, Kampala, Uganda).

[240] See also, Abraham McLaughlin, 'Africa to World: We Can Handle War Justice Ourselves' *Christian Science Monitor* (18 March 2005); Will Ross, 'Forgiveness for Uganda's Former Rebels' *BBC News* (25 October 2004); William Tayeebwa, '"Don't Prosecute Kony"' *New Vision* (Kampala 1 August 2004).

[241] Branch (n 190).

[242] Office of the Prosecutor (n 231) 5. For a discussion of victims' views in relation to national amnesty law, see ch 9.

[243] *Ibid* 5.

[244] *Ibid* 4.

However, the policy paper later refers to 'other forms of justice' including 'domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms' as means of pursuing '*broader* justice'.[245] It also 'fully endorses' the '*complementary* role' that such measures can play, particularly in 'dealing with large numbers of offenders and addressing the impunity gap' which results from the ICC's jurisdiction being limited to only the most serious crimes.[246] This recognition of the role of other justice mechanisms seems to support the idea that ICC investigations could co-exist with a range of domestic transitional justice mechanisms, which, as was explored in earlier chapters, could be accompanied by amnesties to facilitate truth-recovery and institutional reform. It does not, however, clarify whether the existence of these mechanisms, with the obvious exception of national prosecutions under the principle of complementarity, could influence the ICC Prosecutor's decision on whether the circumstances with a particular situation are sufficiently 'exceptional' to suspend an investigation or prosecution.

Furthermore, the policy paper provides that, when considering whether a case is in the interests of justice, the rights of the accused must be respected. It contended that even prosecutions for individuals who bear the greatest responsibility may not be in the interests of justice where 'a suspect has been the subject of abuse amounting to serious human rights violations'.[247] This provision, whilst recognising that in many conflicts the distinction between victims and perpetrators becomes blurred, as discussed in chapter 2, does not appear to reflect the practice of court to date. For example, among the LRA leaders indicted by the ICC for crimes committed in northern Uganda was Dominic Ongwen, a former child soldier who was kidnapped by the LRA when he was ten years old.[248]

Finally, the policy paper notes that any decision not to open or continue an investigation on the interests of justice must be communicated to the Pre-Trial Chamber which has the power to review the decision.[249] The prosecutor can also seek a ruling from the court on admissibility, thereby 'putting the onus of a politically-charged decision on the validity of the Court', which would enable victims to express their views on the purpose and scope of an amnesty to the court.[250]

The author believes that the prosecutorial policy on the interests of justice described in the 2007 policy paper is ill-defined and contradictory. Although it is likely that it was a deliberate strategy of the Office of the Prosecutor to avoid providing a 'template' on the conditions that would

[245] Office of the Prosecutor (n 231) 8.
[246] *Ibid* 8.
[247] *Ibid* 7.
[248] McGregor (n 194) 14.
[249] Office of the Prosecutor (n 231) 1.
[250] Roht-Arriaza (n 186) 81.

lead it to suspend an investigation or prosecution, it would have been helpful if it had highlighted some factors that would influence its decision. These factors could include considering the existence and nature of an amnesty law, and whether the amnesty introduced was preceded by a transparent decision-making process where the views of the victims were heard.[251] The prosecutor could also consider whether other transitional justice mechanisms,[252] such as those involving restorative approaches, are available. These, and other possible criteria that international courts and actors could use to assess the acceptability of individual amnesty processes, will be explored in detail in the conclusion to this book.

CONCLUSION

The judgments of international courts relating to amnesty laws have been investigated, in order to determine whether international courts have jurisdiction to overrule national amnesty laws, and whether they are predisposed to reject all forms of amnesty. This chapter has revealed that there is a distinction in the approach to amnesties between courts that hold states accountable, which consider whether the amnesty violated the state's obligations; and courts that prosecute individuals, which determine whether the accused can use an amnesty to avoid punishment. This chapter has further argued that, although some hybrid tribunals have been awarded jurisdiction over amnesties in their statutes, international criminal tribunals restrict their investigations to those who are deemed 'most responsible' for policies of massive human rights violations, thereby permitting states to determine how to deal with the lower-level offenders. Furthermore, the jurisprudence of the courts has as yet only explicitly rejected amnesties that offered blanket impunity to perpetrators of human rights violations. By considering the extent of the state's obligations to provide a remedy, investigate, prosecute and punish, and provide reparations, it appears that the international courts could choose to recognise individualised, conditional amnesty processes which allow prosecution for higher-level offenders or those who fail to comply with the conditions, provided these programmes investigate the truth and afford reparations for the victims. This flexibility is particularly important for the ICC where the prosecutor has considerable discretion in determining whether to open an investigation.

[251] Thomas Hethe Clark, Note, 'The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance' (2005) 4 *Washington University Global Studies Law Review* 389, 409. See also Stahn (n 10); Robinson (n 191); Richard J Goldstone and Nicole Fritz, '"In the Interests of Justice" and Independent Referral: The ICC Prosecutor's Unprecedented Powers' (2000) 13 *Leiden Journal of International Law* 655.

[252] For an overview of transitional justice mechanisms, see ch 4.

The judgments of international courts relating to amnesties can contribute to the promotion of justice and reconciliation within transitional societies by providing a remedy where none was previously available. International courts can reinforce domestic efforts to combat impunity, and through vertical transnational judicial dialogue,[253] encourage the courts of national states to grant less deference to governments trying to shield themselves from prosecution. This process could contribute to the promotion of the universality of human rights and the establishment of minimum standards that transitional states must implement in order to avoid intervention by international courts. These standards must be general, however, as each transitional government faces a unique situation and must be allowed flexibility in how to respond.

As the international courts have only faced blanket amnesties until now, they have managed to avoid tackling these issues explicitly. However, it is likely that as states become more innovative in their approaches to transitional justice, the international courts will no longer be able to make sweeping statements condemning amnesty laws, but rather will have to rule on specific provisions within the amnesties themselves, many of which will involve political decisions.

[253] For a discussion of transnational judicial dialogue, see ch 5.

7

Beyond Territoriality: Transnational Prosecutions and Amnesties

INTRODUCTION

IN THE PAST sixty years, there have been increasingly frequent, although possibly capricious, endeavours by the international community to combat impunity for serious human rights violations through investigations and prosecutions in third states. This has included some consideration of national amnesties, although this has yet to occur with any great regularity. Under international law, states not only have a right to exercise jurisdiction over crimes committed within their own territory (the principle of territoriality), but can also extend their jurisdiction to crimes committed elsewhere. Currently, there are a number of principles which states might rely upon to do this, including: the principle of nationality of the offender (or active personality principle); the principle of nationality of the victim (passive personality principle);[1] the principle of protection of a state's fundamental interests; and finally, the principle of universality.[2] For amnesty laws, the principle of nationality of the offender is unlikely to arise, as beneficiaries of protection from amnesty laws are usually granted such protection by their own government. Furthermore, the principle of protection is rarely relied upon by itself as

> states still tend to consider these crimes as not directly relevant to, or affecting, their national interests whenever a national or territorial link is lacking.[3]

Therefore, the principles which will be of the greatest interest to this study are passive personality and universality.

[1] The passive personality principle is employed by third states where their nationals have been harmed or killed in the territory of another state. This form of jurisdiction provides a clear link between the investigating state and the territorial state and has frequently been used in investigations where the perpetrator has been granted an amnesty by the territorial state.

[2] For a discussion of the characteristics and extent of each of these principles, see Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford Monographs in International Law, Oxford University Press, Oxford 2004) 21–4 and Antonio Cassese, *International Criminal Law* (Oxford University Press, Oxford 2003) 277–95.

[3] Cassese (n 2) 277.

The scope of the principle of universal jurisdiction is much contested by international scholars, but for the purposes of this book, the definition employed will be that used in the Princeton Principles on Universal Jurisdiction:

> Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising the jurisdiction.[4]

As this definition shows, universal jurisdiction permits investigation and prosecution by the national courts of a state that has no connection to the crime. It is applied to individuals, rather than to states.[5] Universal jurisdiction is based solely on the abhorrent nature of the crime itself and can be argued to cover a range of crimes under international law, such as genocide, crimes against humanity, war crimes, torture, apartheid and terrorism, although an exact list of prohibited actions has not yet been developed.

This chapter will explore how courts in third states should respond when confronted by a national amnesty introduced outside their borders, by assessing the legal basis for jurisdiction and the existing case law. It will begin by considering the jurisprudence for the key issues, such as: the legality of the prosecution in both domestic and international law; the principle of subsidiarity; executive discretion; the 'nexus requirement' and the possibility of prosecutions *in absentia*; and selectivity. Subsequently, it will discuss the 'ripple effect' that universal jurisdiction investigations can have within the territorial state and elsewhere. This chapter aims to show that, although trial in a third state is not bound by national amnesties, it is preferable for third states to decline to intervene where an amnesty has been introduced in good faith to promote reconciliation, and it will suggest criteria which the courts in the forum state[6] should consider when deciding whether to respect a national amnesty.

JURISDICTION OF COURTS IN THIRD STATES TO RULE ON AMNESTIES INTRODUCED ELSEWHERE

A state can be argued to be under an obligation to pursue universal jurisdiction investigations under both treaty and customary international law, although the extent of this duty is still evolving both in terms of the crimes

[4] Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction,* (Princeton University, Princeton 2001), Princ 1(1).

[5] Jon B. Jordan, 'Universal Jurisdiction in a Dangerous World: A Weapon for all Nations against International Crime' (2000) 9 *MSU-DCL Journal of International Law* 1, 13.

[6] 'Forum state is the state investigating and prosecuting extraterritorial offence'. See Reydams (n 2) 6.

it covers and its permissive or mandatory status. Furthermore, states have often granted themselves jurisdiction over crimes under international law in their domestic laws, particularly statutes to implement international treaties, such as the Rome Statute. This section will explore the duties of states under international and domestic law by considering the relevant legal instruments and case law.

Treaty Law

Within treaty law, the principle of universal jurisdiction is recognised in the 1949 Geneva Conventions, which state:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.[7]

This provision was reiterated in Additional Protocol I.[8] It articulates the general principle of *aut dedere aut judicare*, which requires all parties to the conventions either to prosecute individuals who have perpetrated grave breaches, regardless of the nationality of the perpetrator, or to extradite them to another state party that has requested their extradition. Where the territorial state requests the extradition of the accused, this could require the courts in third states to make similar judgments to the ICC when deciding whether the territorial state is 'unwilling or unable' to try the accused.[9] The duty to prosecute or extradite in the Geneva Conventions only applies to grave breaches committed in international conflict. There is no reference to universal jurisdiction for internal conflicts in Common Article 3 or Additional Protocol II.

In contrast to the clear provisions in the 1949 Geneva Conventions relating to universal jurisdiction, the 1948 Genocide Convention does not refer to the principle of *aut dedere aut judicare*, providing instead for prosecution before the courts of the territorial state or before a proposed international

[7] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I) art 49.

[8] Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, arts 85–8.

[9] See discussion of 'Complementarity', ch 6, and for a discussion of the criteria for recognising a universal jurisdiction investigation, see pp 314ff.

penal tribunal.[10] A court in a third state is not required under the terms of the convention to prosecute a non-national for acts of genocide committed elsewhere, and it is not even clear whether it is permitted to, although recent state practice seems to indicate that it is permissible.

More recently, the 1984 Convention Against Torture provides:

> Each State Party shall . . . take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.[11]

It continues:

> The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.[12]

This has been interpreted as establishing an obligation on states parties to prosecute or extradite any torturers found on their territory,[13] even where the state has no links to the crimes they committed.[14] A state is not required, however, to investigate individuals who are not on its territory or to prosecute torturers *in absentia.*

There have been a number of cases where courts in third states have considered the legality under international law of an amnesty introduced elsewhere. For example, in the first judgment to address the issue, the 1997 *Galtieri* case in Spain concerning the disappearance of a Spanish man and his two sons in Chile in 1976, when General Galtieri was Commander of the 2nd Army Corps, the *Audiencia Nacional* found on 25 March 1997 that domestic amnesties cannot bind the courts of another state and, therefore, there was no reason why Galtieri could not be tried for genocide and terrorism in Spanish courts, even though he had been granted an amnesty by Argentine courts.[15] To support this position, the court cited the views of the Inter-American Commission on Human Rights and the UN Human Rights Committee, which had both declared the Argentinian amnesty laws to be incompatible with their respective treaties to which Argentina was a party.[16] The *Audiencia Nacional* reaffirmed this view the following

[10] Convention on the Prevention and Punishment of the Crime of Genocide 1948 (opened for signature 9 December 1948, entered into force 12 January 1951) 78 UNTS 1021, (Genocide Convention) art 6. For a discussion of the drafting history of the relevant provisions of the Genocide Convention, see Reydams (n 2) 47–53.

[11] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('Convention Against Torture') art 5(2).

[12] *Ibid* art 7(1).

[13] Cassese (n 2) 286.

[14] Convention against Torture, art 5(3).

[15] *Audiencia Nacional*, 5 Mar 1997, '*Orden de prisión provisional incondicional de Leopoldo Fortunato Galtieri por delitos de asesinato, desaparición forzosa y genocidio*' (Spain).

[16] *Ibid*.

year in its decision to authorise investigations into human rights abuses committed in Argentina and Chile during their respective 'dirty wars', when it held that, in addition to the fact that Argentina's amnesty laws were contrary to *jus cogens*, they contravened Argentina's treaty obligations and hence were invalid under international law.[17]

The question of the legality of amnesties under international law also arose in the *Ely Ould Dah* decision. Here, a French non-governmental organisation (NGO) initiated a procedure to open an inquiry against Ely Ould Dah,[18] a Mauritanian army lieutenant, who travelled to France to participate in a military training course. He was suspected of committing acts of torture at Jreïda prison near Noukchott in 1990 and 1991. He was placed in pre-trial detention on 2 July 1999, but following an intervention by the French Foreign Minister he was released subject to judicial control on 28 September 1999. On 5 April 2000, he managed to escape to Mauritania and an international arrest warrant was issued against him on 7 April 2000. The French authorities opened an enquiry to examine the circumstances of his escape. In 2002, despite the accused's absence, the Nîmes Court of Appeal[19] held that universal jurisdiction investigations are possible even where there is a national amnesty, and that to act otherwise

> would be tantamount to breaching the international obligations signed up to by France and to limit entirely the scope of the principle of universal jurisdiction.[20]

The decision also confirmed that

> the principle of legality is in no way in opposition to a crime being defined by treaty or an international agreement, since the latter has primacy over domestic law.[21]

Consequently, the judge held that a Mauritanian law that granted blanket amnesty for members of the army and security forces had no legal effect in France and would not be recognised.[22] The decision was appealed, and on 1 July 2005, the *Cour de Cassation* upheld the decision. On 30 June 2006, a coalition of French and Mauritanian NGOs appealed to the French authorities to officially request Ely Ould Dah's extradition to France, so

[17] *Audiencia Nacional*, 4 Nov. 1998, '*Anto de la Sala de lo Penal de la Audiencia Nacional confirmado la jurisdicción de España para conocer de los crimenes de genocidio y terrorismo comtedidos durante la dictadura argentina*' (Appeal 84/98, Criminal Investigation 19/97 (Spain). See also *Audiencia Nacional*, 5 Nov. 1998, '*Anto de la Sala de lo Penal de la Audiencia Nacional confirmado la jurisdicción de España para conocer de los crimenes de genocidio y terrorismo comtedidos durante la dictadura chilena*' (Appeal 173/98, Criminal Investigation 1/98) (Spain).

[18] *Tribunal de Grande Instance de Montpellier*, 25/05/01, '*Ely Ould Dah', Ordonnance (No. du Parquet 99/14445, No. Instruction* 4/99/48) (Fr).

[19] *Cour d'assises de Nîmes*, 08/07/02, '*Ely Ould Dah*' (Fr).

[20] Trial Watch, 'Trial Watch: Ely Ould Dah' <http://www.trial-ch.org/en/trial-watch/profile/db/facts/ely_ould-dah_266.html> accessed 10 September 2007.

[21] *Ibid*.

[22] Cited in Amnesty International (n 29) ch 10, 34.

that he could serve his prison sentence in that country.[23] This has yet to occur.

A similar emphasis was given to international law by the Mexican courts in their extradition hearings in the *Cavallo* case. Ricardo Miguel Cavallo had been the subject of investigations by Judge Baltasar Garzón in Spain into Argentina's notorious torture centre, the ESMA, where Cavallo had held a high-ranking position. At the time of the investigation Cavallo was living in Mexico under a false identity, and he was only exposed following an investigation by the Mexican newspaper *Reforma*. The newspaper article caused Interpol to call for the arrest of Cavallo on 25 August 2000 as he attempted to flee Mexico. He was subsequently detained by the Mexican authorities, who then asked Interpol member states if there were any outstanding arrest warrants against him. Judge Garzón responded the same day by issuing a warrant requesting Cavallo's extradition to Spain to face charges of terrorism and genocide in accordance with Article 23 of the Organic Law of Judicial Power.[24] In the extradition proceedings against Cavallo in Mexico in 2001,[25] Judge Luna of the First Circuit Court held that the Argentine amnesty laws had no legal effect internationally because they are contrary to international conventions which are binding on states parties. He argued that amnesty laws violate international law as they prevent authorities from prosecuting criminals for crimes that are prohibited by treaty. This view was subsequently supported by the Mexican Supreme Court, which in 2003 decided an amnesty law for crimes under international law in one state could not bind any other state with jurisdiction over those crimes because

> international treaties that are applicable to the present case can recognise the jurisdiction of any state party to those treaties, namely, jurisdiction to prosecute them, judge them and punish them in conformity with their domestic law and the treaties themselves, with the purpose of preventing impunity.[26]

Subsequently, in its reasoning, the court relied upon the decision of the Inter-American Court of Human Rights in the *Barrios Altos* case of 14 March 2001,[27] as well as the 1997 *Joinet Principles*.[28] Following this ruling, in a commendable example of international cooperation, Cavallo was

[23] Trial Watch (n 20).

[24] Organic Law 6/1985, of 1 July, of the Judicial Power (*Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*), as amended by Organic Law 11/1999 (Spain).

[25] *Expediente de extradición 5/2000, Juez Sexto de distrito de Procesos Penales en el Distrito Federal, Resolution 5/2000*, 11 Jan. 2001 (Mex).

[26] *Decision on the Extradition of Ricardo Miguel Cavallo, Suprema Court de Justicia*, 10 Jun 2003, 42 ILM 888 (Mex).

[27] *Barrios Altos Case* (*Chumbipuma Aguirre et al v Peru*), Inter-Am Ct HR (ser C) No 74 (2001).

[28] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'The Administration of Justice and the Human Rights of Detainees: Question of Impunity of Perpetrators of Human Rights Violations (Civil and Political)' (2 October 1997) UN Doc E/CN 4/Sub 2/1997/20/Rev 1 (*prepared by* Louis Joinet).

extradited to Spain on 29 June 2003, where he is now imprisoned. On 11 January 2006, he was charged with genocide and terrorism, and the Spanish Prosecutor's Office has said that it will seek a prison term of 17,000 years.[29] At the time of writing, Cavallo was awaiting trial in Spain despite requests by the Argentine authorities for his extradition.

Customary International Law

In addition to treaty law, some courts in third states have considered the position of amnesties under customary international law. This basis for universal jurisdiction is, however, very much disputed, as consensus on the duty to prosecute only exists with respect to piracy, whereas the situation is less clear regarding other crimes under international law. The evidence for international custom comes from two sources: state practice and *opinio juris*. With regard to the former, there appears to be growing support within the international community for the principle of universal jurisdiction, as evinced by the number of states that have introduced domestic legislation that provides for some form of universal jurisdiction. In September 2001, Amnesty International found that over 125 countries had universal jurisdiction over one or more crimes under international law.[30] This development has been echoed by the increasing willingness of states to open universal jurisdiction investigations into crimes under international law since the mid-1990s, and is likely to increase as more states enact implementing legislation for the Rome Statute.

In contrast, there remains some reticence among states to recognise universal jurisdiction in all contexts, as shown by the response at the Rome Conference to Germany's proposition that universal jurisdiction be entrenched within the Statute of the ICC.[31] Germany argued that

> [i]f states individually could exercise universal jurisdiction over the most serious crimes of concern to the international community, such as genocide, crimes against humanity and war crimes, why could they not delegate this jurisdiction to an international body of their own creation?[32]

Their proposal met stiff opposition from several states, particularly the United States, which were reluctant to grant the court the power to investigate the citizens of non-state parties without their consent. Although the German proposal was ultimately rejected, the final position

[29] ——, 'Argentine may face 17,000 years' *BBC News* (11 January 2006).

[30] For a comprehensive summary, see Amnesty International, 'Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation' (1 September 2001) IOR 53/002-018/2001.

[31] William Schabas, 'Preface' in Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford Monographs in International Law, Oxford University Press, Oxford 2004) x.

[32] *Ibid*, x.

was a compromise whereby the court could investigate crimes involving the territory or nationals of a non-state party with that state's consent, UN Security Council authorisation, or where the nationals or territory of a state party were also involved. This failed to satisfy American demands, however, contributing to their subsequent decision to 'unsign' the Rome Statute.[33] Furthermore, territorial and custodial states have frequently contested the jurisdiction of forum states and refused to comply with extradition requests. States have also not always rushed to arrest individuals who are subject to a universal jurisdiction investigation and for whom there is an international arrest warrant. Finally, the willingness of prosecutors within the forum state to proceed with an investigation has sometimes been met with hostility by the executive authorities of the state.[34]

With regards to *opinio juris* on the status of universal jurisdiction under customary international law, perhaps the most significant judgment in recent years was the decision by the ICJ in the *Congo v Belgium* case.[35] In this case, the Democratic Republic of Congo did not challenge Belgium's exercise of universal jurisdiction, preferring instead to focus on immunities, which meant that the plenary court 'simply sidestepped' whether an investigation under universal jurisdiction was possible.[36] Nonetheless, universal jurisdiction featured highly in the individual opinions of the judges. Some of them willingly accepted the principle of universal jurisdiction,[37] and others claimed that no such principle truly existed under customary international law (although it clearly existed in treaty law), except in the case of piracy.[38] This appears to indicate that, while customary international law may permit a state to pursue a universal jurisdiction investigation, it is not yet mandatory that it do so.

A similarly restrictive approach has been followed by some domestic courts. For example, following the request of the Spanish investigating judge for the extradition of Pinochet from the United Kingdom where he was temporarily present in 1998, the British authorities placed Pinochet under arrest and began proceedings to extradite him. The resulting House of Lords judgments[39] are much discussed for the precedent they set regarding universal jurisdiction and immunity for state officials, but they

[33] Amber McNair, 'The ICC: A Victory Despite US Resistance' *Peace Magazine* (Toronto July 2002) 17.

[34] The Spanish government placed pressure on Spanish prosecutors to suspend certain universal jurisdiction investigations. See Madeleine Davis, 'Externalised Justice and Democratisation: Lessons from the Pinochet Case' (2006) 54 *Political Studies* 245, 255.

[35] *Arrest Warrant case* (*Democratic Republic of Congo v Belgium*) 2002 ICJ 3 (14 Feb 2002).

[36] Schabas (n 30) xi.

[37] Dissenting Opinion of Judge Ad Hoc Van den Wyngaert, in Arrest Warrant case (n 34).

[38] Separate Opinion of President Guillaume in *Ibid*.

[39] *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex p Pinochet Ugarte* (1998) 1 AC 61 (HL); *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex p Pinochet Ugarte (No 2)* (1999) 1 AC 119 (HL); *R v Bartle and the Commissioner of Police for the Metropolis and Others ex p Pinochet (No 3)* (1999) 1 AC 147 (HL) (UK).

failed to discuss the self-amnesty law that Pinochet had introduced in Chile. There were, however, references to amnesty in the individual opinions of some of the Law Lords. For example, Lord Lloyd of Berwick, in his dissenting opinion in the first *Pinochet* case, discussed amnesties that had been introduced in other parts of the world and the international support that they had received before highlighting that

> it has not been argued [in this proceeding] that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.[40]

In contrast, on 1 November 1998, a Belgian judge investigating Pinochet's alleged responsibility for crimes against humanity against Chileans, based his jurisdiction on customary international law, which he found gave each state the right to exercise jurisdiction over crimes against humanity; he also held that crimes against humanity are imprescriptible.[41] Similarly, in the *Cavallo* extradition proceedings in Mexico, Judge Luna held that

> the norms of international law that impose an affirmative obligation to investigate, prosecute and punish these alleged crimes are *jus cogens*

and therefore that 'international law does not protect persons accused of these crimes from the jurisdiction of the international community'.[42]

The amnesties of Argentina, Chile and Mauritania considered in the above cases, granted blanket impunity to perpetrators of human rights violations. In these cases, the courts were willing to find that the amnesties did not prevent them from exercising universal jurisdiction over the crimes. However, international law, particularly under customary international law, grants the third state a discretionary, rather than mandatory, duty to prosecute or extradite. This duty becomes more forceful with reference to some crimes that have been prohibited by an international treaty, but these treaty provisions may not apply in all circumstances. Even where there is a mandatory duty for a third state to prosecute or extradite a perpetrator of an international crime that has been protected from the courts of the territorial state by an amnesty law, it is unclear whether the duty applies to every crime that occurred within that state. If the territorial state has made 'good faith' efforts to put those who were 'most responsible' for the policies of systematic human rights violations on trial, whilst granting amnesty together with alternative transitional justice mechanisms to the lower-level offenders,[43] that state could be perceived as

[40] Dissenting Opinion of Lord Lloyd of Berwick in *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex p Pinochet Ugarte* (1998) 1 AC 61 (HL) (UK).

[41] Roemer Lemaître, 'Belgium rules the World: Universal Jurisdiction over Human Rights Atrocities' (2000) 37 *Jura Falconis*.

[42] Juan E. Méndez and Salvador Tinajero-Esquivel, 'The Cavallo Case: A New Test for Universal Jurisdiction' (2001) 8 *Human Rights Brief* 5.

[43] Garth Meintjes and Juan E. Méndez, 'Reconciling Amnesties with Universal Jurisdiction' (2000) 2 *International Law FORUM du droit international* 76, 82–3.

fulfilling its international legal obligations. If such a determination was reached, the courts of third states would not be under an obligation to intervene, although they still would be permitted to if they so chose.

Domestic Law

Although the principle of universal jurisdiction within international law permits states to conduct investigations into crimes under international law that occurred elsewhere, such states usually rely upon the terms of their own domestic laws in determining when such investigations are appropriate or feasible. These domestic laws are usually introduced to implement the state's treaty obligations into domestic law. Recently implementing legislation for the Rome Statute has greatly increased the number of states with universal jurisdiction capabilities.[44] To date, Spain has been the most proactive country in implementing its domestic universal jurisdiction legislation to investigate perpetrators of human rights abuses committed elsewhere that have been shielded by a national amnesty. For example, the *Audiencia Nacional* in its 4 November 1998 decision on investigations into crimes against Argentinian and Spanish nationals noted that, although the *Punto Final* and *Obediencia Debida* laws had been repealed, their effects continued because of the principle of applying the most beneficial law.[45] Despite this, the court found that these laws are 'depenalising' norms, as they prevent the exercise of penal law, and consequently their application cannot be considered in other countries as equivalent to an acquittal or pardon, and therefore Spain, according to its domestic law, does not need to take the amnesties into account when applying extraterritorial jurisdiction over crimes under international law.[46]

In the subsequent ruling on Chile, on the 5 November 1998, the court reached the same conclusion, despite claims by the Chilean authorities that investigations into 'dirty war' era abuses were ongoing in their national courts. The *Audiencia Nacional* held that the investigations to which the Chilean authorities referred had been dismissed by virtue of the amnesty and consequently proclaimed:

[44] Schabas (n 30) xi–xii.

[45] *Audiencia Nacional*, 4 Nov 1998, '*Anto de la Sala de lo Penal de la Audiencia Nacional confirmado la jurisdicción de España para conocer de los crimenes de genocidio y terrorismo comtedidos durante la dictadura argentina*' (Appeal 84/98, Criminal Investigation 19/97 (Spain). For discussion, see Margarita Lacabe, 'The Criminal Procedures against Chilean and Argentinian Repressors in Spain' (11 November 1998) <http://www.derechos.net/marga/papers/spain.html> accessed 1 October 2007.

[46] *Ibid*.

> The crimes to which reference has been made are to be deemed not already adjudicated. Irrespective of whether Decree-Law 2.191 of 1978 can be considered to be contrary to international *ius cogens,* it cannot be considered to be a true pardon according to Spanish legislation applicable to these proceedings. It is merely a provision which abolishes punishment for reasons of political convenience, and consequently it is not applicable to the case of an accused party acquitted or pardoned abroad (article 23(2)(c) of the Organic Law of the Judiciary). That certain behaviour is not punishable, by virtue of a subsequent legal provision abolishing punishment, in the country where the crime is committed (article 23(2)(a) of the said Law), is not relevant in any event in cases of extraterritoriality of Spanish jurisdiction by virtue of the principles of universal protection and prosecution, in view of the provisions of the above mentioned article 23(5) of the Organic Law of the Judiciary.[47]

The court subsequently authorised the investigations into the human rights abuses in Chile.

Similarly, in the *Cavallo* extradition proceedings before the Mexican Supreme Court on 10 June 2003, the court held

> The fact that a state decided not to exercise jurisdiction in order to prosecute crimes subject to international jurisdiction did not prevent any other state of an international agreement to exercise its own jurisdiction. . . . Argentinean laws could not be binding on another state nor would they have the legal effect of depriving it from exercising jurisdiction, not only by virtue of its internal legislation, but also on the basis of international treaties to which it is a party.[48]

Therefore, the court held that it was not bound by the amnesty under domestic or international law.

The inability of an amnesty to bind the courts of another state was also discussed by the Special Court of Sierra Leone in the *Kallon* case, where the court proclaimed:

> Where jurisdiction is universal, a state cannot deprive another state of its jurisdiction to prosecute the offender by the grant of an amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a state in regard to grave crimes under international law in which there exists universal jurisdiction. A state cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other states are entitled to keep alive and remember.[49]

However, this reasoning has been criticised by Williams, who argues that the Special Court

[47] *Audiencia Nacional*, 5 Nov 1998, '*Anto de la Sala de lo Penal de la Audiencia Nacional confirmado la jurisdicción de España para conocer de los crimenes de genocidio y terrorismo comtedidos durante la dictadura chilena*' (Appeal 173/98, Criminal Investigation 1/98) (Spain).

[48] *Cavallo* (n 25).

[49] Decision on challenge to jurisdiction: Lomé Accord Amnesty in *Prosecutor v Morris Kallon, Brima Bazzy Kamara*, SCSL-2004-15-PT-060-I, SCSL-2004-15-PT-060-II, Appeal (13 Mar 2004) [67].

> [a]dopted a very broad view of the scope of universal jurisdiction, a view that does not require the existence of any pre-conditions to its exercise. States and international courts have not consistently or uniformly adopted such a broad view of universal jurisdiction in relation to a State's purported exercise of it.[50]

The language used in the case law discussed above indicates that courts in third states are entitled to bring universal jurisdiction prosecutions, but are not obliged to under international law. Furthermore, as Williams has argued, they often restrict the exercise of this jurisdiction by imposing conditions, which will be explored in the next section.

SCOPE OF UNIVERSAL JURISDICTION WITHIN THIRD STATES

When national courts purport to exercise jurisdiction over universal jurisdiction prosecutions, there are a number of issues that might affect how they rule on an amnesty law from another state. These issues include: (1) the role of subsidiarity; (2) executive discretion; (3) the requirement that there be a 'nexus' to the territorial state and prosecutions *in absentia*; and (4) the process of selecting cases to pursue.[51]

Role of Subsidiarity

If jurisdiction is permissive, courts in third states may decline to investigate under the principle of subsidiarity. In the context of transnational prosecutions where the courts of the forum state and the territorial state are supposedly equal, resulting in a horizontal relationship between the jurisdictions, subsidiarity could be described as 'priority in the exercise of jurisdiction, favouring some bases of jurisdiction over others'.[52] It resembles the principle of complementarity in the Rome Statute, as it assumes that the territorial state is the preferred forum for investigations, and that the courts of third states should only intervene when the territorial state is

[50] Sarah Williams, 'Amnesties in International Law: The Experience of the Special Court of Sierra Leone' (2005) 5 *Human Rights Law Review* 271, 288. Williams further argues that, 'to say that a State may exercise universal jurisdiction for certain international crimes is not the same as concluding that the creation of an international criminal court confers universal jurisdiction on that court', and she concludes that 'the analogy with the exercise of universal jurisdiction by third states is . . . inappropriate, as Sierra Leone was bound by the amnesty provision, whereas a third state is clearly not bound by the domestic amnesty granted by another state'.

[51] For a summary of the provisions of the universal jurisdiction legislation relating to these issues for states where the issue of external amnesty laws has been considered by their courts, see app 3.

[52] Hervé Ascensio, 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*' (2003) 1 *Journal of International Criminal Justice* 690, 696–7.

'unwilling or unable'. This principle can have a similar impact to the doctrine of *forum non conveniens*.[53] But the principle of subsidiarity implies a presumption that the territorial state is the natural forum for a prosecution, whereas the doctrine of *forum non conveniens* entails pragmatic analysis of where a case can be most conveniently tried. The practical criteria that it applies, such as access to evidence and witnesses, would however tend to lean towards prosecution in the territorial state where possible.

The principle of subsidiarity allows courts to consider whether they are the appropriate forum in which decisions on amnesties introduced elsewhere should be made. As there are many practical, legal and political difficulties to conducting transnational prosecutions, including whether the judiciary is in a position to second-guess the delicate political decisions made by transitional governments or obtain access to evidence and witnesses, the courts in third states may decide that another jurisdiction, such as the territorial state or an international court, would be more appropriate.

The principle of subsidiarity first arose in relation to amnesty laws in the 1998 *Audiencia Nacional* decision to sanction investigations into Pinochet's regime. In this judgment, the court referred to cases that had been brought before Chilean courts and then dismissed by applying the amnesty law. It found that as these cases and many other similar ones had not been properly tried, the exercise of Spanish jurisdiction was justified.[54]

The Spanish courts subsequently considered the principle in more depth in the *Guatemalan Generals* case.[55] This case, which was brought in 1999 by Guatemalan victims, including Nobel Prize winner Rigoberta Menchú Tum, and more than twenty NGOs, was filed against several Guatemalan officials for the crimes of genocide, terrorism and torture committed against the Mayan ethnic group during Guatemala's civil war. Although there was an amnesty law in place in Guatemala at this time,[56] it did not apply in this case, as the crimes of genocide, torture and forced disappearances were excluded from its terms. The principle of subsidiarity was

[53] 'Latin: not in agreement with the judicial forum. A doctrine that permits a court to decline to accept jurisdiction over a case, so that the case may be tried in an alternative forum (ie a foreign court). Such decisions are almost entirely at the court's discretion, except that the party seeking a *forum non conveniens* decision must submit to the effective jurisdiction of the alternative court. The stay will be granted by the court if it is satisfied that a foreign court having the interests of all the parties and the ends of justice in that court. The factors that courts generally consider in making this decision include the location of witnesses, exhibits, and documents, the language of witnesses and documents, the citizenship of the claimants, and the law applicable to the dispute.' From Elizabeth A Martin (ed), *A Dictionary of Law* (Oxford Paperback Reference, 5th edn Oxford University Press, Oxford 2002).

[54] *Audiencia Nacional*, 5 Nov 1998, *Anto de la Sala de lo Penal de la Audiencia Nacional confirmado la jurisdicción de España para conocer de los crimenes de genocidio y terrorismo comtedidos durante la dictadura chilena* (Appeal 173/98, Criminal Investigation 1/98) (Spain).

[55] This case is also known as the *Guatemalan Genocide* case or the *Ríos Montt* case.

[56] *Ley de Reconciliación Nacional*, 1996 (Guat).

raised on 27 March 2000, when Judge Guillermo Ruiz Polanco declared himself competent to investigate the case and applied the criterion of subsidiarity referring to the inaction of the Guatemalan judiciary.[57] This ruling was contested by the prosecutor, and on 13 December 2000, the *Audiencia Nacional* repealed Judge Polanco's decision. The *Audiencia Nacional* argued inter alia that Spanish courts had no jurisdiction over the case at that moment, as Guatemalan law permitted prosecution for genocide and not enough time had elapsed since the Historical Clarification Commission's report[58] to conclude that the Guatemalan judicial system had failed to operate, thus justifying the opening of proceedings in Spain. In its discussion of subsidiarity, the court described the principle as a part of 'international *jus cogens*',[59] which generated 'a difficult to rebut presumption in favour of jurisdiction of the territorial state'.[60] Although this reasoning barred jurisdiction, it did not prevent future proceedings, if the Guatemalan judiciary failed to act.

The plaintiffs challenged this decision before the *Tribunal Supremo*, which on 25 February 2003 upheld their challenge and granted the Spanish courts jurisdiction to investigate, but only a much reduced list of charges. This determination was reached by considering the provisions of the Guatemalan amnesty law and finding no legislative impediments to the prosecution of genocide within Guatemala, as the crimes under investigation were excluded from the amnesty's terms.[61] The tribunal further argued that, when determining whether to intervene to prosecute certain acts,

> basing such a decision on either real or apparent inactivity on the part of the courts of another sovereign state implies judgment by one sovereign state on the judicial capacity of a similar judicial bodies in another sovereign state.[62]

[57] *Auto del Juzgado Central de Instrucción No 1 con relación al Caso Guatemala por genocidio, diligencias número 331/99*, 27 Mar 2000 (Spain). The investigating judge's role is to examine the cases assigned to him by the court, gathering evidence and evaluating whether the case should be brought to trial. He is independent of the state. In contrast, the prosecutor, on the basis of the evidence collected by the investigative judge in the preliminary investigation, decides whether to prosecute, and reports to the attorney general, who is appointed by the national government. According to Human Rights Watch, the prosecutors generally take the position of the government. See Human Rights Watch 'Universal Jurisdiction in Europe: The State of the Art' (June 2006) 89.

[58] The Historical Clarification Commission (*Comisión para el Esclarecimiento Histórico*—CEH) published its 12-volume report, *Memoria del Silencio*, on 25 February 1999.

[59] *Audiencia Nacional*, 'Guatemalan Genocide' case, *Asiento*: 162.2000, *Rollo Apelación* No 115/2000, *Causa*: *D Previas* 331/99, 13 Dec 2000 (Spain).

[60] Hervé Ascensio, 'The Spanish Constitutional Tribunal's Decision in *Guatemalan Generals*: Unconditional Universality is Back' (2006) *Journal of International Criminal Justice* 586, 587.

[61] Ascensio (n 51) 697.

[62] TS, 'Guatemalan Genocide' case, *Sentencia No* 327/2003, *Recurso de Casacion No* 803/2001, 25 Feb 2003, Appeal (Spain).

The tribunal argued that this was problematic, as Spain has maintained normal diplomatic relations with Guatemala and any declaration by Spanish courts could interfere in international relations, an area that the Spanish Constitution allocated to the government, not the judiciary.[63] The tribunal also argued that, as Article VIII of the Genocide Convention provides that states may 'call upon the competent organs' of the United Nations to act when confronted with genocide, the courts of third states should refrain from intervening. Therefore, it is clear that the *Tribunal Supremo* made a presumption in favour of investigations within the territorial state or at the international level, rather than before Spanish courts. Nonetheless, the tribunal held, by a majority of eight to seven judges, that Spanish courts had jurisdiction to investigate human rights abuses committed in Guatemala by former Guatemalan officials, on the condition that the victim of the abuses was a Spanish national. This requirement restricted the application of universal jurisdiction within Spain. Although the prosecutor reopened the investigation, it was 'remanded to pursue investigations into the possible torture of Spanish citizens' and 'all the genocide and terrorism charges and the torture charges against non-Spaniards were dismissed'.[64]

In response to three appeals by Rigoberta Menchú Tum, the *Tribunal Constitucional* on 26 September 2005, overturned the 2003 *Tribunal Supremo* decision and held that 'principle of universal jurisdiction takes precedence over the existence or not of national interests'.[65] The *Tribunal Constitucional's* assessment of the principle of subsidiarity asserted that it did not appear to be recognised in Spain's positive law or in the Genocide Convention, and that the lower courts were wrong to have limited Spain's exercise of universal jurisdiction by applying the principle. It continued that it would be difficult to base an assessment of the territorial state's inability or unwillingness to investigate solely on the law, as other factors might prevent the victim's accessing justice.[66] The court further held that it was not necessary for the victims to be Spanish nationals. This new ruling restored the broader application of Spain's universal jurisdiction legislation and on 7 July 2006, an international arrest warrant was issued by Spanish National Court Judge Santiago Pedraz for two former Guatemalan military dictators, Efrain Ríos Montt and Oscar Humberto Mejía Victores, and five other high-ranking officials for genocide.[67]

[63] *Ibid*.

[64] Roht-Arriaza (n 85) 176.

[65] ——, 'Spain Extends its Universal Jurisdiction' *International Justice Tribune* (Paris 10 October 2005).

[66] TC, '*Sentencia del Tribunal Constitucional español reconociendo el principio de jurisdicción penal universal en los casos de crímenes contra la humanidad*' (STC 237/2005) 28 Sep 2005, Appeal (Spain).

[67] ——, 'Spanish Judge Orders Arrest of Former Guatemalan Leaders' *Voice of America News* (8 July 2006). This extradition warrant was refused by the Guatemalan Constitutional Court on 14 December 2007 on the grounds that the Spanish courts did not have jurisdiction.

The 2005 decision of the *Tribunal Constitucional* in the *Guatemalan Generals* case contradicted a judgment earlier the same year by the *Audiencia Nacional* in the *Scilingo* case, concerning a former Argentine Navy Captain accused of throwing dissidents alive from aeroplanes during his involvement in the 'dirty war', where the court made considerable effort to show that criminal prosecutions in Argentina simply did not take place.[68] Tomuschat has argued that this reveals the conviction of the court that universal jurisdiction is to be understood as a 'default jurisdiction' that is 'legitimate only if the states having a significant link with the offences concerned remained passive'.[69]

The principle of subsidiarity or the doctrine of *forum non conveniens* could provide the courts of third states with a theoretical foundation on which to base their decisions whether to proceed with universal jurisdiction investigations. This could be used as a means to filter cases, so that the courts in third states could focus their attentions and limited resources where there is the most need.[70] When a state chooses to defer a prosecution under the principle of subsidiarity, this does not permanently bar prosecution in the forum state, but rather provides that the conditions in the territorial state at that moment indicate that the transnational prosecution should not proceed. It remains possible that human rights violations in that state could be investigated at later date, if the situation deteriorates or if the national authorities fail to act to address impunity. The temporary nature of a deferral under the principle of subsidiarity could be used as tool to encourage governments to make good faith efforts to address the past, and it could encourage perpetrators to engage with these efforts rather than face prosecution abroad.

Executive Discretion

In some states, the ability of the courts to pursue universal jurisdiction investigations can be restricted by rules allowing the government to prevent investigations deemed to be problematic from being opened, or to close them after they have already begun. For example, the Danish executive exercised its discretion in 1998 following a request by Danish nationals of Chilean origin that an investigation be opened into allegations against General Pinochet for torture and ill treatment, and that his extradition be sought from the United Kingdom with a view to prosecuting him according to the passive personality principle. In this instance the Director

[68] Christian Tomuschat, 'Issues of Universal Jurisdiction in the *Scilingo* Case' (2005) 3 *Journal of International Criminal Justice* 1074, 1080–1.

[69] *Ibid* 1081.

[70] For a discussion of criteria which courts in third states should rely upon when deciding whether to recognise an amnesty, see pp 314ff.

of Public Prosecutions denied the request and his decision was later confirmed by the Ministry of Justice.[71]

Such pressure from the executive can be problematic, as frequently there are no formal criteria governing the decision whether to allow such a prosecution to proceed, and no appeal procedures for those investigations that are denied.[72] Furthermore, political considerations may be deemed to be a justifiable reason for refusal,[73] and could enable a government to intervene to prevent an investigation into an individual who has benefited from an amnesty in another state, if it deemed that it was not in the state's interest to proceed. Therefore, it is desirable that transparent criteria be established within national legal systems that permit states to recognise amnesties, but without granting them automatic recognition.[74]

'Nexus Requirement' and *In Absentia* Prosecutions

In 'pure' universal jurisdiction, a nexus between the forum and territorial states is not required. This assumes that a forum state pursuing an investigation under the principle of universal jurisdiction is acting selflessly to protect the interests of the international community, rather than its own narrow self-interests.[75] It has been argued, however, that a decision to investigate violations in one country rather than another may be the result of political links between the forum state and the state being investigated, such as former colonial relationships.[76] Furthermore, in the domestic legislation of many states a link is required. This link can refer to the presence of the victims or their relatives within the territorial state, and can even be limited to requiring that the plaintiffs are domiciled in the state,[77] which could prevent those who are fleeing oppression bringing a case, at least until they obtain residency status. Furthermore, these requirements begin to move towards the passive personality principle, rather than universality.

Another potential nexus could be the presence of the accused on the territory of the state concerned. This requirement may stipulate that the defendant must be within the territory of the forum state, either temporarily or as a resident, for the investigation to be opened. Alternatively, domestic legislation could permit investigations to be opened without the presence of the defendant, requiring that if a prima facie case is

[71] The grounds given for denying the request were that Denmark only had jurisdiction if the accused was present in the territory. See Reydams (n 2) 127.

[72] *Redress & Fédération internationale des lingues des droits de l'Homme* (n 87) 27.

[73] *Ibid* 27.

[74] For a discussion of suitable criteria, see pp 314ff.

[75] Reydams (n 2) 5.

[76] Schabas (n 30) ix.

[77] David Petrasek and Peggy Hicks, *Hard Cases: Bringing Human Rights Violators to Justice Abroad* (International Council on Human Rights Policy, Geneva, October 1999) 6–7.

established, extradition be requested. In contrast, as illustrated below, some states permit universal jurisdiction *in absentia* and only submit an extradition request after the defendant has been found guilty.

For investigations concerning amnesty laws, it is difficult to extradite suspects from territorial states where they have benefited from amnesties. This renders attempts to conduct prosecutions with the defendant present or to enforce the sentence following *in absentia* proceedings very challenging and may leave prosecutors with the choice between a prosecution *in absentia* or no trial at all. The approach that has been followed to date varies according to the legislation of the forum state. The earliest prosecution *in absentia* of an amnesty beneficiary that has been identified occurred in France in the *Astiz* case[78] concerning the torture and disappearance of two French nuns in Argentina in 1977. On 16 March 1990, the Paris *Cour d'assises* tried Alfredo Astiz (known as the 'Blond Angel') with the crimes, found him guilty, and sentenced him to life imprisonment.[79] France then issued an international arrest warrant, but Argentina refused to comply as Astiz was protected by the amnesty laws. Since the repeal of these laws in Argentina, Astiz is now facing charges there on human rights abuses.

More recently, in *Ely Ould Dah*, on 8 July 2002 the Nîmes Court of Appeal held that the investigation could proceed even though the defendant was still in Mauritania,[80] a judgment that was upheld by the *Cour de Cassation* on 23 October 2002. The investigation resulted in the *Cour d'assises* of Nîmes sentencing Ely Ould Dah to 10 years in prison, the maximum term for torture. This case was an expansion of the application of trials *in absentia* in the French system, as the *Astiz* case was based on the principle of passive personality, as the victims were French citizens, whereas in the *Ely Ould Dah* case, the victims were Mauritanian and the crimes had been committed in Mauritania.

The decisions by these courts to proceed with prosecutions even though they could not secure the extradition of the accused to their territory illustrate the difficulties that amnesty laws can pose for the exercise of universal jurisdiction. Nonetheless, these trials, even where they cannot impose punishment on individuals, can still make a significant contribution to the creation of a public memory and can 'summon up a "collective conscience" of moral principles shared by all'.[81] However, all judiciaries must display a degree a selectivity when deciding whether to proceed with an investigation, particularly when the accused is not present within the territory.

[78] Astiz was also sought by Italy, Sweden and Spain.
[79] *Cour d'assises de Paris*, 16/03/90, '*Alfredo Astiz*' (Arrêt No 1893/89) Judgment (Fr).
[80] *Ely Ould Dah* (n 19).
[81] Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (Transaction Publishers, New Brunswick NJ 1997) 2.

Selectivity

When deciding whether to pursue a universal jurisdiction investigation, the choice of cases will involve some selection by the prosecutor. Such selection is even more necessary for universal jurisdiction proceedings than for investigations into ordinary domestic crimes, and can be based on a number of factors including resources, the availability of evidence and the seriousness of the crimes. Other political factors can also be considered, but these carry the risk that a decision to investigate one instance of human rights violations, when so many occur globally, 'will seem irregular and attract suspicion'.[82] This could cause complaints of bias and politically-motivated prosecutions, which could not only undermine the legitimacy of the proceedings being conducted by the prosecutor, but also 'damage the credibility of all work in this field'.[83] Therefore, when prosecutors are determining whether to investigate individuals who have benefited from national amnesty laws, the rationale for their decisions must be transparent and could include the criteria outlined in the conclusion.

'RIPPLE EFFECT': THE IMPACT OF INVESTIGATIONS IN THIRD STATES ON NATIONAL AMNESTIES

To date, despite the excitement surrounding the theory of universal jurisdiction, there have been very few attempted prosecutions under this principle, and even fewer incarcerations.[84] Therefore, it is easy to be cynical and assert that universal jurisdiction investigations have not had any real impact. This view has, however, been disputed by many commentators in recent years,[85] who, using the example of the Pinochet affair, point

[82] Petrasek & Hicks (n 77) 17.

[83] *Ibid* 17.

[84] Schabas (n 30) x.

[85] Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Pennsylvania Studies in Human Rights, University of Pennsylvania Press, Philadelphia 2005); Jonas (n 86); Naomi Roht-Arriaza, 'Of Catalysts and Cases: Transnational Prosecutions and Impunity in Latin America' in Madeleine Davis (ed), *The Pinochet Case: Origins, Progress and Implications* (Institute of Latin American Studies, London 2003); Philippe Sands, 'After Pinochet: The Role of National Courts' in Philippe Sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press, New York 2003); Roseann M. Latore, 'Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes' (2002) 25 *BC International and Comparative Law Review* 419; José Zalaquett, 'The Pinochet Case: International and Domestic Repercussions' in *The Legacy of Abuse: Confronting the Past, Facing the Future* (Aspen Institute, New York 2002) 47–69; Andrew Bounds, '"Pinochet Ripple" Launches Quest for Justice' *Financial Times* (London 10 February 2001) 3; Naomi Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction' (2001) 35 *New England Law Review* 311.

to a positive 'ripple effect'[86] such investigations can have both within the territorial state and globally.

If one begins by looking at the impact of the Pinochet affair in Chile, where a blanket amnesty had been introduced in 1978, it becomes apparent that these proceedings sparked a public debate about the past and led to increased pressure to discover the truth and provide reparations to victims.[87] As a response, the government established the *Mesa de Diálogo*, a series of round-table discussions on human rights, involving the military, human rights lawyers and other participants.[88] The proceedings launched against Pinochet in 10 countries also inspired domestic human rights lawyers to redouble their efforts before the national courts, which subsequently led to several previously powerful individuals losing their impunity[89] and in some instances being convicted.[90] By the end of 2003, almost 300 cases of human rights abuses had been submitted by victims to the courts in Chile, whereas previously there had only been very few cases that had focused on crimes excluded from the amnesty law.[91] Special judges had even been appointed to work exclusively on these cases.[92] In addition, some of the legal proceedings led to the former elite being stripped of the assets they had accumulated whilst oppressing the nation.[93] Finally, the Pinochet proceedings abroad led to more information being revealed about past events, following both efforts to collate evidence for investigations[94] and pressure on foreign governments to open their archives and reveal their records relating to the Pinochet regime.

Following the Pinochet proceedings, there were also developments in other countries in Latin America, which have been highlighted by some commentators as being linked to the Pinochet case, although of course the extent of this causality is unclear. For example, in Argentina, the amnesty

[86] 'Ripple Effect' was borrowed from Stacie Jonas, 'The Ripple Effect of the Pinochet Case' (2004) 11 *Human Rights Brief* 36.

[87] Redress and *Fédération internationale des lingues des droits de l'Homme*, 'Legal Remedies for Victims of "Crimes under international law": Fostering an EU Approach to Extraterritorial Jurisdiction' (March 2004) 2.

[88] Zalaquett (n 85) 54.

[89] General Pinochet was stripped of his senatorial immunity by the Chilean Supreme Court following his return to Chile.

[90] Jonas (n 86).

[91] *Ibid*.

[92] *Ibid*.

[93] See discussion of 'Compensation' in ch 4.

[94] Investigations in Italy into Operation Condor have particularly focused on assessing the historical and political context in which crimes occurred, which has helped them to be a useful source for revealing the truth of events. See Giancarlo Capaldo, 'Proceedings in Italy against Latin American Dictators and Military Personnel of the 1970s and 1980s' (remarks presented at 'The Pinochet Precedent: Individual Accountability for Crimes under international law', sponsored by American University Washington College of Law and the Institute for Policy Studies, 26 March 2001) 1–2.

laws were repealed and more cases involving human rights abuses were submitted to the courts. In Uruguay, a commission to investigate the whereabouts of the disappeared was established. A truth commission was also created in Panama. It should be remembered, however, that the impact a transnational prosecution can have within the territorial state, or in other states with a similar history, is dependent upon the political conditions within the state.[95]

At the international level, the Pinochet affair raised public awareness of human rights issues in many countries across the world and caused considerable debate amongst the international community. Following the Pinochet decision, there were many more cases against former dictators, including Mengistu Haile Mariam, Hissène Habré, 'Baby Doc' Duvallier, and against lower-level perpetrators, including the cases discussed in this chapter. There was also what has been described as the 'Garzón Effect', which suggests that judges and prosecutors in other European countries followed the example of the Spanish judge, Baltasar Garzón and began to open universal jurisdiction investigations.[96] Finally, it has been argued that the Pinochet case instilled fear into former human rights abusers and made them 'think twice or consult their lawyers before making international travel plans'.[97] Overall, the impact of the Pinochet proceedings have been described as

> changing 'the perception of what was possible', creating the political and psychological space that allowed for the effective application of previously existing legal theories and arguments.[98]

Any investigation by a third state into the actions of an amnesty beneficiary suspected of human rights abuses can have a positive outcome, even if ultimately the court decides to defer to the national amnesty and not to proceed with the prosecution. The decision to defer the investigation should not be an automatic response to amnesties, as to do so would undermine many of the positive outcomes that can result from a universal jurisdiction investigation. Instead, any decision has to be conducted on a case-by-case basis, taking into account the conditions attached to the amnesty and the impact of the prosecution on the territorial state.

[95] For a discussion of the political context in Chile before and during the Pinochet proceedings, see Carlos Huneeus, 'The Consequences of the Pinochet Case for Chilean Politics' in Madeleine Davis (ed), *The Pinochet Case: Origins, Progress and Implications* (Institute of Latin American Studies, London 2003).

[96] Zalaquett (n 85) 53.

[97] *Ibid* 53.

[98] Jonas (n 86).

CONCLUSION

To date, courts in third states have generally not been eager to investigate human rights violations that have benefited from national amnesty laws. In the limited number of cases where they have found that an amnesty does not bar their jurisdiction, the amnesties in question offered blanket, unconditional impunity. However, the courts may take a different approach if confronted by individualised, conditional amnesties, or amnesties in conjunction with selective prosecutions that adhere to certain criteria.

First, the courts in the forum state must consider whether the territorial state is 'unwilling' to prosecute as described in the Rome Statute.[99] This could include situations where there is blanket impunity for human rights violations and the needs of victims have been purposefully ignored by the state. It could also cover sham trials or prosecutions of the former leaders on minor charges to help them to evade prosecution for more serious crimes; or even the establishment of truth commissions with very limited mandates and the prevention of these commissions from making their reports public. In contrast, where the territorial state amnesties lower-level offenders and holds selective prosecutions for the former elite, the forum state should, under the principle of subsidiarity, defer to the territorial state, although it can reverse this position later if the prosecutions do not occur. This ability of the courts in third states to revisit the question of whether to conduct investigations may encourage the territorial state to make increased efforts to promote justice.

Secondly, before pursuing a universal jurisdiction investigation, the courts should consider its potential effects on the political climate and stability of the territorial state.[100] As discussed in chapter 6, prosecutions may not always serve the interests of justice where they risk destabilising a fragile political transition, as recognised in Article 16 of the Rome Statute.[101] Presumably, the same rationale applies to the courts of third states,[102] particularly since these courts are far removed from the delicate political decisions made by the transitional government within the territorial state and are therefore ill equipped to determine whether prosecutions would have served the interests of justice in that state, or would have instead led to further violence and suffering. Furthermore, most transi-

[99] For a discussion of concept of 'unwilling and unable' within the Rome Statute, see ch 6.

[100] Bruce Broomhall, 'Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law' (2001) 35 *New England Law Review* 399, 416–7.

[101] See ch 6.

[102] Leila Nadya Sadat, 'Exile, Amnesty and International Law' (2006) 81 *Notre Dame Law Review* 965.

tional governments are not making a simple choice between prosecutions and impunity. Instead, there are several other avenues they could pursue, including truth commissions, community-based justice processes and selective prosecutions. These subtleties in the nature of the level of accountability would be difficult for courts of third states to evaluate fully. In addition, third states may be particularly eager to distance themselves from universal jurisdiction investigations where they are involved in the transition process, either as a funder or a mediator.

Thirdly, as discussed in chapter 1, the arguments for deferring to the territorial state are further strengthened if the amnesty was introduced by a democratic government or following a national consultation process or referendum on the issue.

Fourthly, the prosecutors in third states should consider the international political context before bringing a case, as it is preferable that there be some form of international consensus to support the prosecution so that it is seen as legitimate and fair, rather than as a politically-motivated intrusion into a delicate transition process. Furthermore, if the transnational prosecution attains international legitimacy, it is more likely to gain the support of the victims' groups and human rights organisations in the territorial state, which will help with the collection of evidence for the prosecution and reduce the strain on resources.[103]

Fifthly, the courts in third states should consider the nature of the amnesty law and whether it is accompanied by alternative justice mechanisms, as described in chapter 4. In evaluating these mechanisms, the courts should question 'the extent to which victims participate in and gain satisfaction through the process'.[104] As will be explored in chapter 9, victim participation may be a difficult concept to evaluate as victims of serious human rights violations often have different views on how the past should be approached, and how they wish to be helped to rebuild their lives, nonetheless, it should be considered since given limited resources available for transnational prosecutions,

> it seems pointless to argue that prosecution should be urged abroad in circumstances where the victims do not seek prosecution because they consider that effective local action has been taken on their behalf.[105]

Where the transitional justice processes are deemed to meet the needs of the victims, it is also advisable that, where possible, transnational prosecutions be designed to complement national processes, perhaps by prosecuting individuals whose crimes fell outside the terms of the amnesty, or who failed to comply with the conditions that were outlined in the amnesty process, such as surrendering weapons and admitting the truth

[103] Roht-Arriaza (n 85) 196.
[104] Petrasek and Hicks (n 77) 25.
[105] *Ibid* 25.

about their actions. If such an approach is followed, it could enhance the legitimacy of the transnational prosecutions, whilst also encouraging perpetrators to comply with the processes in the territorial state. It would also make the greatest use of the limited resources that are available for transnational prosecutions, by focusing them where there is the greatest need, rather than on situations where the territorial government is making good faith efforts to address past crimes.

These criteria do not suggest that the courts in third states automatically defer to national amnesties, as this could undermine much of the progress against impunity.[106] Similarly, they should not automatically overlook an amnesty and prosecute a perpetrator, but rather the courts of third states should be aware of the difficulties involved when making a determination on whether to respect an amnesty law. By considering such factors when deciding whether to proceed, the courts in third states could contribute to building an international consensus around the acceptable parameters of amnesties under international law, by 'generating different ideas, which, though hardly "binding" in any formal sense, will enrich an informal system of precedents'.[107] Furthermore, universal jurisdiction prosecutions could raise public awareness internationally about human rights norms, and could register international concern about human rights violations and show that the international community is willing to become involved in holding perpetrators to account. Furthermore, universal jurisdiction prosecutions could complement the work of the ICC by investigating cases that fall outside the court's temporal jurisdiction.

It is unlikely, however, that universal jurisdiction investigations will become a widespread phenomenon in the forthcoming years, due to their complexity, expense and the political difficulties they can create for the government of the forum state. Nonetheless, there are several investigations open currently which, if they proceed to trial will yield valuable case law on the position of amnesties under international law. Furthermore, the pursuit of universal jurisdiction investigations and the extent to which other states co-operate provide evidence of the international community's attitude to national amnesty laws, an issue that will be explored in the next chapter.

[106] Henry J Steiner, 'Three Cheers for Universal Jurisdiction—Or Is It Only Two?' (2004) 5 *Theoretical Inquiries into Law* 199, 222.
[107] *Ibid* 224.

Part III

Views of Stakeholder Groups

8

Legal Obligations v *Self-interest: The Contradictory Approach of International Actors to Amnesty*

INTRODUCTION

THE CHAPTERS IN Part II focused on the jurisprudence on amnesty laws from national and international courts, and from courts in third states. In Part III, the discussion will look at the attitudes to amnesty laws of different stakeholders in political transitions. The first group to be assessed will be international actors.

International actors can comprise a multitude of states and organisations acting either independently or in groups. For example, individual states can provide aid or information to assist investigations, co-operate with tribunals, ratify treaties and implement them in domestic legislation, pursue universal jurisdiction investigations, contribute peacekeepers, or apply diplomatic pressure. In addition, supranational institutions such as the United Nations (UN), NATO, Council of Europe, Organisation of American States (OAS), African Union (AU), European Union (EU) and the World Bank can carry considerable influence within transitional states. These organisations can act as collective entities in transitions, for example, by mediating peace agreements, or they could place requirements on their member states to fulfil certain obligations such as cooperating with international tribunals or adhering to sanctions. In recent years, there have even been cases where the Security Council has established interim administrations in transitional societies, which were awarded responsibility for ensuring the rule of law. Furthermore, through the human rights treaty-monitoring bodies of UN and the regional mechanisms pressure can be applied to states to adhere to their international obligations. However, within inter-state organisations, different organs of the organisations have often had contradictory responses to amnesty laws. For example, although, as discussed in chapter 6, the UN Human Rights Committee has repeatedly criticised domestic amnesty laws, until recently the UN was often involved in mediating peace agreements with amnesty provisions. Furthermore, even policy within individual states can become

rather inconsistent, with different institutions within a state acting in opposition to one another. For example, during the later years of the Cold War, the US Congress tried to condition aid to South American countries on their protection of human rights, whilst the US armed forces and the CIA were providing training to groups involved in perpetrating human rights violations in the region.[1] Therefore, where the term 'international community' is employed in this chapter, it is used for the sake of brevity and is not intended to suggest unanimity of purpose, ideology, or political objectives among international actors, as the use of amnesties frequently creates significant tensions within the 'international community'. These tensions will be explored in this chapter.

International actors can affect amnesties at different points in their lifecycle. First, they may become involved in a political transition before amnesty is introduced, either by applying diplomatic or financial pressure or by becoming an actual participant in the conflict, for example, by providing military training or support. Alternatively, they may become involved at the moment of the law's enactment, by mediating or witnessing a peace agreement. By involving themselves in post-conflict reconstruction to apply pressure to governments or their opponents, international actors can support those who were previously victimised or who seek to institute democratic reforms in the face of stiff opposition from the former regime. This is because

> the international community is not limited, at least not to the same degree, by the agonising choices facing national leaders of new democracies

and therefore 'need not yield' to blackmail from still powerful militaries.[2] In this way, the international community can affect the internal balance of power in transitional states. For example, Cassel claims that in Guatemala in 1996,

> one of the few cards held by amnesty opponents was the argument that the international community would not accept a blanket amnesty for crimes against humanity

which contributed to the adoption of a narrower amnesty than would otherwise have been the case.[3] This shows that the international involvement can be viewed as a 'stick' to pressure recalcitrant dictators towards democracy. Lemarchand does caution, however, that international lever-

[1] Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition* (Cass Series on Peacekeeping, Frank Cass, New York 2004) 26.

[2] Douglass Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities' (1996) 59 *Law and Contemporary Problems* 197, 202.

[3] *Ibid* 204.

age can 'raise the expectations of the "standpatters" to the point where . . . compromise becomes much more problematic'.[4] Finally, international actors could intervene after an amnesty has been introduced, either during the implementation process, for example, by funding or seconding personnel to an amnesty commission, or following legal rulings, for example, by protesting when amnesty has been applied to individuals accused of harming foreign nationals.

To date, the involvement of the international community in amnesty processes has been inconsistent, with some states and organisations becoming heavily involved in certain transitions, such as El Salvador and Haiti, but declining to intervene directly in others, such as South Africa.[5] Where the international community has become involved, its attitude has varied, as certain amnesty laws have been 'universally condemned' whereas others have garnered 'widespread international support' or have even resulted from a 'multi-lateral treaty or . . . Security Council resolution'.[6] Nonetheless, as will be argued below, the response of international actors to amnesty laws can impact both on the domestic legitimacy of the amnesty law and upon the development of customary international law.

This chapter will look at where the international community, in the form of individual nation states and intergovernmental organisations, has expressed views either in support of, or opposed to, amnesty laws. It will consider which factors influence international actors' decisions to intervene in national amnesty processes. Subsequently, the analysis will look at how the international community can exert pressure and the methods that have been employed to date in relation to amnesty laws. This will suggest that international actors are consistently reluctant to condemn amnesty laws outright and are in fact willing to recognise and support amnesty processes that are accompanied by other transitional justice mechanisms, even where the amnesty extends to crimes under international law.

WHAT MOTIVATES INTERNATIONAL ACTORS' DECISIONS ON INVOLVEMENT IN DOMESTIC AMNESTY PROCESSES?

The decisions of international actors on whether to become involved in domestic amnesty processes can be influenced by several factors. First,

[4] René Lemarchand, 'Managing Transition Anarchies: Rwanda, Burundi, and South Africa in Comparative Perspective' (1994) 32 *Journal of Modern African Studies* 581, 602.

[5] Although the international community did not directly intervene in the negotiations leading to the transition, following the creation of the Truth and Reconciliation Commission, it did receive external financial support and had many international staff, some of whom were seconded from government jobs in other states.

[6] William W Burke-White, 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' (2001) 42 *Harvard International Law Journal* 467, 475–6.

individual states may be concerned about the implications of such involvement for their own domestic interests. For example, as one commentator noted, the United States, when becoming involved in the Haitian crisis, described in Case Study 12,

> was afraid of getting lost in voodoo politics, haunted by the ghosts of American soldiers killed in Somalia, [and] horrified of sinking into a quagmire like Vietnam.[7]

It therefore preferred to pressure the elected Haitian government to amnesty the putschists, rather than to contribute soldiers to ensure that those responsible for atrocities could be held accountable.[8] In this way, international actors may shy away from situations which are difficult to resolve and could lead to a loss of domestic political capital and detract from domestic issues. Similarly, third states may decline to advocate truth-recovery mechanisms where they fear revealing their own involvement in the human rights abuses, such as supplying training, personnel, weapons or financial assistance to a party to the conflict or to a dictatorial state. States may also be reluctant to intervene in domestic amnesty processes for fear of establishing a precedent that may subsequently be used against them.

Case Study 12: Amnesty for Haiti's military junta

Following the brutal 29-year dictatorships of the Duvalier family and subsequent military coups, Haiti held UN-monitored elections on 16 December 1990 in which Jean-Bertrand Aristide became the country's first democratically-elected president. The attempt at democracy was, however, short-lived, as the army, led by Brigadier-General Raoul Cédras, staged a coup on 30 September 1991 and seized control of Haiti.

Following the coup, the Provisional Government backed by the armed forces announced an amnesty on Christmas Eve 1991 for 'all those arrested, prosecuted, tried or convicted for political crimes between the . . . elections . . . and the . . . coup'.[9] In practice, this amnesty allowed the release of members of the Tonton-Macoute militia and individuals sentenced for violence committed during the Duvalier regime. The government claimed that it was introducing this amnesty to promote reconciliation,[10] but it appears that many of the beneficiaries became involved in the violent repression of the political opposition.[11] During the initial resistance to the coup and the following years of dictatorship,

[7] Cited in Michael P Scharf, 'Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?' (1996) 31 *Texas International Law Journal* 1, 8.

[8] The role of the US in the Haitian amnesty process will be discussed in more detail below.

[9] ——, 'Freeing of Haiti killers Feared' *Reuters* (Port-au-Prince 26 December 1991).

[10] ——, 'Haiti's government to give amnesty to January putschists' *Agence France Presse* (Port-au-Prince 25 December 1991).

[11] ——, 'Aristide return to Haiti is Unlikely' *National Public Radio* (5 January 1992).

thousands of Haitians were killed and tortured by the military regime and President Aristide was forced into exile, along with thousands of refugees.

The international community condemned President Aristide's expulsion from power and the abuses committed by the military; it gradually began to pressurise the Haitian military to restore democracy, by imposing economic sanctions and a weapons embargo. The most active intervention came during the UN-mediated Governors' Island Agreement in 1993, where the military junta agreed to relinquish power and allow President Aristide to return in exchange for a full amnesty. Although President Aristide's had initially promised an amnesty in the immediate aftermath of the coup,[12] by 1993 when the gravity of the military's human rights violations became apparent, Aristide changed his position and vigorously opposed an amnesty. However, he eventually acquiesced in the face of strong international pressure and a desire to end military rule.

The amnesty agreed in the Governors' Island Agreement was broad and ambiguous, but required both a presidential decree and a parliamentary statute.[13] It was subsequently implemented, first in the Executive Decree on 3 October 1993 for political offences committed between the coup (29 September 1991) and the date of the Governors' Island Agreement (3 July 1993). It was then reinforced by the Haitian Parliament in the law on amnesty of October 1994, which 'merely defined in broad terms the scope of the president's constitutional authority to grant amnesty in political matters'.[14] This law was vague, and it is unclear whether it covered serious human rights abuses. It was, however, accepted by the military junta, which transferred power and went into exile.

Following the restoration of Aristide's Presidency, he created the National Commission on Truth and Justice on 28 March 1995 'to globally establish the truth concerning the most serious Human Rights violations perpetrated between 29 September 1991 and 15 October 1994, inside and outside the country and to help the reconciliation of all Haitians without any prejudice against seeking legal action based on these violations'.[15] The Commission delivered its report to the president on 5 February 1996. The report identified victims and perpetrators (although it recommended that the names of the perpetrators were not made public until after appropriate judicial action had been taken). It made recommendations for institutional reform and reparations,[16] although it

[12] Andre Picard, 'Come back to Haiti with Me, Aristide tells Expatriates Crowds cheer exiled President in Montreal' *Globe and Mail* (Montreal 10 December 1991)

[13] Governors' Island Agreement, 3 July 1993, UN Doc S/26063, art 6.

[14] Ian Martin, 'Haiti: International Force or National Compromise?' (1999) 31 *Journal of Latin American Studies* 711, 721.

[15] The commission's mandate cited in Fanny Benedetti, 'Haiti's Truth and Justice Commission' 3 *Human Rights Brief* (Center for Human Rights and Humanitarian Law, Washington College of Law, American University 1996).

[16] See 'Rapport de la Commission Nationale de Verité et de Justice' (available online on the website of the Haitian Embassy in Washington DC) <http://www.haiti.org/truth/table.htm> last accessed 7 October 2007. See also Priscilla B Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge, New York 2001) 66–7.

appears that no reparations were ever paid to victims.[17] However, few cases against perpetrators have moved forwards and, according to Human Rights Watch, the violence that has troubled Haiti in recent years means that accountability for past human rights abuses remains out of reach.

***Sources**: Audrey R Chapman and Patrick Ball, 'The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala' (2001) 23 Human Rights Quarterly 1; William W Burke-White, 'Protecting the Minority: A Place for Impunity? An Illustrated Survey of Amnesty Legislation, Its Conformity with International Legal Obligations, and Its Potential as a Tool for Minority-Majority Reconciliation' (2000) Journal of Ethnopolitics and Minority Issues in Europe; Ian Martin, 'Haiti: International Force or National Compromise?' (1999) 31 Journal of Latin American Studies 711; Michael P Scharf, 'Swapping Amnesty for Peace: Was There A Duty to Prosecute International Crimes in Haiti?' (1996) 31 Texas International Law Journal 1; Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights in Haiti' (11 February 1994) OEA/Ser.L/II.85; Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights in Haiti 1995' (9 February 1995) OEA/Ser.L/V/II.88 Doc. 10 rev.; Lawyers Committee on Human Rights, 'Haiti: Learning the Hard Way—The UN/OAS Human Rights Monitoring Operation in Haiti, 1993–1994'; UNHRC 'Concluding Observations of the Human Rights Committee: Haiti' (3 October 1995) UN Doc CCPR/C/79/Add.49; A/50/40.*

Secondly, states or international organisations may decline to intervene in political transitions out of deference to other actors. For example, Scharf claims that, as a result of heavy American involvement in the Haitian crisis,

> other members of the UN Security Council . . . perceived the Haitian situation as largely an American problem and were therefore satisfied to yield to US interests in resolving it.[18]

Thirdly, international actors may employ selective criteria when deciding to intervene in transitional states. For example, the anticipated expense and lack of clear end-goals of peacebuilding missions could deter states from intervening at all, or could make them inclined to select situations that look cheaper or easier, rather than the most needy. Similarly, states may select their interventions based on public support at home for such a move.[19] Public support can be influenced by media coverage or by the ethnic, historic, or religious ties of the population to one side in a conflict.

[17] Alexander Segovia, 'The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Noncompliance' in Pablo De Greiff (ed) *The Handbook of Reparations* (Oxford University Press, Oxford 2006).

[18] Scharf (n 7) 8.

[19] Eva Bertram, 'Reinventing Governments: The Promise and Perils of United Nations Peace Building' (1995) 39 *Journal of Conflict Resolution* 387, 403.

Furthermore, some former colonial powers retain 'spheres of influence' in which they are willing to get involved. This can, however, create problems for the legitimacy of the intervention, as shown by the anti-French protests in Côte d'Ivoire, following the French intervention and mediation of the Linas-Marcoussis Accord 2003, which granted amnesty for participants in the conflict, except individuals responsible for 'serious economic violations and serious violations of human rights and international humanitarian law'.[20]

A degree of selectivity can also result from the strategic interests of the international community, with countries that have valuable resources being more likely to inspire international involvement than those that do not, as the existence of conflict in resource rich regions can have destabilising consequences for global trade and make valuable commodities more expensive. For example, following an attempted military coup in oil-rich São Tomé e Príncipe, which was described as 'bloodless', the resulting agreement which provided amnesty for the coup participants was mediated by representatives of the AU, ECOWAS, United States, UN, Community of Portuguese Speaking Countries,[21] Nigeria, Republic of Congo, Gabon, and South Africa. This is a comparatively high level of international involvement, particularly for a country with a population of just 200,000.[22]

Fourthly, international actors may decide to intervene in favour of accountability, in order to maintain and increase their own moral authority by condemning the abuses which occurred. Indeed, it can be argued that international actors have a moral and ethical duty to refrain from condoning the abuses either directly by providing military or financial support to the abusive regime or indirectly by failing to criticise the abuses. Kritz has explained that

> the international community, after allowing atrocities . . . to proceed (usually despite early warning signs and opportunities to intervene) owes it to the victims to assist them with an approach to post-conflict justice that will have the deepest impact on their society.[23]

Fifthly, international actors may base their decision whether to intervene on their evaluation of the conditions within the transitional state.

[20] ——, 'Côte d'Ivoire: French Citizens flee Country "with Death in their Hearts"' *IRIN* (10 November 2004); Craig Timberg, 'Ivory Coast Violence Breaks French Connection' *The Washington Post* (Abidjan 13 November 2004) A19; US Department of State, 'Country Reports on Human Rights Practices 2004: Côte d'Ivoire' (28 February 2005).

[21] Including Angola, Brazil, Cape Verde, Mozambique, and Portugal.

[22] IRIN, 'Democratic Republic of São Tomé e Príncipe: Humanitarian Country Profile' (UN Office for the Coordination of Humanitarian Affairs, March 2007).

[23] Neil J Kritz, 'Dealing with the Legacy of Past Abuses: An Overview of the Options and their Relationship to the Promotion of Peace' in Mô Bleeker Massard and Jonathan Paige Sisson (eds), *Dealing with the Past: Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy* (Swiss Peace Foundation, Bern, Switzerland 2004) 29.

Consequently, they may advocate amnesty laws where they believe that pursuing prosecutions may destabilise the situation and cause further violence. For example, with reference to Haiti, President Clinton said he believed the amnesty deal was necessary to avoid

> massive bloodshed and perhaps an extended period of occupation that could have been troubling to our country and to the world.[24]

In such cases international actors may genuinely feel that amnesty laws could contribute positively to peace and reconciliation. Furthermore, attaining peaceful resolution of conflicts can benefit the international community by reducing the flow of refugees and the possibility of the conflict spreading across borders. It also diminishes the likelihood of the territorial nation becoming a 'failed state',[25] which could have well-documented risks for the 'War on Terror', such as providing an environment for terrorist training camps.

Finally, decisions to intervene may depend on whether all or some of the domestic actors are receptive. Where there is hostility to intervention, it is unclear whether even if attempted, the intervention would have the desired impact, as whilst transitional governments are usually susceptible to foreign influence since they rely disproportionately on aid and international legitimacy, some of the most abusive regimes on the planet are the most isolationist and have been able to survive for decades under sanctions. In such cases, external intervention may serve to tighten the autocratic ruler's grip on power, rather than prompting a transition to a more open and equitable system of government.

Furthermore, international actors may be reluctant to undermine the principle of state sovereignty, as, under Article 2(7) of the UN Charter, the United Nations is prohibited from intervening 'in matters which are essentially within the domestic jurisdiction of any state', except for the 'application of enforcement measures under Chapter Vll'.[26] However, since the Second World War, the international community has become increasingly willing to override state sovereignty in specific areas that are deemed to be of international concern, particularly human rights and humanitarian law.[27] This process has culminated in the recent recognition

[24] Scharf (n 7) 9.

[25] 'Failed states' have been defined by Thürer as 'states in which institutions and law and order have totally or partially collapsed under the pressure and amidst the confusion of erupting violence, yet which subsist as a ghostly presence on the world map'. See Daniel Thürer, 'The "Failed State" and International Law' (1999) 836 *International Review of the Red Cross* 731.

[26] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) UNTS XVI ('UN Charter') art 2(7).

[27] Hans Peter Schmitz and Kathryn Sikkink, 'International Human Rights' in Walter Carlnaes, Thomas Risse and Beth A Simmons (eds) *Handbook of International Relations* (Sage Publications Ltd, London 2002).

by the Security Council of the responsibility to protect.[28] By pursuing a policy of intervention, the international community can act to uphold international rules.

Despite the arguments motivating international involvement in amnesty processes, international actors have typically shown 'complete and absolute deference'.[29] Meintjes explains this trend by asserting that

> although international human rights law places limits on what states can do to their citizens, those restrictions were generally thought to operate to prevent present and perhaps future abuses.[30]

In contrast, the approach taken by a newly democratic government to past human rights abuses 'was considered a matter largely within its own discretion'.[31] Although the factors outlined above demonstrate that decisions on intervention are often political, rather than neutral or impartial, the widespread acquiescence to amnesty laws, even where they cover crimes under international law, could be viewed as an indicator of state practice.[32]

ATTITUDES OF INTERNATIONAL ACTORS TOWARDS AMNESTIES

There are several ways in which states or international organisations can demonstrate their support or opposition to national amnesty laws. Based on information for 137 amnesty processes, the following categorisations have been developed: diplomatic, economic, legal, and military actions.

[28] UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674. The responsibility to protect has been described as embracing three specific responsibilities incumbent on all states: (1) 'The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk'; (2) 'The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention'; and (3) 'The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert', International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' <http://www.idrc.ca/en/ev-9436-201-1-DO_TOPIC.html> accessed 5 October 2007, xi. See also Frederic L Kirgis, 'International Law and the Report of the High-Level UN Panel on Threats, Challenges and Change' (2004) *ASIL Insights* <http://www.asil.org/insights/2004/12/insight041216.htm> accessed 5 October 2007; Adam Roberts, 'Humanitarian Issues and Agencies as Triggers for International Military Action' (2000) *International Review of the Red Cross* 673.

[29] Garth Meintjes and Juan E Méndez, 'Reconciling Amnesties with Universal Jurisdiction' (2000) 2 *International Law FORUM du droit international* 76, 76.

[30] *Ibid* 76.

[31] *Ibid* 76.

[32] For a discussion of the impact of acquiescence on the formation of rules of customary international law, see International Law Association Committee on the Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of Customary (General) International Law* (International Law Association, London 2000).

Within each of these categories, members of the international community can express either approval or disapproval for the amnesty law. This dichotomy can become skewed, however, when addressing releases of political prisoners, which some international actors may support whilst also being opposed to amnesties for combatants. These categories have been developed following a survey of the limited literature on this issue.[33] The information that is publicly available on the behaviour of the international community can be vague at times, with views concerning amnesty laws being expressed only in broad terms, rather than detailing which aspects of the amnesty process are particularly acceptable or displeasing. Furthermore, where security concerns are affected by an amnesty process, international actors are unlikely to reveal their full intentions.

Diplomatic support can be granted for amnesty laws through mediating or witnessing peace agreements that contain amnesty provisions, and disapproval can be shown by making public statements rejecting amnesties. The economic actions of states towards amnesties can include attaching conditions to aid, ending or introducing sanctions, and providing financial support to the amnesty process. The legal category has been defined broadly, to include encouraging or supporting the introduction of prosecutions, legal reforms, and other transitional justice mechanisms. Where transitional justice mechanisms, which were linked to amnesty processes, gained the support of the international community, through the provision of personnel or financial assistance, it was deemed that international actors supported the amnesty. In contrast, if there was pressure during and following the introduction of an amnesty to limit its terms and to instigate at least targeted prosecutions, this was viewed as evidence of international opposition to the law. Similarly, statements by human rights monitoring bodies on the non-compliance of amnesty laws with international law fall within this category. Finally, the military category includes both actual military action, in terms of invasion or sending in peacekeepers, as well as threatened military action and the provision of military aid, which could be either to oppose a government granting amnesty for human rights abuses, or to force warring parties to sign up to a peace agreement. For each of these categories, there is some overlap: for example, the provision of some forms of military aid could also count as economic aid.

These categories represent a continuum, and are not mutually exclusive: most situations under consideration will involve international diplomacy;

[33] To date, the literature has focused on either individual countries or regions, or on the work of the UN. See, eg, William A Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 11 *UC Davis Journal of International Law and Policy* 145; Carsten Stahn, 'United Nations peace-building, amnesties and alternative forms of justice: A change in practice?' (2002) 84 *International Review of the Red Cross* 191; Martin (n 14); Cassel (n 2); Scharf (n 7); Bertram (n 19); Thomas Buergenthal, 'The United Nations Truth Commission for El Salvador' (1994) 27 *Vanderbilt Journal of Transnational Law* 497.

some will also involve sanctions and a few actual or threatened military interventions. Furthermore, each amnesty process can inspire a reaction from several international actors, and the reaction of each actor can fall into all or some of these categories. Where organs of a state or international organisation demonstrate contradictory behaviour, whereby some departments are condemning the human rights abuses whereas other departments are helping to strengthen the military or mediate a peace agreement with amnesty provisions, the individual departments have been recorded distinctly: for example, the Security Council is recorded separately from the UN Human Rights Committee. Each amnesty process can thus have multiple entries in the Amnesty Law Database concerning the response of the international community.

Based on the available data, the distribution of the attitudes of the international community towards amnesty laws is shown in Figure 16 below. This illustrates that the international community is much more likely to support amnesty laws than to criticise them publicly. For example, over five times more amnesty processes received diplomatic support than condemnation. If this pattern is then considered in conjunction with the frequency with which international actors decline to comment publicly on amnesty laws, whether in support or condemnation, it appears that it is an aberration in the practice of the international community to intervene in the affairs of another state to criticise an amnesty. Where condemnation has occurred, it has predominantly focused on legal objections for amnesties which cover crimes under international law. As shown in Figure 17 below, this has been bolstered by the work of the treaty-monitoring bodies, which were the only category of international actor to condemn more amnesty

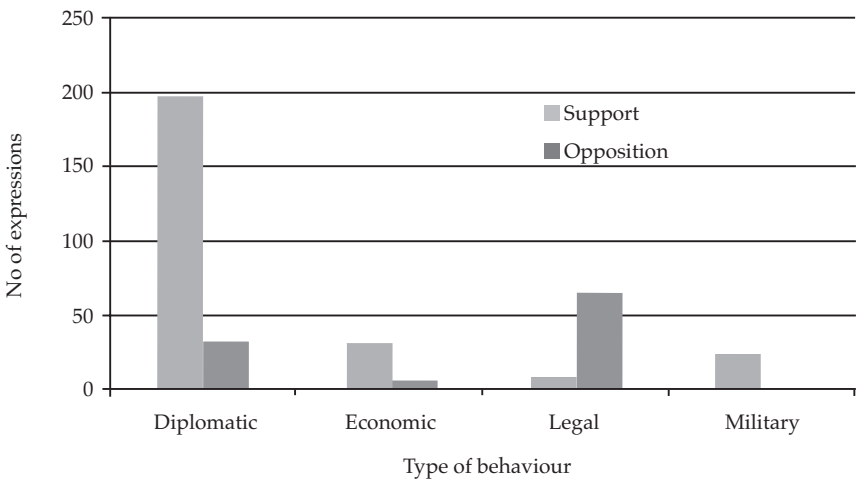

Figure 16: International attitudes towards amnesty laws

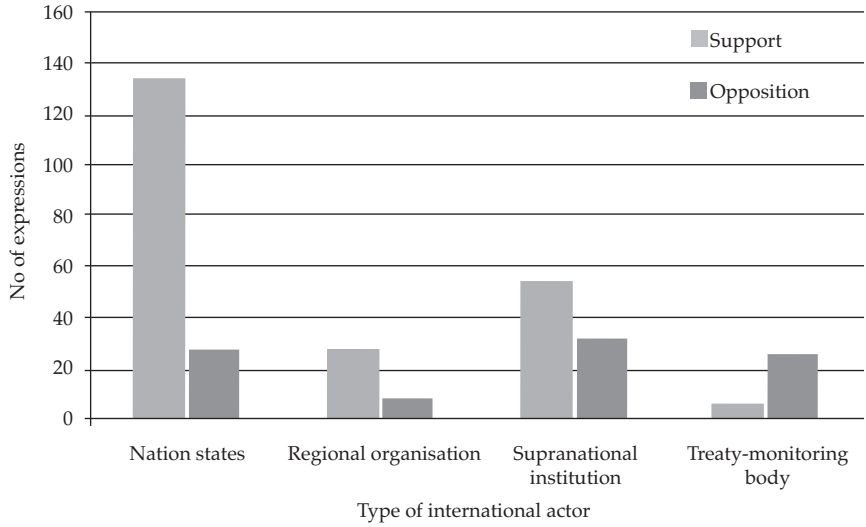

Figure 17: Attitudes by type of international actor

laws than they supported.[34] These bodies have criticised several blanket amnesty laws in their consideration of state reports or general comments, or in special reports on particular countries, as a violation of the state's obligations under international law.[35] Most of the criticism is rhetorical, however, as the treaty-monitoring bodies have limited enforcement powers.

By restricting the sample of amnesty laws to include only those amnesties which cover crimes under international law, it is possible to see that the overall patterns in the actions of different categories of international actor remain the same, as illustrated in Figure 18 below. Furthermore, for the expressions of diplomatic support of amnesties covering crimes under international law, using the information available, it appears that 86 per cent have occurred since the end of the Cold War,[36] and 43 per cent have occurred following the UN's disclaimer to the Lomé Accord.[37] Clearly, within recent years there have been different forms of amnesty, some of which have been accompanied by transitional justice mechanisms, and it is perhaps due to this that the international commun-

[34] The amnesties laws which were endorsed by the treaty-monitoring bodies were reparative amnesties that provided for the release of non-violent political prisoners.

[35] These reports will be considered in more depth below, pp 342ff. This section does not include analysis of the jurisprudence and opinions of these bodies in relation to individual cases. For a discussion of such cases, see ch 6.

[36] Taken here to be the end of 1989.

[37] Unsurprisingly the numbers of amnesties approved by supranational institutions has dropped since the change in the UN's position in 1999.

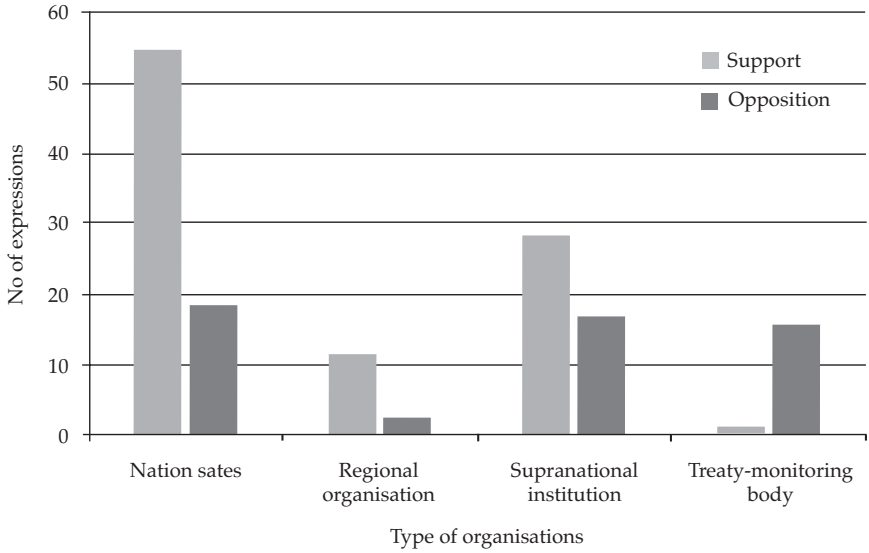

Figure 18: Attitude of international actors towards amnesties for crimes under international law

ity continues to recognise the utility of this tool in peace negotiations and political transitions.

Diplomatic Pressure

The application of diplomatic pressure is the softest form of influence and is the most frequently relied upon by the international community. Although economic pressure and threats of military action can also be viewed as forms of diplomacy, they have different implications and consequently will be discussed separately. In many cases, states and international organisations have been willing to make statements endorsing national amnesty laws and congratulating the parties concerned on their progress towards peace. For example, responding to the 1996 Angolan amnesty law which covered 'crimes against the internal security of the state and related crimes',[38] which in practice included human rights violations, the UN Special Representative for Angola, Blondin Beye, told the media he was satisfied with the amnesty and that he believed it would 'enhance mutual understanding and trust between the Angolan government and UNITA'. He added that 'doubts were now dispelled and the peace process would have a new impetus'.[39] Similarly, reacting to the 1978

[38] *Lei 11/96*, 1996 (Angl).
[39] —— ——, 'Amnesty Law Passed in Angola' *Xinhua News Agency* (Luanda 8 May 1996).

blanket amnesty for serious human rights violations[40] introduced by the military junta in Chile, the US State Department astoundingly declared that the decree was 'a positive contribution by the government of Chile to the improvement of the human rights situation in that country'.[41] More recently, the 2002 amnesty law in FYR Macedonia was described by Javier Solana, the High Representative for the Common Foreign and Security Policy of the EU, as 'courageous' and reflective of 'the will of the authorities and citizens to close the chapter of crisis and conflict'.[42] This amnesty is designed to be more limited, however, as it excludes crimes within the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia, although at the time of writing it remained to be seen how it would be applied by the Macedonian judiciary.

The 2000 Amnesty Act[43] in Uganda, which provided blanket amnesty for rebel fighters responsible for serious human rights violations, has also attracted much international support from a variety of sources. For example, the Irish Ambassador, Martin O'Fainin said in 2003 that the Amnesty Act had had many achievements and should be utilised to bring peace to northern Uganda. He described the positive contribution the law had made to encouraging the rebels to surrender.[44] Similarly, the Head of the Delegation of the European Commission to Uganda, Sigurd Illing, said:

> We have seen large groups of rebels coming out to surrender. Often they also come out with their senior commanders. This shows the amnesty law is working.[45]

Support has also come from the United Kingdom, with Hilary Benn, the then Secretary of State for International Development, claiming in 2004 that, as military efforts were failing to end the conflict, the amnesty should be renewed. He added that,

> if it were to lapse, what message would that send to those fighters who want to stop but fear the consequences?[46]

With all cases of public statements, it is important to note that rhetoric does not always mirror action, and occasionally international actors will emphasise the importance of peace and establishing democracy because its suits their strategic interests rather than because they view the process as important in itself.

[40] *Decreto Ley de Amnistía*, 1978 (Chile). See case study 5.
[41] ——, 'Amnesty Decreed' *Facts on File Inc* (12 May 1978) 351 A2.
[42] ——, 'EU Welcomes Amnesty Law for Ethnic Rebels in Macedonia with Macedonia' *Associated Press* (Brussels 2 March 2002).
[43] Amnesty Act 2000 (Uganda). See case study 2.
[44] Geresom Musamali, 'Ireland hails Uganda on Amnesty' *New Vision* (20 September 2003); Mary Karugaba, 'Irish grant Justice $4M' *New Vision* (25 September 2003).
[45] Geresom Musamali, 'Uganda; EU to Rehabilitate North' *New Vision* (Kampala 21 October 2004).
[46] ——, 'Extend Amnesty, Says British Minister' *New Vision* (Uganda 10 April 2004).

In some cases, international actors gave their assent to an amnesty before its introduction. For example, both the introduction of the 1946 Czechoslovak amnesty and the crimes it covered, which were related to the violent displacement of ethnic Germans from Czech territory at the end of World War Two, were approved by the Allies at the Potsdam Conference.[47] Similarly, the occupying Allied forces in post-World War Two Germany approved the introduction of amnesty laws in 1949 and 1954 for individuals who had committed crimes related to the Nazi regime carrying a prison sentence of less than one year.[48] Where states have been holding large numbers of political prisoners, international actors have occasionally exercised their influence by publicly demanding amnesty for those who are unfairly or illegally detained. For example, during the early 1980s, the United States made the release of political prisoners an essential condition for the warming of relations with Poland, which contributed to an amnesty being introduced in 1984.[49]

In addition to voicing opinions or applying pressure on domestic governments to influence their decisions on amnesty, international actors have often been directly involved in decisions to grant amnesty to combatants through mediating peace agreements. Trumbull has argued such involvement is a significant form of state practice, as

> the participation of third party countries in negotiating amnesty suggests that these states do not believe that amnesties violate customary international law.[50]

One of the most discussed cases of mediation was the involvement of the UN, OAS and the United States in the Haitian crisis, and it is particularly useful for illustrative purposes. As discussed in Case Study 12, following the military coup in Haiti in 1991, the international community brokered a peace deal designed to enable the elected president to return from exile. The period of military rule, and much of the Haiti's previous history, was characterised by severe human rights violations as recognised by US President Bill Clinton on 15 September 1994 when he told a national radio and television audience that the military leaders in Haiti are 'plainly the most brutal, the most violent regime anywhere in our

[47] Jean Bethke Elshtain, 'Politics and Forgiveness' in Nigel Biggar (ed), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press, Washington, DC 2003) 54.

[48] Norbert Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration* (Columbia University Press, New York 2002).

[49] ——, 'US Holds Fire on Lifting Sanctions on Poland / Political Prisoners Amnesty Welcomed by US' *The Guardian* (24 July 1984); Eric Bourne, 'Poland Awaits West's Reaction to Amnesty for Political Prisoners' *Christian Science Monitor* (23 July 1984) 7; Michael T Kaufman, 'Poland Criticizes US Response to Amnesty' *New York Times* (Warsaw 25 July 1984) 11.

[50] Charles P Trumbull, 'Giving Amnesties a Second Chance' (2007) 25 *Berkeley Journal of International Law* 283, 297.

hemisphere',[51] and that their campaign of violence threatened the lives of thousands of Haitians. However, only three days later, President Clinton told the American people that

> providing the Haitian military leaders amnesty from prosecution for their crimes was 'a good agreement for the United States and for Haiti'.[52]

This seeming contradiction was echoed by the approach of the Security Council, which at the same time that it issued resolutions establishing the ad hoc tribunals for Yugoslavia and Rwanda, approved the Haitian peace deal and its amnesty clause, which allowed those responsible for atrocities to go into exile, describing the solution adopted as 'the only valid framework for resolving the crisis in Haiti'.[53] The strong international pressure on the Haitian president to accept the amnesty provisions even extended to the Office of the Special Envoy of the UN and OAS to Haiti supplying him with copies of

> amnesty laws from other countries as possible models—including laws criticized, and eventually formally condemned, as contrary to international law—and drafted amnesty bills for parliament.[54]

There are several reasons why the international community, particularly the United States, became so heavily involved in the Haitian crisis. It had become a major political issue in the US due to: the large numbers of boat people that had been arriving on the coasts of Florida looking for asylum; the large Haitian-American community; liberal outrage at the treatment of the asylum seekers; and the 'solidarity of black activists with the first independent black republic'.[55] Thus, whilst the United States may have recognised that crimes under international law were occurring, its motivation for action was primarily internal American politics. Under these circumstances, it seemed natural to pursue the most pragmatic solution, rather than risk prolonging the crisis.

As discussed in Case Study 13, the international community also became heavily involved in the peace negotiations in Sierra Leone. First with the unsuccessful 1996 Abidjan Accord, and then with the 1999 Lomé Accord, both of which provided blanket amnesty for combatants and human rights abusers. The 1996 Abidjan Accord was negotiated under the auspices of the UN, OAU, ECOWAS, the Commonwealth, and Western governments, and at this time, the concept of amnesty was not

[51] Scharf (n 7) 2.
[52] *Ibid* 2.
[53] Stahn (n 33) 193–4.
[54] Ian Martin, 'Justice and Reconciliation: Responsibilities and Dilemmas of Peace-makers and Peace-builders' in Alice Henkin (ed), *The Legacy of Abuse: Confronting the Past, Facing the Future* (Aspen Institute, Washington, DC 2002) 81.
[55] Martin (n 14) 725.

contentious. However, by the time the Lomé Accords was completed, the attitude of the UN had changed, and upon signing the agreement, the Special Representative of the Secretary-General of the UN, Francis Okelo, appended 'a hand-written disclaimer to the agreement',[56] stating that

> the UN holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.[57]

The approach was later justified by the UN Secretary General in his report to the Security Council:

> As in other peace accords, many compromises were necessary in the Lomé Peace Agreement. As a result, some of the terms under which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity, which inspired the creation of the UN Tribunals for Rwanda and the Former Yugoslavia, and the future ICC. Hence the instruction to my Special Representative to enter a reservation when he signed the peace agreement, explicitly stating that, for the UN, the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law. At the same time, the government and people of Sierra Leone should be allowed this opportunity to realise their best and only hope of ending their long and brutal conflict.[58]

In this statement, Kofi Annan, seems to recognise that certain forms of amnesty can contribute to peace and stability, and the only objection of the UN concerned the scope of the law. Considering that the UN assented to sign the accord, however, the legal weight of its disclaimer was unclear, and due to the subsequent collapse of this process, remained untested.

The approach of other members of the international community to the Lomé Accord amnesty was even more tolerant. The representative of the United Kingdom on the Security Council said:

> The Lomé Agreement is not perfect. The inclusion of a blanket amnesty for those who have committed appalling atrocities has rightly caused concern. But this was one of the many hard choices the government and people of Sierra Leone had to make in the interests of a workable agreement.[59]

[56] Simon Chesterman, 'Rough Justice: Establishing the Rule of Law in Post-Conflict Territories' (2005) 20 *Ohio State Journal of Dispute Resolution* 69, 75–6.

[57] Schabas (n 33) 148–9.

[58] UNSC 'Seventh Report of the Secretary General on the United Nations Observer Mission in Sierra Leone' (30 July 1999) UN Doc S/1999/836 [54]. Cited in Schabas (n 33) 149.

[59] UN Press Release 'Security Council Expands Role Of United Nations In Sierra Leone; More Military Personnel To Join Strengthened Observer Mission' (20 August 1999) UN Doc SC/6714.

Case Study 13: Divergence in UN attitudes: The experience of amnesty in Sierra Leone

The conflict in Sierra Leone began in 1991 when the Revolutionary United Front (RUF) armed militia entered Sierra Leone from Liberia with the proclaimed aim of ending the corrupt, authoritarian rule of the All Peoples' Congress (APC). This led to a series of coups and a civil war which was characterised by extreme brutality. During this conflict, the RUF fought to gain control of the diamond mines using a campaign of terror against the civilian population in which they kidnapped, raped and mutilated thousands of civilians, including large numbers of children.

Following the 1996 election of President Ahmed Tejan Kabbah and the government's use of the private security company, Executive Outcomes, the RUF was substantially weakened and pushed out of the main diamond-producing districts. This contributed to their decision to engage in peace negotiations. Before the talks began, the newly elected government released RUF prisoners as a gesture of good will and pledged to grant 'general amnesty to all members of the RUF in the name of peace'.[60] This promise was reflected in the resulting Abidjan Peace Accord 1996 in which the government promised to 'ensure that no official or judicial action is taken against any member of the RUF/SL in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement'. The government also pledged to introduce measures to reintegrate the former combatants into the armed forces and police, and permit the RUF to become a political party. However, despite this process, violent skirmishes had continued throughout the negotiations, and following the agreement, President Kabbah refused to allow the UN to deploy peacekeepers. This violence culminated in an attempted coup in May 1997 by the armed forces (AFRC), in which the RUF participated, and the Abidjan Accord collapsed.

Between the collapse of the Abidjan Peace Accord and the agreement of the Lomé Accord, Sierra Leone continued to suffer violent conflict. Eventually, following the January 1999 attack on Freetown, both domestic and international pressure began to push towards restarting formal negotiations. Following a ceasefire being agreed between the government and the RUF on 18 May 1999, formal talks began six days later. The result was the Lomé Accord, signed on 7 July 1999. This agreement mirrored its predecessor by granting 'absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement', and pledged that the government would take 'no official or judicial action' against any of the combatants. The Agreement also contained provisions for the disarmament and reintegration of the former combatants, and for the transformation of the RUF

[60] Lansana Gberie, 'First Stages on the Road to Peace: The Abidjan Process (1995–96)' (September 2000) available at <http://www.c-r.org/our-work/accord/sierra-leone/first-stages.php> last accessed 8 October 2007.

into a political party, but it exceeded the Abidjan Accord by earmarking specific cabinet positions for the RUF, including notably the Chairmanship of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development for RUF leader, Foday Sankoh.

The Lomé Accord differed from its predecessor, however, not just by enhancing the provisions for the RUF, but by also offering acknowledgement of the suffering of victims. The latter accord provided for the creation of a special fund to rehabilitate victims, and for the creation of a truth commission 'to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation'.

The Lomé Accord was slow to take effect and violence continued until May 2001. The ongoing conflict prompted a change in the strategy of the Sierra Leonean government, which abandoned the amnesty process in favour of creating the Special Court of Sierra Leone, with UN assistance. This court has since found that the amnesty was no longer valid, as the violence had continued, and that furthermore the amnesty could not cover crimes under international law.[61] Nonetheless, other aspects of the Lomé Accord were implemented and the Truth and Reconciliation Commission produced its report in October 2004.

***Sources**: Tim Kelsall, 'Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone (2005) 27 Human Rights Quarterly 361; Rosalind Shaw, 'Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone', Special Report 130 (United States Institute of Peace, Washington DC 2005); Gabriela Echeverria, 'Amnesties Can Not Bar Prosecution of International Crimes—A Ruling of the Sierra Leone Special Court' (Redress, London 7 April 2004); William A Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 11 UC Davis Journal of International Law and Policy 145; Truth and Reconciliation Commission of Sierra Leone, 'The Final Report of the Truth and Reconciliation Commission of Sierra Leone' (5 October 2004); Daniel J Macaluso, 'Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone' (2001) 27 Brooklyn Journal of International Law 347; David Francis, 'Torturous Path to Peace: The Lomé Agreement and Postwar Peacebuilding in Sierra Leone' (2000) 31 Security Dialogue 357; Karen Gallagher, 'No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone' (2000) 23 Thomas Jefferson Law Review 149; Sarah Williams, 'Amnesties in International Law: The Experience of the Special Court of Sierra Leone' (2005) 5 Human Rights Law Review 271. See also the resources on Sierra Leone on the Conciliation Resources website, available at <http://www.c-r.org/our-work/accord/sierra-leone/index.php> last accessed 8 October 2007.*

[61] For a discussion of the case law of the Special Court of Sierra Leone, see ch 6.

Britain, which had previously spent £30 million on efforts to keep President Kabbah in power since 1998, was eager to resolve the crisis, and therefore urged the Sierra Leonean president to accept the amnesty.[62] Similarly, Nigeria's military contribution to the war effort, through the ECOMOG peacekeepers, had been costing its government $1 million per day, and it was therefore under intense domestic pressure to find a solution.[63] In addition, the United States, which had spent $250 million on humanitarian aid, ran out of patience and pushed for a peace agreement including amnesty.[64] The amnesty was later justified by representatives of the American administration. For example, in October 1999, US Secretary of State, Madeleine Albright described the amnesty as the price of peace that had been so desperately needed, and claimed that 'it was very important to seize the moment'.[65] This shows that the international actors' involvement in the peace negotiations was influenced by a desire to alleviate domestic political pressures and remove itself from a difficult situation, rather than simply a sense of acting under legal imperatives.

In recent years, the UN has maintained its standpoint that it will not accept amnesty for crimes under international law.[66] The UN Secretary General has established the *UN Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution*, which state that:

> Demands for amnesty may be made on behalf of different elements. It may be necessary and proper for immunity from prosecution to be granted to members of the armed opposition seeking reintegration into society as part of a national reconciliation process. Government negotiators may seek endorsement of self-amnesty proposals; however, the UN cannot condone amnesties regarding war crimes, crimes against humanity and genocide or foster those that violate relevant treaty obligations of the parties in this field.[67]

The OHCHR is currently expanding this guidance for UN negotiators by developing a *Rule of Law Policy Tool on Amnesties*.[68] The OHCHR's position is that amnesty should be prohibited for crimes under international law, and that where prosecutions are not immediately possible for serious human rights violations, 'the door should be kept open' for prosecutions

[62] Corinna Schuler, 'Sierra Leone—A Wrenching Peace: Sierra Leone's "See No Evil" Pact' *Christian Science Monitor* (Freetown 15 September 1999).

[63] *Ibid*.

[64] *Ibid*.

[65] Karl Vick, 'Sierra Leone's Unjust Peace; At Sobering Stop, Albright Defends Amnesty for Rebels' *The Washington Post* (19 October 1999).

[66] The UN has reiterated its refusal to recognise amnesties for international crimes when mediating peace agreements in Angola in 2002 and Liberia in 2003.

[67] Cited in Carolyn Bull, 'Amnesty' (Interim Office, Commission for Reception, Truth and Reconciliation in East Timor, November 2001).

[68] OHCHR, *Rule of Law Policy Tool on Amnesties*, September 2007 (*prepared by* Diane Orentlicher) (draft on file with the author).

at a later date.[69] It is unclear how the UN will implement this position in practice: for example, whether they will refuse to witness peace agreements that contain amnesty provisions or whether they will add a disclaimer, as they did in Sierra Leone. Furthermore, the impact of this position on the practice of other international actors is debatable. As shown in chapter 3, since the adoption the UN standpoint in 1999, no clear change in state practice has emerged, possibly because the UN is not involved in all amnesty deliberations, particularly not amnesties offered unilaterally by national governments. Furthermore, the role of the UN as a mediator appears to have declined somewhat in the face of competition from regional intergovernmental bodies, individual states and NGOs all offering mediation services to war-torn states.

Public statements condemning amnesty have also been made by human rights monitoring bodies, drawing attention to the risks attached to grants of amnesty. For example, when discussing the 1990 amnesty for political crimes in Benin,[70] the UN Committee Against Torture expressed its concern that the amnesty law 'might give rise to impunity'.[71] Similarly, the UN Human Rights Committee cautioned that the 1994 amnesty law for political crimes in Togo 'is likely to reinforce a culture of impunity'.[72] More recently, the US Department of State criticised the Slovak government for amnestying the officials who frustrated the referendum on Slovakia's entry into NATO in May 1997 and those who were involved in kidnapping the son of a former president in August 1995. The State Department described the amnesty as undermining the rule of law.[73] In addition to outright condemnations of amnesty laws, there have been more targeted criticisms, which have aimed to encourage transition governments to alter some sections of their amnesty laws. For example, the United States consistently criticised amnesty laws in El Salvador which offered immunity to individuals accused of killing US citizens and religious clergy. It is also interesting to note that some international criticism of amnesties only arises after many years have passed. For example, before the accession of the Czech Republic to the European Union, there was a great deal of controversy surrounding the continued legality of Czechoslovakia's 1946 amnesty law.[74]

[69] This position was explained at an Expert Meeting to discuss the draft tool, OHCHR, Geneva, 27 September 2007.

[70] *Loi no 90/028 du 9 octobre 1990 portant amnistie des faits autres que des faits de droit commun commis du 26 octobre 1972 jusqu'à la date de promulgation de la présente loi*, 1990 (Benin).

[71] UN Committee Against Torture, '*Compte Rendu Analytique de la première partie de la 493e séance: Benin*' (26 November 2001) UN Doc CAT/C/SR 493 [5].

[72] UNHRC, 'Concluding Observations of the Human Rights Committee: Togo' (28 November 2002) UN Doc CCPR/CO/76/TGO.

[73] US Department of State, 'Country Report on Human Rights Practices 1998: Slovak Republic' (26 February 1999).

[74] Jochen A Frowein, Ulf Bernitz and QC Kingsland, 'Legal Opinion on the Benes-Decrees and the Accession of the Czech Republic to the European Union' (European Parliament,

Where states are willing to criticise amnesty and impunity in certain cases, they may be more willing to overlook it in others, particularly where their own country has a legacy of past crimes. For example, in Security Council debates on post-conflict justice, countries such as France, Spain and Algeria, all emphasised the importance of prosecutions for serious human rights violations.[75] Yet neither France nor Spain has addressed its own history of human rights violations, and Algeria has introduced two amnesty laws within the past decade, albeit with some limited restrictions on the crimes to which they apply. Even where states are willing to make a clear condemnation of human rights abuses, they are often reluctant to offer any practical help, or even honour pledges of support that they make. This reluctance can be shown by the lack of concerted international activity following the declarations by the United States Congress that the crimes committed in Darfur amounted to genocide.[76]

Economic Pressure

The threat or use of economic pressure against transitional states is becoming an ever more powerful tool as globalisation develops. International actors can impose such pressure in various ways. First, human rights conditions, such as the release of political prisoners, can be attached to agreements for favourable trade status, or aid, or debt relief. This is argued to have influenced the introduction of the 1990 Romanian amnesty, as the United States examined Romania's human rights record very closely when considering the country's application for most favoured nation trading status, requiring Romania to release its political prisoners before reaping the financial rewards such status would bring.[77] Similarly, the 2002 amnesty law[78] in the FYR Macedonia was introduced just days before an international donors' conference, after the donors made it clear that the amnesty was a prerequisite for them to contribute to reconstruction programmes. The hope of receiving foreign aid was also clearly a motivating factor for the Polish government in 1983 and 1984, which publicly

October 2002); European Commission, 'The Czechoslovak Presidential Decrees in the Light of the Acquis Communitaire: Summary Findings of the Commission Services' (14 October 2002); ——, 'Schuessel praises planned Czech Compensation, dislikes Decrees', *Czech News Agency* (12 December 2003); ——, 'The Sudeten Germans' Forgotten Fate', *BBC News* (7 February 2004); ——, 'Discussion on Benes Decrees not to end with EU Entry—Stoiber', *Czech News Agency* (30 May 2004).

[75] UNSC, 'In Presidential statement, Security Council reaffirms "vital importance" of United Nations' role in post-conflict reconciliation' (27 January 2004) Press release SC/7990.

[76] HR Con Res 467, 108th Congress (2004).

[77] George Jahn, 'Government Announces Charges Against Ceausescu Regime Figures' *Associated Press* (Bucharest 15 January 1990).

[78] Law on Amnesty, 2002 (Maced).

expressed its dismay when financial rewards were not immediately forthcoming following its introduction of amnesties for political prisoners.[79] States may be willing to adhere to these conditions, due to a recognition of the fickleness of the international community. Typically, transitional states only have a limited window of opportunity in which they might obtain financial support from the international community before its focus changes to another problem.

In other cases, international actors have been willing to provide funding to implement amnesty laws, and demobilise and resettle former combatants.[80] Many of these programmes have been funded by the World Bank, as well as by states. They can take various forms: for example, in Uganda the World Bank asked the government to extend the amnesty before it released $3.6 million to the Amnesty Commission for resettling former rebels;[81] similarly, Britain provided £10 million to northern Uganda between 2002 and 2004, part of which funded a radio station on which former LRA members broadcast to their former comrades to assure them that their security would be guaranteed if they surrendered.[82]

In other cases, aid has been conditioned on not introducing amnesties or restricting the scope of amnesty laws. For example, in 1987 US aid to El Salvador was withdrawn to protest against the granting of amnesty to individuals accused of killing US citizens.[83] Similarly, in 1993 the United States delayed $11 million of aid to El Salvador until the government had complied with the recommendations of the truth commission.[84] In other cases, foreign aid has been given to support greater accountability through the work of truth commissions, formal inquiries or prosecutions. For example, the Salvadorean truth commission received $1 million, some 40 per cent of its total budget, from the United States government.[85] Similarly, the South African TRC received financial contributions from many states to the President's Fund, a fund set up to help victims with

[79] Kaufman (n 49).

[80] For more discussion of disarmament, demobilisation and reintegration programmes, see ch 10.

[81] Frank Nyakairu, 'World Bank holds Funds over Rebel Amnesty' *The Monitor* (11 January 2004).

[82] Andrew Woodcock, 'Benn Holds Talks on Rebel Conflict in Uganda' *Press Association* (6 April 2004).

[83] *Ley de Amnistía para el Logro de la Reconciliación Nacional* 1987 grants amnesty to political and to common crimes where they were committed by no less than twenty people. This is a broad provision that extended to crimes against humanity.

[84] The Salvadorean truth commission's report said it could not recommend prosecution of those responsible for crimes under international law, as 'the present Salvadoran judicial system is incapable of assessing and carrying out punishment'. Instead, it recommended a series of institutional and legal reforms, lustration and vetting, and compensation and memorialisation for victims. Few of these recommendations were subsequently implemented, see Segovia (n 17).

[85] Neil J Kritz, 'The Dilemmas of Transitional Justice' in Neil J Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace, Washington, DC 1995).

reparation and rehabilitation. Furthermore, several countries agreed to second personnel and pay their salaries and expenses.[86]

The final form of economic pressure available to the international community is the imposition of economic sanctions. These sanctions can be introduced to encourage combatants to come to the negotiating table or to force a despotic ruler from power. Alternatively, they can be introduced following the signing of a peace treaty if a party reneges on its commitments. For example, during the Haitian crisis, the Security Council introduced trade sanctions, plus an oil and weapons embargo, following the failure of the military junta to abide by its commitments to seek a resolution to the crisis.[87] This form of sanction is, however, problematic, as it risks further harming already beleaguered populations, and it is often ignored by the states that are meant to implement it. In recent years, attempts have been made to counteract the more negative consequences of economic sanctions by relying more often on 'targeted sanctions', such as travel bans or freezing the assets of those leaders or members of the elite believed to be responsible for human rights violations. This approach was pursued in Angola, where following the failure of the UNITA rebel group to comply with the terms of the Lusaka Protocol, the UN Security Council imposed asset freezes and travel bans on senior UNITA officials, along with an embargo on diamonds originating in UNITA-held areas.[88] This more targeted approach is attractive, as it has fewer humanitarian consequences and 'by isolating violators of international standards and laws, even modest sanctions measures . . . can serve an important symbolic purpose'.[89]

Legal Pressure

Since the Second World War, the legal stance of the international community towards human rights has undergone massive change, with states coming together to criminalise the most atrocious crimes and to establish institutions to punish those who commit them. The general developments in the fight against impunity have been articulated in many documents, such as General Comment No 20 of the UN Human Rights Committee (UNHRC) which stated, with reference to acts of torture and cruel treatment or punishment, that

[86] Alex Boraine, 'Truth and Reconciliation in Times of Conflict: The South African Model' (Neelan Tiruchelvam Memorial Lecture delivered at the BMICH, 29 July 2002).

[87] Martin (n 14) 714.

[88] UNSC Res 1127 (28 August 1997) UN Doc S/RES/1127.

[89] UN, *A More Secure World: Our Shared Responsibility—Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* (United Nations 2004) [179].

> [a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[90]

The use of the 'generally' in this provision seems to recognise that amnesties might be acceptable in certain circumstances. However, in its General Comment No 31 of 2004 the UNHRC asserted that 'states parties must ensure that those responsible' for violations such as torture, summary and arbitrary killing and enforced disappearances 'are brought to justice'.[91] It continued:

> where *public officials or state agents* have committed violations of the Covenant rights . . . the State parties may not relieve perpetrators from personal responsibility, as has occurred with amnesties (emphasis added)[92]

The general comment did not, however, refer directly to amnesties for violations committed by non-state armed groups.

The issue of amnesties has also been considered by the UN Commission on Human Rights, which in 2002, emphasised

> the importance of taking all necessary and possible steps to hold accountable perpetrators, including their accomplices, of violations of international human rights and humanitarian law.

It also recognised

> that amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes and urges States to take action in accordance with their obligations under international law.[93]

This formulation, whilst requiring action from states, seems to recognise the difficulties faced by transitional states, when it required only that states take 'all . . . possible steps'. Furthermore, it does not stipulate the manner in which perpetrators must be held accountable. The commission became more restrictive in its formulations by 2005, when it stated that it:

> [r]ecognizes that States must prosecute or extradite perpetrators, including accomplices, of international crimes such as genocide, crimes against humanity, war crimes and torture in accordance with their international obligations in

[90] UNHRC 'General Comment 20: Replaces general comment 7 concerning punishment of torture and cruel treatment or punishment' (10 March 1992) UN Doc CCPR General Comment 20 [15].

[91] UNHRC 'General Comment 31: Nature of General Legal Obligation imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [18].

[92] *Ibid* [18].

[93] UNCHR 'Impunity' (25 April 2002) Res 2002/79 [2].

> order to bring them to justice, and urges all States to take effective measures to implement these obligations;[94]
>
> Also recognizes that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes, urges States to take action in accordance with their obligations under international law and welcomes the lifting, waiving, or nullification of amnesties and other immunities, and recognizes as well the Secretary-General's conclusion that United Nations-endorsed peace agreements can never promise amnesties for genocide, crimes against humanity, war crimes, or gross violations of human rights.[95]

Furthermore, in recent years, the *Joinet Principles*, as updated by Orentlicher, represent efforts at the United Nations to highlight the practice of states in combating impunity, particularly through prosecutions, rather than more restorative mechanisms.[96]

Whilst these developments to combat impunity are positive, as we have seen previously, their terms have not been uniformly applied. Indeed, some actors will in one instance push for prosecutions for serious crimes occurring in a conflict, whilst at the same time advocating amnesty to resolve a different armed struggle. For example, although Britain supported the indictment of Milošević by the ICTY for his responsibility for the crimes under international law committed during the Balkan wars, as discussed above, it also supported the Lomé Accord 1999, which granted blanket amnesty for the crimes under international law committed during the conflict in Sierra Leone. Furthermore, as we have seen above, other international actors have also remained willing to support amnesties for international crimes after 1999.

Even where international actors have tried to encourage accountability for crimes under international law, they do not appear to have considered it necessary for every perpetrator to be tried. Indeed, as discussed in chapter 6, the UN Security Council has restricted the prosecutorial policy of the ad hoc tribunals to investigating only those who are 'most responsible'. The reluctance of international actors to genuinely tackle serious human rights abuses can also be seen in the small number of states that made their prisons available to the ICTY.[97] As discussed previously, some states have

[94] UNCHR 'Impunity' (21 April 2005) Res 2005/81 [2].

[95] *Ibid* [3].

[96] UNCHR 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 (*prepared by* Diane Orentlicher).

[97] Mary Margaret Penrose, 'It's Good to be the King! Prosecuting Heads of State and Former Heads of State under International Law' (2000) 39 *Columbia Journal of Transnational Law* 193, 211–14. See also Dirk Van Zyl Smit, 'International Imprisonment' (2005) 54 *International and Comparative Legal Quarterly* 357, 375.

even been willing to offer former dictators shelter within their borders.[98] The reluctance to completely rule out the possibility of amnesty for serious human rights violations was also evident at the Rome Conference, where some delegates argued

> that the statute should not permit the court to intercede in the administrative (parole) or political-decision making process (pardons, amnesties) of a state.[99]

This view, although not strong enough to force the inclusion of a provision recognising amnesties into the statute, nonetheless succeeded in blocking any attempt to prohibit them.[100]

Even where states have been willing to contribute to establishing a human rights climate and the rule of law following periods of mass violence, those efforts have generally focused on trying to prevent abuses occurring in the future, through the reform of the judicial system, the establishment of training programmes for legal and security personnel, the amendment of domestic legislation, and the creation of domestic institutions to protect human rights, rather than by addressing the crimes of past.

Where international actors decide to employ legal tools to oppose an amnesty within a transitional state, they have a number of possible approaches available to them. First, they could establish an ad hoc or hybrid tribunal to address the crimes, although to be effective this would usually require the consent of the territorial state or a UN Security Council resolution.[101] As discussed in chapter 6, this approach has been followed in several states in recent years, including Sierra Leone, where, following the collapse of the peace process, the Security Council authorised the establishment of a special court in partnership with the Sierra Leonean government.[102] In that instance, the UN Secretary General justified the establishment of the court, despite the existence of a blanket amnesty for its potential indictees, by referring to the disclaimer made by his Special Representative at the signing of the Lomé Accord. From this perspective, the establishment of the court to try those responsible for crimes under

[98] Kritz (n 85) xix. See, eg, Hissène Habré in Senegal; Jean-Claude ('Baby Doc') Duvalier in France; Idi Amin in Saudi Arabia; Fujimori in Japan; Charles Taylor in Nigeria; Menguistu Haile Mariam in Zimbabwe. For a discussion of exile as an option in peace negotiations, see Leila Nadya Sadat, 'Exile, Amnesty and International Law' (2006) 81 *Notre Dame Law Review* 955.

[99] Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Michigan Journal of International Law* 869, 941–2.

[100] For a detailed discussion of the status of amnesties under the Rome Statute, see ch 6.

[101] As discussed in ch 6 the UN Security Council can also refer situations to the International Criminal Court under its Chapter VII powers.

[102] UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315. For an overview of the negotiations leading to the creation of the court see Schabas (n 33), and for greater discussion of the role of the UN in establishing hybrid tribunals see Stahn (n 33).

international law is consistent with the view that the amnesty could not shelter individuals responsible for such actions. This view, however, was not the understanding on which the parties to the conflict had signed the agreement, and therefore, if the peace process had not collapsed, it is doubtful that the court could have been established. Furthermore, as discussed in chapter 7, states can also facilitate prosecutions by enacting legislation to grant their domestic courts jurisdiction to conduct universal jurisdiction investigations. However, neither these prosecutions nor those before international courts offers a realistic possibility of holding all perpetrators to account.

International actors have also tried to foster accountability by reforming and strengthening 'indigenous practices, laws, and institutions that existed before the conflict'.[103] Here, the goal is to hold perpetrators accountable before national courts or traditional justice processes. This can often prove very difficult in the aftermath of mass violence and, in order to facilitate it, international actors will need to provide financial resources and training programmes,[104] which will take time and delay the prosecutions, although without such programmes it is unlikely that the prosecutions could occur. In addition, once the trials are established, the international community will often need to co-operate by providing evidence, extraditing suspects, and tracing and returning assets which were removed from the country by the former elite.[105] Furthermore, where an amnesty is introduced, the international community can contribute by monitoring how it is enforced by national courts or commissions. For example, in 1999 the UNHCR promoted the establishment of a monitoring framework in the Republika Srpska to assess the level of implementation of the entity's amnesty law.[106]

International actors have also pursued more broadly-based solutions designed to address all offenders, rather than simply those who are 'most responsible', by either establishing directly or providing support for alternative transitional justice mechanisms, such as truth commissions. For example, the UN Commission for Truth in El Salvador was operated, staffed, and financed by international actors, and the commissioners were

[103] Michèle Flournoy and Michael Pan, 'Dealing with Demons: Justice and Reconciliation' (2002) 25 *Washington Quarterly* 111, 112.

[104] For example, in November 2003, the European Commission and six other donors initiated a six-month project to help restore the criminal justice system in the Bunia region of the DRC. This short-term funding helped judges and investigative judges start working again years after the regional court had been closed, but there was no capable police force able to carry out investigations, and there was a lack of protection for witnesses who came forward to testify.

[105] Kritz (n 85) xix.

[106] Law on Changes and Amendments to the Law on Amnesty, 1999 (Republika Srpska [Bosn and Herz]).

named by the United Nations.[107] More recently, the UN, in its role as transitional administrator was heavily involved in establishing the Commission for Reception, Truth and Reconciliation in Timor-Leste,[108] and indeed the legal basis for the commission came from a UN regulation rather than national legislation, although it was symbolically approved by the pre-national legislature of the time. The UN designed the commission with the help of human rights organisations, international experts and local representatives.[109] This approach shows that the UN is willing to use different mechanisms to address the divergent levels of culpability among offenders.

The issue of amnesty has been most consistently addressed by the treaty-monitoring bodies of the UN and OAS in their annual reports and country reports. These bodies have often taken a different approach to the other parts of their organisation. For example, the OAS has mediated peace agreements with amnesty provisions which were subsequently criticised by the Inter-American Commission on Human Rights. The criticisms of the Inter-American Commission began in a tentative fashion, such as its comments on the 1986 Guatemalan amnesty law for crimes under international law, which the commission felt

> could hinder and render inefficient the actions taken by the judicial entity in charge of investigating and, if such is the case, sanctioning, the authors of subversive and anti-subversive terrorist acts.[110]

Later in the same report, the commission highlighted the necessity of any amnesty decision having democratic legitimacy.[111] Subsequently, when confronted with the 1989 Colombian amnesty law,[112] the commission became more strident, proclaiming that

[107] Mike Kaye, 'The Role of Truth Commissions in the Search for Justice, Reconciliation and Democratisation: The Salvadorean and Honduran Cases' (1997) 29 *Journal of Latin American Studies* 963; Gregory Jowdy, 'Truth Commissions in El Salvador and Guatemala: A Proposal for Truth in Guatemala' (1997) 17 *BC Third World Law Journal* 285; Mark Ensalaco, 'Truth Commissions for Chile and El Salvador—A Report and Assessment' (1994) 16 *Human Rights Quarterly* 656; Buergenthal (n 33); David Holiday, 'Building Peace: Preliminary Lessons from El Salvador' (1993) 46 *Journal of International Affairs* 415; Rodolfo Cardenal, 'Justice in Post-Cold War El Salvador: The Role of the Truth Commission' (1992) 9 *Journal of Third World Studies* 313.

[108] Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, 2001 (E Timor).

[109] Flournoy and Pan (n 103) 112.

[110] Inter-Am CHR, 'Annual Report 1985–6: Guatemala' (26 September 1986) OEA/Ser L/V/II.68.

[111] Inter-Am CHR, 'Annual Report 1985–6: Chapter V 'Areas in which Steps need to be taken towards full Observance of the Human Rights set forth in the American Declaration of Human Rights and Duties of Man and the American Convention of Human Rights'' (26 September 1986) OEA/SerL/V/II.68.

[112] *Ley 77 de 1989* (Colom). This law excluded murders committed outside of combat, with cruelty, or rendering victims indefensible, or acts of ferociousness or barbarity.

> no political amnesty can be ordered in the case of such egregious crimes and crimes against humanity; enforced disappearance is among those crimes for which there can be neither an amnesty nor a statute of limitations.[113]

The commission has also asserted that the 1992 Salvadorean amnesty, which exempted individuals named by the commission from responsibility for grave violations, nonetheless endangered the work of the truth commission. The Inter-American Commission further argued that despite the amnesty, the state was still subject to its international obligations.[114] In the commission's subsequent reports on El Salvador in 1994 and 1995, the criticism of the amnesty process was strengthened.[115] For example, the commission stated 'regardless of any necessity that the peace negotiations might pose and irrespective of purely political considerations', the amnesty violated the state's international obligations:

> because it makes possible a 'reciprocal amnesty' without first acknowledging responsibility (despite the recommendations of the truth commission); because it applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims.[116]

In its 1995 report, the commission went so far as to recommend that the Salvadorean government repeal the amnesty law, 'in order to investigate and punish those responsible for violating the basic rights of persons and to compensate the victims'.[117] The commission also later argued that the Peruvian government repeal its 1995 amnesty law for crimes under international law.[118] More recently, in considering the 2002 Colombian amnesty law, which excludes those who are under investigation or on trial for serious crimes,[119] the commission argued that, although

> granting an amnesty to persons responsible for the crime of taking up arms against the state may be a useful tool in the context of effort to achieve peace,

amnesties for 'crimes of international law impede access to justice and render ineffective' the state's obligations under the convention.[120]

[113] Inter-Am CHR, 'Second Report on the Situation of Human Rights in Colombia' (14 October 1993) OEA/Ser L/V/II.84.

[114] Inter-Am CHR, 'Report on the Situation of Human Rights in the Republic of Colombia' (30 June 1981) OEA/Ser L/V/II.53 doc 22.

[115] A further amnesty law was introduced in El Salvador in 1993, see Case Study 10.

[116] Inter-Am CHR, 'Report on the Situation of Human Rights in El Salvador' (11 February 1994) OEA/Ser L/V 85 doc 28 Review

[117] Inter-Am CHR, 'Annual Report of the Inter-American Commission on Human Rights 1994: El Salvador' (17 February 1995) OEA/Ser L/V 88 doc 9 Review

[118] Inter-Am CHR, 'Annual Report 2001—Chapter V(d) Peru' (16 April 2002) OEA/Ser/L/V/II 114 doc 5 Review

[119] *Ley 728*, 2002 (Colom) art 21. Among the large numbers of combatants in Colombia, very few would be under formal investigation or on trial and therefore in practice this restriction to the amnesty does not exclude many offenders who are responsible for human rights violations.

[120] Inter-Am CHR, 'Report on Demobilization in Colombia' (13 December 2004) OEA/Ser L/V/II.120.

The UN Human Rights Committee has similarly made progressively stringent pronouncements on amnesty laws when considering state reports. For example, in 1992, when considering the 1988 Senegalese amnesty, which benefited some individuals who were responsible for serious human rights violations, the committee proclaimed that

> [a]mnesty should not be used as a means to ensure impunity of state officials responsible for violations of human rights and that all such violations, especially torture, extra-judicial executions and ill-treatment of detainees should be investigated and those responsible for them tried and punished.[121]

In the following year, when considering the 1986 Uruguayan blanket amnesty law,[122] the committee expressed its 'deep concern on the implications for the Covenant of the Expiry Law'.[123] It argued that the law effectively excludes the 'possibility of investigation into past human rights abuses' and thereby prevents the state from ensuring the victims' right to a remedy.[124] Subsequently, in 1994, the committee reiterated these views in its consideration of the 1993 Salvadorean amnesty law,[125] and in its 2003 report on El Salvador it called upon the government to 'review the effect of the General Amnesty Act and amend it to make it fully compatible with the Covenant'.[126] Similarly, in its 1996 discussion of the 1995 Peruvian amnesty, the committee argued that the amnesty violated the ICCPR, and it recommended that 'the government of Peru review and repeal those laws to the extent of such violations'.[127] This recommendation was reiterated in the committee's 2000 report on Peru.[128] It should be noted, however, that the recommendations of the committee are not binding and that, to date, no government has repealed an amnesty law based on such recommendations.

From the above, it is clear that human rights treaty-monitoring institutions have increasingly argued that any amnesty laws for crimes under international law that impede a victim's access to truth and justice are contrary to a state's international obligations. However, it is not certain that these institutions would respond in the same way to an amnesty law that

[121] UNHRC 'Concluding Observations of the Human Rights Committee: Senegal' (28 December 1992) UN Doc CCPR/C/79/Add 10.

[122] See Case Study 1.

[123] UNHRC 'Concluding Observations of the Human Rights Committee: Uruguay' (5 May 1993) UN Doc CCPR/C/79/Add.19 [7].

[124] *Ibid* [7].

[125] UNHRC 'Concluding Observations of the Human Rights Committee: El Salvador' (18 April 1994) UN Doc CCPR/C/79/Add 34; A/49/40 [209–24].

[126] UNHRC 'Concluding Observations of the Human Rights Committee: El Salvador' (22 July 2003) UN Doc CCPR/CO/78/SLV [6].

[127] UNHRC 'Concluding Observations of the Human Rights Committee: Peru' (25 July 1996) UN Doc CCPR/C/79/Add 67; A/51/40 [358].

[128] UNHRC 'Concluding Observations of the Fourth Periodic Report: Peru' (1 November 2000) UN Doc CCPR/CO/70/PER [9].

aimed to provide alternative forms of justice through the implementation of restorative justice procedures. Furthermore, the greater willingness of treaty-monitoring bodies, in comparison to international actors, to vigorously oppose amnesty laws for international crimes could result from the fact that such institutions, with their distinct mandates to monitor compliance with their constituent treaties, face fewer political risks from adopting more stringent positions on amnesty laws. In contrast, nation states that strongly oppose amnesty laws introduced by other states risk suffering negative economic and diplomatic consequences, and therefore, as discussed above, are less likely to oppose amnesty laws than treaty-monitoring bodies.

Military Pressure

The threat or use of military force is the last resort of the international community when confronted with breaches of international law. Therefore, it has been an issue in only very few amnesty processes. Where the international community has used military pressure to influence a transition involving an amnesty, the intervention has taken various forms, including the denial of military aid, in terms of finance, weapons or training, unless the government adheres to the state's international obligations or allows a transition to democratic, civilian government. For example, in 1978 the US Congress passed the Humphrey-Kennedy amendment to the Foreign Assistance Act, in order to deny military aid for Argentina because of its human rights record. In contrast, the promise of military aid has been used to tempt the military to engage with political reform. For example, during the Haitian crisis, the United States offered a military assistance package including $1.25 million under the International Military Education and Training Programme for military professionalisation, in conjunction with an amnesty to persuade the junta to surrender power.[129]

Amnesties have also been linked to more direct military intervention in the form of peacekeeping. Here, the peacekeepers can be given a mandate to support efforts to promote justice, by allowing them to arrest those accused of serious human rights violations. However, this is rarely the case. For example, in 1999 the United Nations Organisation Mission in the Democratic Republic of Congo (MONUC) was tasked with human rights monitoring and humanitarian assistance, but was not allowed to assist in the prosecution of the perpetrators of serious crimes.[130] Even where peacekeepers are allowed to seize documents that could provide evidence for

[129] Human Rights Watch, 'Terror Prevails in Haiti: Human Rights Violations and Failed Diplomacy' (April 1994) Vol. 6, No. 5, 39.

[130] Hakan Friman, 'The Democratic Republic of Congo: Justice in the Aftermath of Peace?' (2001) 10 *African Security Review* 63.

prosecutions, it can be problematic. For example, American troops in Haiti seized evidence and brought it to the United States, where the names of US citizens who were implicated in crimes were removed.[131] Peacekeepers can also be mandated to facilitate disarmament, demobilisation and resettlement (DDR) programmes,[132] as discussed in chapter 10, to complement national amnesty programmes.

There have also been situations where the mere threat of armed intervention was sufficient to encourage parties to a conflict to accept peace agreements with amnesty provisions. For example, when the military junta in Haiti refused to honour the terms of the Governors' Island Agreement, the Security Council on 31 July 1994 authorised a US invasion and occupation against the military regime.[133] The invasion was planned for 19 September 1994, and immediately before it was launched,

> President Clinton sent a delegation—consisting of former President Carter, Senator Sam Nunn, and former Chairman of the Joint Chiefs of Staff Colin Powell—to try to reach a last-minute agreement with the Haitian military leaders that would enable the sides to avoid armed conflict.[134]

They succeeded in brokering a deal 'just minutes after American military aircraft had taken off toward Haiti'.[135] These examples highlight that international actors can exert military pressure without actually having to go to war.

CONCLUSION

In any transitional context, international actors are able to exert considerable pressure, using a variety of diplomatic, economic, legal, or military tools. This pressure can be used either to encourage or deter transitional governments from introducing amnesty laws. However, as argued in this chapter, this pressure is rarely exerted in a coherent fashion. International organisations and states typically balance the need to address the legacy of past abuses in the transitional state, with a variety of other concerns, many of which are self-serving. This has meant that many international actors have behaved in a contradictory fashion, supporting amnesties for one transition but objecting to them for another.

[131] Martin (n 14) 730.

[132] For example, the 1999 Lusaka Ceasefire Agreement in the Democratic Republic of Congo stipulated, 'The Parties together with the UN and other countries with security concerns, shall create conditions conducive to the attainment of the objective set out in 9.1 above, which conditions may include the granting of amnesty and political asylum, except for génocidaires.' (Art. 9.2 of Annex 1).

[133] UNSC Res 940 (31 July 1994) UN Doc S/RES/940.

[134] Scharf (n 7) 7.

[135] *Ibid* 7.

As this book argues, transitional states should be encouraged to eschew absolute impunity, even where it is practically impossible or politically risky to prosecute all offenders. Anti-impunity campaigners have long argued that the creation of rules-based systems, such as treaty law requiring punishment for the most serious crimes, can contribute to this goal. However, as the experience in many states indicates, ratifying human rights treaties does not automatically result in compliance with those treaties; instead, international relations theorists have argued that the extent to which a state complies will be influenced by other factors, including

> the extent of democracy and strength of civil society groups as measured by participation in non-governmental organisations (NGOs) with international linkages.[136]

Despite these difficulties, it is assumed within liberal and institutionalist approaches to international relations that co-operation between states can have positive outcomes both for individual states and for the international community as whole.[137] In addressing sustained campaigns of human rights violations, these benefits can include reducing threats to 'the security of the international order through massive refugee flows, illegal arms trafficking, and the rise of paramilitary guerrilla armies', which often engage in cross-border criminality, such as drug trafficking.[138] If it is assumed that amnesty laws under certain conditions can contribute positively to ending periods of violence and creating conditions where democratic institutions can be created or renewed, it seems advisable that international actors should seek to support transitional governments in their attempts to achieve those goals whilst addressing the crimes of the past. As discussed above, this support could entail providing diplomatic, financial or personnel resources for individualised, conditional amnesties that are introduced in good faith. However, international actors should also refrain from providing support for blanket, unconditional amnesties and should criticise other actors that do so.[139]

[136] Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) *Journal of Conflict Resolution* 925, 926. See also Emilie M Halfner-Burton and Kiyoteru Tsutsui, 'Justice Lost! The Failure of International Human Law to matter where needed most' (2007) 44 *Journal of Peace Research* 407; Oona A Hathaway, 'Do Human Rights Treaties make a Difference?' (2002) 111 *Yale Law Journal* 1935.

[137] Schmitz and Sikkink (n 27).

[138] Bruce Cronin, 'International Legal Consensus and the Control of Excess State Violence' (2005) 11 *Global Governance* 311, 324.

[139] The international relations theory of transnational human rights advocacy networks argues that where regimes are put under pressure 'via disseminating information, shaming the offending regime, and mobilising international public opinion against it, [and] . . . open criticism as well as diplomatic, aid, trade and other policy measures', the offending government can often be encouraged to move towards greater compliance with international human rights law. See Neumayer (n 136) 931. See also Thomas Risse, Stephen C Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, Cambridge 1999).

However, within these wide parameters, international actors should not dictate policy, but rather complement and support national decisions. Kofi Annan has described the preferred role of the international community as to 'wherever possible, guide rather than direct, and reinforce rather than replace', with the aim of leaving 'behind strong institutions when we depart'.[140] In assuming more of a partnership role, experience in several countries indicates that international actors could benefit from consulting stakeholders in the transitional state, such as civil society, politicians, and members of the opposition groups, in order to support a process that is suited to the unique situation within the transitional state, rather than simply pushing for a generic approach based on measures introduced elsewhere.[141] International actors could also convene and fund conferences to facilitate dialogue between these groups and experts from other transitional societies during negotiations to design transitional justice mechanisms.[142]

Once the mechanisms are agreed, this chapter has shown that international actors can provide support to help them to operate, by, for example: providing financial, personnel or technical support; declassifying intelligence in national archives; denying sanctuary to dictators; and, where appropriate, extraditing suspected offenders. However, all support must be designed to create and promote sustainable institutions that will contribute to the establishment of a permanent human rights culture within the transitional state. In many cases this will require the international community to offer long-term support. As will be explored in the next chapter, such long term engagement could help stakeholders in transitional processes to respond to the needs of victims as they change over time.

[140] Kofi Annan, 'Secretary-General's remarks to the Ministerial Meeting of the Security Council on Justice and the Rule of Law: The United Nations Role' (24 September 2003) <http://www.un.org/apps/sg/sgstats.asp?nid=518> accessed 5 October 2007.

[141] For example, during 2007 the UN OHCHR commissioned a study to obtain the views of the peoples of northern Uganda on the various possible transitional justice mechanisms, see OHCHR, *Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (OHCHR, Geneva 2007).

[142] For example, during the South African transition, an international conference entitled *Dealing with the Past* was organised in 1994 under the auspices of the Justice in Transition Institute, bringing together scholars from South Africa and other states to explore approaches to transitional justice in Latin America and Eastern Europe. See Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press, Cape Town 2000).

9

Prioritising Needs: Amnesties and the Views of Victims

INTRODUCTION

THE GOAL OF international human rights and humanitarian law since the Second World War has been to protect individuals who are at risk of abuse and to provide remedies to those who have suffered, particularly when these violations have occurred at the hands of their national governments. The introduction of amnesty laws is often condemned as a denial of victims' rights, particularly in the case of blanket amnesties designed to prevent any investigations. Furthermore, amnesties that facilitate the reintegration of perpetrators into society or fail to remove them from positions of power at local or national levels can cause anguish for those whom they tortured, or whose family members they killed. Despite this, the views of victims have often been ignored by the elites who forge peace agreements.[1] In fact, politicians have tended only to assert the rights of victims when to do so coincided with their other political objectives.[2]

The aim of this chapter is to explore how far amnesties entail a denial of victims' rights, and whether the process of granting amnesty can be made more responsive to the needs of victims. The account will begin by exploring the complexity of the term 'victim' and the difficulties that can be encountered in identifying the victims' concerns and needs in the aftermath of their suffering. Subsequently, the impact of amnesty laws on victims will be assessed and criteria will be recommended to make individualised, conditional amnesties more victim-centred. This chapter argues that, whilst amnesty laws often prevent victims from seeing those who harmed them in the dock, they need not completely deny victims

[1] Goldstone in Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, Boston 1998) xi.

[2] Consider, eg, the continuing controversy over the how Auschwitz should be memorialised: see, eg, Jonathan Huener, *Auschwitz, Poland, and the Politics of Commemoration, 1945–1979* (Oxford University Press, Oxford 2003). See also the politicisation of victims' groups in Northern Ireland, discussed in M Morrissey and M Smyth, *Northern Ireland After the Good Friday Agreement: Victims, Grievance and Blame* (Pluto Press, 2002).

their rights and amnesties could be designed to balance the needs of victims against those of society as a whole.

RESEARCH ON VICTIMS

To date, there has been a dearth of empirical evidence on how victims respond to amnesty laws in particular and to other transitional justice processes in general.[3] The few studies of the effectiveness and perceived legitimacy of transitional justice institutions that have occurred are of limited significance for victims, as they are usually based on surveys of representative proportions of a population as a whole, rather than being focused specifically on the views and concerns of victims. Furthermore, some of these studies utilise quantitative methods only, which run the risk of shrouding the complexity of victims' views by reducing their stories to statistics. This chapter will attempt to explore this complexity by discussing how victims can prioritise different goals and how their views can change over time. However, the more statistical surveys will be referred to in the discussion.

Much of the academic literature[4] on how transitional justice processes affect victims is speculative and, with the exception of a database based on

[3] Some studies that have attempted to canvas the opinions of survivor groups or larger proportions of the population, including victims, include OHCHR, *Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (OHCHR, Geneva 2007); Lucy Hovil and Zachary Lomo, 'Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation' (Working Paper No 15, Faculty of Law, Makerere University, Kampala, Uganda, February 2005); Anita Isaacs, 'The Therapeutic Benefits of Truth: Insights from Guatemala' (Presentation at Conference on Reconciliation, University of Western Ontario, October 2005); Phuong Pham and others, 'Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda' (International Center for Transitional Justice, New York, July 2005); Spencer Zifcak, 'Restorative Justice in East Timor: An Evaluation of the Community Reconciliation Process of the CAVR' (The Asia Foundation, Timor-Leste, July 2004); James L Gibson and Helen Macdonald, 'Truth—Yes, Reconciliation—Maybe: South Africans Judge the Truth and Reconciliation Process' (Institute of Justice and Reconciliation, Rondebosch, 11 June 2001); Judicial System Monitoring Program, 'Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process' (JSMP, Dili, August 2004); K Lombard, 'Revisiting Reconciliation: The People's View—Research Report of the Reconciliation Barometer Explanatory Survey' (Institute of Justice and Reconciliation, Rondebosch, 15 March 2003).

[4] See, eg, Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violations Console their Victims?' (2005) 46 *Harvard International Law Journal* 295; Ervin Staub, 'Justice, Healing and Reconciliation: How the People's Courts in Rwanda can Promote Them' (2004) 10 *Peace and Conflict: Journal of Peace Psychology* 25; Nigel Biggar (ed), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press, Washington, DC 2003); Michael Humphrey, 'From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing' (2003) 14 *Australian Journal of Anthropology* 171; Raquel Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes' (2002) 35 *Vanderbilt Journal of Transnational Law* 1399; Laurel E Fletcher and Harvey M Weinstein, 'Violence and Social

interviews with Holocaust survivors, founds its conclusions on the writings of psychologists dealing with the victims of violent crime during peacetime or individuals who have suffered post-traumatic stress following events such as natural disasters. It is not yet clear whether this extrapolation is useful or whether victims who experienced human rights violations as part of a sustained political campaign have different needs. Furthermore, this approach emphasises the importance of therapy for victims, but whilst reliving painful experiences during repeated therapy sessions may be beneficial for some victims, it is not apparent that the same consequences will flow from victims telling their story once in a public setting, such as televised truth commission hearings. It is also unclear whether it is appropriate to apply the approaches pursued by psychologists in Western societies to the needs and expectations of victims from other cultures. Indeed, some authors highlight examples such as Mozambique to illustrate that, within some cultures, silence is considered part of the healing process.[5] Similarly, it is unclear how far the lessons learned from one group of victims can be applied to victims in another country, or even to victims from a different community within the same country, where each community has different religious or cultural practices, or its own narrative of the conflict.

Furthermore, attempts to evaluate the work of transitional justice processes by individuals who work within the process can be affected by their relationship with the victims who participate and by their belief in the process. For example, personnel of the East Timorese truth commission reported that most participants 'gained relief from having their mental pain acknowledged and understood'.[6] But many workers in mental health services and victims' groups strongly contradicted this view, arguing that 'opening the wounds led to worsening symptoms of

Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *Human Rights Quarterly* 573; Derek Silove, 'The Psychosocial Effects of Torture, Mass Human Rights Violations, and Refugee Trauma: Toward an Integrated Conceptual Framework' (1999) 187 *Journal of Nervous and Mental Disorders* 200; Minow (n 1); David Becker, 'Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation' (1990) 46 *Journal of Social Issues* 133.

[5] Helena Cobban, *Amnesty After Atrocity? Healing Nations after Genocide and War Crimes* (Paradigm Publishers, Boulder CO, 2007); Carolyn Nordstrom, *A Different Kind of War Story* (University of Pennsylvania Press, Philadelphia 1997); Alcinda Honwana, 'Appeasing the Spirits: Healing Strategies in Postwar Southern Mozambique' in John R Hinnells and Roy Porter (eds), *Religion, Health and Suffering: A Cross-Cultural Study of Attitudes to Suffering and the Implications for Medicine in a Multi-Religious Society* (Columbia University Press, New York 1997); Alcinda Honwana, 'Children of War: Understanding War and War Cleansing in Mozambique and Angola' in Simon Chesterman (ed), *Civilians in War* (Lynne Rienner Publishers, Boulder CO, 2001). See also Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone* (United States Institute for Peace, Washington DC 2005).

[6] Derrick Silove, Anthony D Zwi and Dominique Le Touze, 'Do Truth Commissions Heal? The East Timor Experience' (2006) 367 *Lancet* 1222.

traumatic stress and grief in some survivors'.[7] This means that reports made by those delivering the service may not be objective.

Victims' views are also found in individual accounts given to NGOs or journalists. Each of these individual stories is, of course valuable; however, they are necessarily subjective and reflect only the views of that person at that moment. Whilst these views may represent those of large numbers of victims, they could also be quite different from the opinions of others. Furthermore, when these opinions are published in news articles or NGO reports, they may be selected to illustrate a pre-existing argument, rather than representing the victims' views being used to inform opinion on the transitional justice process.

The chapter will use each of these types of sources to investigate the attitudes of victims and to make recommendations on how amnesty processes can be made more inclusive and responsive to the needs of victims. Due to the paucity of the data available and the complexities outlined here, the recommendations will be rather tentative.

IDENTIFYING VICTIMS AND THEIR NEEDS

Identifying who is entitled to be treated as a victim can be a complex process in many transitional contexts, particularly following civil wars, where each community is reluctant to recognise the victimhood of their opponents. In most countries, government institutions or transitional justice mechanisms have sought to identify victims, rather than applying the label to individuals who choose it for themselves. Nonetheless, an element of self-selection often remains, as victims decide whether to participate in any processes established by the government, although this choice can be restricted by conditioning reparations on participation. In most cases under consideration, states have created a legal definition of victimhood for the purposes of implementing transitional justice processes and awarding reparations.[8] This can be problematic, however, as some countries have chosen to define the term narrowly. For example, the Argentine truth commission (CONADEP) only investigated cases of 'disappearance', and in Chile, the truth commission limited its findings to those human rights abuses resulting in death through torture, disappearance or execution.[9] This raises the question of what sort of suffering makes someone a victim. For example, individuals who were tortured are clearly victims, but does the same apply to individuals who were only threatened with torture? Furthermore, are individuals who suffered from anxiety and lost

[7] Derrick Silove, Anthony D Zwi and Dominique Le Touze, 'Do Truth Commissions Heal? The East Timor Experience' (2006) 367 *Lancet* 1222.

[8] See, eg, Promotion of National Unity and Reconciliation Act, 1995 (S Afr) s 1(1)(xix).

[9] Humphrey (n 4).

opportunities as a result of living in a conflict zone to be considered victims even if they or their family members were not directly injured?

As discussed in chapter 2, further complications can arise in many civil wars in distinguishing between victims and perpetrators.[10] Similarly, in many conflict situations, tensions can arise over whether victims of abuse committed by state actors should be treated in the same way as those who suffered at the hands of non-state actors, and even more problematically, whether the family of an insurgent

> killed in the course of carrying out an attack [should] receive the same recognition as the loved ones of either a civilian caught up in the carnage or a member of the security forces.[11]

This could be particularly relevant where the family of the dead insurgent were unaware of their relative's involvement in an armed campaign.

For the purposes of this chapter, the term victim will be understood as applying to: those individuals who have directly endured serious human rights violations, such as a torture, sexual violence and mutilation; and the family members of individuals who have been killed or disappeared, regardless of the status of the perpetrators responsible for the violations or the political involvement of the deceased.

Even where a definition of victims is agreed, problems can arise in identifying the needs and wishes of the victims, as

> the experience of victims is always very individual and it is wise to be wary of assumptions about victims' best interests.[12]

Simpson summarises these difficulties:

> By generalizing and conveniently summarizing the expectations of victims, their complex, inconsistent human identities are diminished, and the extent to which needs vary from victim to victim and change over time is ignored. Generalized claims that victims are willing to forgive perpetrators who confess, or that they are merely seeking acknowledgement and symbolic reparation, are no more reliable than similarly broad claims that victims demand or are in need of punitive justice.[13]

This highlights that victims are not a homogenous group. Instead, they can hold disparate views and respond differently to the suffering they endured.[14] Furthermore, the type of violation committed and the context

[10] See 'Victim-Perpetrator Axis', ch 2.

[11] Mark Devenport, 'What Defines a Victim in NI?' *BBC News* (26 October 2005).

[12] Cited in Garkawe (n 12) 346.

[13] Simpson, cited *ibid* 346.

[14] O'Connell (n 4) 306–7. For a discussion of the impact of human rights violations on victims, see Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition* (The Cass Series on Peacekeeping, Frank Cass, New York 2004) 9; Jennifer J Llewellyn and Robert Howse, 'Restorative Justice: A Conceptual Framework' (Law Commission of Canada, October 1998); Brandon Hamber, 'Do Sleeping Dogs Lie? The

in which it occurred can influence how it affects the victims. For example, in some cultures, women who were sexually abused may be ostracised by their families and communities, whereas victims of other abuses would not be ostracised. Similarly, people who have been maimed may find it difficult to support themselves. These examples convey the idea that, during and after the political transition, victims can continue to suffer from an array of ongoing physical, social, psychological and economic harms. Furthermore, during and after civil wars, victims from each community can have different concerns, which make it difficult or undesirable to generalise about the needs of victims within that state.[15]

Further complications emanate from the changes that can occur in the views and wishes of victims throughout the lifecycle of transitional justice processes. As Simpson illustrates:

> When [the victims] first testified, many sought no more than acknowledgement and symbolic reparation, but once a perpetrator had confessed to killing their loved ones, or sometimes merely through the passage of time, some of these needs understandably changed.[16]

The views of victims could also be influenced by experiencing the reactions of others to their testimony. Furthermore, their attitudes may change a year later or even five years later based upon the contribution they view the process as having made to society and to their relative standard of living. Attempts to describe victims' needs within a transition can only relate to a particular moment within that transition. The manner in which victims' needs can change can be conceptualised using Maslow's hierarchical model of human needs, which is illustrated in Figure 19 below. This model indicates that our higher needs can only be addressed once our lower needs have been satisfied,[17] which means that the basic physiological needs of victims, such as food and sleep, should be fulfilled before any psychological concerns are addressed. This theory is useful to explain the manner in which victims prioritise their needs and how these needs can change over time. It should not be regarded, however, as a rigid template that will be followed by every individual in the same manner.[18] Instead, an individual's progress through the hierarchy will be affected by social conditions and individual attitudes. For example, individuals may never

Psychological Implications of the Truth and Reconciliation Commission in South Africa' (Seminar No 5, Center for the Study of Violence and Reconciliation, Johannesburg 1995); Minow (n 1) 64–5 and 121; Silove, Zwi and Le Touze (n 7); and Isaacs (n 3).

[15] Thordis Ingadottir, C Ferstman and E Kristjansdottir, 'Victims of Atrocities—Access to Reparations' (Background paper for the 'International Conference on War Crimes—Searching for Justice: Comprehensive Action in the Face of Atrocities', York University Canada, June 2003) 1.

[16] Simpson cited in Garkawe (n 12) 346.

[17] AH Maslow, 'A Theory of Human Motivation' (1943) 50 *Psychology Review* 370, 371.

[18] *Ibid.*

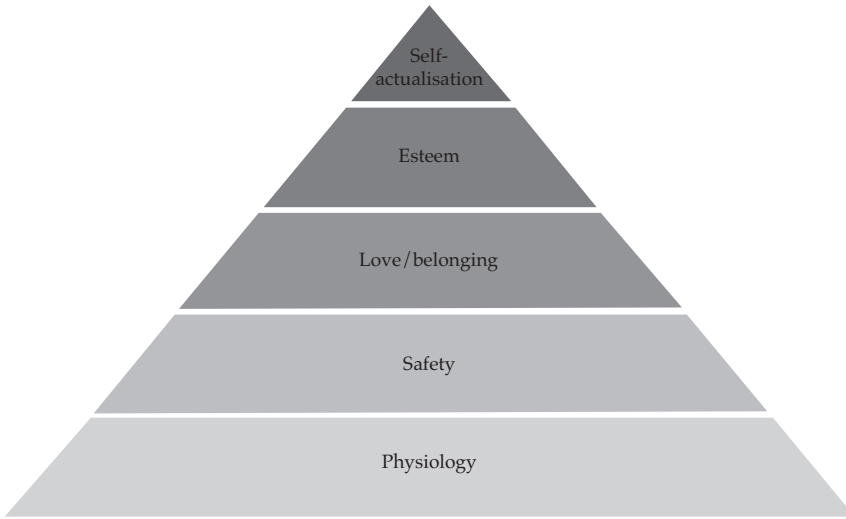

Figure 19: Maslow's hierarchy of needs

suffer extreme deprivations of food and, consequently, may not find themselves in the lowest level of the hierarchy. In contrast, a

> person who has experienced life at a low level, ie chronic unemployment, may continue to be satisfied for the rest of his life if only he can get enough food.[19]

Even where individuals do progress through the hierarchy, there is no fixed time scale, which means that individuals may take longer or shorter periods to reach the upper levels, and some individuals may regress to earlier levels, particularly if renewed violence breaks out. A final caveat with this model is that it was created to explain human needs in general, rather than the specific concerns of victims of human rights abuses, who may place more emphasis on becoming reintegrated into society in order to regain their self-esteem than would be necessary for individuals who had not suffered a similar trauma. The remainder of this section will consider how the hierarchy could be applied to victims of human rights abuses.

The initial stage on the hierarchy refers to physiological needs. Maslow argues that

> in the human being who is missing everything in life in an extreme fashion, it is most likely that the major motivation would be the physiological needs rather than any others.[20]

[19] *Ibid*.
[20] *Ibid*.

He continues that

> for our chronically and extremely hungry man, Utopia can be defined very simply as a place where there is plenty of food. He tends to think that, if only he is guaranteed food for the rest of his life, he will be perfectly happy and will never want anything more. . . . Freedom, love, community feeling, respect, philosophy, may all be waived aside as fripperies which are useless since they fail to fill the stomach.[21]

Therefore, individuals who are suffering from severe physiological difficulties such as an inability to obtain sufficient food, perhaps because they have lost their livelihood or their land as a result of conflict or oppression and are without an alternative means to support themselves, may prioritise solutions such as negotiated peace agreements containing amnesty provisions which will remedy this situation for them.

Once individuals have found fulfilment of their basic physiological needs, according to Maslow's hierarchy, their focus will turn to their safety. Maslow argues that those who feel that their personal security is threatened by 'war, disease, natural catastrophes, crimes waves, [or] social disorganization', where the threat is 'extreme and chronic enough', may be characterised as living almost for safety alone.[22] He further argues that this prioritisation could apply even when the threats to their safety are perceived rather than actual. O'Connell has argued that many victims of human rights violations for long periods after they suffered abuse could feel a loss of a 'basic sense of security in the world' or the belief that that they can

> go through daily life fairly confident that they will not be subjected to emotional or physical attack without warning, except perhaps in places they know to be particularly dangerous.[23]

He gives the example of a Uruguayan torture survivor who described his sense of fear in this way:

> walking down the block I'm in a perpetual cringe; I'm constantly stopping to let whoever is behind me pass: my body keeps expecting a blow from every side.[24]

Where victims continue to feel this sense of fear they may prioritise solutions which they believe will remove or reduce the threat, and they could remain at this stage long after the immediate threats to their safety have been removed.

Once victims' physiological and safety needs have been satisfied, or where the victims were already in a position of relative security, their con-

[21] AH Maslow, 'A Theory of Human Motivation' (1943) 50 *Psychology Review* 370, 371.
[22] *Ibid*.
[23] O'Connell (n 4) 310.
[24] Cited *ibid* 310.

cerns could move towards addressing their need to feel love or belonging. Maslow has described this as the stage where

> the person will feel keenly, as never before, the absence of friends, or a sweetheart, or a wife, or children. He will hunger for affectionate relations with people in general, namely, for a place in his group, and he will strife with great intensity to achieve this goal.[25]

He cautions that where this need is thwarted it can cause 'maladjustment or more severe psychopathology'.[26] Whilst many victims may have supportive networks around them, O'Connell has argued that victims can become alienated from their family:

> Depression can cause family and friends to pull away. Loss of interest in sex can alienate the survivor's spouse or partner. Change in roles within the family may make the victim feel inadequate or other family members resentful. Older children may have to take paying jobs if a parent is emotionally or physically disabled by human rights violations.[27]

He further argues that victims can feel isolated from society when they feel that no one else can understand their experiences,[28] a perception that can be compounded when the victims feel a sense of disgust or shame after the suffering they endured.[29] The victims' sense of isolation can be heightened when people are unwilling to listen to their stories,[30] or even believe that 'victims were responsible for their own suffering' due to their alleged criminal activities.[31] For victims of sexual violations, societies may ostracise them because of the violations they experienced. Furthermore, prolonged periods of conflict or dictatorship can cause communal structures to break down. This problem was expressed by victims in Uganda, who 'emphasised the need for reconciliation in order to help rebuild communal social structures and identities, given the immense social and cultural breakdown experienced'.[32]

At this stage, victims may prioritise programmes that facilitate their reintegration into society. For example, participating in transitional justice mechanisms or requesting programmes to educate the public on the nature of the torment endured and the innocence, and even heroism, of those who were victimised. These measures could be supported by using amnesties to clear the criminal records of those who were wrongly convicted or convicted under unjust laws, by criminalising the abusive

[25] Maslow (n 17).
[26] *Ibid*.
[27] O'Connell (n 4) 316.
[28] *Ibid* 310.
[29] *Ibid* 310.
[30] *Ibid* 310.
[31] *Ibid* 310–1; Sriram (n 14) 9; Llewellyn (n 14); and Hamber (n 14);
[32] OHCHR (n 3) 32.

behaviours, and by reforming the institutions responsible, to demonstrate clearly that society repudiates the behaviour of the oppressors.

As victims become more integrated Maslow's hierarchy suggests that their needs would then focus on questions of esteem. Maslow defines 'firmly based self-esteem' as 'that which is soundly based upon real capacity, achievement and respect from others'. He classifies these needs into 'two subsidiary sets':

> [1] the desire for strength, for achievement, for adequacy, for confidence in the face of the world, and for independence and freedom; [and]
> [2] the desire for reputation and prestige (defining it as respect or esteem from other people), recognition, attention, importance or appreciation.[33]

Human rights violations can have a severe impact on a victim's self-esteem, by causing them to feel shame and guilt, particularly when the violations involved sexual abuse. Therefore, in addition to becoming reintegrated into society, victims need to come to terms with their own experiences and to appreciate that what happened to them was not their fault.[34] To do this, victims may respond to a range of measures including psychological and medical support; participation in truth-recovery mechanisms where their suffering will be placed in a wider political context and the victims will have their pain acknowledged. Victims may also benefit from receiving an apology from their former oppressors, although, as discussed in chapter 4, requiring perpetrators to apologise can risk devaluing the process if the apologies are deemed to be insincere. For victims to regain their self-esteem it is important that they are offered monetary and symbolic reparations for their suffering, as it has been argued that this will enable them to 'be in a position to regain control over their lives'.[35] Furthermore, it is towards the upper end of the pyramid that reconciliation—'which requires empathy, forgiveness, and altruism'—becomes possible, as it 'draws on higher order manifestations of need that cannot be addressed until the more basic needs are satisfied'.[36]

The final stage in Maslow's hierarchy is self-actualisation. He describes this stage as 'the desire for self-fulfilment, namely, the tendency for [an individual] to become actualised in what he is potentially'.[37] He stipulates, however, that for these needs to be fulfilled the individual's other needs must be satisfied, and that 'in our society, basically satisfied people are the exception'.[38] As Maslow's hierarchy is designed for society in general, it is possible to assume that for societies recovering from periods of widespread human rights abuses where large proportions of the population

[33] Maslow (n 17).
[34] Llewellyn (n 14).
[35] *Ibid*.
[36] Fletcher & Weinstein (n 4) 624–5.
[37] Maslow (n 17).
[38] *Ibid*.

have been traumatised by their experiences, it may be even more problematic for individuals to reach this final stage in the hierarchy.

This section has argued that victims are not a homogenous group, and that, instead, there may be a wide diversity of needs and desires among victims of different nationalities, ethnicities, creeds, economic backgrounds, or gender. Victims' needs can also be affected by the nature of the suffering they endured. Identifying victims' needs can also be complicated by the manner in which these needs may change over time. Maslow's hierarchy of needs has been used to illustrate how these changes may occur. Clearly, the manner in which victims prioritise their needs can influence their attitudes to amnesty laws. For example, where a victim prioritises the lower levels of the hierarchy, they may be willing to support blanket impunity in exchange for peace. In contrast, as victims move towards the upper levels of the hierarchy, they will prioritise processes that offer greater accountability and acknowledgement of their suffering. These patterns will be explored below, using evidence from empirical studies.

HOW DO AMNESTY LAWS AFFECT VICTIMS?

The relationship of amnesty laws to victims can be complex, as victims can both benefit from and oppose such laws. For example, individuals who have endured illegal detention may look positively on amnesties that liberate them, but villagers who have suffered violence and the destruction of their homes may oppose amnesties for those responsible. Furthermore, approval or disapproval for amnesties can be modified by political concerns. For example, victims may dislike the process of granting amnesty and express a preference for prosecutions, but also accept the necessity of amnesty within a particular political context. Such tempered views could particularly occur where amnesties produce tangible benefits for victims, such as a reduction in the level of violence. For example, a survey of a large, representative sample of the entire South African population (ie, not just victims), completed in February 2001, indicates that although the amnesty was popular among only a small fraction of the population, 72 per cent of blacks concluded that it 'is the price that had to be paid in order to secure a peaceful transition to democratic rule'.[39] Similar views have been expressed by a victim of right-wing paramilitaries in Colombia, Mariano Guerrero, whose son was murdered. Mr Guerrero, in conversation with a journalist, said that 'we've had more than enough of [the paramilitaries], we just want them to stay away', even if that meant granting them impunity.[40]

[39] Gibson & Macdonald (n 3) 8.

[40] Dan Molinski, 'Colombian Towns Choose Peace over Justice' *Associated Press* (Panjonal, Colombia 14 July 2005).

The prioritisation of physiological and safety needs over calls for justice was illustrated in a 2005 survey conducted by the International Center for Transitional Justice (ICTJ) on the views of the civilian population in northern Uganda, who suffered extreme violence from the LRA and the armed forces. Among the respondents to this survey, four out of five respondents had been exposed to at least one of the following traumatic events: being abducted; having a child abducted; witnessing the abduction of a child; witnessing a family member being killed; being threatened with death; being physically mutilated, maimed or injured; being sexually violated; witnessing someone being sexually violated; or having been physically beaten or injured by a family member.[41] Although witnessing abuses committed against non-family members or being subjected to death threats would not meet the description of victimhood used above, the majority of respondents to the study could be described as victims. Despite this immense suffering, the respondents identified their most pressing needs as the availability of food (34 per cent) and a sustained peace (31 per cent).[42] The respondents could, however, envisage the next stage in Maslow's hierarchy, as, when asked to specify their priorities once peace had been achieved, 63 per cent wanted internally displaced persons (IDPs) to be able to return home.[43] Priority was also given to

> rebuilding village infrastructure (29 per cent), providing compensation to victims (22 per cent), providing education to children (21 per cent), and restoring livelihoods (11 per cent).[44]

The prioritisation of safety was also evident among victims in South Africa. In a series of workshops with 'survivors who belong to the Khulumani Victim Support Group' designed to elicit 'the views of victims/survivors on the recommendations to be made by the Truth and Reconciliation Commission in its final report', Hamber *et al* have shown that many victims felt that before participating in the truth commission, 'they would first have to be assured of their own security'. Those victims who still lack this sense of safety in their own community 'do not feel that the truth commission substantially contributed to their feelings of security'.[45] This shows that victims may evaluate the contribution of a transitional justice mechanism according to how it has contributed to their own quality of life. Isaac's work in Guatemala has argued, however, that the

[41] Pham (n 3) 21–2.
[42] *Ibid* 4.
[43] *Ibid* 25.
[44] *Ibid* 25.
[45] Center for the Study of Violence and Reconciliation (CSVR) and the Khulumani Victim Support Group, *Survivors' perceptions of the Truth and Reconciliation Commission and suggestions for the final report* (Unpublished submission to the Truth and Reconciliation Commission authored by Brandon Hamber, Tlhoki Mofokeng and Hugo Van der Merwe, CSVR, Johannesburg 1998).

impact of participating in a truth commission differed between victims who belonged to a victims' group and those that did not, as those who were members of a group had already begun the process of truth-telling with other members of their group.[46] She argues that, where victims had already begun vocalising their suffering, they agreed to participate in the truth commission, not for psychological relief, but 'out of a sense of moral responsibility' with the aim of preventing a repetition of the crimes.[47]

The importance of improvements in the victims' standard of living was also demonstrated by research into the victims of the communist regime in Czechoslovakia. Here, a survey has shown that 'victims who continue to suffer the economic and health consequences of imprisonment often find it hard to forgive their wrongdoers'.[48] This is particularly the case when former members of the repressive apparatus are benefiting from their actions through substantial redundancy compensation, pensions and health benefits whilst their former victims endure comparative economic deprivation.[49] Similarly, in interviews conducted by the Judicial System Monitoring Programme (JSMP) (a local NGO) with victims who participated in the East Timorese Community Reconciliation Process (CRP),[50] the persistence of economic inequality in Timor-Leste was highlighted by many victims as an inhibitor of any progress towards reconciliation.[51]

Problems can arise when trying to fulfil the needs of victims, as, according to academic research, victims may express public support for amnesty and hold different views privately. For example, many of the victims participating in the Human Rights Violations Committee of the South African TRC

> expressed views on reconciliation that were to some extent influenced by the public imperative of the TRC: forgiveness was the proper thing to do, and amnesty for the perpetrators should necessarily follow.[52]

The same victims have, however, asserted different opinions to 'friends, family members, social workers, psychologists and journalists'.[53] Similarly, in Timor-Leste, the interviews with victims conducted by the JSMP revealed that some victims were reluctant to request an act of reconciliation from the persons that harmed them, due to

[46] Isaacs (n 3) 16.
[47] *Ibid* 16.
[48] Roman David and Susanne YP Choi, 'Forgiveness and Transitional Justice in the Czech Republic' (2006) 50 *Journal of Conflict Resolution* 339, 359.
[49] *Ibid* 359.
[50] For a discussion of the Community Reconciliation Process in Timor-Leste, see case study 7.
[51] Judicial System Monitoring Program (n 3) 24.
[52] Richard Lyster, 'Amnesty: The Burden of Victims' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, London 2000) 187.
[53] *Ibid* 187.

> informal community and family pressures and a sense of 'obligation' to conform to the wishes of the CAVR for the 'good of their community'.[54]

In contrast, victims may oppose amnesty processes when the persons who harmed them or their relatives are freed and able to return to the same town or village, causing the victims to continually fear encountering them. Although, even here the population may be willing to accept the return of amnestied individuals, provided certain conditions are met. For example, a civilian in the Aceh region of Indonesia expressed to journalists a willingness to welcome back former GAM members to his community 'if these people have repented and asked for forgiveness'.[55] Similarly, a preference for conditional amnesties was stipulated by the respondents in the ICTJ survey in northern Uganda (described above). When asked for their views on bringing those responsible for the atrocities to justice, although 76 per cent of those questioned said 'that those responsible for abuses should be held accountable for their actions', 71 per cent were happy to sacrifice justice for peace if an amnesty was viewed as the only means of stopping the violence, and 65 per cent expressed support for the amnesty process.[56] However, 96 per cent of respondents felt that the amnesty should be conditional, 'and the vast majority noted that some form of acknowledgement and/or retribution should be required of all those granted amnesty'.[57] The respondents' approach to amnesty also differentiated between the perceived levels of responsibility of the LRA members, with 79 per cent saying that they would be 'willing to accept lower-ranking LRA back into the community', and 65 per cent saying that they would accept the return of the LRA leadership.[58] But clearly there was considerable support for the reintegration of LRA members of all ranks. Similar views were recorded in the OHCHR study on northern Uganda, which argues:

> For many Ugandans, amnesty is not an automatic response to crimes but rather motivated by various pragmatic considerations, including a desire to see perpetrators—especially local abductees—return from the bush.[59]

The South African approach has been the most researched amnesty process and the one perceived as being most sympathetic to the needs of victims. This process was designed to benefit victims by creating a forum for them to tell their story; encouraging perpetrators to come forward and fully disclose the truth of their actions, which in some cases enabled the remains of individuals who were killed to be returned to their family

[54] Judicial System Monitoring Program (n 3) 33.
[55] Nani Afrida, 'Aceh Leaders Fear Clashes' *The Jakarta Post* (Banda Aceh 12 August 2005) 2.
[56] Pham (n 3) 4–5.
[57] *Ibid* 5.
[58] *Ibid* 40.
[59] OHCHR (n 3) 49.

members; and awarding victims reparations.[60] It is argued that this process enabled victims to receive more truthful information than would have occurred if South Africa had opted for criminal prosecutions.[61] Furthermore, by requiring perpetrators to identify themselves publicly, the amnesty process has been described as a form of punishment for perpetrators.[62] Within the Amnesty Committee of the South African TRC, victims were awarded a greater role in the process of granting amnesty than had occurred in other amnesty processes. The committee provided

> a forum in which victims can 1) hear first hand 'confessions' of those who violated their rights, 2) question and confront amnesty applicants concerning their wrongful acts and their eligibility for amnesty, and 3) tell their own story and perspective concerning the acts for which the applicant is applying for amnesty.[63]

Nonetheless, Sarkin argues that the transcripts of the amnesty hearings show that victims' attitudes to this process varied widely, with some victims remaining strongly opposed to those responsible for human rights violations evading prosecution.[64] In contrast, other victims testified that they did not oppose the amnesty,[65] and have used their participation in the process as an opportunity to become individually reconciled with those who harmed them.[66] Participating directly in the amnesty hearings often enabled victims to find some relief from their pain, by using the process to directly seek answers that would 'heal their memories and prevent a repetition of the same torture in the future'.[67] In this way, the previous power imbalance between victims and perpetrators is reversed as the victims 'assumed the role of interrogators, and the torturer appeared at the mercy of his inquisitors'.[68]

Participation in the hearings also risked having negative consequences for the victims. If they felt that the perpetrators failed to reveal the truth of their actions, the consequences could be shattering for them. This pain was expressed by Mandisa Pumeza, who reported that the policeman who sought amnesty for the death of her father had failed to satisfy her family:

[60] Garkawe (n 12) 355.

[61] *Ibid* 355.

[62] *Ibid* 356–7. See discussion of truth commissions in ch 4.

[63] Ron Slye, 'Victims as the Heart of the Matter: The South African Amnesty Process as Promised in Practice' (April 2003), available at SSRN: <http://ssrn.com/abstract=1022145> 3.

[64] Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, Antwerp 2004) 207.

[65] Slye (n 63) 10.

[66] Nkosinathi Biko, 'Amnesty and Denial' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, London 2000); Slye (n 63).

[67] Tom Winslow, 'Reconciliation: The Road to Healing? Collective Good, Individual Harm?' (1997) 6 *Track Two*.

[68] *Ibid*.

> I was more than prepared to forgive him, but it was clear that he was undermining our intelligence. All he managed to do was hurt us more.[69]

Furthermore, where perpetrators refused to apply for amnesty, this also created pain for some victims. For example, one victim told the truth commission that he wished his torturer would come forward to relieve his pain:

> If I could just see those people. If they could come forward and confess, I think everyone could be relieved. The pain we felt was just like cancer.[70]

The JSMP interviews with victims found that a similar emphasis was placed on 'full disclosure' in Timor-Leste by victims who participated in the CRP process, and in many cases, it was viewed 'as more important than community service or symbolic repayment'.[71]

Despite the potentially positive impact for victims of participating directly in the hearings of the Amnesty Committee, victim participation was limited by several factors. First, many of the amnesty applications were heard in chambers without any public participation.[72] Secondly, even where the amnesty hearings were conducted in public, victims were often not informed that the hearing would take place, or were informed with too little notice to enable them to attend.[73] Furthermore, Sarkin argues that even when victims were present, 'their role at hearings was often minimal', and where they did

> play a more critical role, it was often as a result of their own initiative, with their own lawyers insisting that they give evidence,

rather than the committee creating space for them to participate.[74] Slye argues 'the commission had a limited budget for providing legal representation to victims',[75] which, according to Garkawe meant that many of the victims had inadequate legal representation, particularly compared to the 'highly paid government-funded representation for perpetrators'[76] applying for amnesty. Garkawe argues that this is a significant problem

> given that a grant of amnesty by the [Amnesty Committee] (AC) would have serious legal consequences for victims, and that accountability of applicants would be increased if competent lawyers were available to cross-examine them on their testimony.[77]

[69] Tom Winslow, 'Reconciliation: The Road to Healing? Collective Good, Individual Harm?' (1997) 6 *Track Two*.
[70] *Ibid*.
[71] Judicial System Monitoring Program (n 3) 24.
[72] Sarkin (n 64) 134.
[73] *Ibid* 199.
[74] *Ibid* 199.
[75] Slye (n 63) 8.
[76] Garkawe (n 12) 363.
[77] *Ibid* 363. The grant of amnesty prevented victims from seeking both civil and criminal remedies.

This lack of parity was recognised by the committee itself in its interim report, where it noted

> that as a result of the lack of legal representation, justice may not have been done with respect to indigent amnesty applicants and victims.[78]

Victims also complained of a lack of consultation during the amnesty process, and even in some cases, complete exclusion.[79] Sarkin asserts that

> Often, there was very little acknowledgement of or focus on victims and issues important to them. While they were usually acknowledged at the beginning of a hearing, their needs, concerns and views were frequently not taken into account or even mentioned by the Committee, other than whether they supported granting amnesty or not.[80]

This disregard is highlighted in an example cited by Biko that 'the family of Ashley Kriel came to hear of the decision to grant amnesty to his killers through the media'.[81] Such concerns are clearly problematic, as they could accentuate a victim's sense of alienation. The possibility of participation re-traumatising victims is particularly problematic considering the limited availability of psychological support for victims during amnesty hearings. Garkawe argues that this was a serious deficiency due to the

> formality of AC hearings, and the fact that the revelations made during the testimony before the AC, such as the manner in which a victim died, would be likely to have devastating effects on many victims and survivors.[82]

Similarly, the amount of support and counselling available to victims following an amnesty hearing was also inadequate, 'especially where there was a need for ongoing and long-term follow-up and support'.[83]

The South African amnesty process has also been criticised for placing too much pressure on victims to forgive those who harmed them.[84] Slye argues that this pressure came from the advocate for the amnesty applicant, and 'more surprisingly', the evidence leader.[85] He argues that the pressure from the applicants and their advocates was unsurprising, as most

> probably correctly calculated that acts of apology on their part, and responsive acts of forgiveness and reconciliation on the part of the victims, could sway the amnesty committee in their favour.[86]

[78] Slye (n 63) 8.
[79] CSVR (n 45).
[80] Sarkin (n 64) 199.
[81] Biko (n 66) 197.
[82] Garkawe (n 12) 363.
[83] *Ibid* 363.
[84] The issue of forgiveness before the Human Rights Violations Committee of the TRC is discussed in ch 1.
[85] Slye (n 63) 16. According to Slye, 'An evidence leader represents the Commission and the public before the amnesty committee, and thus plays a role similar to that of a prosecutor in the Anglo-American system.'
[86] *Ibid* 16.

The at times aggressive pressure applied by the evidence leader was more damaging, however, as

> some victims came away from the process feeling the government, through the commission, was more intent on furthering reconciliation than any form of justice to the victims.[87]

A final criticism raised by victims was that the truth commission 'did not devote sufficient resources to instituting a comprehensive programme for those victims who wished to meet "their" perpetrator', even though this was provided for in the mandate of the commission, and where such meetings did occur, usually at the instigation of the victim, the truth commission 'failed to provide the necessary psychological support for victims during and after these emotionally difficult meetings'.[88] Garkawe asserts that this omission was

> particularly ironic given the reconciliation goals of the TRC, the rhetoric of restorative justice and the principles of ubuntu that underlined the TRC's ideology.[89]

The evidence described above indicates that the attitudes of victims to amnesty processes can depend on the relationship of the victim to the amnesty, specifically whether the victim was a beneficiary or whether their former oppressors benefited. Furthermore, the political context in which the amnesty is granted can influence the victims' decisions, with victims being prepared to support amnesty over prosecutions if they believe that it will reduce the threats to their physical safety and enable them to improve their standard of living. Finally, a victim's attitude to an amnesty may depend on the conditions that are attached to it, with the evidence suggesting that amnesty processes where former perpetrators are deprived of the benefits of their crimes, forced to acknowledge their actions and encouraged to apologise being the forms of amnesty most likely to gain acceptance. Victims are also in favour of obtaining both monetary and symbolic forms of reparations, together with psychological support and material assistance to enable them to participate in the transitional justice processes. The experiences of victims who participated in the Amnesty Committee of the South African TRC have demonstrated, however, that such assistance is important, and therefore, the next section will make recommendations on how the role of victims in such processes can be strengthened.

[87] Slye (n 63) 19.
[88] Garkawe (n 12) 364.
[89] *Ibid* 364.

HOW CAN AMNESTY LAWS BE MADE MORE RESPONSIVE TO THE NEEDS OF VICTIMS?

As victims of human rights violations have a wide variety of needs that should in principle be addressed, to enable them to begin healing and for society to move towards reconciliation, attempts to design transitional justice processes must take a holistic approach towards helping victims, encompassing the victims' rights to truth, justice and reparations. Clearly, a blanket amnesty law that aims to obliterate the crimes of the past will not achieve these goals. However, a political compromise in which an individualised, conditional amnesty is granted to former combatants or state agents in conjunction with other mechanisms to investigate the past and prevent a repetition of the abuses might create a climate in which victims can be reintegrated into society and begin to come to terms with their experiences. Using the experiences of the amnesty processes described above, the author has identified a number of criteria that could make amnesty processes more victim-centred.

First, academic literature on truth commissions suggests that, before establishing transitional justice mechanisms, governments must consult widely including with victims and their representatives, as the actual process of voicing their concerns and being listened to can positively influence victims' healing and increase the legitimacy of the transitional justice process.[90] This consultation must recognise the diversity of needs among victims, and it must involve outreach programmes so that all victims can feel comfortable about voicing their views. The results of the consultation should be taken into account by the government in designing the amnesty process. However, the government must ultimately decide which measures are appropriate and how the state's resources should be allocated as, due to the disparate views of many victims' groups, granting individual victims or each group of victims a veto over the transitional justice mechanisms could stall progress towards peace and reconciliation for the whole society. Furthermore, it can sometimes be unclear whether political parties or victims' groups have a mandate to speak for all victims from their community. Some groups can become tainted by political objectives, which they try to justify by describing them as the wishes of the victims. Where the government was itself an actor in the conflict, it may be advisable for the consultation to be conducted by an independent body that then submits its recommendations to the legislature for approval.

The author believes that, once a transitional process has been established, the channels of dialogue should be kept open, to fully educate victims on their rights within the amnesty process and on the aims and nature

[90] See, eg, Winslow (n 67); Minow (n 1); CSVR (n 14); Isaacs (n 3).

of the different transitional justice processes, and to reduce the possibility of creating false expectations. Such programmes are particularly necessary for reassuring victims of sexual abuse, who may be reluctant to come forward due to feelings of shame or fear of being ostracised by the community. Furthermore, continuing dialogue is necessary to ensure that the transitional justice mechanisms continue to be relevant and appropriate as victims' needs often change over time.

Secondly, though periods of widespread and systematic violence can result in large numbers of victims, most transitional justice mechanisms are established with temporal and financial constraints. As a result, these mechanisms are rarely equipped to cope with participation from all victims in society. Although some victims may choose not to participate for a variety of reasons, the transitional justice mechanisms may nonetheless have to decide how to involve victims. For example, a truth commission faced with a large number of submissions from victims may have to decide that only a proportion of the victims will be involved in public hearings. It will then have to develop selection criteria to target and encourage submissions from certain categories of individuals. Often these criteria will 'correspond to the objectives set out' in the commission's mandate,[91] and can include selecting cases to obtain a representative sample of crimes committed; or selecting victims based on their ethnicity, gender, or geographical origins. The criteria could also include choosing victims who are emotionally able to participate, in order to minimise the risk of re-traumatisation. It is likely that each of these determinations will have an impact on the 'truth' that will be revealed, and in order to avoid impressions of bias the author asserts the determinations should be transparent.

Thirdly, for any transitional justice process to achieve its aims of revealing the truth and providing accountability for the perpetrators, the evidence from the case studies examined above shows that efforts must be made to encourage perpetrators to participate. Amnesty can be used to tempt them to come forward and a credible threat of prosecution could be used against those who fail to do so.[92]

Fourthly, the experience of the South African TRC has shown that victims should be permitted to attend and participate in amnesty hearings as far as possible. This participation should be facilitated by informing victims in a timely manner of when the hearings will occur and providing victims with financial support for travel costs and lost income for the period of employment missed. The South African TRC did make provision to do this, but often it was not fully implemented. Furthermore, the commission's court-imposed practice of informing the perpetrators 21 days

[91] Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press, Cambridge 2006) 228.

[92] For a more detailed discussion of how to encourage perpetrators to participate in an amnesty process, see ch 10.

before they would be implicated in a hearing often exceeded the notification granted to victims.[93] Where decisions are not made public at the end of a hearing, victims should also be notified of the decisions, preferably before the decision is made public.

Where victims are permitted to testify before the body granting amnesty, this can benefit the victim by permitting them to tell their story in front of the perpetrators, and 'to correct or counter the impression created by the perpetrator-applicant'.[94] Furthermore, without the victim testimony, the institution would often have to rely solely on the testimony of the amnesty applicant which could impair any truth-recovery function. Victim participation could be further strengthened by including victims in the panel which grants amnesty, although this could raise some difficulties in terms of the perceived objectivity of the institution.

Fifthly, once an amnesty process is established, the case studies examined have shown that the personnel should ideally be trained to deal sensitively with the needs of victims, and procedures need to be developed to make the victims feel secure. For example, if a victim is afraid of repercussions for participating, then efforts should be made to preserve his or her anonymity. In all cases, the victims must be treated with dignity and respect.[95] Furthermore, where appropriate, full translation services ought to be made available. In addition, resources should be made available to provide victims with similar legal representation to perpetrators and with adequate psychological and medical support. Such support should also be made available to victims who are unable, or who decline, to participate.

Sixthly, when institutions such as truth commissions are designed, to enable the victims' views to be taken into account, the exact weight that these views will be granted should be clarified, so that victims are not under a false impression that they have the power to veto an amnesty application. The approach followed under the Community Reconciliation Process in Timor-Leste was that a victim's consent was not required to conclude a Community Reconciliation Agreement.[96] The rationale behind this approach was to 'ensure that the cases of deponents would be settled in an achievable way' and to recognise the difficulty of obtaining

> the consent of individual victims in cases where, for example, a deponent has committed a number of crimes in one community.[97]

[93] Slye (n 63) 7.
[94] *Ibid* 9.
[95] Victims Unit, 'Reshape, Rebuild, Achieve: Delivering Practical Help and Services to Victims of the Conflict in Northern Ireland' (Office of the First Minister and Deputy First Minister, Belfast, April 2002) 1.
[96] Judicial System Monitoring Program (n 3) 33.
[97] *Ibid* 33.

There is some dispute over how much weight was granted to the victims' views by the Amnesty Committee of the South African TRC, but Sarkin argues that

> whether or not victims supported or opposed an application for amnesty, seemed to play a major role in the decision of the Committee to grant amnesty or not.[98]

This role was, however, at the discretion of the committee, and

> victims did not, either in promise or practice, have any right to determine whether an individual should receive amnesty or not.[99]

Where victims are prevented from vetoing a decision to grant an amnesty, they should nonetheless retain the power to 'accept, or to reject, specific offers of reparations or apologies directed to them'.[100] They should not be subjected to any form of pressure to forgive those who harmed them, as

> the ability to dispense, but also to withhold, forgiveness is an ennobling capacity and part of the dignity to be reclaimed by those who survive the wrongdoing.[101]

Indeed, such pressure could be counter-productive, as it might dissuade some victims from participating.[102]

Finally, processes to grant amnesty should, according to international law, also include or be accompanied by measures to grant reparations to victims. Furthermore, failure to do so could cause resentment and undermine any progress made towards reconciliation, particularly where perpetrators continue to benefit from their former activities through state pensions or the proceeds of corruption. In South Africa, although the TRC was empowered to recommend reparations, victims became dissatisfied with the process, owing to the reluctance of the government to implement the recommendations.[103] Furthermore, the considerable delay between participating in the truth commission and receiving reparations was criticised by victims, who would have preferred to receive reparations soon after completing their testimony. As discussed in chapter 4, reparations programmes should include both financial and symbolic measures.

CONCLUSION

In exploring how amnesty laws can be made more responsive to the needs of victims, this chapter has investigated the complexities of the term

[98] Sarkin (n 64) 204, cf Slye (n 63) 24.
[99] Slye (n 63) 26.
[100] Minow (n 1) 135.
[101] *Ibid* 17.
[102] *Ibid* 80.
[103] Sarkin (n 64) 101.

'victim' and the difficulties that can be encountered in attempting to identify victims' needs. It has been demonstrated that, in most transitional situations, victims are a disparate group who have suffered different crimes in different contexts and at the hands of different perpetrators. Therefore, it is unsurprising that transitional governments find it difficult to create programmes to satisfy the needs and wishes of all victims, particularly where they come from different religious or cultural backgrounds and where their needs can change over time. It is perhaps due to this difficulty that governments have tended to impose settlements on victims, rather than affording them a greater say in the processes. If victims' groups could establish a dialogue amongst themselves to enable them to identify core needs which they share, such as the need for medical and psychological support, their unified demands could possibly have more influence over governmental decision making. The needs of victims should not outweigh those of society as a whole; however, victims should always be consulted before transitional mechanisms are established, and should be kept informed once the mechanism is operating.

The attitudes of victims to the amnesty processes that have been explored in this chapter show that, even where they do not support the idea of amnesty, victims may be willing to support an amnesty process when they feel it has the potential to contribute to political stability and improvements in their standard of living. The experiences of the amnesty processes discussed above also indicate that a victim's willingness to accept an amnesty may be influenced by the conditions attached to the amnesty, particularly by whether it holds perpetrators accountable for their actions by forcing them to publicly admit the truth and encouraging them to apologise. Victims' attitudes to amnesty processes may also be affected by the granting of reparations, as victims may need or desire financial compensation to improve their standard of living, particularly in comparison to their former oppressors. In addition, victims may require symbolic reparations that acknowledge the suffering that they endured and aim to prevent a repetition of the violations.

This chapter has argued that ensuring victims' rights to truth, justice and reparations does not prohibit amnesty laws, but rather that amnesty processes, if carefully designed could create a role for victims: to participate and to regain their dignity by questioning their former oppressors; to see their perpetrators punished for their actions through measures such as public identification and lustration; and to obtain reparation. The position of victims in any amnesty process would be delicate, however, and the victims should be treated with consideration and sensitivity, and should be provided with financial and medical support to facilitate their participation.

The attitudes of victims to transitional justice processes are significant, as states have moral and legal obligations towards victims and failure to

consider their views can cause them to pursue vengeance,[104] which could lead to a continuation or re-ignition of the conflict. But if victims are consulted and choose to participate and to forgive those who harmed them, this could extinguish not just their personal need for vengeance, but also the justification for their communities to exact revenge. More research should be conducted to evaluate how victims view transitional justice mechanisms and how these mechanisms can be developed to meet the needs of the victims more fully. Furthermore, as transitional justice aims to safeguard victims and prevent future violations occurring by resolving the harms of the past, it is imperative that more empirical research is conducted to inform practitioners in how to make these mechanisms effective.

[104] Lyster (n 52) 187.

10

Promoting Participation: Making Amnesties Attractive to the Targeted Groups

INTRODUCTION

AS AMNESTIES CAN be introduced at various points during political transitions, either unilaterally by governments or as part of negotiated peace settlements, the responses from the targeted individuals or groups can vary. In some cases, insurgents may demand amnesty as a precondition to begin talks, whereas, in other situations, amnesties introduced by governments keen to make overtures to their enemies may be denounced by insurgents as a sign of weakness or even a trap. Similarly, where amnesties are individualised, the decision whether to participate may be based on a variety of personal factors such as fear of vengeance and poverty. Where amnesty is genuinely intended to end violence and promote reconciliation, failure to entice targeted individuals could have serious repercussions for the transitional state by contributing to continued insecurity and adversely affecting the legitimacy of the regime. Therefore, for many of the amnesty processes under consideration, governments have attempted to attract individuals or groups to apply for amnesty by a variety of means, such as publicity campaigns and the promise of 'sweeteners' like financial assistance and training programmes.

This chapter will consider the views of individuals or groups that are targeted by amnesty laws, in order to ascertain how amnesty processes may be designed to encourage their involvement and reintegration into society. It will begin by considering who applies for an amnesty, before investigating the relationship between disarmament, demobilisation and reintegration (DDR) programmes and amnesty. Subsequently, the methods used by states to encourage acceptance of an amnesty will be described and used to make recommendations on how these processes could be made more attractive. Finally, the attitude of amnesty beneficiaries to transitional justice mechanisms will be analysed, based on the findings of interviews conducted by NGOs, in order to discover whether such

processes could discourage individuals from coming forward. It is expected that the attitudes to amnesty of targeted groups or individuals will depend on their relative strength in the transition and the benefits they can expect to gain from participating.

COMBATANTS, PERPETRATORS, VICTIMS OR FREEDOM FIGHTERS? THE COMPLEX TERMINOLOGY FOR AMNESTY BENEFICIARIES

Amnesty applicants are rarely a homogeneous group. Although amnesties can apply to individuals labelled as offenders or perpetrators, the crimes that they cover can range from perceived violations of repressive or racist laws to human rights abuses.[1] Clearly, individuals who are being absolved from prosecution for actions in the former category of crimes would not be considered offenders in most free societies, whereas human rights violations are often deemed to have a universal nature, particularly those considered to be crimes under international law, and those responsible would be widely held to be perpetrators. Furthermore, where insurgents have engaged in armed campaigns against repressive regimes, their actions are not always easy to label as 'criminal' for moral or ethical reasons, a problem that can be further complicated if the insurgents are victorious in their struggle. Similarly, where an amnesty covers state agents who participated in a conflict, their actions are usually legal under the domestic laws of the state concerned, and consequently, although they may benefit from an amnesty, their actions may not have been prohibited by domestic law, even where they could be in violation of international law.[2]

The beneficiaries of amnesties are often labelled as '(former) combatants' but this term also cannot be universally applied. First, amnesties may be granted for dissidents who engaged in non-violent protest or were interned, for deserters who refused to fight, or in respect of violence committed by state agents or their opponents that does not reach the threshold of an armed conflict. Secondly, even within combatant forces, amnesty applicants can be heterogeneous and might include groups such as conscripted fighters, part-time members, and even members of organised crime gangs.[3] Thirdly, for some rebel groups, the links between regional fighters and a central hierarchy may be very tenuous, particularly where the political leaders of the organisation are operating from exile.[4] Finally,

[1] For a discussion of crimes that are amnestied, see ch 3.

[2] For greater discussion of this point, see ch 2.

[3] Sasha Gear, 'Wishing Us Away: Challenges Facing Ex-Combatants in the "New" South Africa', Vol 8 (Violence and Transition Series, Center for the Study of Violence and Reconciliation, Johannesburg 2002).

[4] *Ibid*.

when former combatants surrender, they are often accompanied by their families and dependants, or by non-combatant members of their organisations, such as women who 'may not have been directly involved in the fighting', but who instead 'may have served armed groups as cooks, servants, or sexual slaves'.[5] This issue illustrates the some of the complications of the victim-perpetrator axis as discussed in chapter 2.

Finally, some individuals may benefit from amnesty without being required to apply formally. For example, where blanket amnesty is granted to state agents, the agents are automatically assumed to be amnestied and the issue only arises where formal legal challenges are brought against the amnesty. In such cases, the amnesty is granted to organisations or institutions, rather than to individuals, in recognition of corporate or state responsibility. Such group amnesties can also benefit the opponents of the state, where, rather than applying for amnesty, individuals are just required to surrender *en masse* with their comrades according to the terms of a peace treaty. This could form part of a disarmament, demobilisation and reintegration programme.

AMNESTY AND DISARMAMENT, DEMOBILISATION AND REINTEGRATION

In the aftermath of conflict, societies are often confronted with large numbers of armed combatants, who must be reintegrated into society to prevent further violence. In recent years, this process has involved the establishment of DDR programmes, which according to the UN include three major elements:

(a) Disarmament is the collection of small arms and light and heavy weapons within a conflict zone. It frequently entails the assembly and cantonment of combatants; it should also comprise the development of arms management programmes, including their safe storage and their final disposition, which may entail their destruction. De-mining may also be part of this process.
(b) Demobilization refers to the process by which parties to a conflict begin to disband their military structures and combatants begin the transformation into civilian life. It generally entails registration of former combatants; some kind of assistance to enable them to meet their immediate basic needs; discharge, and transportation to their home communities. It may be followed by recruitment into a new, unified military force.
(c) Reintegration refers to the process which allows ex-combatants and their families to adapt, economically and socially, to productive civilian life. It generally entails the provision of a package of cash or in-kind compensation,

[5] Lotta Hagman and Zoe Nielsen, 'A Framework for Lasting Disarmament, Demobilization, and Reintegration of Former Combatants in Crisis Situations' (International Peace Academy, 12–13 December 2002) 7.

> training, and job- and income-generating projects. These measures frequently depend for their effectiveness upon other, broader undertakings, such as assistance to returning refugees and internally displaced persons; economic development at the community and national level; infrastructure rehabilitation; truth and reconciliation efforts; and institutional reform. Enhancement of local capacity is often crucial for the long-term success of reintegration.[6]

These initiatives are often characterised as a sequence, but in fact they 'form a continuum whose elements overlap with one another, and are related and mutually reinforcing'.[7] Indeed, it may be beneficial in some cases 'to start the reintegration process before the disarmament and demobilization projects are completed'.[8] Overall, however, for a process to be successful, each element must be completed.[9]

These DDR programmes are frequently introduced in conjunction with national amnesty processes[10] as they can all work to end violence and promote reconciliation, and indeed, amnesty and DDR programmes can work complementarily to encourage combatants to participate if the amnesty 'is pointed to as reassurance that they will not be charged with a crime',[11] and that they will be granted assistance to rebuild their lives. In fact, amnesties and measures to ensure disarmament, demobilisation and reintegration are often provided for in the same peace agreement or negotiation process. For example, the Abidjan Accord 1996 for the conflict in Sierra Leone, which granted a blanket amnesty for crimes under international law,[12] also explicitly set up institutions to implement the DDR programme.

Amnesties can be related to DDR programmes at different levels. First, as seen in chapter 4, amnesty can be conditional on disarmament. It can, however, also allay combatants' fears of surrendering their weapons through its measures to reintegrate them into society. Secondly, the requirement to register formally for demobilisation programmes could be linked to the process of applying for amnesty. For example, a registration form used by Sierra Leone's National Committee on Disarmament, Demobilization and Reintegration states in its first term of acceptance that,

> in accordance with the Amnesty Conditions you will be exempted from criminal prosecution, with regards to any crimes committed prior to your surrender.[13]

[6] UNSC, 'Report of the Secretary-General on the Role of United Nations Peacekeeping in Disarmament, Demobilization and Reintegration' (11 February 2000) UN Doc S/2000/101 [6].
[7] *Ibid* [8].
[8] Hagman & Nielsen (n 5) 3–4.
[9] UNSC (n 6) [8].
[10] Roger Duthie, 'Transitional Justice and Social Reintegration' (Paper prepared for the Stockholm Initiative on Disarmament Demobilisation Reintegration (SIDDR), Working Group 3: Reintegration and Peace Building meeting, 4–5 April 2005) 17.
[11] *Ibid* 17.
[12] For a discussion of the amnesty processes in Sierra Leone, see case study 13.
[13] Duthie (n 10) 17–18.

This amnesty was not dependent upon participation in the DDR programme, but was instead 'just used as reassurance'.[14] Thirdly, DDR programmes can provide a mechanism for community sensitisation on the issue of amnesty, which can reassure combatants wishing to be reintegrated.[15]

Once established, DDR programmes and amnesties can be administered separately or jointly. For example, in Uganda, the Amnesty Commission is responsible for overseeing the DDR programmes for surrendering combatants.[16] This can be difficult to implement, however, as amnesty is often time-limited, with applicants being required to make requests within certain dates, after which point the process will conclude, whereas DDR programmes require a much longer-term commitment to monitoring reintegration.

A danger with closely linking amnesty and DDR initiatives is that, if financial benefits and training programmes are offered to amnesty applicants but are subsequently delayed or denied, this could cause disillusionment with the entire process and inspire former combatants to take up arms once more. Similarly, delays in releasing political prisoners from prison or in administering amnesty applications can cause resentment among fighters on the ground.[17] Furthermore, based on the experience in Kosovo, Heinemann-Grüder and Paes argue that for any amnesty to complement a DDR programme effectively, the terms of the amnesty must be clearly defined to avoid ambiguity. Where this does not occur, the authors assert that

> the expectation of a blanket amnesty is very likely to stimulate insurgents to relapse into a violent or criminal pursuit of interests,[18]

particularly where their expectations are frustrated by a more limited amnesty. However, relapses may also be influenced by other factors within political transitions, such as how rapidly the government implements reforms. Amnesties in conjunction with DDR programmes could also inhibit reintegration where the amnesty is not accompanied by other measures to hold perpetrators accountable or to condition the amnesty on genuine participation in reconciliation efforts,[19] particularly where 'there is entrenched involvement in organised crime among certain former

[14] *Ibid* 18.

[15] See below for further discussion of community sensitisation programmes.

[16] Amnesty Act 2000 (Uganda) art 9. For a discussion of amnesty in Uganda, see case study 2.

[17] Gear (n 3).

[18] Andreas Heinemann-Grüder and Wolf-Christian Paes, 'Wag the Dog: The Mobilization and Demobilization of the Kosovo Liberation Army' *Brief 20* (Bonn International Center for Conversion, Bonn 2001) 9.

[19] Chris Alden, 'Making Old Soldiers Fade Away: Lessons from the Reintegration of Demobilized Soldiers in Mozambique' (2002) 33 *Security Dialogue* 341, 346.

combatants'.[20] Duthie has highlighted the example of South Africa in discussing potential links between the amnesty and the subsequent high crime rates, arguing that former combatants with links to criminality might revert to crime when they are unemployed.[21] Furthermore, Wilson argues that

> the TRC's amnesty for human rights offenders exacerbated an already existing situation of judicial impunity and a trend towards violent retribution.[22]

The causality between amnesty laws and ongoing cultures of violence is not clear, however, and it seems likely that the high rates of violence in South Africa are influenced by many other factors than the amnesty process, which only benefited 1,167 individuals.[23]

METHODS TO ENCOURAGE PARTICIPATION

States can employ several methods to encourage individuals or groups to participate in amnesty programmes. Using information gathered for 140 amnesty processes,[24] the following categorisations have been developed, using literature on DDR and individual amnesty processes: publicising amnesty; developing community sensitisation programmes; granting financial incentives; developing training and employment programmes; integrating former combatants into a unified armed force; and establishing a power-sharing government. Within each of these categories, states have wide scope for action, as will be discussed below. Furthermore, states need not employ each of these methods, and often decisions, such as whether to create a power-sharing government, will depend on the relative strengths of the parties to the transition. Nonetheless, states can introduce one or several methods, and the distributions of each method are shown in Figure 20 below. This chart shows that methods that focus on reintegrating amnesty beneficiaries in the military and political spheres have been popular, whereas there has been relatively little effort to inform potential applicants about amnesties and their benefits. Similarly, in very few cases have concerted efforts been made to prepare the wider community for the re-insertion of individuals receiving amnesty.

[20] Duthie (n 10) 6.

[21] *Ibid* 7. See also Richard A Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State* (Cambridge Studies in Law and Society, Cambridge University Press, Cambridge 2001) 160.

[22] *Ibid* 161.

[23] Helena Cobban, *Amnesty After Atrocity? Healing Nations after Genocide and War Crimes* (Paradigm Publishers, Boulder CO 2007) 112.

[24] Information has not been identified for each of the amnesty processes in the Amnesty Law Database as many amnesties may not have had formal measures to encourage participation, perhaps because they applied unconditionally to state agents or automatically provided for the release of political prisoners.

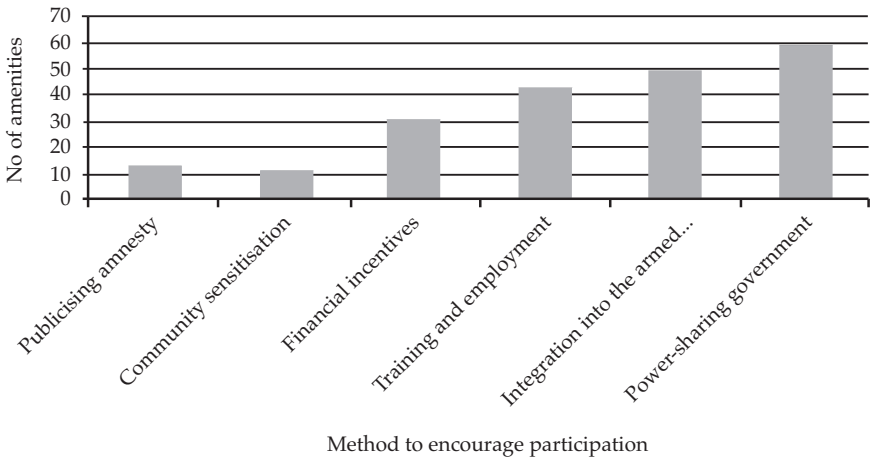

Figure 20: Methods to encourage participation in amnesty processes

Publicising Amnesties

For any amnesty process to achieve its aims, a key element of its implementation must be publicity. Without this, the targeted groups or individuals may fail to comply with the amnesty as they are unaware of its existence or may be sceptical of its benefits. Depending on the quality of the communication infrastructure within the region or country concerned, different forms of publicity may be appropriate, including newspapers, radio, dedicated telephone lines, television, leaflets, letters, posters, or banners. Radio has been particularly relied upon in an outreach programme in northern Uganda, where broadcasts focus on reassuring members of the LRA that they will not be the subjects of revenge killings.[25] Individuals who have already received amnesty are often required to participate in programmes on Gulu's Radio FM Mega to

> call upon their former comrades to come out of the bush and to offer reassurance that they have not been harmed.[26]

This form of awareness-raising can be particularly useful to counteract the manipulation and misinformation of targeted groups by their leaders, who wish to dissuade them from surrendering. In other situations, family members are required to participate. For example, in Saudi Arabia, following the announcement of the 2004 amnesty for individuals involved in

[25] Phuong Pham and others, 'Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda' (International Center for Transitional Justice, New York, July 2005) 49.

[26] *Ibid* 49 and Tim Allen, *Trial Justice: the International Criminal Court and the Lord's Resistance Army* (Zed Books, London 2006) 75.

the Islamic insurgency, but who do not have blood on their hands, newspapers carried appeals from religious figures and family members of some of the wanted men calling on the militants to give themselves up.[27] Civil society has on occasion also been relied upon to provide sensitisation teams that will visit the targeted groups to provide them with information or to distribute leaflets.

The experience of states to date has illustrated that, during any process to publicise an amnesty, some key criteria must be observed. First, any individuals involved in disseminating information, including journalists, aid workers, representatives of civil society, personnel at reception centres, and, where appropriate, staff at embassies, must be properly trained in the scope and impact of the amnesty. They must then be able to convey this information clearly to the targeted groups or individuals in a language that can be understood. This has provided an important component of the work of the Ugandan Amnesty Commission, which provides orientation and training to the personnel at Uganda's embassies in Sudan and Kenya to enable them to better assist applicants, including former child soldiers, to enter into the amnesty programme.[28]

Secondly, the means of communication employed must take into account the situation on the ground, for example, the literacy levels among the targeted groups, and ease of access to radios, televisions, internet or telephones, particularly where the targeted groups are based in remote areas.

Thirdly, the information provided must address the concerns of the targeted groups: for example, will their security from government forces, former comrades, or relatives of those they harmed be guaranteed if they surrender and disarm? The issue of personal safety has been recognised in several amnesty laws to date. For example, in Decree Law 27-83, the Guatemalan government pledged to 'respect the physical integrity and the liberty of those' who have surrendered to government authorities.[29] More concretely, descriptions of the security measures available to former combatants were given in amnesties the Philippines and Turkey, which respectively promised to relocate those at risk[30] or even provide plastic surgery.[31] Other concerns could focus on the provision of financial assistance and training, or whether applicants could be arrested if they provide information on crimes that are beyond the scope of the amnesty. The

[27] Donna Abu-Nasr, 'Hardcore Militants have not Taken Advantage of One-Month Amnesty Offer to Militants' *Associated Press* (Beirut 21 July 2004).

[28] US Department of State, *Country Report on Human Rights Practices: Uganda 2003* (25 February 2004).

[29] *Decreto Ley* 27-83 (15 Mar 1983) (Guate) art 2.

[30] Miguel Suarez, 'President Aquino Announces Amnesty Program' *Associated Press* (Manila 28 February 1987).

[31] ——, '"Law of Repentance" Adopted by Grand National Assembly' *BBC Worldwide Monitoring* (31 March 1988).

publicity must realistically describe the objectives and consequences, rather than creating false hopes among applicants. Furthermore, to address applicants' concerns over providing information, procedural protections must be put in place to protect the rights of amnesty applicants and prevent the possibility of accusations of bias. First, clear 'data protection' rules need to be established, to reassure applicants that any information they provide can only be used in specific contexts. Secondly, amnesty applicants should be permitted to respond to any accusations made against them, and where appropriate have access to legal representation. Thirdly, where amnesty is conditional, it is preferable that amnesty applicants have the right to appeal a decision against them.

Finally, a government, once it has decided to implement an amnesty, must follow a consistent line. In Uganda, President Museveni failed to do this, and instead, has made contradictory statements on whether the amnesty extends to the leaders of the LRA and referred the situation to the ICC. There has also been 'an erratic pattern of renewals' which has led to 'further insecurity', and the designation of the LRA as a terrorist organisation brought the amnesty into potential conflict with domestic terrorism legislation. In such situations, where the terms of the amnesty seem uncertain, it could undermine trust in the process and dissuade individuals from coming forward.

Sensitising Communities

In post-conflict environments, the population of a state may have divergent views on the return of combatants, with some sections of society regarding the returnees as heroes and others viewing them as perpetrators who should be imprisoned or even killed for their actions. Gear, using results from

> a series of in-depth interviews and focus groups with former members of various armed groupings that participated in South Africa's recent conflict

has argued that in South Africa ex-combatants are 'ascribed multiple and conflicting roles' including 'political players, crime fighters, outsiders and scapegoats'.[32] These perceptions can 'impact fundamentally on the nature and experience' of the former combatants' attempts to reintegrate,[33] and could cause them to fear violence and intimidation from the community in which they try to reintegrate. The levels of community support may depend on many factors, including the perceived legitimacy of the cause for which the perpetrators fought, the tactics they employed, the prevalence of child

[32] Gear (n 3).

[33] *Ibid*. See also Peter Shirlow and Kieran McEvoy, *Beyond the Wire: Former Prisoners and Conflict Transformation in Northern Ireland* (Pluto Press, London 2008).

soldiers, and the existence of conscription. Where they were responsible for widespread human rights violations, or attacked members of their own group, there is likely to be greater opposition to their return.

Where suspicion and fear characterise the relationships between ex-combatants and 'former victims, communities, government institutions, and other ex-combatants', programmes to generate trust must be developed to promote sustainable peace and prevent conflict re-occurring.[34] These programmes could take the form of 'community sensitisation' initiatives designed to address the concerns of the wider community on the reintegration of former combatants, in order to raise awareness, where appropriate, of the fact that many combatants were forcibly conscripted, and to help the community prepare to accept these combatants into their community. The measures could include media campaigns, training programmes for local leaders and civil society, public meetings, and education initiatives.

Involving local communities is complicated, as identifying local interlocutors who can represent the community can be problematic.[35] Furthermore, attempting to reintegrate women and girls who were kidnapped and subjected to sexual abuse by a party to the conflict will often clash with prevailing social mores. Similarly, community values can sometimes create incentives and pressure to retain weapons or commit violent acts.[36] Therefore, commentators recommend that community sensitisation programmes be created, using community consultation and engagement, including civil society organisations,[37] as this enables the programmes to build

> on existing local customary structures, empowering communities to define their own objectives and identify collective incentives that are generally more suitable than measures proposed by outsiders.[38]

It can also contribute 'to building up accountability at the level of families and communities' as a means of 'ensuring social control over former combatants'.[39] Furthermore, community involvement can help to ensure that the assistance packages given to ex-combatants are balanced against the needs of the community into which they are returning, and that public works schemes and training programmes are designed to contribute to the

[34] Duthie (n 10) 1–2. These programmes are sometimes provided for in peace agreements, see eg Cotonou Accord, 1993 s H, art 9(3) (Liber).

[35] Béatrice Pouligny, 'The Politics and Anti-Politics of Contemporary "Disarmament, Demobilization & Reintegration" Programs' (*Centre d'études et de recherches internationales, SciencesPo*, Paris September 2004) 11.

[36] *Ibid* 9.

[37] Nat J Colletta, 'The World Bank, Demobilization, and Social Reconstruction' in Jeffrey Boutwell and Michael T Klare (eds), *Light Weapons and Civil Conflict* (Rowman and Littlefield, Lanham, MD 1999) 208.

[38] Pouligny (n 33) 11.

[39] *Ibid* 11.

development of the area and demonstrate the contribution that the former combatants can make to rebuilding.[40]

When creating a community sensitisation programme, Pouligny notes that attention should be paid to the quality of material produced for the programmes, to avoid it being regarded as 'superficial propaganda', and that the language or dialect employed must be appropriate for the target audience.[41] The structuring of amnesty processes can also facilitate the reintegration of the beneficiaries by imposing conditions on the grant of amnesty. For example, a reintegration programme could require participants to undergo civic education, to ensure that they are aware of the norms of the society. For example, many genocide suspects who were released under the Rwandan Organic Law underwent several months of special 'civic education' at one of 30 '*ingandos*' or 'solidarity camps' following their release from prison. The *ingandos* place a premium on blunting ethnic divisions and animosity.[42]

Community sensitisation programmes can be further supported by the establishment of complementary justice measures, such as truth-telling or traditional justice mechanisms. For example, in the Aceh region of Indonesia, where amnesty was granted to all members of the GAM insurgent group, a journalist has found that the Acehnese population felt a 'lot of hatred . . . for some GAM members who often extorted and kidnapped their fellow Acehnese', or even murdered individuals they suspected to be spies.[43] To resolve this tension, former GAM members have been encouraged by local officials to participate in *peusijuek* ceremonies, which are traditional reconciliation rituals.[44] As discussed in chapter 4, similar grassroots ceremonies have been used to help to reintegrate former combatants in other transitional states, including Mozambique, Rwanda, Sierra Leone, Somalia, Timor-Leste and Uganda. By creating forums in which former combatants can acknowledge their actions and show remorse for any crimes they have committed, these mechanisms can symbolically show the commitment of the returnees to abide by the rules of their society. Furthermore, by revealing the truth of the events that occurred, they can illustrate that not all combatants were responsible for serious crimes.[45]

[40] *Ibid* 11.
[41] *Ibid* 12–13.
[42] ——, 'Rwanda: The Role of Re-Integration And Reconciliation of Ex-Prisoners' *The Times* (12 August 2005). For a discussion of Rwanda, see case study 8.
[43] Nani Afrida, 'Aceh Leaders Fear Clashes' *The Jakarta Post* (Banda Aceh 12 August 2005) 2.
[44] *Ibid*.
[45] Stockholm Initiative on Disarmament, Demobilisation, Reintegration, 'Final Report' (Ministry of Foreign Affairs, Stockholm, February 2006) [56].

Providing Financial Incentives

The provision of financial benefits, either in cash or in kind, is a well-established mechanism for encouraging combatants to surrender.[46] It can occur at all stages of a transition, from providing money in exchange for guns during an early disarmament stage, to providing cash instalments and pensions over a long period as a kind of 'transitional safety net'.[47] Financial incentives can encourage perpetrators to participate in amnesty processes by providing them with security whilst they find 'alternative means of income generation and support'.[48] This assistance is particularly needed in transitions characterised by high levels of poverty and unemployment, where deprivation may cause the amnesty applicants to turn to criminality. It has been argued that providing cash directly to perpetrators is the most appropriate means of assistance, as former combatants often 'invest in actions that in culturally appropriate ways convert cash into social capital (reconciliation) and economic capital'.[49] Furthermore, cash payments

> reduce transaction costs, are more flexible to use by beneficiaries . . ., permit more transparent accounting, can adapt more closely to the specific needs of beneficiaries, and have a positive psychological effect of empowering ex-combatants to take charge of their lives.[50]

In the provision of cash payments, a distinction has typically been made between state agents and opponents of the state, with any financial rewards given to demobilised state agents being termed as redundancy pay or pensions, rather than the reintegration payments offered to opponents of the state. For example, the 1968 French amnesty law, which covered soldiers who had fought in the Algerian war of independence, allowed for the beneficiaries to obtain their full pension.[51]

For the amnesties under consideration, cash payments seem to have been the most popular form of financial support, although in some cases bank loans, food and other physical items were provided. For example, the 1997 Bangladeshi amnesty for members of Shanti Bahini guerrilla group provided 'bank loans on easier terms and conditions to give assistance for cottage industry, horticulture etc self-employment activities'[52]

[46] Jeffrey Isima, 'Cash Payments in Disarmament, Demobilisation and Reintegration Programmes in Africa' (2004) 2 *Journal of Security Sector Management* 1 and Anton Baaré, 'An Analysis of Transitional Economic Reintegration' (SIDDR—Reintegration and peace building (Working group 3)) <http://www.sweden.gov.se/content/1/c6/06/54/02/05d5985b.pdf> accessed 17 October 2007.

[47] Isima (n 44).

[48] Gear (n 3).

[49] Baaré (n 44) 18–19.

[50] Isima (n 44).

[51] *Loi No 68-697 portant amnistie* (1968) (France).

[52] 1997 Chittagong Hill Tracts Peace Treaty (Bangladesh) art 16(f).

and under the Ugandan amnesty process, provision was made to grant each amnesty applicant a reintegration package including

> both cash—350,000 Ugandan shillings ($205)—and physical items such as a mattress, blanket, cup, pots and pans, jerry-can, ten kilograms of seeds, and farming tools.[53]

Where cash payments were granted, they were sometimes clearly used as a means of ensuring good behaviour on the part of former combatants. For example, under the 2004 amnesty for the insurgents operating in the region of Kashmir, the Indian government stated its intention to deposit 150,000 rupees ($3,300) into bank accounts established for each applicant, which the applicant would only be able to access after three years of good behaviour.[54] Similarly, the 2005 *Ley de Justicia y Paz* in Colombia promised each fighter $200 as an initial payment, followed by a monthly stipend of $150 for living expenses, provided they did not commit further crimes over the next two years.[55] An alternative approach was followed in the amnesty proposed for Maoist rebels in Nepal in 2006 which offered cash payments that distinguished between rank by offering senior Maoist rebels up to 1 million rupees ($14,000), whereas lower-level fighters were offered between 500 rupees and 500,000 rupees, depending on the weapons that they surrendered with.[56] It is possible that apportioning cash payments according to rank could be used tactically to prompt foot soldiers to become disillusioned with their leaders and thereby sow division within rebel ranks.

There are some risks to providing those previously involved in violent activities with financial rewards for surrendering. First, if similar financial benefits are not available to victims, or if the majority of the population lives in conditions of deprivation, such payments could seem unjust and could spark unrest. Furthermore, if it becomes public knowledge which individuals have received payments, they could be put at risk of theft, which could inhibit their reintegration.[57] In addition, a recurring danger in many transitions is that many programmes

[53] International Crisis Group, *Building a Comprehensive Strategy for Peace in Northern Uganda*, Africa Briefing No 27 (23 June 2005) 8.

[54] Mujtaba Ali Ahmad, 'Two rebels killed, two civilians wounded in Kashmir's violence' *Associated Press* (Srinagar 31 May 2004).

[55] Dan Molinski, 'Colombian Towns Choose Peace Over Justice' *Associated Press* (Pajonal 14 July 2005). See case study 11.

[56] Binaj Gurubacharya, 'Nepal offers amnesty, cash, land to surrendering rebels ahead of planned blockade' *Associated Press* (Kathmandu 13 March 2006). For a discussion of cash in exchange for weapons, see ch 4.

[57] Binaj Gurubacharya, 'Nepal offers amnesty, cash, land to surrendering rebels ahead of planned blockade' *Associated Press* (Kathmandu 13 March 2006). For a discussion of cash in exchange for weapons, see ch 4.

> reintegrate former combatants into poverty stricken societies, and although 'at par with the rest of the community', they are sometimes left in a state of destitute poverty.[58]

Where this occurs, the former combatants could pose a security risk, particularly following conflicts that were ignited by a desire for improved economic well-being. Continued poverty during the transition period may cause former combatants to continue their struggle, especially where the former combatants have links to organised crime. A further danger with cash payments is that they might encourage 'fraud and diversion of assistance funds from the targeted beneficiaries'[59] by corrupt public officials. This could reinforce mistrust between the former combatants and the new government, and could undermine the legitimacy of the new regime. Finally, granting money for surrender could undermine processes of legal and social forgiveness, which can underlie an amnesty process, as applicants could be perceived as only applying for amnesty to obtain financial rewards rather than because of a genuine commitment to the new transitional arrangements and a desire to be reconciled with the wider community.

Commentators have identified a number of issues to be considered for cash payment schemes to be effective. First, the sequencing between financial incentives awarded to amnesty beneficiaries and the compensation payments granted to victims needs to be carefully implemented. Most commonly, amnesty beneficiaries receive the financial benefits first to encourage them to lay down their weapons and reintegrate into society, whereas victims often do not receive compensation payments until completion of measures to investigate past crimes. Where considerable time separates the payments to the two groups, the victims could potentially become disillusioned with the process.

Secondly, close attention needs to be paid when determining the appropriate amount of financial incentives to grant to perpetrators. These calculations could rely on the number of dependants that the recipient must support, or the level of need of different categories of ex-combatant, or simply provide a flat-rate sum.[60] It seems appropriate that the amounts calculated 'fairly correspond to the level of household income of the general population', so as to avoid resentment in the community of settlement[61] and distorting local economies.[62] Furthermore, levels should not be set so high that they create a disincentive for beneficiaries to find work. Finally, the provision of cash payments could be impeded by a lack of a

[58] Baaré (n 44) 4.
[59] Isima (n 44).
[60] Hagman & Nielsen (n 5) 7 and Isima (n 44).
[61] *Ibid* and Colletta (n 35) 207.
[62] Multi-Country Demobilization and Reintegration Program, 'Guidelines for National Programs' (World Bank, Washington DC) <http://www.mdrp.org/PDFs/nat-programs_guidelines.pdf> accessed 17 October 2007, 2–3.

financial infrastructure 'to facilitate the disbursement of cash'[63] and many recipients may require financial management training to help them spend their cash payments or loans appropriately.

Establishing Training and Employment Programmes

In addition to financial payments to provide a transitional safety net to combatants who surrender, many amnesty processes also include programmes to enable applicants to develop sustainable means of supporting themselves and their dependants. These programmes can contribute significantly to a state's redevelopment, as they can enable amnesty beneficiaries to become self-sufficient, rather than simply relying on grants. Furthermore, these programmes can enhance the well-being of the individuals themselves, who without them may be stigmatised and denied access to the labour market due to their former activities, or who may have been recruited as children, and consequently, have no experience of 'normal' life.[64] If left unaided, not only would the individuals be without an income, they could also suffer from 'humiliation, feelings of helplessness, dependency, boredom, and a loss or lack of status' resulting from their unemployment,[65] which could lead them to drift into criminality. To prevent this, the government can pursue a number of initiatives including creating employment opportunities for the recipients of amnesty, either by granting them government jobs or by establishing labour-intensive public works schemes. Ex-combatants can offer a ready source of labour for such schemes. As Hagman and Nielsen highlight, when development programmes are financed by the international community, such schemes can lessen the burden on national governments.[66]

Public works schemes are only a medium-term solution, and for greater long-term security, amnesty laws accompanied by education and training programmes may be more useful. Such programmes can help amnestied individuals by raising their self-esteem, providing them with marketable skills, re-orientating them to civilian life, and, if their training occurs in a demobilisation camp, providing them with a 'cooling-off period' before they attempt to reintegrate fully.[67] When designing a training programme, the 'absorption capacity of the local economy and labour market'[68] must be analysed, to increase the possibility of the newly trained individuals

[63] Isima (n 44).
[64] Baaré (n 44) 5; and Andrea Veale and Aki Stavrou, *Violence, Reconciliation and Identity: The Reintegration of Lord's Resistance Army Child Abductees in Northern Uganda*, No 92 (Institute for Security Studies, Pretoria 2003) 40–1.
[65] Gear (n 3).
[66] Hagman & Nielsen (n 5) 5.
[67] Baaré (n 44) 21.
[68] Multi-Country Demobilization and Reintegration Program (n 61) 3.

obtaining employment. The development of training programmes may be hindered, however, by the low level of education among some former combatants; therefore, resources should also be put into literacy programmes.

An alternative to training individuals to work in industry is to offer amnesty beneficiaries the possibility of becoming farmers. This has been a reintegration component in several amnesty processes. For example, in the Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement, the government pledged

> to allocate suitable farming land . . . to the authorities in Aceh for the purpose of facilitating the reintegration into society of former combatants

and the agreement stipulated that 'all former combatants [political prisoners and victims] will receive an allocation of suitable farming land'.[69] The granting of land, however, can be a very complicated endeavour, as many former combatants will need training in agricultural techniques. Furthermore, ownership of land can be 'one of the most explosive social and political issues' in divided societies, particularly where the land is communally owned and biased in favour of men.[70]

Integrating Former Combatants into the Armed Forces

The process of reintegrating amnestied individuals into society has included not only civilian employment, but in many cases, has also provided for their integration into a state's armed forces and police services. The logic behind this policy is appealing, as a more diverse personnel base can ensure that the institutions adopt 'new attributes and political culture', whilst reversing the hegemony of a previously dominant ethnic group.[71] Requiring the armed forces to become more representative of the whole population can offer greater security to previously oppressed groups whilst rectifying past discrimination. Furthermore, many insurgents,

> with civilian oversight and training in human rights, . . . may be well placed to join these institutions as they are . . . skilled recruits.[72]

In restructuring the armed forces, the government may simply integrate former combatants, or perhaps coup participants, into an existing army. For example, the Bicesse Accords 1991 for the conflict in Angola provided, in addition to the broad amnesty, that

[69] Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement, 2005 (Indon) s 3.2.5.
[70] Baaré (n 44) 17.
[71] Hagman & Nielsen (n 5) 5.
[72] *Ibid* 5.

> [t]he paramilitary or militarized forces of both parties shall have been demobilized or *integrated into the respective regular military forces* by the time the ceasefire enters into force. (emphasis added)[73]

This is perhaps the simplest solution, but it could pose risks if the former insurgents are kept in separate units under the control of their commanders. Similarly, imposing members of former enemy groups into existing structures may adversely affect morale and discipline. An alternative approach could be to completely restructure, or dissolve and re-establish, the armed forces, as was provided for in Angola in the later Lusaka Protocol 1994, which, in addition to broad amnesty for former combatants, outlined the process for forming the Angolan Armed Forces and stipulated that the 'composition of the Angolan Armed Forces will reflect the principle of proportionality between Government and UNITA military forces'.[74] This approach could bring financial benefits to the transitional state from military downsizing and could facilitate the establishment of 'a disciplined, high-quality defence force' that could increase security, build confidence, and reduce public fear.[75] Furthermore, the reduction in personnel numbers of the armed forces could be carried out in conjunction with lustration programmes to remove former human rights abusers.

Any attempt to harmonise former enemies into a single institution is likely to be fraught with difficulty. For example, former insurgents may be reluctant to participate, as they do not trust the state officials or may simply be unaware that the programme exists.[76] They may also be reluctant to register if they are subject to 'outstanding warrants of arrest and criminal investigations'.[77] Furthermore, where only limited numbers of former insurgents can be included, the decisions regarding whom to include can prove very contentious, as shown by the violence in Timor-Leste in 2006.[78] A risk of allowing former rebels to receive military training is that many of the individuals who were not combatants or who only had 'very tenuous links to the status' may become 'further militarized'.[79] Where integration into the armed forces does not result in long-term employment, this could pose security risks for a transitional state, particularly where the former insurgents remain ideologically committed to their former goals and do not recognise the legitimacy of the state.[80] A further dilemma for

[73] Bicesse Accords 1991 (Angola) Annex I, s F.
[74] Lusaka Protocol 1994 (Angola) Annex 4.
[75] Colletta (n 35) 209.
[76] Gear (n 3).
[77] *Ibid*.
[78] Timor-Leste suffered violent unrest in April and May 2006 following the dismissal of one-third of the armed forces. Much of the tension within the military has been credited to perceived discrimination in favour of recruits from eastern district when the Timor-Leste Defence Forces had been created in 2001. For more information, see International Crisis Group, 'Resolving Timor-Leste's Crisis' (10 October 2006) Asia Report No 120.
[79] Gear (n 3).
[80] *Ibid*.

integration into armed forces is whether to screen the applicants, in order to ensure that no human rights violators are admitted. In some amnesty processes, leaders of insurgent forces responsible for human rights violations were deliberately offered positions as generals in the hope that they would encourage their troops to disarm.[81] This is clearly a risky strategy, however, as it could undermine the legitimacy of any attempt to reform the armed forces and could lead to further abuses occurring.

Establishing Power-sharing Governments

During times of transition, there are often strong arguments to be made for reform of all levels of government, to ensure greater representation of all sections of society, greater accountability, greater transparency and impartiality. This is especially the case where the violence within a society was directed at a particular ethnic, linguistic, or religious community, who could continue to be at risk under simple majoritarian government. The decision to allow the former enemy access to the institutions of power is often a very difficult process for stakeholders to a transition to accept, and consequently, typically occurs when there has been no clear victor in the struggle.

There is a continuum of change that could be introduced. First, the amnesty itself could simply restore the political rights of the beneficiaries who were previously excluded because of their political status or criminal record. For example, a post-World War Two amnesty in Austria restored the political rights of individuals who had been previously subjected to lustration measures for their involvement with the Nazis.[82] Alternatively, the transformation of guerrillas into a political party could be facilitated, or the political wing of a rebel movement could be un-banned. For this to be successful, however, the group must have genuine political aims.[83] These changes could be stand-alone decisions, or they could accompany other measures, such as granting supporters of the insurgency a guaranteed number of lower and middle-ranking government jobs. For example, the 2003 Agreement Between Government of Chad and the National Resistance Army provided, in addition to amnesty for all rebel militants and their sympathisers, for: the appointment of qualified rebels to civil institutions such as the police force and customs service; the appointment of members of the rebel group as ministers in the government; and the

[81] ——, 'The UN Gets Tougher' *The Economist* (Bunia 12 March 2005).

[82] Siegfried Beer, 'Hunting the Discriminators: Denazification in Austria, 1945–1957' in Guðmundur Hálfdanarson (ed), *Racial Discrimination and Ethnicity in European History* (Edizioni Plus—Università di Pisa, 2003).

[83] Pouligny (n 33) 18.

transformation of the movement into a legal political party.[84] In some cases, where vacancies have already been available, it has even been possible for the former insurgents to nominate new members of the judiciary. For example, the 1993 Cotonou Accord, which granted amnesty to all combatants in the Liberian civil war, also provided that the insurgent United Liberation Movement of Liberia for Democracy (ULIMO),

> shall have the right to nominate the fifth member of the Court to fill the vacancy which currently exists. The nominee by ULIMO to the Supreme Court shall meet the established criteria and successfully undergo a screening by his or her peers in the Court.[85]

Such appointments could be problematic, however, as insurgents or their supporters may not have the necessary skills to fulfil a role in public office. In such cases, the transitional state could face appointing ill-qualified individuals, failing to fill vacant posts, or simply ignoring its commitment to more representative government.

In addition to lower-level changes, some amnesties have been accompanied by measures to integrate former insurgents into all levels of government. For example, the 1994 Lusaka Protocol for the conflict in Angola provides

> in the pursuit of national interest, UNITA members [will] participate adequately at all levels and in the various institutions of political, administrative and economic activity.[86]

In such cases, it appears that pre-existing government structures will not be altered, but new personnel will be appointed. Transformations that are more fundamental will occur when the amnesty is accompanied by constitutional reform to address the grievances underlying the conflict and ensure greater autonomy for minority groups. Certain amnesties have been introduced to facilitate a national dialogue to produce such reforms. For example, the 1990 amnesty in Benin was introduced to encourage political opponents to participate in a national conference to create a new constitution.[87] Constitutional reforms can be provided for in peace accords or agreements to establish transitional governments of national unity, which will be charged with establishing the new political order. Such transitional power-sharing arrangements can, 'at critical junctures in the transition from intense (sometimes violent) conflict, . . . offer a

[84] Agreement Between Government of Chad and the National Resistance Army 2003 (Chad).

[85] Cotonou Accord 1993 (Liberia) S B art 14.

[86] Lusaka Protocol 1994 (Angola) Annex 6, s 1, art 4(c).

[87] *Loi no 90/028 portant amnistie des faits autres que des faits de droit commun commis du 26 octobre 1972 jusqu'à la date de promulgation de la présente loi*, 1990 (Benin).

compromise acceptable to most ethnic elites'.[88] The mechanisms of a power-sharing arrangement can differ either by allocating specified positions in the government to former insurgents, or by general provisions granting a representative proportion of posts.

Power sharing can, however, be risky due to the high level of mistrust that often characterises transitional regimes. Furthermore, Rothschild and Roeder argue that 'the incentives created by power-sharing institutions themselves encourage ethnic elites to escalate their claims', and use tactics such as 'political brinkmanship' to attempt to force their objectives.[89] Even where power sharing is only temporary, whilst permanent institutions are designed, it is likely that the players will use the opportunity to strengthen their own position. If that is not possible, there is little incentive for them to work towards reconciliation.

IMPACT OF TRUTH COMMISSIONS ON POTENTIAL AMNESTY APPLICANTS

The attitude of perpetrators to participation in alternative accountability mechanisms is as yet under-researched, although there have been a couple of notable studies investigating their views. First, as discussed earlier, Gear conducted a number of interviews with applicants to the Amnesty Committee of the South African TRC.[90] Secondly, PRIDE, a Sierra Leonean NGO, in partnership with the ICTJ, conducted a questionnaire-based survey of ex-combatants, before and after holding eight focus group sessions with the participants to sensitise them to the work of the Special Court of Sierra Leone and the Sierra Leonean Truth and Reconciliation Commission.[91] The evidence from these reports, together with the views of academics will be used to explore the impact of truth commissions on amnesty applicants.

The author believes that the views of amnesty applicants must be considered when designing processes that benefit from their active involvement. The testimony of amnesty applicants can contribute to establishing a common history that can be accepted by all groups in society, providing the answers to victims' questions, and facilitating the reintegration of former combatants into society. However, as discussed previously, amnesty applicants are a diverse group, and consequently, some targeted individ-

[88] Donald Rothchild and Philip G Roeder, 'Dilemmas of State-Building in Divided Societies' in Philip G Roeder and Donald Rothchild (eds), *Sustainable Peace: Power and Democracy after Civil Wars* (Cornell University Press, London 2005) 5.

[89] *Ibid* 9.

[90] Gear (n 3).

[91] PRIDE and International Center for Transitional Justice, 'Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone' (PRIDE, Freetown, 12 September 2002).

uals may willingly participate, whereas others will view the transitional institutions with scepticism. The research on ex-combatants in Sierra Leone has shown that some were willing to engage with the truth commission, as they felt it would help them be accepted by their communities.[92] Other reasons that ex-combatants gave for supporting the commission included hope that it would bring peace, help victims and perpetrators to be reconciled, and correct the mistakes of previous governments.[93] Furthermore, many combatants felt that telling the truth would give them an opportunity to become 'free', to explain why they fought, to enable the victims and their families to grant them forgiveness, and to allow their own families to forgive them.[94] These motives could be particularly strong for former combatants who have become disillusioned with the government or insurgent ideology[95] or desire to repent for their previous actions and become reconciled with the community. This appears to have been the case in Sierra Leone, where perpetrators were willing to participate, and were actually 'relying on the TRC to promote effective reconciliation and reintegration'.[96] In contrast, however, other former combatants expressed a reluctance to participate due to fear, a sense that it is unnecessary or potentially damaging to bring up the past, or concern that by providing information they could inculpate themselves and face prosecution.[97]

Former combatants may not be opposed to accountability mechanisms in theory, but may have concerns about how they operate in practice. For example, although the South African TRC divided its 'work into a more formal, court-like amnesty committee and a more informal, compassionate human rights committee',[98] some former members of SADF Special Forces contended that the truth commission was 'a witch-hunt of apartheid state operatives'.[99] Their views were reinforced by the composition of the TRC, which was 'constituted entirely of people aligned with the anti-apartheid forces', although to do otherwise may have dissuaded some victims from coming forward.[100] Other aspects of the work of the TRC which concerned former combatants included the possibility of a commission using a power of subpoena, which could force former combatants to give evidence against

[92] *Ibid* 5. In contrast, see William A Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 11 *UC Davis Journal of International and Policy* 145, 152–3.

[93] PRIDE (n 91) 12.

[94] *Ibid* 12.

[95] Gear (n 3) and UNSC (n 6) [61].

[96] PRIDE (n 91) 6.

[97] *Ibid* 12.

[98] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, Boston 1998) 72.

[99] Gear (n 3).

[100] *Ibid*.

their will.[101] Former combatants in Sierra Leone voiced concerns over attempts to force them, particularly those who had been conscripted or forced to commit violent acts, to show remorse for their actions, as many of them felt that they had done nothing wrong, and consequently should not be punished or forced to apologise.[102] A final issue that could influence the decision of amnesty applicants on whether to disclose information could be whether their names will be published. For many, the sense of shame that comes from having their actions publicised is acute, and can have a destructive impact on their relationships and sense of inclusion in society, particularly where the applicants' families and friends are unaware of the extent of their behaviour.

As with victims, the views of amnesty applicants may alter over time, depending on their standard of living and level of integration into society. For example, although several former members of SADF reported that, whilst they felt the truth commission 'made an important contribution to society by providing information to families of victims of human rights violations',[103] it is nonetheless 'a fundamental factor in the stigmatization of ex-combatants who were part of the apartheid security forces'.[104] They argued, after participation in the commission, that 'those who have been "hunted" down suffer the consequences of notoriety, and this hinders their reintegration into society'.[105] They further complained that the commission generally focused on lower-level individuals whilst the former leaders and strategists 'rarely make an appearance', which has compounded their sense of betrayal.[106] Former combatants also complained of being alienated from a commission that focused on the suffering of victims but failed to record the combatants' experiences.[107]

CONCLUSION

This chapter has argued that for amnesty processes to be successful, they must have the support of the targeted individuals or groups, but that such support may be dependent on a number of factors, such as fear, financial insecurity, and a lack of information on the amnesty. Therefore, amnesty programmes to promote peace and reintegrate former combatants into society must meet a few essential criteria. First, there must be a widespread and effective outreach programme to inform the potential beneficiaries of the amnesty's existence, its scope, and its consequences. Such

[101] Gear (n 3).
[102] PRIDE (n 91) 12–13.
[103] Gear (n 3).
[104] *Ibid*.
[105] *Ibid*.
[106] *Ibid*.
[107] *Ibid*.

programmes must use appropriate communication tools and convey the information in a language that can be understood by those it targets. Secondly, the programmes must be accompanied by measures to sensitise the community and help them prepare for the reintegration of the amnestied individuals. Thirdly, amnesty applicants will often require financial incentives for them to be able to support themselves and their dependants whilst they become resettled. Such payments should be timely and appropriate to the income levels of the wider community. In conjunction with temporary grants to provide a transitional safety net, training and education programmes should be created to enable former combatants to gain employment and achieve sustainable financial security. There should also be training programmes to improve literacy levels and prepare the amnesty beneficiaries for civilian life. Alternatively, some amnesty applicants could be integrated into a reformed army or police service, or a power-sharing government. Fourthly, efforts should be made to protect the security and physical health of individuals applying for amnesty, to help them reintegrate into society. It is particularly important that special provision is made for the most vulnerable groups, such as child soldiers and women. Finally, procedural safeguards should be implemented to protect the rights of amnesty applicants, and reassure them that by providing information they will not make themselves liable for prosecution.

Considering the opinions of targeted individuals or groups is crucial for the success of amnesty processes, and ignoring them exposes transitional societies to an array of risks. For example, if their views are ignored, the proposed beneficiaries may feel even further excluded from society, which could lead to 'new rifts and resentments' that could perhaps reignite violence.[108] Furthermore, feelings of resentment and alienation could be transferred by the affected individuals to the next generation, and could therefore inhibit any meaningful reconciliation.[109] For example, the failure to reintegrate former Nazi collaborators in the Flemish region of Belgium has contributed to their descendants supporting the extreme right-wing *Vlaams Belang*, which supports Flemish secession from Belgium.[110] Alienating former combatants could also push them into becoming involved in organised crime[111] or into working as mercenaries, which could fuel other conflicts. Furthermore, if the recipients of amnesty are not integrated into society, and instead, continue to be treated as a distinct group, 'they will continue to identify themselves as such, demanding

[108] Minow (n 98) 23.

[109] Gesine Schwan, 'The "Healing" Value of Truth Telling: Chances and Social Conditions in a Secularized World' (1998) 65 *Social Research* 725.

[110] This point was made by Prof Luc Huyse at a presentation on the 'ICTJ Essentials' course in February 2006 in Leuven.

[111] Gear (n 3).

special benefits and targeted economic opportunities over the long-term'.[112]

As discussed in chapter 9, a failure to encourage perpetrators to come forward where complementary transitional justice processes have been established may also deny the victims the opportunity to have those responsible for their suffering reveal the truth about their actions and take responsibility for the harm they caused.[113] This may damage attempts to establish a common history within a divided society, as amnesty beneficiaries are often 'essential witnesses to what happened . . . and the greatest challenge to reconciliation'.[114] In addition, many

> groups of internally displaced persons or refugees will often prefer to wait in their places of displacement to see if opposing armies indeed disarm and return to civilian life.[115]

Furthermore, the decision of insurgents to surrender and disarm is symbolic, as well as practical, and can help to build trust between parties to the negotiations.

Although it has been possible to amass considerable data on the policies introduced by states to stimulate amnesty applications, more research needs to be conducted on whether these policies really meet all the needs of participants in amnesty processes, or whether additions or amendments should be made to encourage greater participation. As transitional states frequently work to ensure some form of accountability and truth-telling, the participation of offenders is likely to become increasingly important rendering such research more urgent. Further research could also be conducted into how to prevent recidivism among individuals who have initially participated in a transitional process, only to subsequently become disillusioned, or among the youth within their communities who were not actively engaged in armed struggle and therefore romanticise armed conflict.

[112] Hagman & Nielsen (n 5) 4.

[113] Jennifer J Llewellyn and Robert Howse, 'Restorative Justice: A Conceptual Framework' (Law Commission of Canada October 1998).

[114] PRIDE (n 91) 2.

[115] UN Development Programme, 'UNDP and the Reintegration of Demobilized Soldiers' (September 1997).

Conclusions

THIS BOOK HAS investigated whether competing demands for peace and justice can be reconciled by individualised, conditional amnesties in conjunction with other transitional justice mechanisms. I have endeavoured to build on the work of previous scholars, and increase our knowledge of this field by exploring the different facets of amnesty laws and their relationship to human rights and humanitarian law. To do this, I created a comprehensive database of amnesty laws, which contains information on over 500 amnesties. This database has made it possible for me to map the nature of amnesty laws across the world and to expand knowledge in this field by considering new areas in detail, such as whether amnesty laws can complement other transitional justice mechanisms[1] and how targeted groups might be encouraged to participate in amnesties.[2] Furthermore, this research has investigated amnesty laws that have previously been neglected and covered regions of the world that have been overlooked. The use of such an expansive range of case studies has made it possible to provide statistical data on the behaviour of states. Such data is crucial for examining the development of international law through state practice and to show how international actors should target their efforts to combat impunity.

However, there are risks inherent in relying on such a broad range of case studies, as the resulting generalisations may minimise the unique conditions faced by each transitional state. Furthermore, due to the large number of transitions under investigation, it has not been possible to conduct fieldwork on the nature and success of each transition; instead, the research has relied upon legislation, case law and secondary sources to compile the information used to build the Amnesty Law Database. Whilst for many amnesty laws this has produced rich, detailed information, for some, particularly those from earlier periods or less powerful countries, only limited information has been obtained. Following their identification, it is hoped that these more overlooked amnesties will become the subject of future research. This book has also been hampered by the lack of availability of empirical evidence on the attitudes of stakeholder groups to amnesty processes. It is recognised that this data is lacking for much of the

[1] See ch 4.
[2] See ch 10.

field of transitional justice, but it is hoped that current efforts to conduct more research in this field will bear fruit.[3] Finally, the scope of this research meant that it was not possible to examine fully how independent commissions to implement amnesty processes should be established and what their functions should be, or to explore in detail the impact of individual amnesty laws on reconciliation.

Using the Amnesty Law Database to conduct an extensive and up-to-date comparative study of amnesty laws has revealed that, despite the development of international law, amnesties for both international and non-international crimes continue to be a political reality in the modern world, and that amnesties have in fact increased in frequency. In analysing amnesty laws, this research has explored why amnesties are introduced and what characteristics they can have. It has revealed that amnesties can be tailored to suit different contexts, and that each adaptation can affect the amnesties' validity domestically and under international law. I have argued that states introduce amnesty laws for varied and often multiple reasons,[4] including to respond to domestic and/or international pressure, to promote peace and reconciliation, to adhere to cultural or religious traditions, to repair harm, and to shield state agents from prosecution. These motivations are rarely fully transparent,[5] however, and where amnesties result from agreements between different stakeholder groups, each group could have different motivations for supporting the amnesty. The obscure nature of the motivations behind amnesty laws could significantly affect attempts to evaluate the laws' efficacy. For example, if a dictatorial regime claimed it was amnestying its opponents to promote national unity, but its real aim was rather to entrench its own power, it is unlikely that the amnesty will result in a more harmonious society.

The differing objectives of amnesty laws mean that they can be designed to target specific groups or levels of offenders, who can be identified by their organisational membership, or individuals who committed specific crimes. By analysing the provisions of international law, I have argued that targeting specific groups can have implications for the states' domestic or international obligations. For example, during conflicts, members of the armed forces are frequently acting under different legal obligations to insurgents whose organisations are usually banned. Therefore, the criminality of similar actions may depend on the status of the perpetrator, with

[3] Projects that are trying to conduct empirical research on attitudes to transitional justice processes include the International Center for Transitional Justice, the work on Justice and Reconstruction of the UC Berkeley's Human Rights Center, and the research of the Refugee Law Center in Uganda.

[4] Ronald C Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* 173, 174.

[5] Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 *Columbia Human Rights Law Review* 661, 689.

the actions of non-state actors more frequently being criminalised under domestic law. Consequently, it is unsurprising that, according to the Amnesty Law Database, amnesties most commonly offer protection to opponents of the state, either exclusively or together with state agents. I would contend that, although distinguishing between offenders in this manner would appear to undermine the principle of equality by treating perpetrators of similar crimes differently, it could work instead to promote equality of outcome where combatants from different organisations obtain a similar status after the transition, despite having obtained it by different legal means. States can further distinguish between groups of offenders, by excluding those who are deemed 'most responsible' for creating and administering policies of mass abuse from amnesty provisions.[6] This practice reflects developments in international criminal justice, where the statutes of international or hybrid courts restrict the courts' jurisdiction to try the leaders and intellectual authors of policies of mass abuse.[7] Although for many transitions it may be difficult to indict the former leaders, due to the delicate nature of the transition, I would argue that, where selective prosecutions of the 'most responsible' are possible, they offer a means to reconcile the work of international and hybrid courts with amnesties within territorial states. Furthermore, if the leaders are prosecuted before domestic courts, the case can symbolise the end of the period of repression and the creation of a government established according to the rule of law.

Similarly, amnesties can be targeted at certain groups of offenders by granting immunity to specific categories of crimes. This approach can, however, breach the state's obligations under international law where amnesty is granted to perpetrators of crimes under international law, such as genocide or torture.[8] Where this occurs, the amnesty could be criticised by human rights treaty-monitoring bodies, or disregarded as a defence by international courts or courts in third states. Furthermore, since the 1999 Lomé Accord, the UN will not recognise amnesties for crimes under international law,[9] and the

[6] Based on the information on the 92 amnesties categorised as covering crimes under international law, it appears that 56 (61 per cent) specifically exclude those who are 'most responsible' for planning and ordering the atrocities.

[7] See discussion in ch 7 on 'Holding Individuals to Account'.

[8] M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63; Kristin Henrard, 'The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law' (1999) 8 *MSU-DCL Journal of International Law* 595; Michael P Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41; Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537.

[9] Simon Chesterman, 'Rough Justice: Establishing the Rule of Law in Post-Conflict Territories' (2005) 20 *Ohio State Journal on Dispute Resolution* 69, 75–6; UNSC, 'Seventh Report of the Secretary General on the United Nations Observer Mission in Sierra Leone' (30 July 1999) UN Doc S/1999/836 [54]; William A Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 11 *UC Davis Journal of International Law and Policy* 145.

UN High Commissioner for Human Rights is currently creating a tool kit on amnesties to guide UN negotiators working in the field. The Amnesty Law Database has revealed, however, that despite these objections, states are continuing to amnesty crimes under international law. I would argue that this implies that no clear state practice has as yet been established for amnesties for these crimes, which if coupled with the permissive duty to prosecute certain crimes under international law, or the inapplicability of treaty law to some situations of human rights abuses, indicates that states have a degree of flexibility in determining how to respond to past crimes. Less contentiously, amnesty laws can also be introduced that do not conflict with international law. For example, where the actions of a state's opponents can be characterised under domestic law as political crimes, such as treason or espionage, amnesties for such crimes are generally regarded by international actors as matters exclusively within the jurisdiction of the state, resulting in international actors being reluctant to intervene.

This research has further noted that states are increasingly likely to attach conditions to the grant of amnesty. These conditions, which can aim inter alia to disarm combatants, to reveal the truth about events and the suffering of victims, or to purify a state by removing individuals who are responsible for human rights violations, can, if properly applied, serve to make the amnesty more acceptable within the territorial state and internationally, by seeking to fulfil the victims' rights to truth and reparations, whilst working to (re-)establish peace and stability. I have argued that where an amnesty is accompanied by alternative transitional justice mechanisms, such as truth commissions or community-based justice processes, it can complement these processes by encouraging individuals to participate in exchange for immunity from prosecution. In this way, an amnesty could contribute to uncovering the truth about past crimes and to promoting the restoration of relationships between previously antagonistic groups. Alternative transitional justice measures can also complement amnesties by mitigating their most negative effects, and by contributing to the amnesty's efforts to facilitate reconciliation rather than retribution.

Using the provisions of international treaties, the statutes of international tribunals and the case law of national and international courts, I have argued that, whilst blanket impunity for crimes under international law is unacceptable in all circumstances, more nuanced approaches may fulfil the state's international obligations. Such approaches can allow for some form of accountability for perpetrators through selective prosecutions of the elite before national or international courts, coupled with obligations on lower-level offenders to reveal the truth of their actions and face non-criminal sanctions, such as removal from public office, loss of pension, or even a denial of some of their political rights for a prescribed period. Lower-level offenders can also be required to participate in community-based justice mechanisms to facilitate their reintegration into society. Where individuals

are permitted to evade criminal prosecution because of an amnesty, efforts can be made to ensure that the process remains responsive to the needs of victims. This is a complicated requirement, due to the often diverse wishes of victims' groups, but it can include efforts to consult victims during the establishment and implementation of the amnesty process, to inform victims of their rights, to facilitate their participation in the process, and to provide them with monetary and non-monetary reparations.

It appears from the case studies in the Amnesty Law Database that states are increasingly employing more flexible approaches to amnesty to address past crimes. I have argued that this is a positive development as, although prosecutions for human rights violations are desirable, they are not always possible, at least in the early stages of a transition. In such cases, some form of amnesty may be the only feasible option and, consequently, efforts should be made to establish complementary mechanisms that make good-faith efforts to investigate the past, establish accountable forms of government, and provide reparations for victims, rather than simply permitting blanket impunity. Although, as will be discussed below, it can be problematic to determine whether such mechanisms represent real efforts to address the concerns of victims, or whether they are instead tokenistic measures designed to deflect criticism from the government.

Although amnesty laws have progressively increased in frequency during the past 60 years, their development has been accompanied by endeavours to end impunity for serious human rights abuses. These efforts can be seen in the ever-increasing number of human rights treaties, and in the efforts to criminalise atrocities committed in both international and internal conflicts. To enforce these new treaty obligations, institutions such as treaty-monitoring bodies, ad hoc tribunals, hybrid tribunals and the International Criminal Court have been established, many of which have already issued judgements on amnesties. Those institutions that hold individuals accountable for their actions operate within the new field of international criminal justice that is constantly growing and gaining greater institutional capacity through organisations such as the International Criminal Bar and large numbers of NGOs lobbying in support of the tribunals and to condemn amnesties.[10] These endeavours have been further strengthened in recent years, by the tentative commencement of universal jurisdiction investigations and prosecutions,[11] and an increasing rhetoric from states and intergovernmental organisations on the importance of human rights protections. Sadly, however, these developments have occurred in relative isolation, as extreme suffering caused by violence and

[10] International NGOs include: the Coalition for the International Criminal Court; Human Rights Watch; Amnesty International; Global Policy Forum; *Equipo Nizkor*; and *Fédération interntionale des ligues des droit de l'Homme*. Furthermore, a large number of national NGOs lobby their national governments in support of the ICC.

[11] See ch 7.

oppression has continued in many countries, and even where it has ended, those responsible are rarely held to account and are often shielded from prosecution by amnesty laws.

In forthcoming years, the previously distinct growth of amnesty laws and the development of international criminal justice will collide, as amnesties will continue to be granted by states despite increased international efforts to combat impunity. As more states when enacting implementing legislation to ratify the Rome Statute have granted their judiciaries the power to conduct universal jurisdiction investigations, and the ICC has began operating, it is expected that more national amnesties will be called into question at the international level and before courts in third states. Therefore, I have argued that it is desirable that international actors exert pressure on the transitional governments, to prevent them from introducing blanket amnesties for the most heinous human rights violations, whilst accepting amnesties that adhere to international law as far as possible.

During this research process, I had envisaged that the approach of international actors could be founded upon minimum standards which an amnesty would have reach in order to be recognised as valid under international law. However, as this study progressed, it became apparent that the complexities faced by transitional states would make it undesirable to establish a set of minimum standards that could be universally applied, and that, instead, a more pragmatic approach would be needed to evaluate the delicate political decisions made by transitional governments. Therefore, based on the amnesties investigated for this research and the provisions of international law, a range of key issues have been identified that should be considered by states when introducing amnesty laws and by international actors when deciding whether to respect an amnesty introduced elsewhere. These issues include:

- How was the amnesty enacted? Did it have democratic approval?
- What crimes did the amnesty cover?
- Did the amnesty only immunise state agents from prosecution?
- Did the amnesty differentiate between different levels of culpability?
- Was the judicial system capable of prosecuting human rights violations and ensuring the accused the right to due process?
- Were appropriate alternative remedies made available to the victims? Were victims permitted to participate in the amnesty hearings? And if so, were resources made available to facilitate such participation and to support the victims after they had given testimony?
- Has the amnesty contributed to stability within the country? Is it likely that without the amnesty the violence would have continued?
- Did the state undertake measures to prevent a repetition of the human rights violations by investigating the past violations and conducting institutional reforms?

- Did all the parties to the transition comply with the terms of the amnesty?
- Did the amnesty proposals/process receive international approval and support?
- Were efforts made to encourage targeted groups or individuals to participate in the amnesty process?

I appreciate that these questions may be difficult to answer, particularly for observers who are geographically or temporally removed from the complex decisions to introduce amnesty and to allocate resources to reparations and reform programmes. Furthermore, many of the answers may depend on a question of extent rather than a simple 'yes' or 'no' response. For example, as explained in chapter 1, assessing the democratic legitimacy of an amnesty law can depend on factors such as the legitimacy of the negotiators to the peace treaty,[12] the fairness by which political representatives were appointed to the legislature, or whether intimidation was used during a referendum campaign.[13] In the absence of a referendum, observers would need to consider whether it would have been possible to conduct a fair public vote on the amnesty. Despite these difficulties in accurately evaluating the democratic legitimacy of an amnesty law, I contend that distinctions can be made between amnesties introduced unilaterally by oppressive regimes and amnesties that are decided upon by democratically-elected governments.

Questions of extent can also arise when considering which crimes were covered by the amnesty. For example, where amnesties exclude some crimes under international law, such as those resulting in death, but include others, such as torture, should this invalidate the whole amnesty? The response to this question may depend on the nature of the crimes committed and the identity of the perpetrators. For example, if a dictatorship was not characterised by widespread disappearances and summary executions, but instead the majority of the human rights abuses that occurred could be described as torture, it would appear that the amnesty was seeking to provide immunity for the crimes which were most serious in that context. Amnesty for torture could, however, be viewed differently if it were offered in response to genocide where most of the human rights violations resulted in the death of the victims. Due to these complexities, I contend that any determination would have to consider the uniqueness of the transition, the rationale for distinguishing between different forms of crimes under international law, and whether the state was a party to the

[12] Thomas Hethe Clark, Note, 'The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance' (2005) 4 *Washington University Global Studies Law Review* 389, 409–10.

[13] See, eg, Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* (University of Chicago, Chicago 1998).

Convention Against Torture when the crimes occurred. The issue of crimes can also create concerns relating to the 'myth of equivalency' between the belligerent groups,[14] with arguments focusing on whether similar crimes committed by state and non-state actors should be treated similarly. The response to this question will again depend on the nature of the transition, although I would argue that amnesties introduced by a dictatorial regime in its final days to protect its own agents should be viewed with scepticism, particularly where the state is responsible for a large proportion of the abuses.

Where amnesty processes were accompanied by selective prosecutions, the criteria used to distinguish between offenders can raise concerns over appropriateness, where most offenders are implicated in crimes under international law, or scope, where only a very small number of offenders are to go on trial. Governmental decisions on how far to restrict domestic prosecutions may be constrained by many factors, including: the relative strength of the parties to the transition or the armed forces; the resources available for complex and expensive prosecutions; the number of perpetrators involved; and, where appropriate, the need to cooperate with international tribunals.[15] Further complications can arise from decisions on how many levels of responsibility should be recognised and whether offenders of each level should be dealt with at separate institutions. Furthermore, the possibility of offenders being reallocated to a different level of responsibility following the uncovering of more evidence could indicate efforts to create a genuine accountability process.

Determining whether appropriate remedies have been made available to the victims can be a complicated process, due to the diverse and changing nature of the victims' views[16] and the resource constraints, which constrict the ability of a transitional government to act, particularly where reparations need to be balanced against promoting development within the country. Furthermore, many of the non-monetary forms of reparations[17] can be difficult to offer immediately. For example, providing victims with medical and psychological care may first entail training professionals to fulfil this role and building institutions such as hospitals where the care can be provided, which can be expensive for transitional

[14] For discussion of the 'myth of equivalency', see Kieran McEvoy, *Truth, Transition and Reconciliation: Dealing with the Past in Northern Ireland* (Willan Publishing, Cullompton 2008).

[15] See, eg, Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, Antwerp 2004) 32–3.

[16] See discussion in ch 9 on victims' needs. See also Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violations Console their Victims?' (2005) 46 *Harvard International Law Journal* 295.

[17] See, eg, list of potential reparations measures outlined in UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Res 60/147 (16 December 2005).

states. I contend, therefore, that attempts to evaluate whether appropriate alternative remedies have been made available to victims should consider whether the forms of reparations which it is possible to grant early within a transition, such as instituting a national day of commemoration, are pursued. Furthermore, consideration should be given to whether the state has acted to fulfil its duty to investigate by inter alia preserving archives relating to the transition, investigating disappearances, and instituting truth-recovery mechanisms.[18] In addition, the extent to which the government consulted the victims when establishing alternative remedies and instituted policies to encourage their participation should be evaluated.[19]

Assessing the contribution that an amnesty has made to peace and stability may be problematic soon after the amnesty's introduction, as considerable time may need to elapse before its contribution can be evaluated. Furthermore, even where peace has not been achieved, this may be due to events outside the remit of the amnesty process, rather than a consequence of the amnesty itself. In contrast, where stability has been established, it is likely that the amnesty was only one factor in its achievement. Nonetheless, many amnesty processes seem to have been introduced as a response to a genuine belief that a failure to do so would result in further violence.[20] Substantive grounds for this belief could include: threatening statements or actions by the military or insurgent groups; continuing low-level violence; splintering of extremes away from parties to the peace processes; unwillingness of insurgents to disarm; or a lack of mutual trust among the parties of a transitional government that could cause the political institutions to collapse. Where such grounds exist, I would argue that they should be factor in a favour of recognising the amnesty.

Similar difficulties could arise when determining whether the amnesty was accompanied by significant institutional reform and the establishment of a human rights culture. For example, the existence of a human rights culture can be difficult to measure, and its creation is likely to be a long-term process. Furthermore, efforts to move towards greater respect for human rights could be inhibited by high levels of criminality and/or the entrenchment of cultures of violence following the period of mass abuse. It may be possible, however, to look at certain indicators, such as

[18] *Ibid*.

[19] See, eg, Tom Winslow, 'Reconciliation: The Road to Healing? Collective Good, Individual Harm?' (1997) 6 *Track Two*; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, Boston 1998); and Brandon Hamber, 'Do Sleeping Dogs Lie? The Psychological Implications of the Truth and Reconciliation Commission in South Africa' (Seminar No 5, Center for the Study of Violence and Reconciliation, Johannesburg 1995).

[20] See, eg, Tom Hadden, 'Punishment, Amnesty and Truth: Legal and Political Approaches' in Adrian Guelke (ed), *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies* (Palgrave Macmillan, 2004); and Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International, Hague 2002) 25.

whether the armed forces are placed under civilian control, whether repressive laws are repealed and international treaties are ratified, and whether human rights abusers are removed from office, to determine whether the government has made a good faith effort to prevent a repetition of the abuses.[21]

Concerns of real or perceived subjectivity could arise when determining whether the parties to the transition complied with the conditions imposed by the amnesty. Such determinations could be extremely complex, particularly where former combatants remained involved in (non-political) violent crime, or where sections of the parties to the transition broke off into splinter groups that remained committed to using violence to achieve their political aims. In such cases, where the transitional arrangements seem to be holding despite the actions of certain groups, I would argue that international actors should refrain from intervening in disregard of the amnesty.

Subjectivity can also be an issue when determining whether an amnesty received international approval or support. Identifying approval could be hampered by international indifference to amnesties introduced in small, resource-poor countries, resulting in few public statements or actions supporting or condemning the amnesty.[22] In contrast, if a few powerful actors loudly condemn an amnesty due to their own political objectives, this could overshadow the existence of a consensus among other international actors. When evaluating the existence of international approval, I would argue that a failure to criticise the amnesty should be viewed as indifference, which, if coupled with some international actors supporting the amnesty process, could provide evidence of an international consensus in favour of recognising it. In contrast, if most international actors opposed the granting of amnesty for a particular transition, this would provide grounds for disregarding the amnesty and attempting to prosecute its beneficiaries before international courts or courts in third states.

Finally, for an amnesty process to be viewed as a good-faith effort to promote peace and reconciliation, a government must take measures to inform the targeted groups of their rights,[23] to encourage them to participate, and to assuage their concerns, which may focus on their physical safety after surrendering their weapons, their means of financially supporting themselves and their dependants, or the risk of inculpating themselves by providing evidence. Where a government does not make any effort to inform or reassure its opponents about the terms of amnesty,

[21] These criteria are based on the measures to guarantee non-repetition of human rights violations as outlined in the *Basic Principles and Guidelines*, see UNGA (n 18) Princ 23.

[22] Garth Meintjes and Juan E Méndez, 'Reconciling Amnesties with Universal Jurisdiction' (2000) 2 *International Law Forum du droit international* 76, 76.

[23] For a discussion of how a government can publicise an amnesty and encourage individuals to participate, see ch 10.

I would argue that the government is not making a good-faith effort to achieve peace, and is instead perhaps only offering the amnesty as a tactical move, with the intention of continuing its armed campaign against its opposition once they have failed to avail themselves of the amnesty.

Overall, I believe that these questions will need to be asked for each amnesty process individually, as the approach that a government will take will be dictated by the unique conditions within that state, such as the availability of resources, the duration of the conflict or dictatorship and the balance of power between the parties to the transition. Furthermore, when deciding whether to recognise an amnesty, the responses to these questions should not be considered in isolation, but rather viewed as a whole, to determine the nature of the amnesty and the extent of the transitional government's efforts to move towards a freer and fairer system of government. Such a holistic approach may mean that, even where an amnesty has not been introduced democratically, provided it has been accompanied by good-faith efforts to hold perpetrators to account, to reform political institutions and to repair the harm suffered by victims, it could be viewed as an acceptable amnesty. In contrast, even where an amnesty has widespread democratic support, if it provides for complete impunity with no investigations or reparations, it is unlikely to be viewed as legitimate by the international community. In this way, it is hoped that the international community can move towards ensuring greater accountability for human rights abuses by encouraging transitional states to make good-faith efforts to address past crimes as far as possible, whilst still recognising the complex political, financial and infrastructural difficulties faced by many transitional states.

Amnesties go to the heart of difficulties in managing such transitions, as they speak directly to notions of justice, accountability and peace. In this book, I have argued that, when approaching these issues, it is necessary to privilege pragmatism, rather than attempting to apply ill-suited universal models to the complexities faced by individual transitional states. This is not to say that universal goals for accountability and truth should be abandoned, but rather that each country should be allowed to pursue its own approach to the crimes of the past and to find its own means 'to bridge the peace and justice divide'.

Appendix 1

List of Amnesty Processes

Afghanistan 1979
Afghanistan 1980
Afghanistan 1981
Afghanistan 1991
Afghanistan 1992
Afghanistan 1997
Afghanistan 2003
Afghanistan 2007
Albania 1959
Albania 1989
Albania 1991
Albania 1993
Albania 1997
Algeria 1981
Algeria 1984
Algeria 1999
Algeria 2005
Algeria/France 1962
Angola 1978
Angola 1980
Angola 1983
Angola 1989
Angola 1990
Angola 1991
Angola 1994
Angola 1996
Angola 2000
Angola 2002
Angola 2006
Angola/Portugal
Argentina 1973
Argentina 1975
Argentina 1983
Argentina 1986
Argentina 1987
Armenia
Australia 1972
Austria 1948
Austria 1957
Azerbaijan 1997
Azerbaijan 1998
Azerbaijan 2001
Azerbaijan 2003
Bahrain 1999
Bahrain 2001
Bangladesh 1975
Bangladesh 1983
Bangladesh 1989
Bangladesh 1997
Benin 1984
Benin 1989
Benin 1990
Benin 1997
Benin 2001
Bhutan 1999
Bhutan/India/Myanmar
Bolivia 1984
Bolivia 2003
Bosnia-Herzegovina (Federation) 1996
Bosnia-Herzegovina (Federation) 1999
Bosnia-Herzegovina (Republika Srpska)
Brazil
Bulgaria 1981

Bulgaria 1984
Bulgaria 1990
Bulgaria 1991
Burkina Faso
Burma 1948
Burma 1958
Burma 1963
Burma 1972
Burma 1980
Burma 1989
Burma 2007
Burundi 1962
Burundi 1967
Burundi 1990
Burundi 1993
Burundi 2000
Burundi 2006
Cambodia 1994
Cambodia 1996
Cameroon
Canada
Cape Verde
Central African Republic 1959
Central African Republic 1961
Central African Republic 1997
Central African Republic 2003
Chad 1969
Chad 1979
Chad 1981
Chad 1983
Chad 1985
Chad 1992
Chad 1997
Chad 1998
Chad 2002
Chad 2003
Chad 2007 Feb
Chad 2007 Oct
Chile
Colombia 1953
Colombia 1981
Colombia 1982
Colombia 1989
Colombia 1993
Colombia 1997
Colombia 2002
Colombia 2005
Comoros, Federal Islamic Republic of the
Congo, Democratic Republic of 1962
Congo, Democratic Republic of 1999
Congo, Democratic Republic of 2003
Congo, Democratic Republic of 2005
Congo, Republic of 1999
Congo, Republic of 2002
Côte d'Ivoire 1992
Côte d'Ivoire 2000
Côte d'Ivoire 2002
Côte d'Ivoire 2007
Croatia 1992
Croatia 1996
Cyprus
Czechoslovakia 1946
Czechoslovakia 1960
Czechoslovakia 1969
Czechoslovakia 1973
Czechoslovakia 1977
Czechoslovakia 1989
Djibouti
Dominican Republic 1960
Dominican Republic 1961
Dominican Republic 1965
Dominican Republic 1978
Ecuador 1957
Ecuador 1967
Ecuador 1976
Ecuador 2000
Egypt 1975
Egypt 2003
El Salvador 1962
El Salvador 1968
El Salvador 1979
El Salvador 1979
El Salvador 1980
El Salvador 1981
El Salvador 1983
El Salvador 1987
El Salvador 1992

El Salvador 1993
Equatorial Guinea 1992
Equatorial Guinea Aug 1979
Equatorial Guinea Sep 1979
Ethiopia 1975
Ethiopia 1976
Ethiopia 1977
Ethiopia 1978
Ethiopia 1980
Ethiopia 1982
Ethiopia 1983
Fiji 1987
Fiji 2000
France 1946
France 1947
France 1951
France 1953 (Aug)
France 1953 (Feb)
France 1966 (Algeria)
France 1966 (deserters)
France 1968
France 1974
France 1981
France 1982
France 1988
France 1989
France 1990
Gambia
Georgia 1992
Georgia Apr 2000
Georgia Dec 2000
German Democratic Republic (East Germany) 1979
German Democratic Republic (East Germany) 1987
German Democratic Republic (East Germany) 1989
Germany 1947
Germany 1949
Germany 1954
Ghana 1962
Ghana 1980
Ghana 1983
Ghana 1992
Greece 1945
Greece 1973
Greece 1974
Guatemala 1982
Guatemala 1983 Aug
Guatemala 1983 Mar
Guatemala 1985
Guatemala 1986
Guatemala 1987
Guatemala 1988
Guatemala 1996
Guinea 2003
Guinea 2007
Guinea-Bissau 1999
Guinea-Bissau 2002
Guinea-Bissau 2003
Guinea-Bissau 2004
Haiti 1956
Haiti 1977
Haiti 1991
Haiti 1993
Honduras 1963
Honduras 1965
Honduras 1969
Honduras 1977
Honduras 1980
Honduras 1981
Honduras 1985
Honduras 1986
Honduras 1987
Honduras 1990
Honduras 1991
Hungary 1955
Hungary 1985
Hungary 1992
India 1975 (Nagaland)
India 1986
India 1991 (Assam)
India 2004 (Kashmir)
India 2005 (Assam)
India 2005 (Naxalites)
India/Pakistan
India/Sri Lanka
Indonesia (Aceh) 2005 Aug

Indonesia (Aceh) 2005 Jan
Iran 1978
Iran 1979
Iran 1979 (Kurds)
Iran 1980
Iran 1981
Iran 1982
Iraq 1976
Iraq 1979
Iraq 1986
Iraq 1988
Iraq 1988 (Kurds)
Iraq 1991
Iraq 1995
Iraq 2002
Iraq 2004
Iraq 2007
Ireland/United Kingdom
Israel 1949
Israel 1967
Israel 1979
Israel 1981
Israel 1986
Israel 2007
Israel/Palestine National Authority 1995
Israel/Palestinian National Authority 2003
Italy 1946
Italy 1953
Italy 1966
Japan 1947
Jordan 1973
Jordan 1982
Jordan 1992
Jordan 1999
Kenya 1978
Kenya 1979
Korea, Democratic People's Republic of, 1978
Korea, Democratic People's Republic of, 2001
Korea, Republic of, 1987
Korea, Republic of, 1988
Korea, Republic of, 1993
Korea, Republic of, 1995
Korea, Republic of, 1998
Korea, Republic of, 1999
Korea, Republic of, 2000
Kosovo 1999
Kyrgyzstan
Laos (Lao People's Democratic Republic) 1991
Laos (Lao People's Democratic Republic) 2004
Lebanon
Lesotho
Liberia 1979
Liberia 1981
Liberia 1993
Liberia 2001
Liberia 2005
Macedonia, Former Yugoslav Republic of, 2001
Macedonia, Former Yugoslav Republic of, 2002
Macedonia, Former Yugoslav Republic of, 2003
Madagascar 1993
Madagascar 2003
Malawi 1993
Mauritania 1991
Mauritania 1993
Mauritania 2005
Mauritania 2006
Mexico 1978
Mexico 1994
Moldova 1995
Moldova 2003
Morocco 1975
Morocco 1991
Morocco 1994
Morocco 1999
Mozambique 1987
Mozambique 1992
Nepal 1999
Nepal 2003
Nepal 2006

Nicaragua 1960
Nicaragua 1978
Nicaragua 1983
Nicaragua 1985
Nicaragua 1987
Nicaragua 1988
Nicaragua 1990
Nicaragua 1991
Nicaragua 1993
Niger
Nigeria 2002
Nigeria 2004
Nigeria 2007
North Yemen 1979
Northern Ireland 1969
Pakistan 1948
Pakistan 1977
Pakistan 1988
Pakistan 2004
Pakistan 2006 Apr
Pakistan 2006 Dec
Panama 1952
Panama 1960
Panama 1987
Panama 1988
Panama 1994
Papua New Guinea (Bougainville)
Peru 1956
Peru 1970
Peru 1980
Peru 1992
Peru 1993
Peru 1995
Peru 2001
Philippines 1946
Philippines 1948 (Collaborators)
Philippines 1948 (Hukbalahap)
Philippines 1950
Philippines 1973 Feb
Philippines 1973 Jan
Philippines 1974 1 Nov
Philippines 1974 2 Nov
Philippines 1974 Jun
Philippines 1977
Philippines 1977 Aug
Philippines 1978
Philippines 1980
Philippines 1985
Philippines 1987
Philippines 1992
Philippines 1994
Philippines 1994b
Philippines 1996
Philippines 2000
Philippines 2007
Poland 1945
Poland 1983
Poland 1984
Poland 1989
Portugal 1945
Portugal 1974
Portugal 1976 Nov
Portugal 1976 Oct
Portugal 1977
Portugal 1996
Rhodesia 1979
Rhodesia 1980
Romania 1976
Romania 1977
Romania 1990
Russian Federation 1994
Russian Federation 1997
Russian Federation 1999
Russian Federation 2003
Russian Federation 2006
Rwanda 1963
Rwanda 1974
Rwanda 1991
Rwanda 2003
São Tomé e Príncipe
Saudi Arabia 2004
Saudi Arabia 2006
Senegal 1988
Senegal 1991
Senegal 2004
Senegal 2005
Sierra Leone 1996
Sierra Leone 1999

Slovak Republic
Solomon Islands 2000
Somalia 1974
Somalia 1982
Somalia 1983
Somalia 2006
Somalia 2007
South Africa (Namibia) 1989
South Africa 1961
South Africa 1977
South Africa 1990
South Africa 1992
South Africa 1994
Spain 1975
Spain 1976
Spain 1977
Sri Lanka 2007 Aug
Sri Lanka 2007 Jan
Sri Lanka 2007 Nov
Sudan 1964
Sudan 1972
Sudan 1977
Sudan 1984
Sudan 1997
Sudan 2000
Sudan 2004
Sudan 2006
Sudan 2008
Suriname 1989
Suriname 1992
Syrian Arab Republic 1980
Syrian Arab Republic 1991
Syrian Arab Republic 1995
Syrian Arab Republic 1999
Syrian Arab Republic 2000
Syrian Arab Republic 2003
Syrian Arab Republic 2004
Tajikistan 1997
Tajikistan 1999
Thailand 1978
Thailand 1980s
Thailand 1981
Thailand 1988
Thailand 1991
Thailand 1992
Thailand 2006
Timor Leste / Indonesia 2005
Timor Leste 2001
Togo 1991
Togo 1994
Togo 2005
Trinidad and Tobago
Turkey 1988
Turkey 1995
Turkey 1999
Turkey 2000
Turkey 2003
Uganda 1978
Uganda 1987
Uganda 1988
Uganda 1996
Uganda 1997
Uganda 2000
Union of Soviet Social Republics (Russia) 1953
Union of Soviet Socialist Republics (Russia) 1945
Union of Soviet Socialist Republics (Russia) 1987
Union of Soviet Socialist Republics (Russia) 1989
Union of Soviet Socialist Republics (Russia) 1991
United Kingdom
United Kingdom (Dominica)
United Kingdom (Malaysia)
United States 1947
United States 1974
United States 1977
Uruguay 1966
Uruguay 1985
Uruguay 1986
Uzbekistan 1992
Uzbekistan 2000
Uzbekistan 2002
Uzbekistan 2003
Venezuela 2000
Venezuela 2007

Vietnam 2006
Yemen 1994
Yemen 2002
Yemen 2003
Yemen 2005
Yugoslavia (excluding Kosovo) 1999
Yugoslavia (excluding Kosovo) 2001
Yugoslavia 1962
Yugoslavia 1973
Yugoslavia 1982
Yugoslavia 1996
Yugoslavia 2002
Yugoslavia, Socialist Republic of, 1977
Zaire 1972
Zaire 1978
Zaire 1981
Zaire 1983
Zimbabwe 1988
Zimbabwe 1990
Zimbabwe 1995
Zimbabwe 2000

Appendix 2

International Court System

Table 2: International Court System

	International		Regional			Ad hoc Tribunals		Hybrid Tribunals
	ICC	UNHRC	ECHR	IACHR	ACHR	ICTY	ICTR	SCSL
Location	The Hague	Geneva, New York José (Court)	Strasbourg D.C. (Commission) San	Washington	Banjul, The Gambia (Commission)	The Hague	Arusha, Tanzania	Freetown, Sierra Leone
Constituent Instrument	Multilateral treaty (Rome Statute)	Multilateral treaty	Multilateral treaty	Multilateral treaty	Multilateral treaty Protocol on the Court has not yet entered into force	Ch VII of UN Charter	Ch VII of UN Charter	Bilateral agreement
Type of institution	Court body	Quasi-judicial body	Court	Quasi-judicial body (Commission) Court (Court)	Quasi-judicial (Commission) Court (Court)	Court	Court	Court
Relationship to domestic legal system	Complementarity: only investigate if state is 'unwilling or unable'	Must exhaust domestic remedies	Must exhaust domestic remedies	Must exhaust domestic remedies	Must exhaust domestic remedies	Primacy	Primacy	Primacy, but part of Sierra Leone's judicial system
	•State party •Prosecutor (possibly after receiving petitions)	•Interstate petitions (art 41)—has never been used	•Contracting states (inter-state applications) •Individual	•Any individual, group of individuals or groups NGO may present a	•States parties to the African Convention (inter-state complaints)—either	Investigations are initiated by the Prosecutor •At her own discretion	The Prosecutor shall initiate investigations •Ex-officio or •On the basis	The legal process begins with the Prosecutor and his team

Who can initiate proceedings?	•Security Council	•Individual petitions (First Protocol)—any individual who has been a victim, or any family member or representative (NGO) on behalf of the victim	applicants (individuals, or NGOs)	petition (Commission) •Inter-American Commission •State parties •NOT INDIV-IDUALS (Court)	considered directly by the Commission or following an attempt at an negotiated settlement •Non-state party (physical or moral person, private or public, African or inter-national) (Commission) •Unusually advisory opinions can be requested by any NGO that has been recogni-sed by the OAU •Individuals can only bring cases against states who when signing the Protocol have made a declara-tion recognising individual petitions (Court)	•On the basis of information received from any of the following: •Individuals •Governments •International organizations •NGOs	of information obtained from any source, parti-cularly from •Governments •UN organs •Intergover-nmental organisations •NGOs	investigating crimes which took place in Sierra Leone and submitting indictments for confirma-tion once he has amassed sufficient evidence.

Table 2: (*cont.*)

	International		Regional			Ad hoc Tribunals		Hybrid Tribunals
	ICC	UNHRC	ECHR	IACHR	ACHR	ICTY	ICTR	SCSL
Binding	Yes	No	Yes	No	No (Commission)	Yes	Yes	Yes
				(Commission) Yes (Court)				
Jurisdiction								
Temporal	Crimes since statute entered into force—1 Jul 2002 (non-retroactive) Can be extended if a state makes a declaration.	Crimes which take place following the state parties ratification of the ICCPR	Crimes which take place following the state parties ratification of the ECHR	Crimes which take place following the state parties ratification of the ACHR	Crimes which take place following the state parties ratification of the ACHPR	Any of the crimes as above listed, committed on the territory of the former Yugoslavia since 1991	Crimes committed between 1 Jan and 31 Dec 1994	Crimes since 30 Nov 1996 (date of an earlier ceasefire agreement—the Abidjan Accord—limited to less than half the conflict)
Subject-matter	Genocide Crimes against humanity War crimes Aggression (once it is defined)	Rights within the ICCPR	Rights contained in the ECHR	Violations of the ACHR (for state parties of the Convention) and violations of the American Declaration (for non-state	Rights contained in the Charter (Commission) Any international human rights instrument ratified by the state party (e.g. UN treaties,	Grave breaches of the Geneva Conventions Violations of the laws or customs of war Genocide Crimes against	Genocide Crimes against humanity Violations of Common art 3 and Additional Protocol II	International crimes •Crimes against humanity •Violations of common art 3 and Protocol II (and other

				parties of the Convention) (Commission) ACHR (Court)	IHL and ILO and environmental treaties) (Court)	humanity		serious violations of IHL) Domestic crimes •Abuse of girls •Wanton destruction of property
Territorial	Over territory of states parties (unless the Security Council refers a situation or a non-state parties consents to an investigation)	State party to the treaty under which the complaint is made and the state has made the necessary declaration to recognise jurisdiction	All state parties to the ECHR	Only where it is alleged that a member state of OAS is responsible (Commission) All states parties to the ACHR for advisory jurisdiction; those states parties which have voluntarily submitted for adjudicatory jurisdiction (18 states); or states which agree to abide by the court's jurisdiction in a specific, individual case (Court)	State parties to the Charter	Any of the crimes as above listed, committed on the territory of the former Yugoslavia since 1991.	Crimes committed by Rwandans in the territory of Rwanda and in the territory of neighbouring States, as well as non-Rwandan citizens for crimes committed in Rwanda.	Sierra Leone

Table 2: (*cont.*)

	International		Regional			Ad hoc Tribunals		Hybrid Tribunals
	ICC	UNHRC	ECHR	IACHR	ACHR	ICTY	ICTR	SCSL
Personal/ State parties	Nationals of states party even when the crime was committed on the territory of a non-state party (unless the Security Council refers a situation or a non-state parties consents to an investigation)	•ICCPR—154 state parties •Optional Protocol—104 state parties	All states parties to the ECHR	All members of the OAS (Commission) 25 states have ratified or adopted the ACHR (Court)	States who have ratified the Charter (Commission) States have ratified the Protocol (Court)	Only over natural persons over organisations, and not political parties, administrative entities or other legal subjects. International criminal responsibility	Crimes committed by Rwandans in the territory of Rwanda and in the territory of neighbouring states, as well as non-Rwandan citizens for crimes committed in Rwanda.	Limited to persons 'who bear the greatest responsibility for serious violations of IHL and Sierra Leonean law . . .' Also persons over 15 years.

Appendix 3

Provisions of the Universal Jurisdiction Legislation in Third States[1]

[1] For a table of the provisions of extraterritorial jurisdiction laws in the European Union see Redress and Fédération internationale des lingues des droits de l'Homme, 'Legal Remedies for Victims of "International Crimes": Fostering an EU Approach to Extraterritorial Jurisdiction' (March 2004) <http://www.fidh.org/IMG/pdf/LegalRemediesFinal.pdf> accessed 27 October 2005, 41.

Table 3: Provisions of the Universal Jurisdiction Legislation in Third States

COUNTRY	CRIMES	ACCESS TO JUSTICE AND EXECUTIVE DISCRETION	NEXUS	*IN ABSENTIA*?
Austria	Conduct that corresponds to crimes against humanity as described in the Rome Statute Genocide	Residence is not required to open an investigation Executive consent is not required		Residence of the accused is not required to open an investigation Presence during a criminal trial is required for crimes with a punishment of more than three years. Civil proceedings can be conducted *in absentia*
Belgium	Crimes against humanity Genocide War crimes	Possible In states where the possibility to trigger prosecutions exists for ordinary domestic criminal offences, there is a tendency to restrict the power by giving the ultimate decision to open an investigation to prosecuting authorities. Unless the accused is a Belgian or has his primary residency in Belgium, the decision as to whether to proceed with any complaint, including whether to initiate an investigation concerning genocide, crimes against humanity or war crimes rests entirely with the state prosecutor. This considerably reduces victims' ability to obtain direct access to courts, as compared to procedure in	The residence of either the alleged perpetrator or the victim in Belgian territory has been established as a condition except where Belgium is required by treaty to exercise jurisdiction over a case. Under the previous 1993 law (as amended in 1999), not link to Belgium was required. The law was changed in August 2003 following pressure from the	The residence of the accused is required to open an investigation

		place prior to 5 Aug 2003 amendments in which victims could be involved as civil parties.	United States.	
Denmark	Conduct that corresponds to crimes against humanity as described in the Rome Statute War crimes	Executive consent is required Prosecutions under Section 8 (4–6) of the Penal Code cannot take place except with the approval of the Minister of Justice, a political appointee. Such discretion may be limited by Section 12 of the same Code, which restricts the application of Section 8 in accordance with 'the applicable rules of international law'.	Investigations can proceed if the accused is not present.	Trial *in absentia* is prohibited.
France	Torture	Possible In states where the possibility to trigger prosecutions exists for ordinary domestic criminal offences, there is a tendency to restrict the power by giving the ultimate decision to open an investigation to prosecuting authorities. Executive consent is not required The opportunity to bring a prosecution remains the discretion of the Public Prosecutor. Victims can institute a civil action.		The presence of the accused is required to open an investigation, but they need not be resident. If the accused flees, trial *in absentia* is possible.

Table 3: (*cont.*)

COUNTRY	CRIMES	ACCESS TO JUSTICE AND EXECUTIVE DISCRETION	NEXUS	*IN ABSENTIA*?
Germany	Crimes against humanity Genocide War crimes	In states where the possibility to trigger prosecutions exists for ordinary domestic criminal offences, there is a tendency to restrict the power by giving the ultimate decision to open an investigation to prosecuting authorities. The Public Prosecution Service (*Staatsanwaltschaft*) is required to 'take action in the case of all criminal offences which may be prosecuted, provided there are sufficient factual indications'. It is appears that it is possible to dispense of a case on political grounds.		With the introduction of the Code of Crimes, there is no requirement that someone suspect of genocide, war crimes or crimes against humanity be present on German territory for an investigation to commence. However, prosecution might not proceed if the suspect is neither present in Germany nor, likely to be present in Germany depending on the decision of the prosecutor.

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A

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Introductory Note

References such as '178–9' indicate (not necessarily continuous) discussion of a topic across a range of pages, whilst '84f6' indicates figure 6 on page 84. Wherever possible in the case of topics with many references, these have either been divided into sub-topics or the most significant discussions of the topic are indicated by page numbers in bold. Because the entire volume is about amnesties and transitions, and certain other terms occur constantly throughout the work, the use of these terms as entry points has been minimized. Information will be found under the corresponding detailed topics.