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Anti-Impunity and the Turn to Criminal Law in Human Rights

Karen Engle

ANTI-IMPUNITY AND THE TURN TO CRIMINAL LAW IN HUMAN RIGHTS

Karen Engle†

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† Minerva House Drysdale Regents Chair in Law and Founder & Co-director, Bernard and Audre Rapoport Center for Human Rights and Justice, University of Texas School of Law. I am grateful to Adeno Addis, Antony Anghie, Daniel Brinks, Nathalie Davidson, Dennis Davis, Ariel Dulitzky, Cianan Good, Neville Hoad, David Kennedy, Duncan Kennedy, Zina Miller, Peter Rosenblum and José Zalaquett for their comments on various drafts of this article. I also benefitted enormously from feedback on presentations of the project at faculty workshops and colloquia at the University of Utah College of Law, Tulane Law School, University of Texas, Harvard Law School, Instituto Tecnológico Autónomo de México, University of Cape Town, University of Diego Portales (Santiago, Chile), and Melbourne Law School. Finally, I am appreciative of Maddy Dwertman for outstanding research and editing assistance during the development of the project, and to Nicholas Bruno for providing excellent research assistance in its final stages.

INTRODUCTION

Since the beginning of the twenty-first century, the human rights movement has been almost synonymous with the fight against impunity. Today, to support human rights means to favor criminal accountability for those individuals who have violated international human rights or humanitarian law. It also means to be against amnesty laws that might preclude such accountability. This Article both chronicles and critiques this turn to criminal law within human rights.

Human rights advocates have garnered significant success with their relatively recent turn to criminal law. Judicial and quasi-judicial human rights bodies, international and regional human rights institutions, and international human rights law scholars have largely concluded that states are responsible for criminally investigating, prosecuting, and punishing individuals who commit war crimes, crimes against humanity, and genocide, as well as other "serious" human rights violations. They further generally agree that a state's failure to fulfill such a duty constitutes a violation of international human rights law and that, in certain instances, international criminal institutions should be created or used to punish individual perpetrators.

For the most part, scholars and advocates alike consider the ensuing increase in criminal trials for human rights violations—what Kathryn Sikkink refers to as "the justice cascade"—as a positive turn within the human rights movement.[1] While Sikkink documents human rights trials over the past three decades and recounts when and how human rights prosecutions began and developed in Latin America before spreading around the globe, no scholar—to my knowledge—has systematically analyzed the extent to which judicial and scholarly interpretation of both treaty-based and customary international law have changed over time to facilitate and justify the shift. And few have considered the effects of that turn on the human rights movement itself.

This Article aims to begin to fill both of those gaps. Rather than charting the number or frequency of criminal prosecutions that have taken place, it follows international human rights jurisprudence and scholarly pronouncements on the state of international law to show how criminal prosecutions have come to be seen as legally required. As such, it situates contemporary international criminal legal institutions and the broad rejection of amnesty laws by regional and international human rights courts and institutions in some of the international human rights law that predated them. And it connects

1 KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 5 (2011).

these legal responses to the human rights movement's explicit fight against impunity, particularly against the "culture of impunity," which only began in the early-1990s.[2] It was then that much human rights advocacy started to move from naming, shaming, and sometimes judicially trying states for their violations of human rights to finding ways to hold individuals criminally responsible for them.

In this Article I question the often unsupported or even unstated assumption that the turn to criminal prosecution is a clear success for the human rights movement by suggesting some of the disabling effects of that focus. I do not simply consider what has been missed by the turn but attempt to demonstrate that, as criminal law has become the enforcement tool of choice, it has negatively affected the lens through which the human rights movement and the international law scholars who support it view human rights violations. In short, as advocates increasingly turn to international criminal law to respond to issues ranging from economic injustice to genocide, they reinforce an individualized and decontextualized understanding of the harms they aim to address, even while relying on the state and on forms of criminalization of which they have long been critical.

Relatedly, I aim to demonstrate that the turn to criminal law was not an obvious trajectory for either the human rights movement or international law. I revisit the "truth versus justice" and "peace versus justice" debates from the late-1980s through the mid-1990s, in which human rights activists and international legal scholars actively disagreed over whether justice (meaning criminal justice) should take priority over truth and peace, primarily in the context of transitional regimes. I trace how those debates were mediated over time and attempt to revive the positions that "lost" and have largely been forgotten, even though the debates occurred during the professional lives of many who remain influential in the human rights movement.

The contemporary embrace of criminal law—along with the equation of criminal prosecutions, justice, and human rights—has taken place with little systematic deliberation about the aims of criminal law or about its pitfalls. In fact, forgotten are not only the debates about justice versus peace and truth but also broader critiques of penal systems that have long been voiced by human rights advocates. I am interested in how anti-impunity and its alignment with criminal prosecutions came to be uncontested within human rights so relatively quickly and the effect that the current, increasingly rigidified, position has on possibilities for legal interpretation as well as for internal critique within the human rights movement.

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[2] *See infra* note 25 and accompanying text. **R**

Throughout the Article, I use Amnesty International (AI), one of the oldest and most significant of the international non-governmental organizations (NGOs) on human rights, to illustrate the shift I see from the 1970s to today within human rights advocacy. Although, given its name, it almost seems too obvious to mention, *amnesty* was central to the organization's mission when it was founded in the early-1960s to organize letter-writing campaigns calling for the release of political prisoners, or those whom it adopted as "prisoners of conscience." By the early-1970s, AI had begun to work more broadly on issues of prison conditions and due process for all prisoners. Yet, since the 1990s, AI has been one of the most vocal opponents of amnesties, now for perpetrators of human rights violations rather than prisoners of conscience. It also, if somewhat reluctantly at first, has become a strong supporter of international criminal institutions.

I use AI as my primary example, in part to show that the term "amnesty" has only relatively recently been perceived as a negative term in human rights.[3] I also believe that AI's current positions on impunity and amnesty are representative of the views of other large international human rights NGOs, as well as of many domestic human rights NGOs. I occasionally refer to other such organizations but concentrate on AI as a way to study how the shift operates within one organization.

I pursue these arguments and aims as follows. Part I of the Article provides a brief overview of the trend in human rights that I identify, locating the human rights movement's shift, in part, within post-Cold War neoliberalism. Part II situates the criminal law turn in the jurisprudence of the Inter-American Court of Human Rights (IACHR), and shows how the court's decision to hold states accountable for the action of nonstate actors (at the urging of advocates) provided an important precursor to the criminal turn. It then considers jurisprudence on amnesty, primarily though not exclusively in the IACHR, and contrasts it with the South African Constitutional Court's early decision on the issue. It does so to trace the truth, justice, and peace debates throughout the period. Part III studies the development of international criminal institutions and how their prosecutorial goals have both influenced and largely been adopted by the human rights movement. Part IV returns to the human rights movement and contends that the movement's focus on criminalization has narrowed and distorted its view both of human rights harms and of possible remedies for them.

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3 As recent debates over immigration reform in the United States demonstrate, "amnesty" has come to have negative connotations in other arenas as well. *See* Linda S. Bosniak, *Amnesty in Immigration: Forgetting, Forgiving, Freedom*, 16 CRITICAL REV. INT'L SOC. & POL. PHIL. 352–53 (2013).

I
Overview of the Anti-Impunity Trend

From the mid-1970s through the late 1980s, the human rights movement—at least as represented by large international NGOs based in Europe and the United States—primarily concerned itself with the protection of individual civil and political rights.[4] These NGOs mostly used naming and shaming tactics to put pressure on states to end their direct violations of human rights. They did not generally call on states to prosecute individuals who committed the violations, in large part because states—not individuals—were considered the perpetrators.

Moreover, during this period, much human rights advocacy was directed at states' criminalization of political activity and at abuses of their penal systems. When AI first began its letter-writing campaigns in 1961, it called for the release of those it deemed prisoners of conscience. It did so by invoking the Universal Declaration of Human Rights (UDHR) Article 18 (freedom of thought, conscience, and religion) and Article 19 (freedom of opinion and expression).[5] As early as 1964, however, it began scrutinizing the criminal justice system's treatment of all political prisoners, even if it did not adopt, nor call for the release of, those who advocated force.[6] By 1968, it officially expanded its mandate to express concern for the treatment of all prisoners—political and "ordinary"—using Article 5 (prohibiting torture and

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4 I understand this geographical caveat is a big one. But given that much of the push for criminal responses to human rights violations today also comes from some of these same organizations and from human rights funders in the global north more generally, I believe it is an appropriate trend to consider. By beginning with the 1970s, I essentially follow Samuel Moyn's history of the origins of the contemporary human rights movement. *See generally* Samuel Moyn, The Last Utopia: Human Rights in History (2010).

5 *See* Wendy H. Wong, Internal Affairs: How the Structure of NGOs Transforms Human Rights 208 n.4 (2012); *The Forgotten Prisoners by Peter Benenson*, Amnesty Int'l USA, http://www.amnestyusa.org/about-us/amnesty-50-years/peter-benenson-remembered/the-forgotten-prisoners-by-peter-benenson (last visited May 15, 2015) (reproducing the 1961 *Observer* article which marked the start of AI's campaigns), *see generally* Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/910 (Dec. 10, 1948).

6 Amnesty Int'l, *Annual Report, June 1, 1964 - May 31, 1965*, at 7, AI Index POL 10/001/1965 (May 31, 1965), *available at* http://www.amnesty.org/en/library/info/POL10/001/1965/en. After much internal debate surrounding Nelson Mandela, whom AI had earlier adopted as a "forgotten prisoner," AI decided that while it would advocate for fair and prompt trials for all political prisoners, it would only campaign for the unconditional release of those who had not advocated violence. *Id.* at 3, 7; *see also* Nelson Mandela, Long Walk to Freedom: The Autobiography of Nelson Mandela 612 (1995) ("The award [Nobel Peace Prize] was a tribute to all South Africans and especially to those who had fought in the struggle; I would accept the award on their behalf. But the Nobel award was one I never thought about. Even during the bleakest years on Robben Island, Amnesty International would not campaign for us on the grounds that we had pursued an armed struggle, and their organization would not represent anyone who had embraced violence. It was for that reason that I assumed the Nobel committee would never consider the man who had started Umkhonto we Sizwe for the peace prize.").

cruel and inhumane punishment) and Article 9 (prohibiting arbitrary arrest and detention) of the UDHR.[7] Opposition to the death penalty became part of its mandate in the early-1970s.[8] While AI might have found some states' criminal justice systems more suspect than others, it saw all countries as capable of abusing their penal power.[9]

Even as international and regional human rights institutions, including adjudicatory and quasi-adjudicatory bodies, emerged or expanded during the 1970s and 1980s with the aim of enforcing human rights law beyond naming and shaming, they did so to review or judge the human rights records of states. No international criminal courts or tribunals existed to try individual perpetrators. Enthusiasm for an international criminal court to try crimes ranging from war crimes to terrorism had waxed and waned among international lawyers since before the advent of the human rights movement, even as far back as the interwar period.[10] It did not gain significant momentum, however, until the mid-1990s. (See Figure 1, indicating the extent to which such a court was discussed in books during these years, with a sharp and steady increase beginning in the mid-early 1990s.)

As recently as 1991, the establishment of international criminal courts to try individual perpetrators seemed implausible to many human rights advocates as did large-scale domestic criminal adjudication. As Argentine legal theorist Carlos Nino put it in his article in the *Yale Law Journal* that year, after suggesting that an

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7 WONG, *supra* note 5. R

8 *Id.*; *see also* Amnesty Int'l, *Annual Report, 1969–1970*, at 1, AI Index POL 10/001/1970 (Jan. 1, 1970), *available at* http://www.amnesty.org/en/library/info/POL10/001/1970/en (adding, for the first time, Articles 5 and 9 of the UDHR to its list of "objects" included in the introduction of its Annual Report). In 1970, AI engaged in a campaign to secure the application of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMRTP), thus evidencing growing concern with the treatment of prisoners in custody. *See* Amnesty Int'l, *supra* at 2. In 1972, it launched the campaign against torture. *See* Amnesty Int'l, *Report on Torture*, at 1, AI Index ACT 40/001/1973 (Jan. 1, 1973).

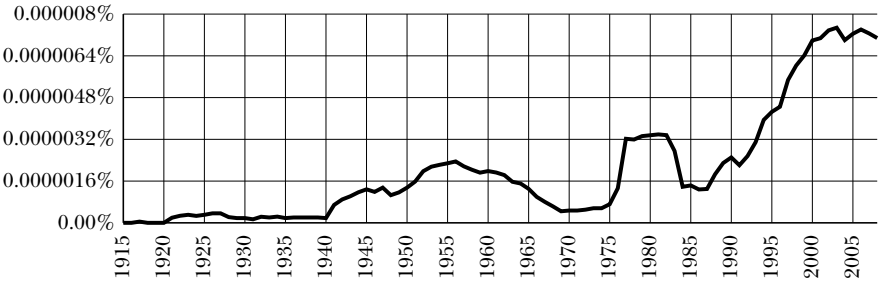
9 For example, Amnesty International's 1973 *Report on Torture*, which discusses the use of torture in criminal justice systems, states: "torture, now used not only for extracting information but as a method of political control, is a world-wide phenomenon which is on the increase." Amnesty Int'l, *Report on Torture*, *supra* note 8, at 1. R

10 When in 1944, Hans Kelsen called for an international criminal court to try war criminals, he offered as support the work of Hugh H. L. Bellot, who first suggested the establishment of such a court in a paper to the Grotius Society in 1916 and authored the International Law Association's draft statute for the "International Penal Court" in 1926. *See* HANS KELSEN, PEACE THROUGH LAW 112–13 (2007) (1944) (citing Hugh H. L. Bellot, *A Permanent International Criminal Court*, *in* INT'L LAW ASS'N, 1 REPORT OF THE THIRTY-FIRST CONFERENCE HELD AT THE PALACE OF JUSTICE, BUENOS AIRES, 24TH AUGUST-30TH AUGUST 1922, at 63 (1923)).

For discussion of various draft statutes and codes of crime that were produced in the post-World War II era, between the 1950s and 1970s, and the effect of the Cold War on the establishment of international criminal jurisdiction, see M. Cherif Bassiouni, *The Making of the International Criminal Court*, *in* 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 117–22 (2008) [hereinafter Bassiouni, INTERNATIONAL CRIMINAL LAW, VOLUME III].

international criminal forum would be preferable to a requirement that transitional states engage in domestic prosecutions: "[I]t may be idealistic to hope for the establishment of [international criminal] courts in the present state of international law; but it is no less realistic than to hope that the international community, through external political pressure, will enforce the duty to prosecute past human rights abuses."[11] Of course, we now know that neither was as far out of reach as Nino expected.

FIGURE 1. N-GRAM: REFERENCES TO "INTERNATIONAL CRIMINAL COURT" (1915–2008)[12]



According to M. Cherif Bassiouni, the tide had begun to turn in 1989 when, in response to a United Nations special session on drug trafficking, the United Nations General Assembly asked the International Law Commission (ILC) to prepare a study on the establishment of an international criminal court to prosecute drug traffickers.[13] The ILC responded with a report that addressed a number of international crimes other than drug trafficking.[14] The report was favorably received by the General Assembly and eventually resulted in the ILC's 1994 draft statute for an International Criminal Court.[15] Bassiouni notes that, although an international criminal court still seemed a distant possibility up until 1992, events in the former Yugoslavia and in Rwanda generated broad-based support for international prosecutions of war crimes, which was manifested in the United Nations Security Council resolutions establishing the ad hoc tribunals for the former Yugoslavia in 1993 and Rwanda in 1994.[16] That support paved

11 Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2638–39 (1991).

12 An N-gram based on eight million of the titles digitized in Google books demonstrates a sharp and steady increase in references to "international criminal court" from around 1991. *See generally* Jean-Baptiste Michel et al., *Quantitative Analysis of Culture Using Millions of Digitized Books*, 331 SCIENCE 176, 176–82 (2011).

13 Bassiouni, INTERNATIONAL CRIMINAL LAW, VOLUME III, *supra* note 10, at 122. **R**

14 *Id.* at 123.

15 *Id.* at 123–24.

16 *Id.* at 125.

the way for the 1998 Rome Conference that adopted the treaty establishing the International Criminal Court (ICC).[17] The focus of the ad hoc tribunals on war crimes also caused a shift in terms of the scope of the ICC. In the end, it was given no jurisdiction over drug trafficking. Rather, it covers genocide, crimes against humanity, war crimes, and the crime of aggression.[18]

That the Security Council was able to agree on the establishment of international criminal tribunals with regard to the former Yugoslavia and Rwanda was also, of course, largely due to the end of the Cold War and reflected the end of the stalemate that the Security Council had faced for decades between its five permanent members. To be sure, an international criminal response first functioned as a compromise in the former Yugoslavia when states were still unable to agree on military intervention. And in Rwanda, international criminalization was largely seen as a necessary response to an unfortunate problem that the United Nations should have averted to begin with. Nevertheless, the Security Council's choice of international criminal tribunals in the early-1990s corresponded with a move to criminal law in other areas as well, including in the battle against narco-trafficking that provided the impetus for the General Assembly's request in 1989.

Moreover, the rise of neoliberalism that accompanied the end of the Cold War often called for a strong punitive state, even while relaxing government control in many other areas.[19] Criminal law played an important role in economic restructuring and rule of law projects throughout the world. Allegra McLeod explores in detail the United States' increased exportation of its own criminal justice model throughout the 1990s to combat transnational crime.[20] Noting that then-Senator Kerry "repeatedly declared that transnational crime was 'the new communism, the new monolithic threat'" and that it was up

17 *Id.* at 122–32.

18 Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 3. Article 5(2) conditions the ICC's jurisdiction over the crime of aggression on future amendment to the statute. Achieving such change has proved contentious. In 2010, States Parties agreed on language for several related amendments, but made their enactment dependent upon ratification by thirty states and further decision by States Parties after January 1, 2017. For discussion of the amendments and the continuing uncertainties and ambiguities concerning the ICC's jurisdiction over the crime of aggression, see generally Sean D. Murphy, *The Crime of Aggression at the ICC*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller & Alexia Solomou eds., 2015).

19 For discussion of the neoliberal turn within the United States, *see generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007). For discussion of the emergence of the penal state in Latin America, see generally Markus-Michael Müller, *The Rise of the Penal State in Latin America*, 15 CONTEMP. JUST. REV. 57 (2012).

20 Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL'Y REV. 83 (2010).

to the United States to lead the crusade against it,[21] she contends that "[b]attling transnational crime became a vehicle to organize U.S. global engagement in the post-Cold War period."[22] The exported model favored retributive justice, and its spread corresponded to the rise of prison rates in the United States.

In the early 1990s, the focus and approach of the human rights movement also began to change in ways that coincided with, and perhaps fueled, the increased attention to and faith in criminal justice systems—domestic, international, and transnational. During that time, human rights advocates began to see the threat of impunity in much the way then-Senator Kerry understood the threat of transnational crime.

AI's 1991 "policy statement on impunity" is exemplary of the term's usage:

> Amnesty International believes that the phenomenon of impunity is one of the main contributing factors to ["persistent patterns of gross human rights violations' that 'are still occurring in many countries throughout the world."] Impunity, literally the exemption from punishment, has serious implications for the proper administration of justice . . . . International standards clearly require states to undertake proper investigations into human rights violations and to ensure that those responsible are brought to justice.[23]

Note that in this quotation, impunity is not simply a failure to remedy human rights violations; it is a unique cause of them. AI repeated this language in numerous country reports during this period.[24] Such impunity, of course, might occur from a state's passive failure to investigate human rights violations; or it might result from explicit decisions not to prosecute abuses of human rights, such as through amnesty laws. Advocates began to oppose both, increasingly decrying the

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21 *Id.* at 104–05.

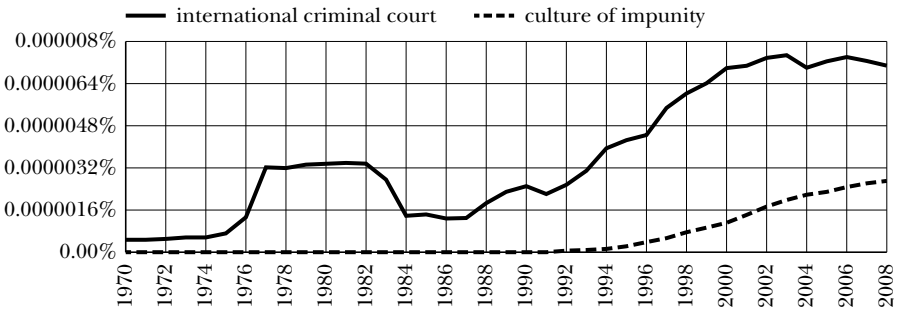
22 *Id.* at 104. McLeod details how the three primary modes of export—the Office of Overseas Prosecutorial Development Assistance and Training, the International Law Enforcement Academies, and the International Criminal Investigative Training Assistance Program—have been largely influenced both by Cold War counterinsurgency and drug war training and by the American legal academy's "Law and Development Movement." *Id.* at 96–102.

23 Amnesty Int'l, *Policy Statement on Impunity*, *in* 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 219 (Neil J. Kritz ed., 1995).

24 *See, e.g.*, Amnesty Int'l, *Chile: Members of Security Forces Charged in Connection with "Disappearance" of Mapuche Indians in 1974*, at 2, AI Index AMR 22/02/92 (Feb. 1, 1992), *available at* http://www.amnesty.org/en/library/info/AMR22/002/1992/en; Amnesty Int'l, *Colombia: A Further Exchange of Views with the Colombian Government*, at 13–14, AI Index AMR 23/69/91 (Dec. 1, 1991), *available at* http://amnesty.org/fr/library/info/AMR23/069/1991/en [hereinafter Amnesty Int'l, *Colombia*]; Amnesty Int'l, *El Salvador: Observations and Recommendations Regarding the Commission of Truth*, at 11, AI Index AMR 29/006/1992 (May 31, 1992), *available at* http://www.amnesty.org/en/library/info/AMR29/006/1992/en.

"culture of impunity," a term that had rarely been used before 1991. (See Figure 2).

FIGURE 2. N-GRAM: REFERENCES TO "CULTURE OF IMPUNITY" AND "INTERNATIONAL CRIMINAL COURT" (1970–2008)[25]



Seeing impunity as cultural suggests deeply entrenched attitudes that can only be changed over time. While one could imagine multiple ways to respond to that culture,[26] the stage was being set for individual criminal responsibility to emerge as the primary and even legally necessary response to it. Criminalization appealed to human rights advocates working on a variety of different issues. Many women's human rights proponents, for example, supported what Elizabeth Bernstein labels "carceral feminism," particularly in their attempts to address sex trafficking and sexual violence.[27]

In the next two Parts I consider some of the ways in which individual criminal responsibility became central to the human rights effort. Domestic and international human rights NGOs as well as regional and international institutions, including human rights courts, eventually concluded that the protection of international human rights and

25 This N-gram demonstrates a steady and significant increase in usage of the term "culture of impunity" between 1991 and 2008. The line roughly mirrors that of references to the International Criminal Court during the same period. *See generally* Michel et al., *supra* note 12. It also roughly coincides with the rise in actual international, domestic, and foreign human rights prosecutions. *See* SIKKINK, *supra* note 1, at 138 fig.5.1. R R

26 Even AI, despite its strong position against impunity, stated in many of its reports in the early 1990s that it took "no position on the granting of official amnesties or pardons once the truth about the individual abuses has been brought to light through investigations and those responsible have been convicted." *See* Amnesty Int'l, *Colombia*, *supra* note 24, at 13. R

27 Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS: J. WOMEN CULTURE & SOC'Y 47 (2010). For a discussion of the history of the turn to criminal law in the United States feminist movement during the same period, particularly among those she identifies as dominance feminists, see Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007); Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583 (2012).

humanitarian law (which increasingly overlapped) required criminal accountability at both domestic and international levels.

II
Domestic Punishment as International Human Rights Remedy

When we think of international criminal law, we generally have in mind international criminal institutions. As I discuss in Part III, one of the aims of the ICC is to put pressure on states to prosecute individuals domestically.[28] In this Part, I consider how international human rights law also attempts to affect domestic criminal prosecutions. That is, although it has received relatively little attention, since the late-1980s (several years before the ICC seemed likely), much human rights law has aimed to pressure states to respond criminally to human rights violations through what Alexandra Huneeus has recently termed "the quasi-criminal jurisdiction of the human rights courts," or "international criminal law by other means."[29]

I concentrate here on the development of the jurisprudence of the IACHR, in particular on when, why, and how it has held states accountable for the criminal investigation, prosecution, and punishment of human rights violations, including by invalidating amnesty laws. I aim to show that, if inadvertently, the IACHR's early case law set the stage for the human rights movement's anti-impunity emphasis, normalizing the turn to criminal law both inside and outside of the Inter-American system. Its influence can be seen, for example, in both the European and African human rights regimes, as well as in the United Nations. I also aim to demonstrate how, along the way, the IACHR's jurisprudence and the human rights advocacy it both followed and spurred crafted decisions and arguments to make the conclusions seem less contested than they were. To consider the extent to which there were differing opinions on the importance of impunity and the meaning of impunity and justice, I also discuss in some detail a 1996 South African Constitutional Court decision that has escaped significant direct criticism, even though it reached a result quite different from that of the IACHR.

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28 See *infra* note 199 and accompanying text. **R**

29 Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 Am. J. Int'l L. 1, 1–3 (2013); *see also* Frédéric Mégret & Jean-Paul S. Calderón, *The Move Towards a Victim-Centric Concept of the Criminal Law and the "Criminalization" of Inter-American Human Rights Law: A Case of Human Rights Law Devouring Itself?*, *in* 35 Years of the Inter-American Court of Human Rights: Theory and Practice, Present And Future (Yves Haeck, Clara Burbano Herrera, & Oswaldo Ruiz Chiriboga, eds., forthcoming 2015).

A. Breakdown of the Public/Private Distinction

In recent years, the IACHR has struck down amnesty provisions in many different countries,[30] and it is there that its anti-impunity stance is most clear. Yet, the roots of that line of cases extend to the court's earliest jurisprudence, which is known for its progressive move to break down the public/private or state action/inaction divide. In this subpart, I consider that early case law, reading it in particular for how it set the stage for the court's jurisprudence on amnesty.

In 1988, the IACHR handed down *Velásquez-Rodríguez v. Honduras*, its first decision in a contentious case.[31] In that case, the Honduran government denied responsibility for the disappearance of a political activist, although it put forward little by way of defense. Rather than requiring that the applicant prove direct state action, the court found that state accountability did not rest on only direct state involvement.[32] Indeed,

> [a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[33]

According to the court, the state therefore possessed "a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations . . . to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[34]

At the time, human rights advocates and legal scholars heralded the decision as a defining moment for human rights law. Theodor Meron, for example, in a lecture on state responsibility shortly after the decision was rendered, read it as a response to the difficulty of attribution in human rights law:

> If we want international human rights law to become an authentic branch of international law, equal to all other branches of international law, we must create a conceptual structure in which we can invoke the same principles of state responsibility as in other fields of

30 *See infra* Part II.B.2.

31 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29,1988).

32 *Id.* ¶ 172.

33 *Id.*

34 *Id.* ¶ 174.

> international law. The basic requirement here is that we should be able to invoke the same principles of attribution.[35]

Dinah Shelton, who would later become a member of the Inter-American Commission on Human Rights, the body tasked with bringing and arguing cases before the court, wrote an article shortly after *Velásquez-Rodríguez* and two subsequent decisions.[36] There, she commented that, because of the court's willingness to interpret the American Convention on Human Rights to attribute state responsibility to state inaction, "the American Convention provides guarantees for individual rights that are lacking in U.S. constitutional law."[37] And, in a 1993 report, AI referred to the judgment as "the most far-reaching pronouncement to date of the principle of state responsibility."[38]

When the women's human rights movement began to take off in the late-1980s and early-1990s, largely with a focus on violence against women in the so-called private sphere, it saw *Velásquez-Rodríguez* as signaling a paradigmatic shift. In particular, a number of scholarly articles at the time cited the case as pathbreaking for the women's human rights movement's attempts to break down the public/private distinction in international law.[39] To this day, the case and its progeny are cited by those who argue for state responsibility for violence against women.[40]

Given that I identify *Velásquez-Rodríguez* as a significant precursor to the turn to criminal law, it is important to point out that, despite its

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35 Theodor Meron, *State Responsibility for Violations of Human Rights*, 83 AM. SOC'Y INT'L L. PROC. 372, 377 (1989).

36 *See* Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 FORDHAM INT'L L.J. 1 (1989). The other two contentious cases to which she refers are *Godinez Cruz* and *Fairen Garbi & Solis Corrales*. Godínez-Cruz v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5 (Jan. 29, 1989); Fairén-Garbi & Solís-Corrales v. Honduras, Merits, Judgment Inter-Am. Ct. H.R. (ser. C) No. 6 (Mar. 15, 1989).

37 Shelton, *supra* note 36, at 3. **R**

38 Amnesty Int'l, *"Disappearances" and Political killings: Human Rights Crisis of the 1990s—A Manual for Action: Chapter G-5: Bringing the Perpetrators to Justice*, Part 6, AI Index ACT 33/60/93 (Oct. 1993), *available at* https://www.amnesty.org/download/Documents/188000/act330601993en.pdf.

39 *See, e.g.*, Andrew Byrnes, *Women, Feminism, and International Human Rights Law—Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?*, 12 AUST. YBIL 205, 229 (1988–89) (discussing the IACHR's recognition of the obligation of states to prevent or provide a remedy for violations of rights by private individuals); Margareth Etienne, *Addressing Gender-Based Violence in an International Context*, 18 HARV. WOMEN'S L.J. 139, 157 n.97 (1995) (citing the case as "sufficient precedent" for holding states liable for failing to protect against human rights violations perpetrated by private individuals); Elizabeth K. Spahn, *Waiting for Credentials: Feminist Theories of Enforcement of International Human Rights*, 44 AM. U. L. REV. 1053, 1064 n.34 (1995) (citing the case in discussion of making human rights enforceable for both state and nonstate actions).

40 *See, e.g.*, U.N. Human Rights Council, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo*, ¶ 15, U.N. Doc. A/HRC/23/49 (May 14, 2013), *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A_HRC_23_49_English.pdf.

announcement of the state's obligation to punish, the court explicitly distinguished itself from a criminal tribunal.[41] The decision explained:

> The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. 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.[42]

Somewhat paradoxically, the court asserted this distinction to lower the commission's burden of proof.[43] Because the Honduran government failed to provide evidence in support of a defense on the merits, the court accepted as true the commission's rendition of the facts, a move it acknowledged would be unlikely to satisfy the requirements of a criminal prosecution.[44]

Perhaps because it had in mind a clear distinction between itself and a criminal court and because it had little faith in the Honduran government to investigate the case, the IACHR did not order the state to engage in criminal prosecution. Instead, it ordered Honduras "to pay fair compensation" to the victim's next of kin.[45] In cases beginning in the mid-1990s, however, including in some countries where there was little reason to trust the police and prosecutors to engage in fair investigation, prosecution, and punishment, the court began affirmatively to require that states initiate criminal investigations against individual perpetrators.[46] And, as Huneeus shows in great detail, over time it has become increasingly common for human rights adjudicatory and quasi-adjudicatory bodies to order, or at least exhort, states to engage in criminal proceedings at the remedial stage.[47] She especially

41 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 134 (July 29, 1988).

42 *Id.*

43 *Id.* ¶¶ 135–38.

44 *Id.*

45 *Id.* ¶ 194(5).

46 *See, e.g.*, Loayza-Tamayo v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 192(6) (Nov. 27, 1998) (unanimously ordering Peru to "investigate the facts in the . . . Case, identify and punish those responsible for those acts, and adopt all necessary domestic legal measures to ensure that this obligation is discharged"); Paniagua-Morales et al. v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 181(6) (Mar. 8, 1998) (unanimously ruling that Guatemala "must conduct a genuine and effective investigation to determine the persons responsible for the human rights violations referred to in this Judgment and, where appropriate, punish them"); Caballero-Delgado and Santana v. Colombia, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 22, ¶ 72(5) (Dec. 8, 1995) (unanimously deciding "that the Republic of Colombia is obligated to continue judicial proceedings into the disappearance and presumed death of the persons named and to extend punishment in accordance with internal law").

47 Huneeus, *supra* note 29, at 2. R

finds that trend in the IACHR, which, as of the time of her study, had ordered the state to conduct a criminal investigation in over fifty contentious cases across fifteen states.[48] Following such orders, states had handed down nearly forty convictions in fifteen separate cases.[49]

Of course, the piercing of the public/private or state action/inaction divide did not necessarily require a criminalization approach. One could hold the state accountable without ordering it to prosecute individuals. Indeed, as I have already suggested, this turn to criminal law was a somewhat curious move in the context of a human rights movement that had, up until that point, largely focused on the punitive state as part of the problem.

While the IACHR's early jurisprudence played a formative role in the turn to criminal law, it was also part of a larger trend. The 1993 Vienna Declaration and Program of Action, for example, "call[ed] upon all States to take effective legislative, administrative, judicial or other measures to prevent, terminate and punish acts of enforced disappearance."[50] And invoking the need to oppose impunity for human rights violations beyond enforced disappearances, seemingly with amnesties in mind, the document continued: "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law."[51] When then-United Nations High Commissioner for Human Rights Navi Pillay delivered her opening comments to the Human Rights Council in

48 *Id.* at 15–16.

49 *Id.* at 15–17. Huneeus does note a contrast between the IACHR and the European Court of Human Rights (ECHR), describing the latter as more "deferential" to states in that "it views its rulings as 'declaratory' and typically demands financial compensation of the victim, but allows states to choose the means of bringing their practices into compliance with the European Convention." *Id.* at 24. Although the European Court does not supervise its own rulings, Huneeus contends that the Council of Europe nevertheless engages in "quasi-criminal review," particularly via the Committee of Ministers, which has responsibility for supervising the implementation of the ECHR's decisions. For example, in cases against Russia for forced disappearances and other war crimes that took place during the Chechnya conflict from 1999 to 2003, the Committee of Ministers, "has declared that successful prosecution of individual cases is prerequisite to a finding that Russia has complied with its obligation to ensure effective remedies pursuant to the ECHR's rulings." *Id.* Additionally, Huneeus points to decisions on individual complaints by the United Nations Human Rights Committee and the Committee Against Torture, which she contends also suggest quasi-criminal review. *Id.* at 26–27.

50 World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 62, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*], *available at* http://www.refworld.org/docid/3ae6b39ec.html. Further, "[t]he World Conference on Human Rights reaffirms that it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators." *Id.* The document also called for criminalization at an international level. *See infra* notes 186–87 and accompanying text. R

51 *Vienna Declaration*, *supra* note 50, ¶ 60. R

February 2013, she reflected on the twenty years since the Vienna Declaration, highlighting three of its accomplishments.[52] One was "its impact on the fight against impunity."[53]

The issue had also been on the mind of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities since at least 1991, when it requested that Louis Joinet undertake a study on the impunity of perpetrators of civil and political human rights violations.[54] The final report, issued in 1997 and often referred to as the Joinet Report, stated that countries have an obligation "to investigate violations, to prosecute the perpetrators, and, if their guilt is established, to punish them."[55] Further, it concluded that "[a]mnesty cannot be accorded to perpetrators before the victims have obtained justice by means of an effective remedy."[56] As we see in the following section, that connection between the obligation to punish and the prohibition on amnesty was soon to be made by the IACHR.

B. Invalidation of Amnesty Laws

Today, few human rights NGOs, courts, or scholars defend the legality of amnesties, at least those amnesties that do not exclude, at a minimum, war crimes, crimes against humanity, genocide, and "serious" violations of human rights. Yet, many of these same groups, institutions, and even scholars tolerated, and sometimes even endorsed, certain types of amnesties not that long ago. Argentine human rights scholar and advocate Juan Méndez, for example, had long opposed amnesties in Latin America. In 2000, as a member of the Inter-American Commission on Human Rights, he successfully argued before the IACHR that Peru's amnesty law violated the American Convention on Human Rights.[57] That same year, however, he acknowledged that the amnesty process employed by transitional South Africa in the

52 *See* Navi Pillay, Opening Statement by Ms. Navi Pillay United Nations High Comm'n for Human Rights at the 22nd Session of the Human Rights Council (Feb. 25, 2013), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13031&LangID=E.

53 *Id.* The other two accomplishments were "its role in advancing women's rights" and "its swiftly realized recommendation to create the [High Commission]." *Id.*

54 *See* U.N. Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), ¶ 1, U.N. Doc. E/CN.4/Sub.2/1997/20 (June 26, 1997), *available at* http://www.refworld.org/docid/3b00f1a124.html.

55 *Id.* ¶ 27. The report also sees itself as a follow-up to Vienna, stating that it "comes under the general heading of the Vienna Programme of Action." *Id.* ¶ 6.

56 *Id.* ¶ 32.

57 *See* Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 21 (Mar. 14, 2001) (indicating that the commission apointed Juan Méndez as one of its two delegates).

mid-1990s had met the requirements of international law.[58] In 2012, a little over a decade later, he wrote that, due to its "rapid evolution," international law would no longer support "the South African-style 'conditional amnesty' . . . if it covered war crimes, crimes against humanity (including disappearances), or torture."[59]

Méndez's interpretation of the international law on amnesties is one that is commonly found in the writings of human rights scholars, international institutions, and human rights courts. While sometimes the list of crimes for which amnesty cannot be granted is articulated largely in humanitarian law terms, as in his statement above, other times it is put primarily in human rights terms. For example, in *Barrios Altos v. Peru*, the case in which Méndez participated and that I consider in some detail below, the IACHR referred to "serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance," noting that they all "violate non-derogable rights recognized by international human rights law."[60]

Although they are in the minority, a few scholars today maintain that nothing in international law prohibits a state from granting amnesty, including in at least some of the categories listed above, or that the question is at least unsettled.[61] They generally base their analysis

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58 *See* Garth Meintjes & Juan E. Méndez, *Reconciling Amnesties with Universal Jurisdiction*, 2 INT'L L.F. D. INT'L 76, 88 (2000) (discussing South Africa's amnesty as "a significant step in the evolution of domestic efforts to deal with the past in a manner that satisfies the requirements of international law"). In fact, South Africa's Truth and Reconciliation Commission continued to be held out as a model for some time so that, even during the Rome Conference establishing the International Criminal Court (ICC), some regarded it as representative of an instance where the ICC should refrain from prosecution. Former Secretary-General Kofi Annan endorsed this position, stating that it would be "inconceivable" for the ICC 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." Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L. J. 205, 205–22 (2000) (quoting Kofi Annan, Speech at the Witwatersrand University Graduation Ceremony (Sept. 1, 1998)).

59 Juan E. Méndez, *Foreword* to AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES, at xxiii (Francesca Lessa & Leigh A. Payne eds., 2012).

60 *Barrios Altos*, ¶ 41. It is also common to see lists that include a combination of humanitarian and human rights terms, such as that in a report on amnesties by the United Nations High Commissioner on Human Rights that states that "United Nations bodies, officials and experts have condemned amnesties for war crimes; genocide; crimes against humanity; and other gross violations of human rights, such as extrajudicial, summary or arbitrary executions, torture and similar cruel, inhuman or degrading treatment; slavery; and enforced disappearance, including gender-specific instances of these violations." Office of the U.N. High Comm'r for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, at 27, U.N. Doc. HR/PUB/09/1 (2009).

61 *See, e.g.*, MARK FREEMAN, NECESSARY EVILS: AMNESTIES AND THE SEARCH FOR JUSTICE 32 (2009) ("There is not a single treaty that, in an explicit way, even discourages any kind of amnesty."); WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 177–88 (2012) ("It might be safer to say that although state practice is evolving, and that amnesties in peace agreements are increasingly viewed with

on international humanitarian law and, as I explain more fully below, have had relatively little impact on human rights jurisprudence.[62]

As Méndez suggests, the prominence of this view on the illegality of amnesties is relatively recent. Notwithstanding the Vienna Declaration's 1993 call on states to repeal legislation that would grant impunity to those who have committed grave human rights violations and to prosecute such crimes,[63] the issue of whether truth commissions, international criminal institutions, or even amnesties offer the greatest promise for responding to mass atrocities was seriously debated among human rights advocates during the late-1980s and mid-1990s. In what were often referred to as the "truth versus justice" and "peace versus justice" debates, "justice" referred to criminal prosecutions, and

disfavour, a prohibitive legal rule has not crystallized."); TRANSITIONAL JUSTICE INST., THE BELFAST GUIDELINES ON AMNESTY AND ACCOUNTABILITY 38 (2013), *available at* http://www.transitionaljustice.ulster.ac.uk/documents/TheBelfastGuidelinesonAmnestyandAccountability.pdf (discussing Guideline 6, which "addresses the most unsettled area of international law on amnesties, namely the extent to which amnesties for international crimes are prohibited under customary international law"); Mark Freeman & Max Pensky, *The Amnesty Controversy in International Law*, *in* AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY, *supra* note 59, at 42, 44 ("Yet in this area, what stands out the most is the *absence* of an explicit prohibition of amnesty in any human rights, humanitarian, or criminal treaty."); Max Pensky, *Amnesty on Trial: Impunity, Accountability, and the Norms of International Law*, 1 ETHICS & GLOBAL POL. 1, 8–11 (2008) (contending that the legality of amnesties under international law remains unsettled); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 505–27 (1999) ("[T]here are frequently no international legal constraints to the negotiation of an amnesty for peace deal."). R

Note that Méndez's quotation, *supra* text accompanying note 59, comes from the foreword he authored for the book in which Freeman and Pensky's article on the amnesty controversy appears. With regard to their chapter, Méndez simply states that the language they rely on from Protocol II to the Geneva Convention (which I discuss *infra* at notes 106–08 and accompanying text) "has been authoritatively interpreted to mean [that states] . . . may not condone violations of international law in cases of international crimes or grave breaches of human rights and humanitarian law." Méndez, *supra* note 59, at xxii (internal citations omitted). Making no reference to their argument that the law is unsettled even with regard to those crimes, he cites a 2010 report from the Afghanistan Independent Human Rights Commission and a letter written by the head of the ICRC Legal Division in 1977. *Id.* at xxii n.35. See *infra* note 111 and accompanying text for further discussion of the ICRC's interpretation of the provision. R R R

62 One such group of scholars, which includes Freeman and Schabas, wrote an amicus brief in a case before the ECHR Grand Chamber to respond to the initial panel's statement that international law increasingly considers amnesty for international crimes to be prohibited. The scholars "urge[d] the Grand Chamber to adopt a more legally sound and nuanced approach that recognizes the uncertain picture presented by custom as well as the weaknesses in the claim that there is any support for the prohibition of amnesty in treaty law." Brief for Third Party Interveners at 8, Marguš v. Croatia, App. No. 4455/10 (Eur. Ct. H.R. 2014). The brief primarily focuses on international humanitarian law and, strikingly, does not once mention the European Convention on Human Rights and Fundamental Freedoms. For discussion of the Grand Chamber's decision in the case, see *infra* notes 143–51 and accompanying text. For elaboration on the position of this group of scholars, see TRANSITIONAL JUSTICE INST., *supra* note 61. R

63 *Vienna Declaration*, *supra* note 50, ¶ 60 (discussed *infra* note 50 and accompanying text). R

many considered that truth and peace might be incompatible with criminal punishment, in part because immunity (if not impunity) might be necessary to get perpetrators to reveal the truth or agree to a peaceful transition of government.

In the remainder of this section, I consider how this change in attitude and doctrine occurred and suggest that it worked in tandem with a shift in perspective on the relationship between truth and peace, on one hand, and justice, on the other. I begin with the 1996 decision by the Constitutional Court of South Africa upholding the amnesty provisions of the country's 1995 Act to promote national reconciliation. I use the decision to illustrate the not uncommon understanding at the time that criminal prosecutions were in conflict with goals of truth and peace, as well as forgiveness. I then turn to the jurisprudence of the IACHR, which has ruled against the state in every case in which amnesty laws have been challenged. I demonstrate how, while the IACHR also shares the goals of truth and to a certain extent peace (though not forgiveness), it sees criminal punishment as central—rather than opposed—to the achievement of those goals. Following my analysis of these contrasting approaches, I discuss how the IACHR jurisprudence has migrated to other human rights regimes, including the European Court of Human Rights and the African Commission on Human Rights. Finally, I discuss that, despite a growing consensus among human rights advocates and judges against amnesties, they nevertheless persist.

1. *Truth, Peace, and Forgiveness Versus Justice: South Africa and Beyond*

In 1995, in accordance with its 1993 interim Constitution, South Africa passed its Promotion of National Unity and Reconciliation Act, which established the Truth and Reconciliation Commission.[64] Among its purposes, the commission was meant to facilitate "the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective."[65] The Act extinguished criminal and civil liability for individuals who were granted amnesty and shielded the state and others from civil and vicarious liability.[66] In *Azanian Peoples Organization (AZAPO) v. President of South Africa*, an organization representing the Black Consciousness Movement and the families of several prominent anti-apartheid

64 S. AFR. (INTERIM) CONST., 1993, postamble; Promotion of National Unity and Reconciliation Act of 1995 § 2 (S. Afr.).

65 Promotion of National Unity and Reconciliation Act of 1995, § 3(1)(b).

66 *Id.* § 20(7).

victims challenged the constitutionality of the Act.[67] They argued that the amnesty was inconsistent with section 22 of the interim Constitution, which provided that "'[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum.'"[68]

In its 1996 decision in *AZAPO*, the Constitutional Court upheld the legislation. In doing so, it deployed rationales based on truth, peace, and forgiveness. With regard to truth, the court explained:

> 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.[69]

The court did not deny, then, that perpetrators deserved punishment, but it saw punishment and truth as incompatible and elevated the latter in the interest of all victims, including the applicants in the case who sought the opposite result. The court continued: "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."[70]

Similarly, the *AZAPO* decision emphasized that peace and prosecution were in conflict. It saw the amnesty provision as central to the Constitution's "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."[71] Indeed, the court explained, "but for a mechanism providing for amnesty, the 'historic bridge' itself might never have been erected."[72] The court continued:

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67 *Azanian Peoples Organization (AZAPO) v. President of the Republic of S. Afr.* 1996 (4) SA 671 (CC). The plaintiffs included the family of anti-apartheid activist Steve Biko, who was tortured and died while in police custody in 1977. Biko had been one of the primary theorists of and advocates for Black Consciousness. For more information on AZAPO, see http://azapo.org.za/azapohistory/azapo-and-bcma-historical-background/. For more information on Biko, see STEVE BIKO, I WRITE WHAT I LIKE (Aelred Stubbs ed., 3d ed. 2002). For discussion of judicial opinions by both the High Court and Constitutional Court, see ANTJE DU BOIS-PEDAIN, TRANSITIONAL AMNESTY IN SOUTH AFRICA, 29–37 (2007). For a contemporary reflection on the case, see DM Davis, *The South African Truth Commission and the Azapo Case: A Reflection Almost Two Decades Later*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA (Karen Engle, Zinaida Miller & DM Davis eds., forthcoming 2016).

68 *See AZAPO*, ¶¶ 7–8.

69 *Id.* ¶ 17.

70 *Id.*

71 *Id.* ¶ 3, n.1 (quoting S. AFR. (INTERIM) CONST., 1993, postamble).

72 *Id.* ¶ 19.

> 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 victimisation.[73]

The amnesty process was thus key to both building and maintaining a peaceful transition.

In addition to facilitating truth and peace, the court considered that amnesty led to forgiveness.[74] Forgiveness had been central to the transitional aims of the National Unity and Reconciliation Act.[75] As Archbishop Desmond Tutu explained its function in the foreword to the final report of the Truth and Reconciliation Commission when it was issued in 1998: "Having looked the beast of the past in the eye, having asked and received forgiveness and having made amends, let us shut the door on the past—not in order to forget it but in order not to allow it to imprison us."[76] In its own discussion of forgiveness, the court saw it as important to victims, perpetrators, and the nation as a whole:

> [W]hat might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised 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.[77]

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73 *Id.*

74 *See id.* ¶ 17 (noting that amnesty "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'").

75 *See* Explanatory Memorandum to the Parliamentary Bill, Dep't of Justice and Constitutional Dev., http://www.justice.gov.za/trc/legal/bill.htm (last visited May 15, 2015) (The National Unity and Reconciliation Act "is based on the principle that reconciliation depends on forgiveness and that forgiveness can only take place if gross violations of human rights are fully disclosed.").

76 TRUTH AND RECONCILIATION COMM'N, 1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 22 (1998), *available at* http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf.

77 *See AZAPO*, ¶ 17.

Thus, for both the Constitutional Court and the legislation it upheld, amnesty served important instrumental and moral functions for victims as well as perpetrators.

This understanding of a dichotomous relationship between justice (meaning criminal justice), on one hand, and truth, peace, and forgiveness, on the other, could be found in most debates about and reflections on the issue of amnesty at the time. Both those who supported and those who opposed amnesties generally accepted that they had to choose between these conflicting aims.[78] Even those who were ambivalent about whether amnesty should be granted in particular circumstances generally conceded that one or all of the truth, peace, and forgiveness trilogy might have to be sacrificed for justice—or vice versa.[79]

Over time, however, most human rights advocates, institutions, and courts began to reject the dichotomies, seeing prosecutions as necessary to truth, and often to peace. (As I discuss below, forgiveness largely dropped out of the picture.) Consequently, the truth versus justice and peace versus justice debates waned. This shift in approach can be found in IACHR decisions striking down amnesty laws as well as in the United Nations human rights documents and policies

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78 *But see* Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 481–82 (1990) (providing an early effort to tie prosecution to truth: "Prosecution constitutes an important avenue for recounting because it puts the state's resources at the service of truth-telling and because it identifies those responsible . . . .").

79 *See, e.g.*, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 10 (1998) (noting that in addition to truth and justice, "[t]here is another basic, perhaps implicit pair of goals or responses to collective violence—vengeance and forgiveness"); Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past*, 20 LAW & SOC. INQUIRY 7, 43 (1995) (positing questions about the compatibility of justice with truth and reconciliation: "What is the point of knowledge without justice? Should justice or truth be the guiding aim of accountability? Is punishment through the criminal justice system a suitable means of arriving at knowledge? . . . Is justice compatible with reconciliation?"); Nino, *supra* note 11, at 2620 (acknowledging "valuable consequences of punishment" while counseling that "prosecutions may have some limit and must be counterbalanced with the aim of preserving the democratic system"); Scharf, *supra* note 61, at 507 (discussing the "paradoxical question of whether the International Criminal Court will require justice at the expense of peace"); José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1432–33 (1992) ("Righting a wrong and resolving not to do it again is, at its core, the same philosophy that underpins Judeo-Christian beliefs about atonement, penance, forgiveness, and reconciliation. At a societal level, the equivalent of penance is criminal justice. Yet the Chilean government's assessment of the situation led it to conclude that priority ought to be given to disclosure of the truth. This disclosure was deemed an inescapable imperative. Justice would not be foregone, but pursued to the extent possible given the existing political restraints. Forms of justice other than prosecuting the crimes of the past, such as vindicating the victims and compensating their families, could be achieved more fully. The underlying assumption, which I share, was that if Chile gave truth and justice equal priority, the result might well have been that neither could be achieved.").

eschewing amnesty laws on which the court often relies. Although others have recited the IACHR jurisprudence on the legality of amnesties in judicial decisions and legal scholarship, I focus on them here with an eye toward their attempted mediation of the dichotomies that were relied upon in *AZAPO*.

2. *Justice as Facilitating Truth and Perhaps Peace and Forgiveness: The Jurisprudence of the Inter-American Court of Human Rights*

In a series of cases between 2001 and 2012, the IACHR found amnesty laws in Peru, Chile, Brazil, Uruguay, and El Salvador to be incompatible with the American Convention on Human Rights. In the first few cases, the court relied partly on the language of the Vienna Declaration and Program of Action referenced earlier.[80] As time went on, though, it also began to resurrect *Velásquez-Rodríguez* to support its position, even though it is unlikely that anyone was thinking about amnesty when *Velásquez-Rodríguez* was decided.[81] While from today's vantage point the court's reasoning and conclusions might appear natural, the decisions were not uniformly anticipated, partly as a result of many of the debates mentioned above.

Indeed in the early-1990s, the Inter-American Commission, which refers cases to the IACHR, issued resolutions stating that amnesty laws in Argentina,[82] El Salvador,[83] and Uruguay[84] violated the American Convention. It left open the possibility, however, that some states might be permitted to forego criminal prosecution and punishment

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80 *See* Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 4 (Mar. 14, 2001) (Cançado Trindade, J., concurring); *see also* Gomes Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 153 (Nov. 24, 2010) (noting that the Vienna Declaration emphasized that States "should derogate legislation that favors the impunity of those responsible for serious humans rights violations"); Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 202 (Feb. 24, 2011). *See supra* notes 50–51 and accompanying text for the relevant language in the Vienna Declaration. **R**

81 *See Gomes Lund*, ¶ 137 (stating, with reference to *Velásquez-Rodríguez* that "[s]ince its first judgment, this Court has highlighted the importance of the State's obligation to investigate and punish for human rights violations"); Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 144 (Oct. 25, 2012) (citing *Velásquez-Rodríguez* when discussing a state's legal obligation to prevent and punish human rights violations).

82 *See* Alicia Consuelo Herrera v. Argentina, Case 10.147, Inter-Am. Comm'n H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14 (1992) (involving "[forced] disappearances, summary executions, torture, [and] kidnapping").

83 *See* Masacre Las Hojas v. El Salvador, Case 10.287, Inter-Am. Comm'n H.R., Report No. 26/92, OEA/Ser.L/V/II.83, doc. 14 (1992) (regarding an army massacre of seventy-four civilians).

84 *See* Hugo Leonardo v. Uruguay, Case 10.029, Inter-Am. Comm'n H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14 (1992) (regarding forced disappearances and kidnapping of children).

as long as they conducted an adequate investigation and provided compensation.[85] Despite the commission's negative treatment of the amnesty laws of Argentina and El Salvador, when the South African Constitutional Court decided *AZAPO* in 1996, it referred favorably to the amnesty and truth-seeking practices in those countries as well as in Chile.[86] That same year, the Inter-American Commission began to oppose amnesty more explicitly, stating in two resolutions regarding Chile that amnesties that foreclose prosecution and punishment for "serious" human rights violations violate the American Convention.[87] Yet the commission did not refer any of the cases on the legality of amnesty to the court in the 1990s, likely because it was well aware that its conclusions were contested. It did not want to risk rejection of its position by the court, which might then be seen as offering judicial sanction to the amnesty laws.[88]

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85 This exception was narrow, as it was limited to states that did not already afford victims the right to initiate and participate in criminal proceedings. See Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197, 211–14 (1996), for a relatively contemporaneous discussion of the cases and the commission's determination that, despite significant variations among the amnesty laws in the three countries, all violated the states' duties under the American Convention to investigate human rights violations, provide adequate compensation to victims and survivors, and afford victims a fair trial.

86 *See Azanian Peoples Organization (AZAPO) v. President of the Republic of S. Afr.* 1996 (4) SA 671 (CC) at 22–23 paras. 22–24.

87 Cassel, *supra* note 85, at 215–17 (discussing Garay Hermosilla v. Chile, Case 10.843, Inter-Am. Comm'n H.R., Report No. 36/96, OEA/Ser.L/V/II.95, doc. 7 ¶¶ 77, 105–09 (1996); Meneses Reyes v. Chile, Case 11.228, 11.229, 11.231, 11.282, Inter-Am. Comm'n H.R., Report No. 34/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 76, 103–08 (1996)). **R**

88 The commission's failure to refer any such cases does not mean that amnesty did not arise as an issue before the court. In 1998, for example, in *Loayza-Tamayo*, the court responded to Peru's invocation of its amnesty law to defend against a claim that it had failed to investigate an alleged arbitrary detention, thus arguably offering the court a chance to rule on whether Peru's amnesty law violated the Convention. Loayza-Tamayo v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 42, ¶¶ 1–2 (Nov. 27, 1998). Even while rejecting Peru's defense, the majority of the court declined to rule on the legality of the amnesty. *See id.* ¶ 49. In concurrence, however, two judges went further, stating that "so-called self-proclaimed amnesties pertaining to violations of human rights" are incompatible with Article 1(1) and Article 2 of the Convention. *Id.* ¶¶ 1–4 (Cançado Trindade, J. and Abreu-Burelli, J., jointly concurring). Judge Sergio García-Ramírez, in contrast, adopted his concurrence in a separate case, stating "the Court's judgment does not dismiss the advisability and need of amnesty provisions that serve to restore peace." *Id.* (García-Ramírez, J., concurring) (adopting his concurrence in Castillo-Páez v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 6–12 (Nov. 27, 1998)). Discussing contemporaneous debates about amnesty within the human rights movement, he argued that although impunity should be limited, democratically enacted amnesties that do not preclude prosecution for grievous human rights violations remain admissible under international law. *Id.*

The same day the court issued its judgment in *Loayza-Tamayo*, it issued a reparations judgment in *Castillo-Páez*. *Id.* In that case, in which Peru had invoked its amnesty law to defend its failure to investigate an arbitrary detention and subsequent disappearance, one of the attorneys representing the family of the disappeared individual asked the court to rule on the incompatibility of Peru's amnesty laws with its international obligations.

By 2000, however, the landscape had changed. In that year, the commission brought a case against Peru to what it hoped would be a receptive court and argued that the country's amnesty law violated the American Convention.[89] The commission was successful, and the court's 2001 decision in that case, *Barrios Altos v. Peru*, is considered momentous for its finding that self-amnesty laws are "manifestly incompatible with the aims and spirit of the [American] Convention [of Human Rights]."[90] The court followed earlier, arguably creative, interpretations of the Convention by the commission to find specific violations of Article 8, setting forth the right to a fair trial for criminal defendants, and Article 25, recognizing the right to judicial protection, or to recourse "to a competent court or tribunal for protection against acts that violate [an individual's] fundamental rights."[91] By the time the court's decision was handed down, impunity had become a clear target of the human rights movement, and it thus is fitting that the court articulated its opposition to self-amnesty laws on the ground

Castillo-Páez, ¶ 98. The commission supported the request, although it had not originally raised the issue, either on the merits or with regard to reparations. *See id.* ¶¶ 99–100. Aligning itself with the 1997 Joinet Report (see *supra* note 54 and accompanying text), the commission argued that "impunity arises from a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried, and duly punished." *Id.* ¶ 100 (quoting Commission at public hearing). The court responded by reaffirming its holding in the earlier judgment on Peru. *Id.* ¶ 105. While it reiterated the state's duty to investigate, prosecute, and avoid impunity, the court stopped short of declaring the amnesty illegal. *See id.* ¶¶ 105–08. In another joint concurrence, Judges Cançado Trindade and Abreu-Burelli echoed their position in *Loayza-Tamayo*, and García-Ramírez filed the concurrence he adopted in *Loayza-Tamayo*. *See id.* ¶¶ 1–3 (Cançado Trindade, J. and Abreu-Burelli, J., jointly concurring), ¶¶ 1–12 (García-Ramírez, J., concurring); *Loayza-Tamayo*, ¶¶ 1–4 (Cançado Trindade, J. and Abreu-Burelli, J., jointly concurring), (García-Ramírez, J., concurring). R

89 *See* Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83 (Mar. 14, 2001).

90 *Id.* ¶ 43. In 2006, the court issued another decision finding Peru in violation of the Convention for failing to make efforts to locate the disappeared or to initiate proceedings against those thought to be responsible for a 1992 massacre. *See* La Cantuta v. Perú, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, (Nov. 29, 2006) (García-Ramírez, J., concurring). In a separate concurrence, Judge Sergio García-Ramírez summarized the "Inter-American view on self-amnesty." *Id.* ¶¶ 1–8. For further discussion of *La Cantuta*, see Fábia Fernandes Carvalho Veçoso, Between Human Rights Absolutism and Contextual History: Aspects of the Experience of the Inter-American Court of Human Rights 41–43 (2012) (unpublished Ph.D. dissertation, University of São Paulo).

91 American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 9 I.L.M. 673 (1970) (entered into force 18 July 1978); *Barrios Altos*, ¶ 42. The court also found violations of Articles 1(1) and 2 of the Convention, which include general provisions on states' obligations to respect and ensure all rights in the Convention, including through legislation. *Barrios Altos*, ¶ 42. The state of Peru did not contest the commission's arguments applying these provisions, and the court therefore simply accepted them in this case. Their articulation can be found in earlier commission decisions. *See, e.g.*, *Garay Hermosilla*, ¶ 53; Alicia Consuelo Herrera v. Argentina, Case 10.147, Inter-Am. Comm'n H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14 ¶ 50 (1992).

that they ''lead to the defenselessness of victims and perpetuate impunity."[92] Each subsequent challenge to an amnesty law afforded the court the opportunity to expand that decision's reach.

In 2006, in *Almonacid-Arellano v. Chile*, the IACHR struck down Chile's amnesty law, which was not technically a self-amnesty law because it applied in principle to political opponents as well.[93] The court found, however, that the amnesty functioned as self-amnesty "since it was issued by the military regime to avoid judicial prosecution of its own crimes" and therefore violated the Convention.[94] At the same time, the court suggested that its holding might not be limited to self-amnesties.[95]

In 2010, in *Gomes Lund v. Brazil*, the court considered the Brazilian amnesty law, which was not a self-amnesty law both because it had been legislatively adopted and because it applied to members of the guerilla groups as well as state actors.[96] The court nevertheless found the law in violation of the Convention, expanding its previous holdings: "In regard to [arguments] by the parties regarding whether the case deals with an amnesty, self-amnesty, or 'political agreement,' the Court notes . . . that the non-compatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, 'self-amnesties.'"[97]

Having made both the source of amnesty laws and the question of whom they apply to irrelevant, the court seemingly seamlessly invalidated the Uruguayan amnesty law in 2011, in *Gelman v. Uruguay*.[98] There, the court cited its own precedent and international law more generally in support of its broad holding that "amnesty laws are, in cases of serious violations of human rights, expressly incompatible with the letter and spirit of the [American Convention of Human Rights]."[99] In fact, Uruguay had argued that its case required unique

92 *Barrios Altos*, ¶ 43.

93 Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 115–22 (Sept. 26, 2006).

94 *Id.* ¶ 120.

95 *Id.* ("[E]ven though the Court notes that Decree Law No. 2.191 basically grants a self-amnesty . . . it points out that a State violates the American Convention when issuing provisions which do not conform to the obligations contemplated in said Convention . . . . [T]he Court . . . addresses the *ratio legis*: granting an amnesty for the serious criminal acts contrary to international law that were committed by the military regime."). The court also noted that amnesties that do not exclude crimes against humanity "are overtly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention." *Id.* ¶ 119.

96 Gomes Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 134–36. (Nov. 24, 2010).

97 *Id.* ¶ 175.

98 Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 241–46 (Feb. 24, 2011).

99 *Id.* ¶ 226.

treatment because, unlike any other country in the world, Uruguay had held two popular referenda—in 1989 and in 2009—in which voters rejected the opportunity to repeal the law.[100] The court reinforced its view that the source of the law was irrelevant, stating: "[T]he protection of human rights constitutes a[n] impassable limit to the rule of the majority, that is, to the forum of the 'possible to be decided' by the majorities in the democratic instance . . . ."[101]

In 2012, the IACHR handed down its most recent decision on amnesties. In its decision in *Massacres of El Mozote & Nearby Places v. El Salvador*, the court entered new doctrinal terrain.[102] The challenged amnesty was passed in the early-1990s, not necessarily as a part of, but definitely in the context of, the peace agreement that ended the internal armed conflict in the country.[103] While the court could simply have decided the case based on its previous reasoning invalidating amnesties—regardless of their source or impetus—as a matter of human rights law, doing so might have been read to conflict with international humanitarian law, which, as I noted above, some have argued might permit amnesties.[104] It therefore used the opportunity to interpret the 1977 Additional Protocol II to the 1949 Geneva Convention, applicable to noninternational armed conflict. According to a concurring opinion in the case, the court incorporated "international

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100 The referendum failed in 1989 by roughly thirteen points and in 2009 by roughly five points. *Id.* ¶¶ 147, 149. Some argue that many voted against repeal in 2009, not because they favored impunity but because, since 2005, President Tabaré Vásquez, a former Tupamaro and the first president elected from the left-wing *Frente Amplio*, had—unlike any other president—been approving the launching of investigations under a loophole in the 1986 law. For a discussion of some of the ways he did so, see Louise Mallinder, Impunity, Accountability and Public Participation: Uruguay's Evolving Experience of Amnesty Laws 96–100 (2010) (unpublished manuscript), *available at* http://works.bepress.com/louise_mallinder/1. Vásquez ended his five-year presidential term in 2010, but was elected to become president once again beginning in March 2015. For further discussion of the *Gelman* case and of the history of debates around amnesty in Uruguay, see Karen Engle, *Self-critique, (Anti)politics and Criminalization: Reflections on the History and Trajectory of the Human Rights Movement*, *in* New Approaches to International Law: The European and American Experiences 41, 61–67 (José María Beneyto & David Kennedy eds., 2012).

101 *Gelman*, ¶ 239.

102 Massacres of El Mozote & Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252 (Oct. 25, 2012).

103 *See id.* ¶¶ 288–89. The Peace Accord contained a paragraph entitled "End to impunity," which indicated that particular acts should be "the object of exemplary action by the law courts so that the punishment prescribed by law is meted out to those found responsible." *Id.* ¶ 272. The 1992 National Reconciliation Law similarly excluded from the amnesty "anyone who, according to the report of the Truth Commission, had taken part in grave acts of violence . . . whose impact on society demands, with the utmost urgency, that the public know the truth, regardless of the sector to which he or she belongs." *Id.* ¶ 289 (quoting National Reconciliation Law (Legislative Decree No. 147/1992) (El Salvador)). In March, 1993, however, shortly after the Truth Commission presented its report, the legislature enacted the Law of General Amnesty for the Consolidation of Peace, which extended amnesty to those seemingly excluded by it in the previous legislation. *Id.* ¶ 291.

104 *See supra* note 61 and accompanying text. **R**

humanitarian law elements to produce an interpretation that harmonized with the obligations established in the American Convention."[105]

Article 6(5) of Protocol II states that "[a]t 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."[106] It is the main legal provision on which those who defend the legality or uncertain legal status of amnesties rely.[107] Indeed, the South African Constitutional Court had interpreted the provision to favor amnesty in the *AZAPO* decision.[108]

The IACHR's unanimous opinion in *El Mozote* interpreted Article 6(5) to exclude amnesties that preclude the investigation and prosecution of war crimes, such as the December 1981 military massacres in El Mozote and nearby communities at issue in the case.[109] Although there have been ongoing debates over the meaning of that provision,[110] the judgment made no reference to them. Moreover, the sole support it offered for its interpretation is the study of the International Committee for the Red Cross (ICRC) on customary international humanitarian law, with which some scholars disagree.[111] The court thus created human rights case law on the meaning of Protocol II, finding El Salvador's amnesty law incompatible with it, at least to the extent that the amnesty law covers individuals who have committed war crimes or crimes against humanity. It then found the

105 Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 16 (Oct. 25, 2012) (García-Sayán, J., concurring)

106 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 6(5), June 8, 1977, 1125 U.N.T.S. 609, 613.

107 *See, e.g.*, Freeman & Pensky, *supra* note 61, at 44 ("The majority of national courts that have applied Article 6(5) have used it as a legal basis to validate or uphold amnesties covering serious crimes."); Brief for Third Party Interveners, *supra* note 62, at 2–3. R R

108 *Azanian Peoples Organization (AZAPO) v. President of the Republic of S. Afr.* 1996 (4) SA 671 (CC) at 28 para. 30 (S. Afr.).

109 *El Mozote*, ¶¶ 285–87.

110 For additional discussion around Article 6(5) and its interpretations, see SCHABAS, *supra* note 61, at 178–80 (reviewing the literature that has been written on Article 6(5)). R

111 *El Mozote*, ¶ 286 n.461. The court cites—as a "*Cf.*"—Rule 159 of the ICRC's study, which provides that "'[a]t the end of hostilities, the authorities in power must endeavor to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.'" The ICRC thus maintains that Article 6(5) cannot be construed to allow amnesty for individuals guilty of war crimes or crimes against humanity.

For an argument that state practice and *opinion juris* do not support the ICRC's interpretation of the provision or its claim about the status of customary international law on amnesty, see Kieran McEvoy & Louise Mallinder, *Amnesties, Transitional Justice and Governing Through Mercy*, *in* THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 434, 440–41 (Jonathan Simon & Richard Sparks eds., 2013).

state responsible for violations of the American Convention and other American treaties for its failure to provide an "effective remedy to guarantee the rights of access to justice and to know the truth by the investigation and eventual punishment of those responsible."[112]

Although the court's judgment made clear its view that amnesties granted for war crimes or crimes against humanity would violate the Convention, five of the seven judges of the court signed a concurring opinion, which was authored by Judge Garcia-Sayán, the president of the court. As I discuss below, that concurrence was more open to the possibility of a permissible amnesty under international humanitarian law than the judgment might suggest and has been referenced favorably by those scholars who have argued for the possible legality of amnesty.

With the potential exception of the concurrence in *El Mozote*, as the court has deepened and broadened its jurisprudence on amnesty laws through this line of cases, it has also attempted to mediate the tension that the South African Constitutional Court and early human rights and transitional justice advocates saw between truth and justice and peace and justice. It has done so in large part by finding that criminal investigation and punishment are required for truth and, if to a lesser extent, peace.

a. Truth

The "right to truth" has done much of the work in attempting to ameliorate the tension between truth and justice. Each of the amnesty cases has afforded the court an opportunity to state its view of the right to truth, as each raised at some level the question of the relationship between access to truth and the prohibition on amnesty. Even as the court has felt its way on the questions about the source of the right to truth (whether it is an "independent right," as was urged by representatives in the *El Mozote* case, or "subsumed" in certain articles of the Convention, as was first stated in *Barrios Altos* and expanded by later case law), it has continually asserted that truth and criminal justice, far from being in opposition, are in line with each other. As such, unlike the Constitutional Court of South Africa, it has avoided having to choose between the two.

Three understandings of the relationship between criminal trials and truth emerge in the IACHR's jurisprudence. First, the court suggests that truth is one of the purposes of criminal investigations and prosecutions. As the judgment in *Barrios Altos* puts it:

> [T]he right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human

112 *El Mozote*, ¶¶ 299, 301.

> rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.[113]

Similar language appears in *Almonacid-Arellano* as well.[114]

Second, the court, especially in more recent cases, makes clear that it considers amnesty provisions to be in violation of the right to truth. It references and follows United Nations documents to identify a right to truth and, once that right is established, to consider the implications for amnesty of such a right. Accordingly, both the *Gomes Lund* and *Gelman* decisions state that "amnesties and other analogous measures contribute to impunity and constitute an obstacle to the right to the truth in that they block an investigation of the facts on the merits."[115] Moreover, citing the Office of the United Nations High Commissioner for Human Rights, they conclude, based largely on the right to truth, that amnesties are incompatible with states' obligations under "various sources of international law."[116]

Finally, the court rejects the possibility that truth commissions without criminal prosecutions might fulfill the right to truth. While not disparaging the existence or creation of truth commissions, the court's decisions make clear that such commissions "do not substitute the obligation of the State to establish the truth and ensure the legal determination of individual responsibility by means of criminal legal procedures."[117] Rather, the state has the obligation to open and expedite criminal investigations to determine the corresponding responsibilities.[118]

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113 Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 48 (Mar. 14, 2001).

114 Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 148 (Sept. 26, 2006) ("[T]he right to know the truth is included in the right of victims or their next of kin to have the harmful acts and the corresponding responsibilities elucidated by competent State bodies, through the investigation and prosecution provided for in Articles 8 and 25 of the Convention.").

115 Gomes Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 151 (Nov. 24, 2010) (citing Office of the U.N. High Comm'r for Human Rights, Rep., *Right to the Truth*, ¶ 20, U.N. Doc. A/HRC/5/7 (June 7, 2007)) ("Accordingly, a direct connection is made between the right to the truth and such measures as amnesties or other juridical arrangements of comparable effect, since these measures not only promote impunity: they also pose a major obstacle to efforts to uphold the right to the truth by inhibiting the conduct of full inquiries."). Identical language appears in Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 199 (Feb. 24, 2011).

116 *Gomes Lund*, ¶ 151 (citing Office of the U.N. High Comm'r for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, at V, U.N. Doc. HR/PUB/09/1 (2009)). Identical language appears in *Gelman*, ¶ 199.

117 *Gomes Lund*, ¶ 297; *see* La Cantuta v. Perú, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 224 (Nov. 29, 2006*); El Mozote*, ¶¶ 298, 316.

118 See cases cited in *id.*

Thus, as the right to truth has developed jurisprudentially—largely at the urging of human rights advocates—criminal prosecutions have come to be seen as essential to that right. Unlike in *AZAPO*, truth and criminal justice now fit hand-in-glove.

b. Peace

In the early amnesty cases, the court mostly avoided addressing the relationship between peace and justice. To the extent that it did consider the issue, it seemed to accept, much like the Constitutional Court of South Africa in *AZAPO*, that the two might conflict. Yet it reached the opposite result, choosing the prohibition on amnesty over peace. The concurring opinion in *Barrios Altos* by Judge García-Ramírez, for example, tackled the issue directly by acknowledging "the advisability of encouraging civic harmony through amnesty laws that contribute to reestablishing peace."[119] It nevertheless insisted (in line with "a growing sector of doctrine and also the Inter-American Court") that such "forgive and forget provisions 'cannot be permitted to cover up the most severe human rights violations, violations that constitute an utter disregard for the dignity of the human being and are repugnant to the conscience of humanity.'"[120] The court's positive reference in *Almonacid-Arellano* to the United Nations Secretary-General's position that "all peace agreements approved by the United Nations can never promise amnesty for crimes against humanity"[121] suggested a similar view; in instances in which they are not both achievable, criminal justice is preferable to peace.

At least until *El Mozote*, more recent cases by the IACHR have explicitly questioned the sharp distinction between peace and criminal justice. Indeed, both *Gomes Lund* and *Gelman* refer to "the false dilemma between peace and reconciliation, on the one hand, and justice on the other," and favorably reference the report on amnesties by the United Nations High Commissioner on Human Rights for its statement that:

> The amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their bene-

119 Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 11 (Mar. 14, 2001) (García-Ramírez, J., concurring).

120 *Id.* ¶ 11 (García-Ramírez, J., concurring) (quoting Castillo-Páez v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 7 (Nov. 27, 1998) (García-Ramírez, J., concurring)).

121 Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 107 (Sept. 26, 2006) (citing U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 10, U.N. Doc. S/2004/616 (Aug. 23, 2004)). The court quotes identical language in *Gomes Lund*, ¶ 150*; Gelman*, ¶ 198.

> ficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict.[122]

The High Commissioner's reconciliation of criminal justice and peace avoids a difficult choice, and its sentiment is often heard among opponents of amnesty. Even were amnesty to bring peace, many claim, it would not be a "lasting peace."[123]

Such a position also made its way into the 2010 Kampala Declaration, adopted unanimously at the Review Conference of the International Criminal Court, as an agreed-upon assumption of States Parties. The preamble declares that "there can be no lasting peace without justice and that peace and justice are thus complementary requirements."[124] The very next paragraph states that "justice and the fight against impunity are, and must remain, indivisible."[125]

That said, to the extent that amnesties continue to be defended, peace is generally the justification that is given. Recall that the decision in *El Mozote* was unanimous, but the court's president authored a concurrence signed by a majority of the judges. That concurrence suggests that the peace argument continues to have some traction. In the opinion, Judge García-Sayán acknowledges the tension that some-

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122 *Gomes Lund*, ¶ 151; *Gelman*, ¶ 199 (quoting Office of the U.N. High Comm'r for Human Rights, *supra* note 60). R

123 A recent statement by AI on the Colombian peace process, for example, states that "[t]he historic declaration agreed between the Colombian government and the country's main guerrilla group, FARC, will not contribute to a lasting peace unless those responsible for human rights abuses, including war crimes and crimes against humanity, are brought to justice." Amnesty Int'l, *Historic Colombia-FARC Declaration Fails to Guarantee Victims' Right to Justice* (June 9, 2014), http://www.amnesty.org/en/news/historic-colombia-farc-declaration-fails-guarantee-victims-right-justice-2014-06-09. Similarly, in 2013, when Nepal established a truth and reconciliation commission that had the power to grant amnesty, the United Nations High Commissioner for Human Rights complained that "[s]uch amnesties would not only violate core principles under international law but would also weaken the foundation for a genuine and lasting peace in Nepal." *Nepal Must Strike Law on Possible Amnesty for Serious Rights Violations – UN Official*, UN NEWS CENTRE (Mar. 20, 2013), http://www.un.org/apps/news/story.asp?NewsID=44431&Cr=nepal&Cr1=#. Moreover, she stated, "[a]n amnesty for those who committed serious human rights violations will deny the right of thousands of Nepalese to truth and justice. This will not provide a sustainable road to peace." Several months later, the Nepalese Supreme Court struck down the amnesty, based partly on Nepal's obligations under the United Nations and on the Inter-American Court's jurisprudence. *See* Basnet & Pokharel v. Gov't of Nepal & Ors., 069-WS-0057, Supreme Court of Nepal, Jan. 2, 2014 ("[T]his provision is against the victims' fundamental right to justice including their right to life and liberty, right to information, right against torture, and against the accepted principles of justice.").

124 Kampala Declaration, RC/Decl.1, pmbl. (June 1, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.1-ENG.pdf.

125 *Id.* For a detailed discussion and critique of the position that amnesty is not permitted under the Rome Statute of the ICC or international law more broadly, see SCHABAS, *supra* note 61, 177–98. R

times occurs "between justice and the ending of the conflict"[126] and states that "armed conflict and negotiated solutions give rise to various issues and introduce enormous legal and ethical requirements in the search to harmonize criminal justice and negotiated peace."[127]

Although the opinion states that the aim of peace processes should be "to ensure that the combatants choose peace and submit to justice," it also recognizes that there might be a need to consider devising "alternative or suspended sentences," taking into account "the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened."[128] Truth telling and identification of perpetrators seem essential, but criminal punishment—if not investigation—might ultimately give way to, or at least be balanced by, peace. Indeed, perhaps the greatest doctrinal innovation of Judge García-Sayán's opinion is its statement that "international human rights law should consider that peace is a right and that the State must achieve it."[129] By elevating peace from a realpolitik consideration to a right, he puts it squarely back into the realm of the court's legal deliberation: "[T]aking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately."[130]

Some proponents of the legality of at least certain forms of amnesty have cited the concurrence favorably. Not surprisingly, it has been referenced in relation to the peace processes in Colombia and Northern Ireland, both countries in which some forms of amnesties or reduced sentences are being debated.[131] If the opinion is suggesting

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126 Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 22 (Oct. 25, 2012) (García-Sayán, J., concurring).

127 *Id.* ¶ 26.

128 *Id.* ¶ 30; *see also id.* ¶ 31 (noting that "[r]eduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility are other ways that can be considered").

129 *Id.* ¶ 37.

130 *Id.* ¶ 38.

131 With regard to Colombia, see, e.g., INTERNATIONAL CRISIS GROUP, TRANSITIONAL JUSTICE AND COLOMBIA'S PEACE TALKS 8, 18–22 (2013), *available at* http://www.crisisgroup.org/en/regions/latin-america-caribbean/andes/colombia/049-transitional-justice-and-colombia-s-peace-talks.aspx (acknowledging, in the context of a discussion of the concurrence in *El Mozote*, that "[e]xtensive amnesties, such as those Colombia granted to guerrilla groups in the 1990s, might no longer be viable [but] there is growing recognition of a distinction between a transition from armed conflict via negotiated peace and a transition from authoritarianism," and calling for amnesties for political crimes that do not include war crimes and crimes against humanity). The Belfast Guidelines similarly reference the decision. *See* TRANSITIONAL JUSTICE INST., *supra* note 61, at 30 ("The case law of international tribunals and human rights monitoring bodies also notes human rights obligations are not absolute and emphasises the importance of balancing competing obligations, even **R**

an exception, though, it seems to be a rather narrow one that would in fact apply to few amnesties to date. Indeed, it makes it clear that it does not apply to any of the amnesties the court has considered in the past. Yet by re-recognizing the tension between peace and justice and suggesting that peace might be a right to be balanced against other human rights, it at least opens the possibility for bringing some of the debate over amnesty back into human rights law and discourse.

c. Forgiveness

Recall that the South African Constitutional Court in *AZAPO* saw the power of forgiveness, claiming that it was good for perpetrators and victims alike, as well as for the nation. In the debates over amnesty in Latin America during the same time, forgiveness was also sometimes invoked as a justification for amnesty.[132] Yet, only one opinion by the IACHR has addressed forgiveness in the context of amnesty: A concurring opinion by Judge Cançado Trindade, who was one of the judges on the court most opposed to amnesty even before *Barrios Altos*.[133] That opinion, in *Almonacid-Arellano*, stands in contrast to the perspective in *AZAPO*. As with the IACHR's position on peace in *Gomes Lund* and *Gelman*, the opinion attempts to reconcile criminal justice and forgiveness rather than seeing them in opposition.

Judge Cançado Trindade's opinion offers a skeptical view of forgiveness as a rationale for amnesty. It refers to forgiveness (along with "achieving 'national reconciliation' through the revelation of the 'truth'") as a "pretext" for the grant of amnesty.[134] It then describes forgiveness as an individual matter, stating that it "cannot be imposed by a decree law or otherwise; instead, it can only be granted spontaneously by the victims themselves."[135] Speaking of the victims in the case, the opinion surmises that "in order to [forgive], they have

in relation to prosecutions for serious crimes. For example, a concurring opinion by the president of the Inter-American Court of Human Rights supported by four other judges in the *El Mozote v. El Salvador* case acknowledged the importance of balancing the right of victims to peace against the duty to prosecute gross human rights violations."). According to the web page on which they are published, the Belfast Guidelines resulted in part from the debate about "promoting reconciliation and facilitating truth recovery" through amnesty in Northern Ireland, among other countries. Louise Mallinder & Tom Hadden, *The Belfast Guidelines on Amnesty and Accountability*, TRANSITIONAL JUST. INST. http://www.transitionaljustice.ulster.ac.uk/TransitionalJusticeInstitute.htmAmnestyGuidelinesProject.htm (last visited May 15, 2015).

132 *See, e.g.*, *supra* note 79 (discussing the position of José Zalaquett at the time). R

133 *See supra* note 88 (discussing his concurrences in earlier cases in which amnesty laws were raised as a defense to state failure to investigate). R

134 Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 4 (Sept. 26, 2006) (Cançado Trinidade, J., concurring).

135 *Id.*

sought justice."[136] While the contention that forgiveness must be an individual, not a national, matter is not new,[137] Judge Cançado Trindade has added to that concept here by suggesting that if forgiveness is to take place, criminal justice is the means by which it will generally do so.

It is not surprising that the IACHR does not discuss forgiveness. It was not a rationale offered by the various states in the cases the court has considered, at least according to the court's rendition of the states' arguments. Moreover, among human rights advocates, even the more general questioning of the punitive model of justice on the ground that forgiveness might offer unique value for both victims and perpetrators (which criminal justice would impede) has all but disappeared.[138]

3. *The Influence of the Jurisprudence of the Inter-American Court of Human Rights on Other Jurisdictions*

The IACHR has clearly taken the lead on jurisprudence on amnesties. At least parts of the line of cases reviewed above have often been cited in other regional human rights courts and commissions as well as in domestic jurisdictions outside of the Americas. For example, both the African Commission on Human and Peoples' Rights (notwithstanding *AZAPO*) and the European Court of Human Rights (ECHR) have used the IACHR decisions to find amnesty laws incompatible with their respective conventions.[139]

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136 *Id.*

137 *See, e.g.*, Coalition of NGOs, *About the Coalition of NGOs Concerned with Impunity for Violators of Human Rights*, 16 SOC. JUST. 135, 140 (1989) ("In response [to the argument about reconciliation], we quote a saying from Latin America: only the victims can forgive."). For further discussion of the relationship between the role of law in individual and societal forgiveness, see Martha Minow, Forgiveness, Law and Justice 17–21 (Feb. 2014) (unpublished manuscript).

138 One exception might be with regard to the treatment of child or juvenile soldiers, where reintegration is strongly encouraged. That only individuals over eighteen can be tried by the ICC attests to the extent to which the punitive model is seen as inappropriate for children and youth. *See* Rome Statute of the International Criminal Court, *supra* note 18, art. 26. At the same time, the statute does not criminalize recruitment of children aged fifteen through eighteen. *Id.* art. 8(2)(b)(xxvi). For discussion of this lacuna in the law and the difficulty with simply forgiving child soldiers, see Minow, *supra* note 137, at 26–30. R R

I do not mean to suggest that forgiveness is not discussed. Rather, it is rarely provided as an explicit justification for amnesty in the way it was in the South African context. When it is, it has little traction with human rights advocates. For a recent discussion of various invocations of forgiveness and responses to them in Uganda in the context of the arrest and transfer to the ICC of LRA leader Dominic Ongwen, see Andrew Green, *To Forgive a Warlord*, FOREIGN POL'Y (Feb. 6, 2015) http://foreignpolicy.com/2015/02/06/ongwen-uganda-ice-joseph-kony-international-Justice/.

139 *See, e.g.*, Zimbabwe Human Rights NGO Forum v. Zimbabwe, Case No. 245/02, Judgment, ¶¶ 204, 206, 211 (African Comm'n on Human and Peoples' Rights, 2006) (citing the Inter-American Commission's rulings on amnesties in Argentina and Uruguay, as well as the IACHR's decisions in *Velásquez-Rodríguez* and *Barrios Altos*, in striking down an

The consideration of amnesty laws in the European human rights system has generally arisen in a different context from that found in the American system. While the Inter-American claimants in the cases I have considered are family members of victims whose cases have remained uninvestigated and unprosecuted due to amnesty laws, claimants in the European cases include criminal defendants who contend that their human rights (usually due process rights) have been violated because an amnesty granted to them has not been respected.[140] The European Convention organs have rendered six decisions that explicitly involve amnesty laws, including one decision by the Grand Chamber of the ECHR.[141] In part because of the different way that

amnesty law for "'politically motivated crimes'"); Ould Dah v. France, App. No. 13113/03 (Eur. Ct. H.R. Mar. 17, 2009) (citing the American Convention on Human Rights in finding that an amnesty law in Mauritius did not prohibit prosecution in France under a universal jurisdiction statute); Marguš v. Croatia, App. No. 4455/10, ¶¶ 60–66, 138 (Eur. Ct. H.R. May 27, 2014) (Grand Chamber) (discussed *infra* at notes 143–51 and accompanying text). For an example of a domestic court that has cited the Inter-American Court cases to find unconstitutional part of its amnesty law, see Basnet and Pokharel v. Gov't of Nepal & Ors., 069-WS-0057, Supreme Court of Nepal, Jan. 2, 2014 (favorably citing *Barrios Altos* and *Velásquez-Rodríguez*).

140 Of course, as in *Velásquez-Rodríguez* and many other IACHR cases, victims and their family members do bring cases before the ECHR alleging that the state has failed to investigate human rights violations. *See, e.g.*, *supra* note 49 (discussing cases of disappearances in Russia). In addition, in a series of cases against Turkey, victims or their family members have brought claims against the state for applying laws that limit liability to individuals accused of crimes involving deprivations of life or torture or inhuman and degrading treatment. Such laws include statutes of limitation, provisions for the suspension of sentences, and a law granting "amnesty" to civil servants in disciplinary matters. (Although the latter law is termed an amnesty law, it differs significantly in scope, intention and effect than those that are generally considered in discussions of amnesty.) *See, e.g.*, Yeter v. Turkey, App. No. 33750/03, ¶ 70 (Eur. Ct. H.R. Jan. 13, 2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90598; Ali and Ayse Duran v. Turkey, App. No. 42942/02, ¶ 69 (Eur. Ct. H.R. Apr. 08, 2008), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85767; Abdulsamet Yaman v. Turkey, App. No. 32446/96, ¶ 55 (Eur. Ct. H.R. Nov. 02, 2004), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67228. For a similar case in Romania that also included a challenge to a proposed amnesty law, see Case of Association "21 December 1989" and Others v. Romania, App. Nos. 33810/07 and 18817/08 (Eur. Ct. H.R. May 24, 2011), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104864. R

One of the ECHR's four cases explicitly involving amnesty laws was brought by a family member. *See* Dorado v. Spain, App. No. 30141/09 (Eur. Ct. H.R. Mar. 27, 2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110236. The only case before the European Commission to consider the application of an amnesty law was also brought by a family member. *See* Dujardin v. France, App. No. 16734/90, 72 Eur. Comm'n H.R. Dec. & Rep. 236, 241 (1991).

141 One of the decisions was rendered by the European Commission, while the others were from the European Court. One decision is no longer valid because the Grand Chamber agreed to hear the case under Article 43 of the European Convention, and rendered a subsequent decision. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 43(2), Nov. 4, 1950, 213 U.N.T.S. 221 ("A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue

amnesty emerges in each case, the judgments are much more disparate than those of the IACHR, with some decisions accepting the legality of amnesty laws.[142]

The 2014 Grand Chamber judgment in *Marguš v. Croatia* is the most recent and authoritative of the European Court jurisprudence on the matter.[143] The applicant, former Croatian military commander Fred Marguš, challenged his 2007 conviction for war crimes committed in the early 1990s. Because initial charges brought against him had been discontinued in 1997 under the application of Croatia's General Amnesty Act, he contended his 2007 trial violated his right against double jeopardy, enshrined in Article 4 of Protocol No. 7 to the European Convention.[144]Against the urging of a number of judges who wrote concurring or partially dissenting opinions to say that the Grand Chamber's decision should have been based solely on the interpretation of Protocol No. 7 (as the lower chamber had done in ruling against Marguš), the majority of the Grand Chamber considered whether the amnesty law itself, as applied to the crimes for which Marguš was tried, violated other provisions of the European Convention, namely the right to life and the prohibition of torture found in

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of general importance."). My count of decisions does not include the Turkish cases mentioned in *supra* note 140 for the reasons discussed therein. R

142 Cases that suggest a permissive approach to amnesty are *Dujardin* ("The State is justified in adopting, in the context of its criminal policy, any amnesty law it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public . . . .") (regarding French amnesty law in New Caledonia, passed as part of self-determination agreement) and Tarbuk v. Croatia, App. No. 31360/10, ¶ 50 (Eur. Ct H.R. Dec. 11, 2012), *available at* http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-115166 (upholding Croatia's right to impose General Amnesty Act and denying claim for monetary compensation for time imprisoned prior to its passage). Decisions finding the application of amnesty laws to violate the Convention are *Ould Dah* ("The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law.") (upholding France's application of its universal jurisdiction statute to Mauritanian accused of torture, despite amnesty law in Mauritania covering his acts) and Marguš v. Croatia, App. No. 4455/10 (Eur. Ct. H.R. Nov. 13, 2012); Marguš v. Croatia, App. No. 4455/10 (Eur. Ct. H.R. May 27, 2014) (Grand Chamber) (discussed below).

Because the court ruled that *Dorado v. Spain* was inadmissible due to failure to demonstrate new information or evidence (¶ 41) or "genuine connection" (¶ 36) between a Franco era death/disappearance and any ongoing unresolved investigative process, it did not address the issue whether the Spanish amnesty was in violation of the European Convention.

143 *Marguš* (Grand Chamber).

144 *Id.* ¶¶ 139–41. The article Marguš claimed was violated reads in part: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State." Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 7, art. 4(1), Nov. 22, 1984, 213 U.N.T.S. 221, Europ. T.S. No. 5, *available at* http://conventions.coe.int/Treaty/en/Treaties/html/117.htm. Marguš also complained of a violation of Article 6 of the Convention, which is not relevant for my analysis here.

Articles 2 and 3.[145] In doing so, it reviewed the state of international jurisprudence on amnesty laws, looking in depth at the jurisprudence of the IACHR, including the court's judgment in *El Mozote*.[146] It cited that jurisprudence for its "firm[ ] stance" against amnesties,[147] one paragraph before finding that "[a] growing tendency in international law is to see such amnesties [for grave breaches of fundamental human rights] as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights."[148] It then concluded that, because Croatian authorities were acting in compliance with their obligations under Articles 2 and 3 of the Convention, the proscription of double jeopardy in Protocol No. 7 is not applicable.[149]

Although the Grand Chamber arguably left open the possibility that amnesties might be permissible in certain circumstances, "such as a reconciliation process and/or a form of compensation to the victims" (which it found were not present in the case in hand),[150] most of the decision belied that possibility. In fact, the court positively referenced the IACHR's interpretation of Article 6(5) of Additional Protocol II of the Geneva Conventions which, as noted earlier, is controversial among scholars.[151] Moreover, the Grand Chamber's decision to consider Article 2 and 3 arguably sets up future claims by victims contending that amnesty laws violate states' duties under those provisions.

4. *The Persistence of Amnesties and of Human Rights Opposition to Them*

Notwithstanding increased condemnation of amnesties and the attempts by human rights advocates and courts to ameliorate the tensions between justice and truth and justice and peace, both formal and informal amnesties continue to be granted in much of the world.[152] Even the United Nations, though it had stated it would not

145 *Marguš* (Grand Chamber), ¶¶ 124–28.

146 *Id.* ¶¶ 60–66.

147 *Id.* ¶ 138.

148 *Id.* ¶ 139.

149 *See id.* ¶¶ 140–41.

150 *Id.* ¶ 139.

151 *Id.* ¶ 131. *See supra* notes 62, 107 and accompanying text (in part discussing the Third Party brief submitted in *Marguš* on this point). Shortly after the decision, Fionnuala Ní Aoláin commented: "The density of soft law is hardening on the position that amnesties should not be granted to persons who have committed such grave violations of human rights and international humanitarian law." Fionnuala Ní Aoláin, *European Court of Human Rights Rules on Amnesty and Double Jeopardy*, JUST SECURITY (June 10, 2014, 10:00 A.M.), http://justsecurity.org/11112/ecthr-double-jeopardy/ (in part placing the decision in the context of three other ECHR cases that had considered amnesty).

152 *See, e.g.*, Louise Mallinder, *Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment*, *in* AMNESTY IN THE AGE OF

participate in peace accords that grant amnesty, in fact did so in the well-known example of the 1999 Lomé Agreement in Sierra Leone, which it later and somewhat embarrassingly repudiated.[153]

Various explanations have been given for the persistence of amnesties, including—ironically—that they might be a response to the increasing threat and trend of prosecution.[154] Louise Mallinder notes, for example, that the number of newly enacted amnesties peaked in 2003, the year following the beginning of the ICC.[155] Their persistence also suggests that amnesty continues to be a demand of many parties to negotiated peace agreements, which might explain why the most recent decisions of the IACHR and ECHR (perhaps with Colombia and Northern Ireland, respectively, in mind) contain the recognition that peace processes might call into question absolutist rules on the prohibition of some forms of amnesty or at least on the requirement of criminal punishment.

Not only have amnesties continued to appear in peace agreements but even some countries in which amnesty laws were not a direct result of such agreements continue to be reluctant to repeal their laws. Indeed, both Brazil and Uruguay have in many ways acted in defiance of the IACHR's rulings invalidating their amnesty laws.

Perhaps most famously, Brazil has explicitly refused to comply with the IACHR's decision in *Gomes Lund*, relying instead in part on a 2010 decision of the Brazilian Federal Supreme Court that upheld the

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HUMAN RIGHTS ACCOUNTABILITY 80–81, 87–90 (Francesca Lessa & Leigh A. Payne eds., 2012) (noting that amnesty enactments have persisted globally since 1979, although since 1999, amnesties have been more likely than not to exclude international crimes); *see also* TRICIA D. OLSEN, LEIGH A. PAYNE, & ANDREW G. REITER, TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY 99 (2010) (arguing that an increased focus on criminal accountability has not been accompanied by a decline in the number of amnesties).

153 For a discussion of the Lomé agreement, the United Nations' role in it and in its repudiation, and the subsequent conflicting decisions by the Sierra Leone Truth and Reconciliation Commission and Special Court for Sierra Leone as to its legality, see William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145 (2004). Since 1999, in instances in which truth commissions have considered the possibility of granting or recommending amnesties for serious crimes, the United Nations has explicitly refused to cooperate. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 105 (2d ed. 2011) (discussing Timor-Leste and Kenya).

154 *See, e.g.*, Kathryn Sikkink, *The Age of Accountability: The Global Rise of Individual Criminal Accountability*, *in* AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY 21 (Francesca Lessa & Leigh A. Payne eds., 2012) (suggesting that amnesties may reflect the "growing influence of international criminal law"); Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 175 (2002) (arguing that the "increased use of amnesties is . . . less a reflection of our increased tolerance of impunity and more of an indicator of the growing force of the international human rights movement and international criminal law").

155 Mallinder, *supra* note 152, at 81. R

amnesty law (while the case was still pending before the IACHR).[156] As its minister of human rights stated in 2012, Brazil considers the amnesty law to be part of the "process of national reconciliation" and it "will not get involved in the debate on the amnesty law, either domestically or at the international level."[157] In October 2014, the IACHR again criticized Brazil. In a compliance resolution on *Gomes Lund*, it reaffirmed that Brazil's amnesty law is in violation of its international commitments, perpetuating "impunity for grave human rights violations in open disregard of the decisions of this Court and international human rights law."[158]

Notwithstanding the IACHR's clear statement in its original decision in *Gomes Lund* that a truth commission alone would be insufficient to comply with its ruling,[159] Brazil established such a commission in November 2011.[160] The truth commission initially generated mixed responses within the country. Both victims and military officers referred to it, respectively, as a "sham" and a "threat."[161] Human

156 For detailed discussion of this case, see Fabia Fernandes Carvalho Veçoso, *Whose Exceptionalism? Debating the Inter-American View on Amnesty and the Brazilian Case*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, *supra* note 67. **R**

157 International Justice Desk, *Brazil Nixes International Debate of its Amnesty Law*, RADIO NETH. WORLDWIDE (May 22, 2012, 9:49 AM) (on file with author). In Brazil, as in other countries during times in which amnesty laws existed, there have been attempts to circumvent the amnesty law by initiating prosecutions for ongoing crimes, such as forced disappearance and kidnapping, or other crimes that fall outside the temporal scope of the amnesty. In March 2012, for example, federal prosecutors in Brazil charged a former colonel, Sebastião Curio Rodrigues de Moura, with aggravated kidnapping. The court initially dismissed the charges on the grounds that he could not be tried due to the amnesty, but the court accepted the charges on appeal. *See* Guerrilha do Araguaia, *Justiça Federal Aceita Denúncia Contra Major Curió*, VEJA (Aug. 30, 2012), http://veja.abril.com.br/noticia/brasil/justica-do-para-aceita-denuncia-contra-major-curio. Similar prosecutions have gone forward more recently, despite defendants' claims that the statute of limitations prevented them. *See Brazil: Panel Details 'Dirty War' Atrocities*, HUM. RTS. WATCH (Dec. 10, 2014), http://www.hrw.org/news/2014/12/10/brazil-panel-details-dirty-war-atrocities (discussing the cases of Col. Carlos Alberto Brilhante Ustra and of Alcides Singillo).

158 *See* Resolución de la Corte Interamericana de Derechos Humanos de 17 de Octubre de 2014, Caso Gomes Lund y Otros ("*Guerrilha do Araguaia*") vs. Brasil, Supervisión de Cumplimiento de Sentencia (par. 19) (Braz.) ("[Brazilian] judicial decisions have interpreted and applied the Amnesty Law of Brazil in a way that continues to compromise the international responsibility of the State and perpetuate impunity for grave human rights violations in open disregard of the decisions of this Court and international human rights law.") (Sp: "[D]ecisiones judiciales [de Brasil] que interpretan y aplican la Ley de Amnistía del Brasil de una forma que continúa comprometiendo la responsabilidad internacional del Estado y perpetúa la impunidad de graves violaciones de derechos humanos en franco desconocimiento de lo decidido por esta Corte y el Derecho Internacional de los Derechos Humanos.").

159 *See supra* note 117 and accompanying text. **R**

160 Lei No. 12.528, de 18 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.18.2011 (Braz.).

161 *See* John Otis, *Brazil's Truth Commission Under Fire from Military and Torture Victims*, PUB. RADIO INT'L (Oct. 30, 2012, 12:30 PM), http://www.pri.org/stories/2012-10-30/brazils-truth-commission-under-fire-military-and-torture-victims.

rights advocates saw it as but one step toward, rather than as a substitute for, prosecutions.[162]

In December 2014, many human rights advocates were pleasantly surprised when the truth commission released its final report.[163] Not only did the report increase the numbers of individuals identified as dead or disappeared but it also named the perpetrators of those human rights violations.[164] And, in its explicit consideration of amnesty, it endorsed the IACHR's position on amnesty and international law, calling for the prosecution of those responsible for grave violations of human rights during the twenty-one years of dictatorship.[165]

The Brazilian government has been supportive of many parts of the report, with President Roussef stating upon its release that "[w]e hope this report prevents ghosts from a painful and sorrowful past from seeking refuge in the shadows of silence and omission."[166] The current minister of human rights stated that the government has begun to implement twelve of twenty-nine of the truth commission's recommendations, but that the other seventeen (presumably including the recommendations on prosecutions), would need to be dealt with through collaboration between different branches of government.[167] Several human rights organizations (from Brazil, Argentina, and the United States) have since aired the issue at a hearing before the Inter-American Commission on Human Rights, calling on Brazil to implement all of the reports' recommendations. They explicitly called upon the state to determine the "legal responsibility . . . of the government agents who caused the serious human rights violations that occurred in the period investigated" by the truth commission.[168]

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162 *See* Amnesty Int'l, *Brazil: Uncovering the Past; President Dilma Names Truth Commission Members* (May 11, 2012), http://www.amnesty.org/en/news/brazil-truth-commission-signals-long-overdue-justice-past-crimes-2012-05-11 (describing the creation of the Brazilian truth commission as a "landmark event," but adding that "the findings of this newly formed Commission will further the vital efforts of the Public Ministry in initiating criminal prosecutions against suspected past violators").

163 *Relatório Final da Comissão Nacional da Verdade* COMISSÁO NACIONAL DA VERDAD (Dec. 10, 2014), *available at* http://www.cnv.gov.br.

164 Simon Romero, *Brazil Releases Report on Past Rights Abuses*, N.Y. TIMES (Dec. 10, 2014), http://www.nytimes.com/2014/12/11/world/americas/torture-report-on-brazilian-dictatorship-is-released.html.

165 *See Relatório Final da Comissão Nacional da Verdade*, *supra* note 163, at 966–67; *see also* Romero, *supra* note 164; *Brazil: Panel Details 'Dirty War' Atrocities*, *supra* note 157. R R

166 Romero, *supra* note 164. R

167 Roldão Arruda (in interview with Ideli Salvatti), *Governo já Segue Recomendações da Comissão da Verdade, Afirma Ministra*, ESTADÃO (Feb. 4, 2015), http://politica.estadao.com.br/blogs/roldao-arruda/governo-ja-segue-recomendacoes-da-comissao-da-verdade-afirma-ministra/.

168 *National Truth Commission in the OAS: Organizations call for the Implementation of Recommendations and Request Monitoring by IACHR*, CONECTAS (Mar. 24, 2015), http://www.conectas.org/en/actions/justice/news/31810-national-truth-commission-in-the-oas.

In October 2011, after much debate and previous failed attempts, Uruguay adopted new legislation that effectively repealed its amnesty law.[169] Yet, in February 2013, the Supreme Court struck down part of the new law as unconstitutional, based on its failure to respect the statute of limitations for what it labeled common crimes of the dictatorship (versus crimes against humanity) and because of its ex post facto effect.[170] As in Brazil,[171] some lower courts have found ways around the Supreme Court's ruling,[172] but the issue of amnesty continues to be both contentious and unresolved.

In addition, the newly elected president of Uruguay, Tabaré Vázquez, who had also been president between 2005 and 2010, launched a truth commission on March 1, 2015—his first day in office—to "research and compile a comprehensive work on the crimes committed by the state during the right-wing military dictatorship (1975-1983), most notably the forced disappearances of people."[173] Nevertheless, human rights activists in the country have expressed skepticism about the commission, claiming that the result could be "a luxurious burial" of the investigations.[174]

During these periods of defiance of the IACHR's decisions, both Brazil and Uruguay have had presidents who are ex-guerrilla members and former political prisoners.[175] Yet, neither President Rouseff nor

169 Publicada D.O. 1° nov/011 - N° 28340, Ley N° 18.831; Press Release, Cámara de Representantes, Diputados Aprobo Restablecimiento De La Pretension Punitiva Del Estado (Oct. 27, 2011), *available at* http://www0.parlamento.gub.uy/palacio3/scroll2/printscrolldb.asp?IdComunicado=4173&Cuerpo=D.

170 Pierre-Louis Le Goff & Francesca Lessa, *Uruguay's Supreme Court of Injustice*, ARG. INDEP. (Mar. 21, 2013), http://www.argentinaindependent.com/socialissues/humanrights/uruguays-supreme-court-of-injustice/.

171 *See supra* note 157. **R**

172 For a discussion of the lower court decisions, see Francesca Lessa & Pierre-Louis Le Goff, *'Breaking the Wall of Impunity' in Uruguay*, AL JAZEERA (May 6, 2013), http://www.aljazeera.com/indepth/opinion/2013/05/20135592150620600.html; *see also* Francesca Lessa & Pierre-Louis Le Goff, *Elusive Justice in Uruguay*, AL JAZEERA (Feb. 13, 2014), http://www.aljazeera.com/indepth/opinion/2014/02/elusive-justice-uruguay-201426154329630301.html.

173 InSerbia Network Foundation, *Uruguay: President-Elect Vázquez Announces Dictatorship Truth Commission*, INNEWS (Feb. 19, 2015 12:09 PM), http://inserbia.info/today/2015/02/uruguay-president-elect-vazquez-announces-dictatorship-truth-commission/.

174 *Huidobro Fue el Único Jerarca Silbado en Plena Ceremonia*, EL PAIS (Mar. 2, 2015), http://www.elpais.com.uy/informacion/huidobro-unico-jerarca-silbado-ceremonia.html ("The commission has generated skepticism in those who work on the themes of human rights because they believe the result could be a 'luxurious burial' of the investigations.") ("esa comisión genera escepticismo en actores que han trabajado en el tema derechos humanos por considerar que el resultado puede ser 'un entierro de lujo' de las indagatorias.").

175 Specifically, Uruguay's immediate past president, José "Pepe" Mujica, is an ex-guerrilla fighter with the Tupamaros and was also incarcerated for his guerilla efforts. *See* Simon Romero, *After Years in Solitary, an Austere Life as Uruguay's President*, N.Y. TIMES (Jan. 4, 2013), http://www.nytimes.com/2013/01/05/world/americas/after-years-in-solitary-an-austere-life-as-uruguays-president.html. Brazilian President Dilma Rouseff is a former guerrilla fighter who was tortured throughout her imprisonment. *See* Simon Romero, *Leader's*

President Mujica, who preceded (and succeeded) Vázquez, has promoted criminal trials for past abuses.[176] In contrast, nearly all human rights NGOs inside and outside of the countries oppose amnesties because they are seen to facilitate impunity. As one news article stated with regard to Uruguay, the Supreme Court's decision and related developments "were unsurprisingly met by a wave of international condemnations, including by Amnesty International, the UN High Commissioner for Human Rights, the Center for Justice and International Law and the Inter-American Commission on Human Rights."[177]

If human rights NGOs spend an enormous amount of time and resources in their efforts to repeal amnesty laws in countries like Brazil and Uruguay, those in countries where the laws have long been repealed continue to spend an inordinate amount of energy prosecuting human rights violators. In Argentina, for example, prosecutions first began shortly after the fall of the dictatorship in 1983.[178] The passage of the "Full Stop" law at the end of 1986 put an end to investigations and prosecutions, and the "Due Obedience" law of 1987 granted immunity to all members of the military, except those in positions of command, for crimes committed during their dictatorship.[179] Both laws were repealed in 2003, paving the way for prosecutions to begin again.[180] Over a decade later, criminal prosecutions remain an important if not exclusive focus of major human rights or-

Torture in the '70s Stirs Ghosts in Brazil, N.Y. TIMES (Aug. 4, 2012), http://www.nytimes.com/2012/08/05/world/americas/president-rousseffs-decades-old-torture-detailed.html.

176 Mujica first ran for president at the same time as the 2009 referendum on repeal of the amnesty law. He is said to have reluctantly supported the referendum, but only at the end of his campaign. Although he eventually accepted the IACHR's ruling through an executive decree and through support of the amnesty law's legislative repeal, he did so only after having thwarted initial attempts by the legislature to repeal the law several months earlier. Jo-Marie Burt et al., *Civil Society and the Resurgent Struggle Against Impunity in Uruguay (1986–2012)*, 7 INT'L J. TRANSITIONAL JUST. 306, 318–22 (2013). He also encouraged Uruguayans not to focus on the brutality of the past.

177 Le Goff & Lessa, *'Breaking the Wall of Impunity' in Uruguay*, *supra* note 172 (referencing Naciones Unidas Derechos Humanos Oficina del Alto Comisionado, Uruguay: sentencia de la Suprema Corte sobre ley contra impunidad preocupa seriamente a Alta Comisionada (Feb. 2013), http://acnudh.org/2013/05/uruguay-decision-de-la-suprema-corte-sobre-ley-contra-impunidad-preocupa-a-alta-comisionada/); Center for Justice & International Law, *CEJIL Denuncia Sentencia de la Suprema Corte de Justicia* (Feb. 25, 2013), https://www.cejil.org/comunicados/cejil-denuncia-sentencia-de-la-suprema-corte-de-justicia; Organización de los Estados Americanos, *Anexo al Comunicado de Prensa Emitido al Culminar el 147 Período de Sesiones*, COMUNICADO DE PRENSA (Apr. 5, 2013), http://www.oas.org/es/cidh/prensa/comunicados/2013/023A.asp. R

178 Emilio Fermin Mignone et al., *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118, 118 (1984).

179 Ley de Punto Final, Law No. 23492, Dec. 29, 1986, [XLVII-A] A.D.L.A. 192 (Arg.); Ley de Obediencia Debida, Law No. 23.521, June 4, 1987, [XLVII-B] A.D.L.A. 1548 (Arg.).

180 For discussion of the "Full Stop" law, its complement, the "Due Obedience" law, their 2003 repeal, and subsequent developments, see *World Report 2012: Argentina*, HUM. RTS. WATCH (Jan. 2012), http://www.hrw.org/world-report-2012/argentina; *see also* Christine A.E. Bakker, *A Full Stop to Amnesty in Argentina: The* Simón *Case*, 3 J. INT'L CRIM. JUST.

ganizations like Abuelas de Plaza de Mayo, Madres de Plaza de Mayo, and Asamblea Permanente por los Derechos Humanos.[181] While other human rights organizations, like Asociación Civil por la Igualidad y la Justicia and Centro de Estudios Legales y Sociales, might have a broader mandate, they do not appear to disagree on the question of amnesty or impunity.[182]

III
International Criminal Law and the Human Rights Agenda

Even as some human rights advocates and international and regional institutions began to put pressure on states to prosecute international human rights and humanitarian law violations in domestic courts, they also recognized that states would not always be able or willing to do so. As we saw in Part I, there had long been periodic support for an international criminal court and, with the end of the Cold War, it became more of a realistic prospect. Thus, when the United Nations Security Council was unable to agree on military intervention in the former Yugoslavia, it voted in May 1993 to use its Chapter VII powers in an unprecedented way—to establish the International Criminal Tribunal for the former Yugoslavia (ICTY).[183] Although controversy ensued over whether the Security Council had the power to establish such a tribunal,[184] many human rights advocates almost immediately claimed it as a human rights project.

1106 (2005) (describing the judicial and legislative downfall of the "Full Stop" law and the "Due Obedience" law).

181 *See, e.g.*, Asamblea Permanente por los Derechos Humanos, *Protección otorgada a Hooft, el Jurado de Enjuiciamiento de Magistrados lo absolvió* (Apr. 29, 2014), http://www.apdh-argentina.org.ar/proteccion-otorgada-a-Hooft-sobre-jurado-de-enjuiciamiento (describing the assembly's disgust of recent outcomes in prosecutions against alleged human rights violators during the last military dictatorship).

182 That said, there are some scholars who are critical of the Argentine Supreme Court, the IACHR, and the Argentine human rights movement for their "neopunitivism." They argue that the prosecutions violate prohibitions against double jeopardy, as well as other due process rights. *See, e.g.*, Daniel R. Pastor, *La Deriva Neopunitivista de Organismos y Activistas Como Causa del Desprestigio Actual de Los Derechos Humanos*, Jura Gentium (2006), http://www.juragentium.org/topics/latina/es/pastor.htm; Nicolás Guzmán, *El Neopunitivismo en la Jurisprudencia de la Corte Suprema de Justicia de la Nación y de la Corte Interamericana de Derechos Humanos: Un Pronóstico Incierto para el "Ne Bis In Idem" y la Cosa Juzgada*, *in* Jurisprudencia Penal de la Corte Suprema de Justicia de la Nación 257 (Leonardo G. Pitlevnik ed., 2008). For a response, see Leonardo Filippini, *El Prestigio de los Derechos Humanos: Respuesta a Daniel Pastor*, Jura Gentium (2007), http://www.juragentium.org/topics/latina/es/filippin.htm.

183 *See* S.C. Res. 827, U.N. Doc. S/RES/ 827 (May 25, 1993).

184 The ICTY rejected the challenge to its own legality in its first judgment, Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995).

In fact, the ICTY was established one month before the Vienna World Conference on Human Rights.[185] The conflict in Yugoslavia and the response of the ICTY had an obvious impact on the conference. Not only did the Vienna Declaration and Program of Action contain provisions calling for domestic prosecutions and opposing amnesty but it also promoted the development of international criminal institutions, "stress[ing] that all persons who perpetrate or authorize criminal acts associated with ethnic cleansing are individually responsible and accountable for such human rights violations, and that the international community should exert every effort to bring those legally responsible for such violations to justice."[186] Further, it "encourage[d] the International Law Commission to continue its work on an international criminal court."[187]

Notwithstanding the alignment in Vienna between human rights and international criminal institutions, Amnesty International—in line with its concerns for due process and its long-term interest in the rights of those imprisoned—expressed some initial reservations about the ICTY. It soon made clear, however, that the tribunal matched AI's "fundamental aims" to "have the full truth made known about violations of human rights and humanitarian law, and to end impunity for the perpetrators."[188] AI thereby articulated a relatively early view of the position that truth and justice are reconcilable. Still, AI saw the tribunal as a "stopgap" measure, and called for a commitment to a permanent international criminal tribunal to end impunity.[189] It supported the establishment of the International Criminal Tribunal for Rwanda (ICTR) a little over a year later on the same basis—as a step

185 *See supra* note 183; *see also* United Nations Human Rights: Office of the High Commissioner for Human Rights, *World Conference on Human Rights, 14-25 June 1993, Vienna, Austria*, http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx (last visited May 15, 2015). R

186 *Vienna Declaration*, *supra* note 50, ¶ II-23. At another point, it expressed "dismay at massive violations of human rights especially in the form of genocide, 'ethnic cleansing' and systematic rape of women in war situations" and "reiterate[d] the call that perpetrators of such crimes be punished and such practices immediately stopped." *Id.* ¶ I-28. R

187 *Id.* ¶ II-92.

188 Amnesty Int'l, *Weekly Update Service* (Nov. 15, 1993), https://www.amnesty.org/download/Documents/188000/nws110151993en.pdf; *see also* Amnesty Int'l, Former Yugoslavia: Moving Forward to Set Up the War Crimes Tribunal for the Former Yugoslavia, at 7, AI Index EUR 48/03/93 (Apr. 30, 1993), *available at* http://www.amnesty.org/en/library/info/EUR48/003/1993/en ("The war crimes Tribunal could be one step towards breaking the cycle of impunity and gross human rights violations in the former Yugoslavia, but only if it is taken seriously by governments and the U.N. There is still a real danger that this initiative will be no more than an empty political gesture. Amnesty International will continue its work to ensure that the Tribunal actually prosecutes and convicts perpetrators of gross human rights violations and rigorously complies with all internationally accepted standards for fairness and justice.").

189 Amnesty Int'l, *Moving Forward to Set Up the War Crimes Tribunal for the Former Yugoslavia*, *supra* note 188, at 7. R

on the way to the ICC. Apparently satisfied with the procedural fairness guarantees of the institutions, it continued to encourage the development of international criminal law, including the ratification of the Rome Statute and the referral of cases to the ICC.[190]

AI was not alone among human rights NGOs in its support of an international criminal tribunal for Rwanda. In its 1994 extensive report on the Rwandan genocide, written before the Security Council passed the resolution establishing the ICTR, human rights NGO African Rights called for the need to "put the culture of impunity on trial."[191] The centrality of international criminal law to the fight against impunity was made clear by 1998, with the adoption of the Rome Statute establishing the ICC.[192] The preamble states that the ICC's goal is "to put an end to impunity for the perpetrators" who commit "the most serious crimes of concern to the international community as a whole."[193]

Even though AI early on expressed due process concerns about international criminal tribunals and offered a justification for them based on the facilitation of truth through criminal justice mechanisms, the truth, peace, forgiveness, and justice debates did not generally make their way into the discourse around the development of international criminal institutions. In fact, international criminal tribunals were often seen as a way to avoid at least the peace concerns engendered by the prospect of domestic trials. Recall, for example, that Carlos Nino preferred the creation of an international criminal court to the implementation of a legal duty on transitional governments to prosecute their previous regimes.[194] The latter, he contended, "is too blunt an instrument to help successor governments who must struggle with the subtle complexities of re-establishing democracy."[195] He also believed that "[v]iolations of human rights belong with crimes such as terrorism, narcotics-trafficking, and destabilizing democratic governments, in a category of deeds which may, because of their magnitude, exceed the capacity of national courts to handle internally."[196]

While the ICTY and ICTR were given primary jurisdiction over the crimes they cover, the ICC was established to be "complementary

190 *See, e.g.*, Amnesty Int'l, The International Criminal Court Fact Sheet 2: The Case for Ratification, AI Index IOR 40/03/00 (July 31, 2000), *available at* https://www.amnesty.org/en/documents/IOR40/003/2000/en/.

191 AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR AND DEFIANCE 724 (1994).

192 Rome Statute of the International Criminal Court, *supra* note 18.

193 *Id.* at pmbl.

194 Nino, *supra* note 11, at 2638–39. R

195 *Id.* at 2638.

196 *Id.*

to national criminal jurisdictions."[197] That is, cases involving the same conduct that has been or is being investigated or prosecuted at the domestic level are inadmissible unless the state in which the investigation took place is "unwilling or unable genuinely to carry out the investigation or prosecution."[198] Many scholars and practitioners have read complementarity as a means for the ICC to put pressure on states to prosecute human rights violations, which they generally see as a positive aspect of the court.[199] To the extent that it does exert such pressure, however, I would contend that it faces some of the issues that have resulted from similar pressure by human rights courts. That is, it relies on the criminal apparatus of the same regime that has enabled, if not directed, the actions of the perpetrators who were themselves a part of the state. It also potentially works against the goals of recently transitioned governments who are reluctant to prosecute for fear of upsetting a fragile peace.[200] Still, most of the attention on the

197 Rome Statute of the International Criminal Court, *supra* note 18, art. 1 (providing that the court "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions"). R

198 *Id.* art. 17(1)(a). Article 17(1)(b) applies the same exception to cases where states have investigated but not prosecuted due to unwillingness or inability. Article 17(1)(c) excepts those cases in which the individual has been tried, but in which the proceedings were conducted for the purpose of shielding the individual from international criminal responsibility or in a way that was otherwise inconsistent with bringing the person to justice. *Id.* arts. 17(1)(c), 20(3). For arguments that Article 17 is often misread and misunderstood in general pronouncements about the meaning of complementarity, see Sarah M.H. Nouwen, *Fine-tuning Complementarity*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CRIMINAL LAW 206 (Bartram S. Brown ed., 2011); Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L.F. 67 (2010), *available at* http://ssrn.com/abstract=1559403.

199 *See, e.g.*, JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS (2008) (analyzing the extent to which the ICC encourages states to develop legislative frameworks that satisfy the complementarity requirements of the Rome Statute); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice*, 49 HARV. INT'L L.J. 53 (2008) (identifying "proactive complementarity"—the ability of the ICC to encourage states to prosecute international crimes—as a possible solution to the limited resources and capacity of the ICC). Whether and how the ICC has in fact served as a catalyst to increased domestic prosecution requires a complex country-specific analysis, as Sarah Nouwen has demonstrated. *See* SARAH NOUWEN, COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN (2013).

200 Sometimes, of course, the new regime is more than happy to punish past perpetrators, in which case how it does so could potentially become a matter of international human rights law. The ICC has dealt with that issue in the admissibility hearings regarding the prosecution of Gaddafi's son, Saif al-Islam, before the ICC. *See* Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶ 138 (May 31, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf. Citing concerns about due process and the type of proceeding Gaddafi would receive in Libya, his defense attorney argued (against Libya and, somewhat surprisingly, the ICC Prosecutor) that the case was properly before the Court even if Libya was willing or able to prosecute. *Id.* ¶¶ 66–70, 90–101. The Pre-Trial Chamber found the case admissible and reinstated Libya's obligation to surrender

ICC is not about its potential effects on domestic prosecutions but about the work it does once it exercises jurisdiction.

In considering investigations and prosecutions of the international tribunals and the ICC's exercise of jurisdiction, human rights advocates have at times been critical of the inner workings of the tribunals and courts. Yet, the primary criticism is that prosecutors or judges have not gone far enough. Advocates question, for example, decisions to omit or reject certain charges or the use of prosecutorial discretion.[201] With regard to the latter, human rights advocates and scholars alike sometimes express concern that prosecutors—who are meant to be allied with the fight against impunity—engage in selective (and what is seen as political) prosecution.[202] This issue often emerges in the context of the ICC, with human rights advocates calling for addressing selectivity by *increasing* the number and geographical sites of prosecutions—by indicting someone from outside Africa, most notably.[203]

Gaddafi. *Id.* ¶ 219. In doing so, it avoided the due process issue and Libya's argument that the ICC should not become a "human rights court," by concluding, in part, that Libya had failed to establish that its domestic proceedings focused on "'substantially the same conduct and series of events as the ICC case,'" as required by the statute. *Id.* ¶¶ 65, 88, 195. It also found that Libya was unable "genuinely to investigate and prosecute the case." *Id.* ¶¶ 135, 138, 218. On May 21, 2014, the Appeals Chamber affirmed. *See* Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11 OA, 4, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi," ¶¶ 213–14 (May 21, 2014), http://www.icc-cpi.int/iccdocs/doc/doc1779877.pdf.

201 Human rights advocates expressed concern, for example, over the narrow scope of charges brought at the ICC against Thomas Lubanga Dyilo, who was eventually convicted of the conscription of child soldiers. *See* Joint Letter from Human Rights Watch et al. to Luis Moreno Ocampo, Chief Prosecutor, ICC (Aug. 1, 2006), http://www.hrw.org/news/2006/07/31/dr-congo-icc-charges-raise-concern. After the first pretrial hearing to confirm the charges that had been brought against Lubanga, they criticized the court for not including charges for murder, torture and sexual violence. *Id.* Similarly, the Democratic Republic of Congo Association of Defense of Human Rights described the charges as "feeble when compared to the crimes committed." *DRC: ICC Begins Hearings in Case Against Militia Leader*, INTEGRATED REG'L INFO. NETWORKS (IRIN) (Nov. 9, 2006), http://www.irinnews.org/report/61518/drc-icc-begins-hearings-in-case-against-militia-leader.

202 *See, e.g.*, William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 549–50 (2010) (arguing ICC selectivity is inherently political); Joint Letter from Human Rights Watch et al. to Luis Moreno Ocampo, Chief Prosecutor, ICC, *supra* note 201; Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, WORLD AFF. (Spring 2009), http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders (noting concern among Africans that the ICC "may be turning criminal prosecution into a selective political instrument"). For discussion of the Rome Conference debate on prosecutorial discretion, see Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 590–93 (2007). R

203 For an example of this position, see Human Rights Watch's report on the tenth anniversary of the court in 2012, which is aptly titled "Unfinished Business." HUMAN RIGHTS WATCH, UNFINISHED BUSINESS: CLOSING GAPS IN THE SELECTION OF ICC CASES 46–47 (2011), *available at* http://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf.

I do not mean to suggest that no one has offered more fundamental critiques of international criminal law. To the contrary, some international relations scholars have contended that international criminal law—whether through international institutions or the assertion of universal jurisdiction—often fails to attend to realpolitik interests.[204] And both traditional and critical public international law scholars have argued that international courts or the institutions supporting them have under or over reached in a variety of ways.[205]

My concern is that these scholarly critiques have had little impact on the practice of human rights advocates. In a piece describing what she calls "[t]he tragedy of international criminal justice activists," Sarah Nouwen contends that for many advocates who have equated criminal prosecutions and justice, the distributional consequences that some critics have delineated are considered to be largely beside the point.[206] That is, the activists respond to the idea that their good intentions might cause harm by insisting that "justice must be done irrespective of its consequences."[207] Similarly, Samuel Moyn discusses how, in the face of criticism, supporters of the ICC often refuse to provide explicit justifications for their institution, often assuming that doing "something" is better than doing "nothing."[208] While these representations of disregard for consequences are undoubtedly accurate for some, I believe that a more common approach is to deny such consequences altogether. The Kampala Declaration's statement that peace and justice are complimentary,[209] for example, attempts to

204 *See, e.g.*, Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INT'L SECURITY 5, 5 (Winter 2003/04) ("[A] strategy that many [human rights NGOS] favor for achieving this goal—the prosecution of perpetrators of atrocities according to universal standards—risks causing more atrocities than it would prevent, because it pays insufficient attention to political realities.").

205 For a critical, third world approach, see Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77 (2003) (criticizing the ICTY for its imposition by the Security Council, for its unwillingness to consider NATO actions in Kosovo, and for its undemocratic expansion of international criminal law doctrine). For a list of sources that "touch upon or approach international criminal law from a critical perspective," see *Bibliography*, CRITICAL APPROACHES TO INT'L CRIM. L. RES. NETWORK, http://www.caicl.net/bibliography/ (last visited May 15, 2015).

206 Sarah M. H. Nouwen, *Justifying Justice*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 327, 337 (James Crawford & Martti Koskenniemi eds., 2012).

207 *Id.* at 338.

208 Samuel Moyn, *Towards Instrumentalism at the International Criminal Court,* 39 YALE J. INT'L L. ONLINE 55, 60 (2014). Frédéric Mégret made a similar argument over a decade ago at a much earlier point in the ICC's history, when he noted that "[p]roponents of a strong ICC often seem to join arguments with the moral fervour of the neophyte, at times providing no better reason as to why the ICC might come into being than the fact that it should." Frédéric Mégret, *Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project*, 12 FINNISH Y.B. INT'L L. 193, 194 (2001).

209 *See* Kampala Declaration, *supra* note 124, at pmbl., discussed *supra* at text accompanying note 124. **R**

ameliorate the tension between peace and justice precisely so as not to have to articulate a choice between the two. The same could be said of much of the IACHR's jurisprudence, particularly with regard to its reconciliation of truth and justice.

Whether through the denial of adverse consequences or of their significance to justice, the correspondence between criminal prosecution and human rights has become so ingrained that expressing opposition to any particular international prosecution is sometimes seen as anti-human rights. Early discussions over whether the United Nations Security Council should refer the case of Syria to the ICC reflected this dynamic. In January 2013, over fifty countries signed a letter penned by the Swiss government to the Security Council that, while recognizing international criminal jurisdiction as complementary, encouraged the Security Council to address the failure of Syria to exercise its national responsibility to ensure accountability for crimes against humanity. The letter called upon "the Security Council to act by referring the situation in the Syrian Arab Republic as of March 2011 to the International Criminal Court (ICC) without exceptions and irrespective of the alleged perpetrators."[210] Sweden was the only European Union (EU) country that did not sign the letter, apparently for pragmatic reasons.[211] As the country's foreign minister explained: "It would put Assad in a headlock and make him less flexible, because we'd be telling him 'your only option is to fight to the death.'"[212]

Reinforcing Nouwen's observation that there is no space for pro-justice advocates to attend to such potential consequences, Human Rights Watch's spokesperson in the EU responded to Sweden's failure to sign the letter by calling it "a sad day for Swedish foreign policy."[213] The lead to a story written in a Swedish newspaper about the decision began: "Sweden was the lone EU member state to opt out of [the] petition . . . disappointing human rights observers who claim the move is 'un-Swedish.'"[214] The story went on to interview members of different parties, with the foreign affairs spokesperson of the Christian Democrats making clear the connection between being Swedish, pro-human rights, and pro-international prosecution: "Of course Sweden should be exerting pressure. We usually fly the flag for human rights."[215] The Swedish example demonstrates a criti-

210 Letter from Thomas Gürber, Deputy Permanent Rep., Permanent Mission of Switz. to the U.N., to Mohammad Massod Khan, President of U.N. Sec. Council 2 (Jan. 14, 2013), http://www.news.admin.ch/NSBSubscriber/message/attachments/29293.pdf.

211 *See id.* at 1.

212 *Sweden Rules Out Taking Syria's Assad to the ICC*, LOCAL (Jan. 16, 2013), http://www.thelocal.se/45642/20130116.

213 *Id.*

214 *Id.*

215 *Id.*

cal change: Debates over the value and consequences of, or alternatives to, prosecution no longer take place *within* the human rights movement. Instead, advocates have come to see human rights as incompatible with a reluctance to pursue an aggressive anti-impunity stance through criminal justice mechanisms.

IV
Concerns About the Trend

The purpose of this Article thus far has been to identify, describe, and understand some of the reasons for the criminal turn in human rights law and advocacy. I have aimed to demonstrate in particular how the IACHR and the United Nations have attempted to mediate the justice versus truth and peace debates and have bolstered their anti-impunity stance in the process. I also have hoped to show more generally the ways in which the human rights movement has become aligned with the prosecutorial side of international and domestic criminal law.

Clearly the human rights movement has been engaged in other types of work over the same years that it has become invested in anti-impunity rhetoric and activity. Yet, the fight against the culture of impunity—with impunity narrowly defined as foreclosing the option of criminal punishment—has not only taken up a significant amount of the human rights movement's space; it has helped shape the direction of human rights advocacy as well as both international human rights and international criminal law.

While some might disagree with my assessment of the trajectory of the human rights movement, others would likely agree with the analysis but nevertheless contend that the correspondence between anti-impunity, criminal law, and human rights is a positive development. Indeed, as we have seen, many have argued that the international legal recognition of a duty to prosecute at the domestic level and the expansion of international criminal institutions have marked huge progress for human rights and humanitarian law (even as they have blurred—or perhaps attempted to harmonize—the two fields, sometimes quite intentionally as in *El Mozote*). Human rights law and humanitarian law are at last seen as enforceable.

As my description of the trend has already suggested, I have serious misgivings about the criminal turn. I am concerned not only about the significant time and resources that have gone into building criminal institutions but also about how the existence of international criminal institutions and the possibility of, even demand for, domestic prosecutions have helped shape and limit human rights aspirations. I sketch below some of my critiques around four main themes: individualization and decontextualization, conceptions of economic harm and

remedy, alignment with the state, and the production of history. Some are aimed at ways in which the turn to criminal law changes the movement in negative ways, while others show how it reinforces preexisting biases within the human rights system.

A. Individualization and Decontextualization

The criminal law lens often reveals a simple picture of a world infused with a few bad actors, even monsters. Hannah Arendt brought this danger to our attention long ago: We convince ourselves that if we remove the bad actors, we deal with evil.[216] That view affects the human rights movement's understanding of the world and affects its strategies and ability to attend to underlying structural causes of human rights violations. In obscuring state responsibility, it misses the ways in which bureaucracy functions—even through individual actors—to perpetuate human rights violations. It also misses the multiple ways in which even well-meaning people act both criminally and noncriminally, inside and outside of state structures, to produce and reproduce injustice.

Martti Koskenniemi argues that international criminal law's individualization, and the depoliticization that comes with it, is deliberate. Referencing the chief prosecutor's explicit statement that only the individual, not the Serb nation, was on trial in the case against Slobodan Miloševic at the ICTY, he contends that "[t]he effort to end the 'culture of impunity' emerges from an interpretation of the past—the Cold War in particular—as an unacceptably political approach to international crises."[217] This refusal to take into account context, however, distorts the very search for "truth" on which human rights advocates base their defense of the trials. As Koskenniemi puts it, "the meaning of historical events often . . . can be grasped only by attention to structural causes, such as economic or functional necessities, or a broad institutional logic through which the actions by individuals create social effects."[218]

Individualization not only narrows historical inquiry and downplays the role of the state but it also "may even serve as an alibi for the population at large to relieve itself from responsibility."[219] Robert Meister argues that the same logic applies to the human rights

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216 *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963). For a similar but more contemporary argument, see Vasuki Nesiah, *The Specter of Violence that Haunts the UDHR: The Turn to Ethics and Expertise*, 24 MD. J. INT'L L. 135 (2009).

217 Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 13 (2002). He continues: "Indeed, this is precisely what the Prosecutor in the Milosevic trial, Carla del Ponte, said she was doing in The Hague in February 2002. The (Serb) nation was not on trial, only an individual was." *Id.*

218 *Id.* at 13–14.

219 *Id.* at 14.

movement itself, which, due to its focus on evil and its sense that it has accomplished justice, fails to see the ways in which it and those with whom it aligns are often complicit in creating and continuing conditions of gross structural inequality.[220]

Both a cause and manifestation of decontextualization and depoliticization is that international human rights and humanitarian law increasingly treat state and nonstate actors to a given conflict alike. The primary issue often becomes which side has committed what atrocities, without concern for the *cause* of the conflict or its ideological content. Nearly every armed conflict today involves what we might term "human rights-fare," with each side accusing the other of atrocities worthy of international attention, if not intervention. To respond, human rights advocates must often deny any political position with regard to the conflict.[221]

Of course, that human rights advocates do not claim to take a political position does not mean that they do not. When they push to indict and obtain custody of certain leaders or, as in Kenya, even of candidates for office,[222] they play a significant role in the politics of the country. They also problematically side with governments, such as with Uganda in the case of the Kony indictment and other self-referrals by states.[223] And, as already suggested, they often refuse to consider seriously the ways in which the exertion of power by

220 *See generally* ROBERT MEISTER, AFTER EVIL: A POLITICS OF HUMAN RIGHTS (2011).

221 This dynamic has been seen in the various disclosures and debates about atrocities committed by both sides in Syria. Even before the 2013 chemical weapons attacks, AI began to chronicle, based on interviews and video evidence, alleged war crimes committed by armed opposition groups in Syria. It then called upon those groups to stop all human rights violations, upon governments to condemn such violations and upon the United Nations Security Council to refer the situation to the ICC. *See* Amnesty Int'l, *Syria: Summary Killings and Other Abuses by Armed Opposition Groups*, AI Index MDE 24/008/2013 (Mar. 14, 2013), *available at* http://www.amnestyusa.org/pdfs/summary_killings_by_armed_opposition_groups.pdf. Both the reporting of abuses and the call for the situation to be referred to the ICC to consider crimes on all sides allowed for, even required, claims of neutrality.

222 During the March 2013 elections, both Kenyan Presidential candidate Uhuru Kenyatta and his running mate William Ruto had been indicted by the ICC. For an analysis of the likely impact of the indictments on the election from February of that year, see Gabrielle Lynch & Miša Zgonec-Rožej, *The ICC Intervention in Kenya* (Feb. 2013), http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0213pp_icc_kenya.pdf. On December 5, 2014, the ICC prosecutor withdrew the charges against Kenyatta. *See* Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta (Dec. 5, 2014), http://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf

223 In addition to advocating for the indictment of Kony, whose name gained international recognition after a video titled *Kony 2012* went viral, human rights activists have been working with the Ugandan military to attempt to capture him. *See* Elizabeth Rubin, *How a Texas Philanthropist Helped Fund the Hunt for Joseph Kony*, NEW YORKER (Oct. 21, 2013), *available at* http://www.newyorker.com/news/news-desk/how-a-texas-philanthropist-helped-fund-the-hunt-for-joseph-kony.

international criminal institutions might block other political solutions.

As the political context gets lost, domestic and international attention often turn to questions of how to make war more humane, rather than how to prevent it or respond to underlying inequities that might lead to it. *Jus ad bellum* has thus taken a backseat to *jus in bello*.[224] More importantly, perhaps, attention is deflected away from an analysis of the multiple ways in which the global north is complicit in military conflict in the global south. The United States, for example, has been and continues to be the primary supplier of arms to numerous governments involved in ongoing conflicts.[225]

B. Conceptions of Economic Harm and Remedy

Advocates of economic and social rights have often challenged the dominance of civil and political rights within human rights law and advocacy. For years, they have pushed to make economic and social rights more justiciable at the domestic and international levels, with mixed success.[226] Many now often concentrate their efforts on holding corporations criminally or civilly liable, as the slate of cases against corporations in the United States under the Alien Tort Statute attests.[227] Even though their goal might sometimes be to weaken cor-

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224 For a comparison of international legal challenges to United States atrocities committed during the Vietnam War and those committed during the war on terror, the former based on *jus ad bellum* and the latter on *jus in bello*, see Samuel Moyn, From Antiwar Politics to Antitorture Politics (Nov. 29, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966231. This perspective is in contrast to that voiced by a number of scholars shortly after the invasion of Afghanistan and Iraq, when it seemed there was a new turn to *jus ad bellum* justifications for war. *See, e.g.*, Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905 (2002).

225 *See, e.g.*, RICHARD F. GRIMMETT & PAUL K. KERR, CONG. RESEARCH SERV., R42678, CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS, 2004-2011, at 2–4 (2012) (noting that the developing world [defined as including countries in Asia, the Near East, Latin America, and Africa while excluding the United States, Russia, European nations, Canada, Japan, New Zealand and Australia] is the primary focus of foreign arms sales activity and that, as of 2011, the United States ranked first in arms transfer agreements with and arms deliveries to developing countries).

226 For an analysis of the effects of justiciable education and health rights in a variety of domestic courts around the world, see COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., 2008).

227 Arguably, the United States Supreme Court ruling for the defendants in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) might lead to more, rather than fewer, attempts to hold corporations accountable in criminal or tort law. Global Diligence, a group of international criminal lawyers who advise corporations on human rights risk, wrote the following shortly after the decision:

> What the Kiobel ruling does not do is to de-rail the entire business and human rights movement. . . . On the contrary, victim groups and NGOs are likely to re-double their efforts in seeking to hold businesses accountable. Within the U.S., class action trial lawyers will continue to push cases of alleged corporate complicity in human rights violations overseas. . . . Other

porate power so as to protect a broad range of rights, they often state their claims in terms of civil and political rights so as to make them more justiciable or more publicly compelling.[228]

The turn to criminal law in this context arguably perpetuates biases against economic restructuring already inherent in the human rights framework. Regardless of the extent to which economic and social rights are justiciable, they are still pursued within a neoliberal system. Given that neoliberalism depends upon and reinforces criminal law, in part to protect private property rights, the cards are stacked against any attempt to use criminal law to challenge neoliberalism. The aim of advocates is therefore to prevent excesses, rather than to restructure. They do not, for example, focus on changing property, contract, corporate, or tax law in their efforts reduce corporate power.

It is also difficult to pursue economic reparations in the criminal justice context. For many years, economic reparations were seen as an alternative, or at least supplement, to criminal justice. The former tended to be the domain of truth and reconciliation commissions while criminal legal institutions were exclusively punitive. As criminal institutions began to be seen as necessary to transition, those who argued for reparations often pushed for courts to be able to award them. They achieved some success with the inclusion of a provision in

> victims will undoubtedly be dissuaded from launching an action in the U.S. courts, but they will look to other jurisdictions for satisfaction. The courts of certain European countries–such as the U.K., France and the Netherlands–may be more receptive to hearing claims of corporate complicity in extra-territorial human rights violations . . . . There may also be further pressure on the International Criminal Court to hold senior company executives accountable for complicity in international crimes where there is credible evidence to do so . . . although extending the jurisdiction of the ICC to legal as well as natural persons does not appear likely in the immediate future.

Alex Batesmith, *The Kiobel Ruling: Big Business Wins the Battle but Not the War—and How All Companies Will Be Under Increasing Scrutiny in the Future*, GLOBAL DILIGENCE (Apr. 19, 2013), http://www.globaldiligence.com/the-kiobel-ruling-big-business-wins-the-battle-but-not-the-war-and-how-all-companies-will-be-under-increasing-scrutiny-in-the-future.

228 Consider two cases involving Shell Oil's exploitation of oil reserves in Ogoniland, one against the corporation under the United States' Alien Tort Statute and the other against the state of Nigeria under the African Convention on Human and Peoples' Rights. *Compare Kiobel*, 133 S.Ct. 1659 ("Petitioners, Nigerian nationals residing in the United States, filed suit in federal court under the Alien Tort Statute . . . ."), *with* The Social and Econ. Rights Action Ctr. & the Ctr. for Econ. and Soc. Rights v. Nigeria, African Comm'n on Human & Peoples' Rights, Comm. No. 155/96 (2001) ("The communication alleges that the military government of Nigeria . . . caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People."). Even though the latter case was brought intentionally to highlight the economic impact of the activities of Shell and the Nigerian-owned oil company in the region (given that economic and social rights are included in the African Commission's jurisdiction), the plaintiffs and the commission alike arguably emphasized the civil and political rights violations by the Nigerian military against those who protested Shell's activities. *See The Social and Economic Rights Action Center*, ¶ 10.

the Rome Statute that allows the ICC to issue reparations that include financial compensation.[229] While economic remedies are important for most victims, their award is generally dependent upon a finding of guilt and a proven "'but/for' relationship between the crime and the harm."[230] Given the selectivity of criminal prosecutions, granting of these types of reparations is relatively arbitrary. Moreover, although the court lists the return of "lost or stolen property" as a possible form of reparation,[231] the remedy leaves little room for the significant redistribution of property that might be needed to attend to long-standing inequalities.[232]

C. Alignment with the State

When local human rights NGOs spend time and resources promoting prosecutions, they often align themselves with the state. From feminists advocating for the enforcement of antitrafficking legislation to indigenous groups helping to strategize and participate in the prosecution of former military leaders who targeted them for extermination, human rights advocates are often dependent upon the very police, prosecutorial, and even adjudicatory apparatuses of which they have long had reason to be suspicious.

Human rights advocates also participate in the governance of the state when their advocacy encourages states to overreach in their investigations, prosecutions, and punishments. As Frédéric Mégret and Jean-Paul S. Calderón have noted in a recent piece on the neopunitivism they see in the jurisprudence of the IACHR, "[t]here will inevitably be cases where responsibilities cannot be identified, a case beyond reasonable doubt cannot be mounted, or suspects cannot be appre-

229 Rome Statute of the International Criminal Court, *supra* note 18, art. 75. For further elaboration of the conditions for and types of reparations (including collective as well as individual), see Rules of Procedure and Evidence of the ICC, ICC-ASP/1/3, rule 97(1), *available at* http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.ENG.08Feb1200.pdf; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations (Aug. 7, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf. R

230 *Lubanga Dyilo*, ¶ 250. That said, the Rome Statute also established a Trust Fund for Victims. Rome Statute of the International Criminal Court, *supra* note 18, art. 79. In addition to its mandate to implement ICC reparations awards, it also has an "assistance mandate." Under the latter mandate, it can use resources from private donations and voluntary contributions to "provide victims under Court jurisdiction with physical rehabilitation, psychological rehabilitation, and/or material support." *The Two Roles of the TFV*, Trust Fund For Victims, http://www.trustfundforvictims.org/two-roles-tfv (last visited May 15, 2015).

231 *Lubanga Dyilo*, ¶ 224.

232 For a discussion of the failure of reparations to address land inequality in the context of reparations awarded by domestic courts in Rwanda, see Zinaida Miller, *Effects of Invisibility: In Search of the 'Economic' in Transitional Justice*, 2 Int'l J. Transitional Just. 266, 279–80 (2008).

hended."[233] They express a concern I share that "[t]o suggest that these cases manifest a failure of the state to comply with its duty to offer a remedy could quickly lead to a culture of 'results' that could have catastrophic consequences for the rights soundness of the criminal justice system."[234]

An example of such a focus on results can be seen in the Mexican government's response to international pressure mounted on it to investigate and prosecute those responsible for the murders of women in Ciudad Juárez. The state falsely arrested, detained, and tortured a number of individuals, many of whom lacked the resources to challenge the accusations against them.[235] A 2005 study of femicides in Mexico by the Latin American Working Group Education Fund (LAWGEF) reported strong evidence for false imprisonment in approximately one-sixth, and the use of physical or psychological torture to coerce confessions in nearly one-half, of the murder cases in which the state had detained a suspect.[236] Given Mexico's widespread use of pretrial detention[237] and its practice of considering a femicide case "resolved" for official reporting purposes once a suspect is in custody,[238] wrongful arrest and detention offer a particularly expedient means for officials to alleviate concerns surrounding impunity for human rights violations.

This concern about overreach is not only about penal systems that do not meet formal rule of law requirements. As discussed in Part I, many penal systems in the world have undergone a neoliberal makeover—often as a direct result of explicit exportation of United States criminal justice, aimed largely at transnational crime.[239] That criminal justice project has favored large-scale incarceration and eschewed criminal justice reform initiatives—from carceral abolition to

233 Frédéric Mégret and Jean-Paul S. Calderón, *supra* note 29, at 18. **R**

234 *Id.*

235 *See* SEAN MARIANO GARCÍA, SCAPEGOATS OF JUÁREZ: THE MISUSE OF JUSTICE IN PROSECUTING WOMEN'S MURDERS IN CHIHUAHUA, MEXICO (2005).

236 *Id.* at 12 (citing *Informe Especial de la Comisión Nacional de los Derechos Humanos Sobre los Casos de Homicidios Y Desapariciones de Mujeres en el Municipio de Juárez, Chihuahua* COMISION NACIONAL DE LOS DERECHOS HUMANOS (1998), http://www.cndh.org.mx/sites/all/fuentes/documentos/informes/especiales/2003_HomicidioDesapariciones.pdf).

237 GUILLERMO ZEPEDA LECUONA, LOS MITOS DE LA PRISIÓN PREVENTATIVA EN MÉXICO (2d ed. 2010), *available at* http://www.opensocietyfoundations.org/reports/myths-pretrial-detention-mexico (showing that more than forty percent of all suspects are incarcerated while awaiting trial, and contesting the reasons commonly given for such detention); Richard M. Aborn & Ashley D. Cannon, *Prisons: In Jail, But Not Sentenced*, AM. Q. (Winter 2013), http://www.americasquarterly.org/aborn-prisons (showing country-by-country pretrial detention rates in the Americas, and assessing their cost).

238 GARCÍA, *supra* note 235, at 13. **R**

239 *See generally* McLeod, *supra* note 20. **R**

restorative justice.[240] Thus, at the same time that "justice" came to mean "criminal justice" in human rights advocacy, "criminal justice" largely came to mean incarceration in the United States and in its exported models. The possibility for imagining alternatives has therefore arguably been eroded at two different levels.

The alignment of human rights advocates with the carceral state cannot help but affect the extent to which the human rights movement is able to mount a serious criticism of mass and brutal incarceration and the biases we see in nearly every penal system in the world. Moreover, advocates might be less likely in general to be critical of governments that seem finally to be attempting to remedy past wrongs, even if through the penal system. In line with several of the previously stated concerns, advocates might also begin to conceive of the broader issues they promote as criminal issues, as though their victories in punishing a few bad actors could address centuries of biases based on race, class, and gender, thus relieving pressure on the state to attend to structural issues of distribution.

D. The Production of History

With institutional resources focused on anti-impunity, anti-impunity often becomes the primary objective for the collection of documents, archives, and video. Increasingly, archival materials are collected with their relevance for criminal trials in mind.[241] Beginning with Hannah Arendt, a number of scholars have criticized the use of criminal trials to narrate history.[242] My concern here is slightly different, though. If the collection and preservation of the historical record is guided by its legal admissibility or relevance, much of the story might be lost.[243]

Criminalization also affects the issue of access to more general archives that already exist. Those in control of such archives might be less forthcoming in collecting incriminating materials or in granting

240 For some of McLeod's imagined alternatives, see Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 UNBOUND: HARV. J. LEGAL LEFT 109 (2013).

241 For an example of the ways such concerns about admissibility and relevance are addressed, see KATHLEEN O'NEILL, DELLA SENTILLES & DANIEL M. BRINKS, NEW WINE IN OLD WINESKINS? NEW PROBLEMS IN THE USE OF ELECTRONIC EVIDENCE IN HUMAN RIGHTS INVESTIGATIONS AND PROSECUTIONS, *available at* http://www.crl.edu/sites/default/files/attachments/pages/Rapoport-E-evidence-report.pdf.

242 *See* ARENDT, *supra* note 216. For a contemporary discussion of the crafting of historical narrative through international criminal trials, see RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS (2011). R

243 Of course it could be argued that the focus on criminal trials has led to increased funding for preserving archival materials so that, even if limited, at least records are kept. Moreover, even archives that are limited to legally relevant materials have proven useful to historians. *See, e.g.*, Robert M. W. Kempner, *Review, The Nuremberg Trials as Sources of Recent German Political and Historical Materials*, 44 AM. POL. SCI. REV. 447 (1950).

access to those materials if they believe they might be used for criminal prosecution or even civil claims. They might thereby forego "truth" in order to avoid liability.[244]

CONCLUSION

In this Article, I have both shown and questioned the human rights movement's attachment to the fight against impunity and its uses of criminal law in the process. I have taken a position against a strong anti-impunity focus, with a critical look at the implications of connecting human rights remedies to criminal law. Being against anti-impunity is not the same as being for impunity. Rather, my anti anti-impunity stance is much like the "anti anti-relativism" proposed by Clifford Geertz in his famous 1984 lecture. I quote from that lecture below, replacing "cultural relativism" with "impunity":

> A scholar can hardly be better employed than in destroying a fear. The one I want to go after is [~~cultural relativism~~ impunity]. Not the thing itself, which I think merely there, like Transylvania, but the dread of it, which I think unfounded. . . . To be more specific, I want not to defend [~~relativism~~ impunity], which is a drained term anyway, yesterday's battle cry, but to attack [~~anti-relativism~~ anti-impunity], which seems to me broadly on the rise and to represent a streamlined version of an antique mistake.[245]

My aim is to encourage human rights advocates to imagine a world in which the culture of impunity is not their principal opponent. As with relativism in 1984, few would actually argue for impunity today, such that anti-impunity often "concoct[s] the anxiety it lives from."[246] In fact, as I have suggested above, anti-impunity is more often than not today the battle cry of each side to any given conflict. As such, it provides a way for all sides to avoid overt discussion of distribution, even while deploying in their political struggles the criminal justice system, a potentially potent weapon of which the human rights movement has long been critical.

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244 Leora Bilsky describes, for example, how the release from legal liability provided by a class action settlement encouraged the opening of corporate archives in Germany, enabling historians to research business cooperation with the Third Reich. Leora Bilsky, *The Judge and the Historian: Transnational Holocaust Litigation as a New Model*, 24 HIST. & MEMORY 117, 136–38 (2012).

245 Clifford Geertz, *Distinguished Lecture: Anti Anti-Relativism*, 86 AM. ANTHROPOLOGIST 263, 263 (1984).

246 *Id.* at 265.