Transitional (In)Justice: An Exploration of Blanket Amnesties and the Remaining Controversies Around the Spanish Transition to Democracy

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Abstract

"Blanket amnesties" have generally been declared to be incompatible with international law due to the fact that they shield perpetrators of serious crimes from accountability as well as conflict with established principles regarding the applicability of statutory limitations to certain criminal offenses. The repeal of the *Full Stop* and *Due Obedience* laws in Argentina set a crucial precedent in the process toward the abrogation of legislation leading to impunity for those responsible for grave violations of *jus cogens*. Additionally, permitting the prosecutions of Nazi officers Klaus Barbie and Erich Priebke in Europe confirmed the customary principle of the non-applicability of statutory limitations to crimes against humanity. However, for nearly 40 years, Spain's amnesty legislation continues to preclude any investigation or prosecution of the crimes committed during the civil war (1936–1939) and the Francoist regime (1939–1975). Spain's 1977 Amnesty Act has been widely characterized as a blanket amnesty and remains in force today despite allegations of non-compliance with international law and numerous requests from United Nations bodies to repeal it. This article explores the history of Spain's 1977 Amnesty Act, compares and contrasts it with other nations with similar amnesties, and makes the case that a successful transition from an authoritarian regime to a

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peaceful democracy is feasible without the use of overly broad "blanket" amnesties.

Introduction

On July 22, 2014, Pablo de Greiff,[1] as the U.N. Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, issued a report[2] after his first official visit to Spain. De Greiff, a transitional justice expert, was sent to Spain by the United Nations Human Rights Council to assess the measures adopted by the Spanish authorities in relation to the gross human rights violations that occurred during the Spanish Civil War (1936–1939) and the Francoist regime (1939–1975). His goal was to become acquainted with the different initiatives undertaken by the Spanish democratic government since 1975 and to make recommendations on how to address the remaining challenges.[3]

De Greiff noted that the poorest areas of performance by the Spanish government occurred in dealing with past abuses in the administration of justice for the victims of the most serious crimes committed during the Franco dictatorship.[4] This should not come as a surprise to the Spanish authorities. De Greiff's conclusion is entirely subscribed by an important number of internationally renowned scholars, institutions, and U.N. treaty bodies alike,[5]

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[1] Pablo de Greiff (Colombia) was appointed in by the United Nations Human Rights Council as the U.N. Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence at the conclusion of its 19th session on March 23, 2012. He is independent from any government and proposes responses to strengthen the effectiveness of mechanisms aimed at addressing gross human rights violations. *See* Human Rights Council. 19th Session. Report of the Human Rights Council on its nineteenth session. Annex V. Special procedures mandate holders appointed by the Human Rights Council at its nineteenth session. U.N. Doc. A/HRC/19/2 (May 24, 2013), and Human Rights Council. 24th Session. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff. U.N. Doc. A/HRC/24/42 (Aug. 28, 2013).

[2] Human Rights Council. 27th Session. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff. Mission to Spain. U.N. Doc. A/HRC/27/56/Add.1 (July 22, 2014).

[3] *Id.* p. 4, ¶ 2.

[4] *Id.* p. 14, ¶ 67.

[5] *See inter alia* Human Rights Committee. 94th Session. Consideration of the reports submitted by States parties under article 40 of the Covenant. Concluding observations of the Human Rights Committee. Spain. U.N. Doc. CCPR/C/ESP/CO/5 (2009); Committee Against Torture. 43rd Session. Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Spain. U.N. Doc. CAT/C/ESP/CO/5 (2009); Committee

who have already made similar observations regarding the lack of due investigation and prosecution of the crimes of the war and the subsequent dictatorship.

This Article proceeds as follows. Part I addresses the concept and legality of blanket amnesties and their relationship with the principle of the non-applicability of statutory limitations. Part II examines the historical process that led to the adoption of the Spanish 1977 Amnesty Act, as well as its final content and scope. Part III provides selected instances that illustrate the consolidation of the principle of non-applicability of statutory limitations to crimes against humanity, traces the abrogation of comparable amnesties, and explores an alternative transitional justice scheme. Part IV draws attention to the differing legal interpretation models so far adopted by Spanish courts concerning the 1977 Amnesty Act, and articulates the main grounds for derogation. In Part V, I share my conclusions about how the Act interferes with Spain's ability to abide by its obligations under international law. Part VI includes a bibliography of all cited works referred to throughout this article. Please also note that all Spanish translations are my own work and are not official translations.

Part I. Blanket Amnesties as Legislative Tools

Amnesties are often complementary mechanisms intended to contribute to—and not achieve *per se*—the democratic restoration processes in countries where gross human rights violations have occurred. Ideally, they are adopted along with other measures in order to ascertain the historical truth behind past regimes, which more broadly constitute forms of accountability that do not necessarily entail criminal prosecution.

"Blanket amnesties" are dispositions that exempt broad categories of serious human rights offenders from prosecution and/or civil liability without the perpetrators having to satisfy any preconditions on an individual basis, such as filing an application, acknowledging their culpability, or disclosing details regarding the crimes. Blanket amnesties generally do not discriminate between common crimes, political crimes, and international crimes, nor do they consider the motives of the offences.[6]

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on Enforced Disappearances. 5th Session. Concluding observations on the report submitted by Spain under article 29, paragraph 1, of the Convention. U.N. Doc. CED/C/ESP/CO/5 (2013).

[6] Burke-White, W. W., *Reframing Impunity: Applying Liberal International Law Theory to An Analysis of Amnesty Legislation,* 42 HARV. INT'L L. J., 467–533, (2001), p. 482.

These all-encompassing immunity laws appeared in the late 1970s and early 1980s.[7] They have been generally condemned because they fail to strike the right balance between conflicting interests as they usually grant leading perpetrators of international *core crimes*[8] a type of impunity that tends to exclude all kinds of investigation of the facts thereby totally neglecting the rights of the victims.[9]

A. The Unlawfulness of Blanket Amnesties Under International Law

The United Nations has taken a firm stance against blanket amnesties. Different sets of UN principles distil a broad range of policies which are incompatible with certain types of amnesty laws. The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005)[10] provides that States have the duty to investigate and criminally prosecute those responsible for gross human rights violations.[11] The *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (2005)[12] affirms the same standard and specifically bars amnesties from shielding the perpetrators of serious crimes under international law or affecting the victims' right to reparation, "[e]ven when intended to establish conditions conducive to a peace agreement or to foster national reconciliation."[13] Additionally, the policy guidelines set forth in its publication, *Rule-of-Law Tools for Post-Conflict States—Amnesties* (2009)[14] systematically articulate the rejection of amnesties

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[7] *Id.*

[8] "*Core Crimes*" is an expression commonly used to refer to crimes against humanity, war crimes, genocide and the crime of aggression after the adoption of the Rome Statute of the International Criminal Court.

[9] Ambós, K., in Foreword to GIL GIL, A., LA JUSTICIA DE TRANSICIÓN EN ESPAÑA. DE LA AMNISTÍA A LA MEMORIA HISTÓRICA. (Atelier, 1st ed. 2009), p. 18.

[10] G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005). Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

[11] *Id.,* at Principle III, ¶ 4.

[12] Commission on Human Rights. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher. Addendum: *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*. U.N. ESCOR, 61st Sess., Supp. U.N. Doc. E/CN.4/2005/102/Add.1 (2005).

[13] G.A. Res. 60/147, *supra* note 10, Principle 24 (a) and (b).

[14] UNITED NATIONS, *Rule-of-law Tools for Post-Conflict States. Amnesties,* HR/PUB/09/1, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS. New York and Geneva (2009).

whenever they either: (a) prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity, or gross violations of human rights, including gender-specific violations; (b) interfere with the victims' right to an effective remedy, including reparation; or (c) restrict victims' or societies' right to know the truth about violations of human rights and humanitarian law. Moreover, the United Nations underscores that "amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or in some respects perpetuate the original violations."[15]

Interestingly enough, the granting of blanket amnesties to transgressors of *jus cogens* international crimes has even been portrayed as a breach of the social contract:

> *Thus, if the right of punishment originally belonged to the victim and the international legal community exercises it on behalf of the victim, it cannot be traded in for blanket amnesties [...] Political negotiators acting on behalf of major powers have compromised the victim's right and breached the 'social contract' for international criminal justice by bartering accountability for political settlements. [...] Granting pardons without justification clearly hinders the pursuit of justice because it destroys all beliefs of fairness, equality of application of the law... it also eradicates hopes of deterring similar crimes from being committed in the future.*[16]

A wide consensus now rejects blanket amnesties barring all types of investigations, as it is generally accepted that amnesties cannot be applied where treaties obligate states to prosecute or where customary law compels prosecution.[17]

B. The Non-Applicability of Statutory Limitations to Crimes Against Humanity

The principle of non-applicability of statutory limitations to the prosecution of crimes against humanity[18] developed in both treaty and customary

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[15] *Id.* at p. 11.

[16] CHERIF BASSIOUNI, M. (ed.), INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (Martinus Nijhoff Publishers, 2nd ed. 2013), pp. 973–974.

[17] Laplante, L.J., *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes,* 49 VA. J. INT'L L., 915–984 (2009), p. 941.

[18] The modern concept of "crimes against humanity" originated in the preamble to the 1907 Hague Convention, in the commonly known as the *Martens Clause*. *See*

international law before Spain enacted its amnesty laws in the late 1970s. It partly arose from the will to maintain the prosecution of the Nazi war criminals that had so far escaped the reach of justice.[19] The principle, today embodied in the laws and international customs, may also act as a barrier against self-imposed impunity in those instances where the consequences of a crime are legitimized by crimes' own perpetrators who happen to still hold the reins of power.[20]

Some sectors of academia—eminently, the internationalist doctrine—are inclined towards an approach whereby perpetrators of crimes against humanity can and ought to be held criminally accountable based on the international prohibition of such conduct, even when the crimes are not covered by domestic legislation at the time of the offense.[21] Indeed, crimes against humanity are deemed *jus cogens* crimes.[22] Originally established in Article 6(c) of the Charter of the International Military Tribunal at Nuremberg (1945),[23] Article 5(c) of the Charter for the Far East (1946),[24] and Article II(c) of Control Council Law No. 10 (1946),[25] crimes against humanity are recognized in 52 instruments from 1943 to 1998.[26] It can be considered that

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Lyons, S.W., *Ineffective Amnesty: The Legal Impact on Negotiating the End to Conflict,* 47 WAKE FOREST L. REV., 799–842 (2012), p. 812.

[19] PIGRAU SOLÉ, A., LA JURISDICCIÓN UNIVERSAL Y SU APLICACIÓN EN ESPAÑA. LA PERSECUCIÓN DEL GENOCIDIO, LOS CRÍMENES DE GUERRA Y LOS CRÍMENES CONTRA LA HUMANIDAD POR LOS TRIBUNALES NACIONALES. (Col·lecció Recerca per Drets Humans (RxDH), 1st ed. 2009), p.64.

[20] Raúl Zaffaroni, E., *'Notas sobre el fundamento de la imprescriptibilidad de los crímenes de lesa humanidad'* in IGNACIO ANITUA, G. *et al.*, DERECHO PENAL INTERNACIONAL Y MEMORIA HISTÓRICA. DESAFÍOS DEL PASADO Y RETOS DEL FUTURO. (Fabian J. Di Placido. Buenos Aires, 1st ed. 2012), pp. 61–64.

[21] Zapico Barbeito, M., in *'La investigación penal de los crímenes del franquismo: ¿possible y/o deseable?'* in IGNACIO ANITUA, G. *et al.*, DERECHO PENAL INTERNACIONAL Y MEMORIA HISTÓRICA. DESAFÍOS DEL PASADO Y RETOS DEL FUTURO. (Fabian J. Di Placido. Buenos Aires, 1st ed. 2012), p. 441.

[22] CHERIF BASSIOUNI, M. (ed.), *supra* note 16, p. 158.

[23] International Military Tribunal at Nuremberg, created by the Agreement for Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945: Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279, Article 6(c).

[24] International Military Tribunal for the Far East, established by order of General Douglas MacArthur, Jan. 19, 1946: Charter of the International Military Tribunal for the Far East, T.I.A.S. No. 1589, Article 5(c).

[25] Control Council Law, No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette, Control Council for Germany 50–55 (1946), Article II(c).

[26]. CHERIF BASSIOUNI, M. (ed.), *supra* note 16, p. 157–158.

the emergence of a customary basis for the definition of crimes against humanity dates back to 1950,[27] when the International Law Commission adopted the so-called Nuremberg Principles once they had been approved by U.N. General Assembly Resolution 95(I).[28] However, their independence with respect to the conduct of war cannot be appreciated at least until 1954,[29] provided that we assume that the final draft of the first Draft Code of Crimes Against the Peace and Security of Mankind codified to some degree customary international law.[30]

In 1968, through General Assembly Resolution 23/2391,[31] the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was adopted by the United Nations and opened for signature, ratification, and accession.[32] Probably motivated by the fact that only a limited number of states had signed the Convention within the terms granted by Article V,[33] in 1973, through General Assembly Resolution

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[27] July 29, 1950. *See* GIL GIL, A., BASES PARA LA PERSECUCIÓN PENAL DE CRÍMENES INTERNACIONALES EN ESPAÑA. (Editorial Comares, S.L. Biblioteca Comares de Ciencia Jurídica. Estudios de Derecho Penal y Criminología, 1st ed. 2006),, pp. 115–116.

[28] G. A. Res. 1/95, ¶ 3, U.N. Doc. A/RES/1/95 (Dec. 11, 1946). Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal.

[29] For the International Military Tribunal (1945), crimes against humanity were defined as: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war*, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal…" (*italics added*). However, the International Law Commission removed the war nexus and eliminated the connection to other crimes. In the Draft Code of Offenses against Peace and Security of Mankind of 1954, crimes against humanity were defined as: "inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the tolerance of such authorities". *See* Lyons, S.W., *Ineffective Amnesty: The Legal Impact on Negotiating the End to Conflict,* 47 WAKE FOREST L. REV., 799–842 (2012), pp. 813–814.

[30] GIL GIL, *supra* note 27, pp. 116.

[31] G. A. Res. 23/2391, U.N. Doc. A/RES/23/2391 (Nov. 26, 1968). Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

[32] *Id.* at ¶ 2.

[33] By December 31, 1969, only 10 states had signed the Convention: Belarus (January 7, 1969), Bulgaria (January 21, 1969), Hungary (March 25, 1969), Mexico (July 3, 1969), Mongolia (January 31, 1969), Poland (December 16, 1968), Romania (April 17, 1969), Russian Federation (January 6, 1969) and Ukraine (January 14, 1969). *See* UNITED NATIONS, *Chapter IV. Human Rights. 6. Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity,* UNITED NATIONS

28/3074,[34] the United Nations, taking into account the "special need for international action in order to ensure the prosecution and punishment of persons guilty of war crimes and crimes against humanity,"[35] proclaimed the non-applicability of statutory limitations to those crimes as a principle of international cooperation.[36] Specifically, the United Nations declared that States "shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity."[37] On the same grounds, the Council of Europe adopted just a month later the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (1974).[38] In light of these, it has been argued by scholars and national courts that the conventions were ultimately supported by a customary basis contrary to the applicability of statutory limitations to international *core crimes*.[39]

As discussed below in more detail, the Spanish 1977 Amnesty Act[40] does not abide by the constraints arising from international law which act as restrictions to the permitted scope of amnesty legislation.

TREATY COLLECTION, https:// treaties.un.org/Pages/ViewDetails.as px? src= TREATY &mtdsg_no =IV-6& chapter=4&lang=en (last visited August 18, 2015).

[34] G. A. Res. 28/3074, ¶ 4, U.N. Doc. A/RES/28/3074 (Dec. 3, 1973). Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

[35] *Id.* at ¶ 2.

[36] *Id.* at ¶ 4.1 and ¶ 4.5.

[37] *Id.* at ¶ 4.8.

[38] European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, Council of Europe, Jan. 25, 1974, CETS No. 082 (1974).

[39] *See* PIGRAU SOLÉ, *supra* note 19, p. 65; Tribunal Militare di Roma. Sentenza, 22 iuglio 1997 (*Court Martial Rome. Judgement of July 22, 1997)*; Corte Militare di Appello di Roma. Sentenza, 7 marzo 1998 *(Military Court of Appeals. Judgement of March 7, 1998)*; Corte di Cassazione. Sentenza, 16 novembre 1998 *(Court of Cassation. Judgement of November 16, 1998)* and *inter alia* Corte Suprema de Justicia de la Nación [Argentina]. Sentencia de 2 de noviembre de 1995 (*Supreme Court. Judgement of November 2, 1995). Cfr. Case of Almonacid Arellano and others.* Almonacid Arellano and others v. Chile, Inter-Am. Ct. H. R., ¶ 152–153 (2006).

[40] Ley 46/1977, de 15 de octubre, de Amnistía, B.O.E. nº 248, de 17 de octubre de 1977 (*Law 46/1977, Oct. 15, of Amnesty, Official Bulletin of the State number 248, Oct 17, 1997*) Hereinafter "the Amensty Act."

Part II. Spain: From the Civil War to the Amnesty Act, 1936–1977

A. The Spanish Civil War, 1936–1939

The Spanish Civil War (1936–1939) was an extremely harsh internal armed conflict characterized by the systematic violation of the norms today comprised within the body of international humanitarian law.[41] The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia singled out the Spanish Civil War as an illustration of how "internal armed conflicts [had] become more and more cruel and protracted" since the 1930s, an argument which ultimately underpinned its decision that rules of international humanitarian law also governed internal armed conflicts.[42] Special Rapporteur de Greiff underscores the "colossal aftermath" left by the war "in terms of victims of serious human rights and humanitarian law violations, including executions, torture, arbitrary detentions, disappearances, forced labour for prisoners and exile."[43]

B. The Francisco Franco Dictatorial Regime, 1939–1975

Both during the years of the civil war as well as of the subsequent Franco dictatorial regime, many people were executed—for the most part extrajudicial executions– and their families prevented from knowing the circumstances of their deaths or the location of the mass graves where they were buried. Many of the ones that were killed by members of the Franco opposition were eventually found, exhumed, and taken to their places of origin by order of the Francoist authorities. However, the Franco regime did not carry out the same task of investigating and recovering the bodies of those assassinated by the fascist rebels and alike, so they still remain unidentified.[44]

Since December 2006, a number of complaints have been brought before the *Audiencia Nacional* (National Court) asking for a thorough investigation around the death and current location of the more than 30,000 citizens—according to Historical Memory associations—that were victims of enforced disappearances which arguably constitute crimes against humanity and should therefore not be subject to any statute of limitations.[45]

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[41] GIL GIL, *suprfa* note 27, pp. 26–28

[42] *The Prosecutor v. Duško Tadić*, International Criminal Tribunal for the former Yugoslavia, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber, October 2, 1995), ¶ 97.

[43] de Greiff, *supra* note 2, p. 1.

[44] GIL GIL, *supra* note 27, pp. 87–88.

[45] *Id.*

C. The First Years of the Political Transition to Democracy, 1975–1977

Contrary to the widespread belief that the Spanish transition to democracy was an archetypical model of a peaceful transitional process, the reality is that between 1975 and 1982 there were 644 politically-motivated violent deaths. Most of them (356) were caused by the terrorist group *Euskadi Ta Askatasuna* (Basque Country and Freedom, or "ETA").[46] However, 140 deaths were caused by law enforcement officials during the repression of street demonstrations, and another 64 by the *Grupos de Resistencia Antifascista Primero de Octubre* (First of October Anti-Fascist Resistance Groups or "GRAPO").[47] Finally, other deaths were caused by the far right (68), the far left (11), and pro-independence political organizations (5).[48]

During Franco's authoritarian regime (1939–1975), Spain's foreign policy related to a political understanding blatantly contrary to individual rights and freedoms that kept the country internationally isolated for many decades.[49] In June 1976, seven months after Francisco Franco's death, a process towards the normalization of diplomatic relations began[50] and Spain started to adhere to relevant international treaties for the protection of human rights, including the International Covenant on Civil and Political Rights ("ICCPR" or "the Covenant").[51] On September 28, 1976, Spain signed the Covenant in New York and the instruments of ratification were presented by President Suárez to the United Nations Secretary-General on April 27, 1977.[52]

Article 2.3 of the Covenant requires each State party to [1] undertake the obligation to uphold the right to an "effective remedy" for any violation of the rights and freedoms protected under the Covenant, even when the perpetrator was acting in an official capacity,[53] and [2] to refrain from the

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[46] Data from the "Base de datos de violencia política" ["*Database of political violence*"], elaborated by Ignacio Sánchez-Cuenca and Paloma Aguilar Fernández within the framework of the project *'Explaining Terrorist Target Selection',* subsidized by the Spanish Ministry of Education (SEJ2006-12462), cited in GIL GIL, A., LA JUSTICIA DE TRANSICIÓN EN ESPAÑA. DE LA AMNISTÍA A LA MEMORIA HISTÓRICA. (Atelier, 1st ed. 2009), p. 45.

[47] *Id.*

[48] *Id.*

[49] Menéndez del Valle, E., in TEZANOS, J.F, COTARELO, R. et DE BLAS, A. (eds.), LA TRANSICIÓN DEMOCRÁTICA ESPAÑOLA. (Editorial Sistema. Fundación Sistema, 1st ed. 1989), pp. 719–720.

[50] *Id.* at p. 731.

[51] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[52] Menéndez del Valle, *supra* note 49.

[53] International Covenant on Civil and Political Rights, *supra* note 51, Article 2.3(a).

abrogation of these duties through the operation of an amnesty.[54] However, the Human Rights Committee[55] has repeatedly held that the Covenant does not provide that citizens have a right to demand that the State in question take on the criminal prosecution of an individual; rather it has interpreted the Covenant to require State parties to take effective steps to investigate the violations of human rights as well as to provide the victims with an effective remedy.[56] As to the latter, the United Nations has stressed the importance of its observance during political transitions following a period of widespread violations of human rights, circumstances in which remedial measures are said to take on a qualitatively different dimension.[57]

In this context of constant political upheavals, and by virtue of Royal Decree-Law 10/1976,[58] an amnesty was granted to all politically-motivated offenses (provided the perpetrators did not attack or pose a threat to people's life or physical integrity), as well as to crimes such as sedition, rebellion, and refusal to perform the military service. In stark contrast, all the relevant pro-amnesty mobilizations that had taken place during the last decades of the Franco dictatorship had clearly called for a limited rather than a blanket amnesty.[59] For example, since the 1960s, calls for a "labor amnesty" became widespread due to the fact that the laws permitted unrestricted dismissal of workers for political or ideological motives.[60] In 1970, Ruiz Giménez, former education minister soon to become Spain's first Ombudsman, spoke out in the journal *Cuadernos para el Diálogo* in favor of an amnesty for "all those who

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[54] UNITED NATIONS, *Rule-of-law Tools..., supra* note 14, p. 35.

[55] *See Arhuacos v. Colombia,* views on communication No. 612/1995, 29 July 1997 (A/52/40 (vol.II), annex VI, sect. Q., ¶¶ 8.2 and 8.8), and *Bautista de Arellana v. Colombia,* views on communication No. 563/1993, 27 October 1995 (A/51/40 (vol.II), annex VIII, sect. S., ¶¶ 8.2 and 8.6), as cited in UNITED NATIONS, *Rule-of-law Tools..., supra* note 14, p. 21.

[56] UNITED NATIONS, *Rule-of-law Tools..., supra* note 14, p. 21. . *Cfr.* Lyons, S.W., *Ineffective Amnesty: The Legal Impact on Negotiating the End to Conflict,* 47 WAKE FOREST L. REV., 799–842 (2012), pp. 806–807: "These legal commentators argue that the duty to 'ensure' these rights creates an affirmative obligation to prosecute violators of such rights, and thus is an invalidation of amnesty. The legal commentators further assert that judicial action is a natural extension of a right to a remedy."

[57] UNITED NATIONS, *Rule-of-law Tools..., supra* note 14, p. 35.

[58] Real Decreto-Ley 10/1976, de 30 de julio, sobre Amnistía, B.O.E. nº 186, de 4 de agosto de 1976 [*Royal Decree-Law 10/1976, Jul. 30, on Amnesty, Official Bulletin of the State number 186, Aug. 4, 1976*].

[59] *See* Aguilar Fernández, P., *Collective Memory of the Spanish Civil War: The Case of the Political Amnesty in the Spanish Transition to Democracy,* 4 DEMOCRATIZATION, 88–109 (1997), pp. 90–91.

[60] De la Villa, E., and Desdentado, A., *La amnistía laboral. Una crítica política y jurídica* (1978), as cited in Aguilar Fernández, *Id.* at p. 90.

suffer any type of discrimination for activities which are not considered criminal or illegal in the legislation of other… countries."[61] In early December 1974, a general strike that shook the Basque Country proclaimed, as a principal demand, the freedom for political prisoners.[62] And in 1975, the organization *Justicia y Paz* sent a letter to the archbishop of Madrid—with the hope that it would reach the Head of State—in which it requested a *political* amnesty.[63]

However, these legislative measures were perceived as limited and soon after, a broader amnesty was discussed in order to fulfill the apparent demands of the civil society.

As a preliminary consideration, scholars acknowledge the fact that most transitional processes develop under a constant threat of institutional breakdown, either abetted or directly brought about by the armed forces, in which a high rate of impunity often ends up prevailing.[64] Spain was no exception to that.

It is often argued that the perceived frailty of the new state was the rationale behind the social and political elites' decision to carry out reformist proposals, as opposed to groundbreaking proposals, during the Spanish transition to democracy. Transitional justice expert Professor Aguilar Fernández concludes that the fact that both terrorists and fascists were each granted an amnesty illustrates how concessions of some nature had been made to the latter in order for them to accept the release from prison of members of terrorist groups that had posed a threat against the stability of the regime.[65] Legal continuity therefore became a defining element that prevented the first democratically-elected governments from renouncing the Francoist legal system's own procedures.[66]

Spain's democratization process consequently resulted in no substantial departure from the socioeconomic *status quo* that had been inherited from

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[61] Ruiz Giménez, J., *El camino hacia la democracia. Escritos en 'Cuadernos para el Diálogo' (1963–1976)* (1985), as cited in Aguilar Fernández, *supra* note 59, p. 91.

[62] Castells, M., *Los procesos políticos (De la cárcel a la amnistía)* (1977), as cited in Aguilar Fernández, *supra* note 59, p. 90.

[63] Ruiz Giménez, *supra* note 61, p. 91.

[64] *See* e.g. OHCHR News, *Observaciones preliminares del Relator Especial para la promoción de la verdad, la justicia, la reparación y las garantías de no repetición, Pablo de Greiff, al concluir su visita oficial a España,* February 3, 2014, OFFICE OF THE HIGH COMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14216& (last visited August 17, 2015), ¶ 14.

[65] Aguilar Fernández, P., *La evocación de la guerra y del franquismo en la política, la cultura y la sociedad españolas* in SANTOS, J., MEMORIA DE LA GUERRA Y DEL FRANQUISMO. (Taurus, 2006), p. 375.

[66] RUIZ-HUERTA CARBONELL, A., LOS ÁNGULOS CIEGOS. UNA PERSPECTIVA CRÍTICA DE LA TRANSICIÓN ESPAÑOLA (1976–1979). (Editorial Biblioteca Nueva. Colección El Arquero. Fundación José Ortega y Gasset, 1st ed. 2009), pp. 210–211.

the dictatorship period.[67] President Adolfo Suárez[68] confirmed this in his televised message to the nation on September 10, 1976,[69] where he assured the citizens that it was not the executive's intention "to wipe the slate clean [but to] modify a number of concrete aspects in order to clearly state the purpose of letting the people decide their own fate [through a process that] stems from the legislation in force and through its established procedures."[70]

Another common denominator shared by the governmental actors of the time was a strong support for the transitional process to democracy provided that it is developed through "controlled reforms and moderate attitudes not likely to endanger Spain's contribution to the Western military and economic structures [as the] price to be paid for international recognition and endorsement."[71] However, the difficulty involved in finding a trace of legitimacy to justify the legality of the Franco regime has led some to claim that a truly democratic stance would have only endorsed a proposal to start again from scratch in the creation of political and judicial structures.[72]

D. The 1977 Amnesty Act

1. Introduction of the Act

On January 11, 1977, a first proposal to address all politically motivated acts regardless of their result was submitted for debate and

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[67] Powell, Ch., "Reform Versus Ruptura in Spain's Transition to Democracy", Thesis, University of Oxford, 1989, p. 11, cited in OÑATE RUBALCABA, P., CONSENSO E IDEOLOGÍA EN LA TRANSICIÓN POLÍTICA ESPAÑOLA. (BOE. Centro de Estudios Políticos y Constitucionales, 1st ed. 1998), p. 145.

[68] Adolfo Suárez González was the first democratically-elected President of Spain after Franco's dictatorship. He held office from July 3, 1976 to February 25, 1981.

[69] *See El País* of September 11, 1976, cited in OÑATE RUBALCABA, P., CONSENSO E IDEOLOGÍA EN LA TRANSICIÓN POLÍTICA ESPAÑOLA. (BOE. Centro de Estudios Políticos y Constitucionales, 1st ed. 1998), p. 143.

[70] *Cfr.* President Suárez's parliamentary assembly address during the presentation of the bill of associations: "*To deem that the transforming effectiveness of the system has not been able to lay solid foundations for gaining access to public freedoms amounts to undervaluing the giant work of that unparalleled Spaniard whom we will always owe tributes of gratitude and whose name was Francisco Franco*", cited in POWELL, C., EL PILOTO DEL CAMBIO. EL REY, LA MONARQUÍA Y LA TRANSICIÓN A LA DEMOCRACIA (Editorial Planeta, 1991), p. 165.

[71] González Madrid, D.A., in MARTÍN GARCÍA, O.J. *et* ORTIZ HERAS, M. (coords.), CLAVES INTERNACIONALES EN LA TRANSICIÓN ESPAÑOLA. (Catarata, 1st ed. 2010), pp. 41–42.

[72] RUIZ-HUERTA CARBONELL, *supra* note 66, p. 211.

subsequently approved by a 93.3% majority of the votes.[73] But this law that has been healed in Spain as "the most significant step towards reparation and reestablishment of personal freedom for those who were deprived of it for political reasons," actually hid two provisions that completely escaped parliamentary discussion and entailed impunity for the abhorrent crimes systematically committed by the Franco regime against its own citizens.[74]

The waiver of prosecution provided for in the 1977 Amnesty Act has been portrayed as the byproduct of the sophisticated balancing of interests that requires every classical "peace versus justice" dichotomy in transitional justice periods, even though in this case, according to some, it seemed more like a fight between those willing to live in a democracy, and those unwilling to lose the privileges inherited from the dictatorship.[75]

It has been contended[76] that the Spanish response to that apparent peace versus justice dilemma was notably influenced by the fear of a relapse into civil war, which invariably led to the prevalence of the *negative* peace element (amnesty paired with a democratic government) over the justice one. It seems *a priori* that it was agreed upon that a "total impunity scheme" would contribute to enduring peace, true reconciliation, and the consolidation of a democracy, once evaluated by all the far-reaching political, social, and economical effects.[77] As portrayed by one of its main proponents, "[the amnesty] puts an end to a chapter in the History of Spain and creates conditions for an authentic reconciliation among Spaniards and the establishment of a democratic regime."[78]

Drawing on pure consequentialist theories, some have gone as far as to say that the successful transition to a democratic state necessarily requires the total convalidation of the measures taken in the process on behalf of national reconciliation.[79] From a critical perspective, Morán contended in this regard that

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[73] All parliamentary groups voted in favor except for the right-wing *Alianza Popular*, that refused to do so because "streets will be filled with criminals". *See* GIL GIL, A., LA JUSTICIA DE TRANSICIÓN EN ESPAÑA. DE LA AMNISTÍA A LA MEMORIA HISTÓRICA. (Atelier, 1st ed. 2009), pp. 49–50.

[74] GIL GIL, A., LA JUSTICIA DE TRANSICIÓN EN ESPAÑA. DE LA AMNISTÍA A LA MEMORIA HISTÓRICA. (Atelier, 1st ed. 2009), pp. 49–50.

[75] DEL ÁGUILA, *et* R. MONTORO, R., EL DISCURSO POLÍTICO DE LA TRANSICIÓN ESPAÑOLA. (Centro de Investigaciones Sociológicas. Siglo Veintiuno de España Editores, S.A., 1st ed. 1984), p. 132.

[76] Ambós, *supra* note 9, p. 16. *See also* Aguilar Fernández, *supra* note 59, p. 89.

[77] Ambós, *supra* note 9, pp. 17–18.

[78] S. Sánchez Montero, interview in *El País,* August 5, 1978, cited in DEL ÁGUILA, *et* R. MONTORO, R., *supra* note 75, p. 135.

[79] *See* Chinchón Álvarez, J., *El viaje a ninguna parte: Memoria, leyes, historia y olvido sobre la guerra civil y el pasado autoritario en España. Un examen desde el*

> [t]he moral victory of the political class of the dictatorship was to achieve an amnesty on their past in exchange for the facilitating of the incorporation of the opposition into the real political life. The first ethical defeat suffered by the democratic opposition was to consider that the only way to achieve integration into the real political life consisted in guaranteeing the other side impunity.[80]

2. Content and Scope of the 1977 Amnesty Act

Article One of the 1977 Amnesty Act provided for a broad amnesty in the following terms:

> *Article One. I. An amnesty is hereby granted to:*
>
> *a) All politically-motivated acts, regardless of their result, established as criminal offences and committed prior to 15 December 1976.*
>
> *b) All acts of the same nature carried out between 15 December 1976 and 15 June 1977, whenever besides the political motivation an intent to reestablish public freedoms or demands for autonomy of the different peoples of Spain are noted.*
>
> *c) All acts of the same nature and motivation as in the previous paragraph committed prior to 6 October 1977 insofar as they did not entail severe violence against people's life or integrity.*[81]

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derecho internacional. 45 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS, 119–233 (2007), p. 135.

[80] MORÁN, G., EL PRECIO DE LA TRANSICIÓN. (Planeta, 1991), pp. 186–188, as cited in Chinchón Álvarez, J., *El viaje a ninguna parte: Memoria, leyes, historia y olvido sobre la guerra civil y el pasado autoritario en España. Un examen desde el derecho internacional*. 45 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS, 119–233 (2007), pp. 135–136.

[81] Ley 46/1977, de 15 de octubre, de Amnistía, B.O.E. nº 248, de 17 de octubre de 1977 [*Law 46/1977, Oct. 15, of Amnesty, Official Bulletin of the State number 248, Oct 17, 1997*], Article 1.I.

Article Two grants six *special* amnesties[82] for particular types of crimes which are not subject to the requirement of political motivation. For the sake of the argument supported here, specific attention ought to be paid to the last two special amnesties:

> "*e) Crimes that could have been committed by authorities, government officials and law enforcement officials,"*
>
> and
>
> "*f) Crimes committed by government officials and law enforcement officials against the exercise of the rights of the people.*"[83]

These two provisions were never subject to discussion among parliamentary forces, nor even covered in the media.[84] According to the general report of the *Inter-ministerial Committee for the study of the situation of the victims of the Civil War and Francoism*, articles 2.e) and 2.f) highlight the will to relinquish the prosecution of the servants of Franco's regime who took part in the repressive apparatus.[85]

All of the above entailed the total "extinction of the criminal responsibility arising from the penalties imposed or that could eventually be imposed,"[86] and at any rate, the "full reinstatement of the sanctioned officials in their active and passive rights" as well as the "removal of criminal history."[87] This pact crystallized collective impunity, covering both the civil war and the Franco dictatorship period, to such an extent that some regret that the rebuilding of our democratic memory was buried thereby.[88]

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[82] SOBREMONTE MARTÍNEZ, J.E., INDULTOS Y AMNISTÍA. (Colección de Estudios. Instituto de Criminología y Departamento de Derecho Penal. Universidad de Valencia, 1st ed. 1980), pp. 102–103.

[83] Ley 46/1977, *supra* note 81, Articles 2.e) and 2.f) 1977.

[84] Aguilar Fernández, P., in *'Justicia, política y memoria: los legados del franquismo en la transición española',* in BARAHONDA DE BRITO, A., AGUILAR FERNÁNDEZ, P. *et* GONZÁLEZ ENRÍQUEZ, C. (eds.), LAS POLÍTICAS HACIA EL PASADO. JUICIOS, DEPURACIONES, PERDÓN Y OLVIDO EN LAS NUEVAS DEMOCRACIAS (Itsmo, 2002), pp.158–159, cited in GIL GIL, *supra* note 74, p. 53.

[85] *See* GIL GIL, *supra* note 74, p. 53.

[86] Ley 46/1977, *supra* note 81, Article 6.

[87] *Id.* at Articles 7.a) and 7.c).

[88] RUIZ-HUERTA CARBONELL, *supra* note 66, p. 234.

Part III. A Global and Historical Exploration: Recognition of Blanket Amnesties and the Non-Applicability of Statutory Limitations to International Crimes

How a newly democratic government decides to address past human rights abuses—and whether it includes some form of amnesty—has traditionally been considered a matter within its own discretion and attributes of sovereignty, thus of little or no concern at all to the international community.[89] This remotely Hobbesian paradigm has changed to the extent that now amnesties generate mistrust when they become "shameful tools for perpetuating the impunity enjoyed by violators of human rights, rather than opportunities for reconciliation among warring parties."[90]

It is nowadays widely acknowledged that permitting the complete lack of prosecutorial and investigation measures whenever gross human rights violations have been detected amounts to a failure on the part of the State to abide by its international law obligations.[91] Amnesties that prevent the prosecution of individuals responsible for international *core crimes* are blatantly inconsistent with international law as well as with the United Nations policy.[92] Through Article 7 of the Spanish Constitution of 1931, the then-existing international law and principles formally became incorporated into Spanish domestic law and a commitment was made explicit to show compliance with the rules of the same nature generated thereafter.[93]

International law scholar and policy advisor William Burke-White once constructed a deontological framework for the analysis of amnesty legislation, which sought to integrate "the acknowledgement of the role of amnesties as tools for national reconciliation" and "the respect for the binding constraints imposed by international law."[94] Professor Burke-White's liberal test for legitimacy purports to incorporate a set of normative values into the positive model by looking "not just to the existence of seams of interaction between individuals and governments, but to the very nature of those seams to determine how they compare with these chosen normative values."[95]

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[89] Meintjes, G. & Méndez, J.E., *Reconciling Amnesties with Universal Jurisdiction,* 2 INT'L L. F. D. INT'L, 76, 97 (2000), p. 76.

[90] *Id.*

[91] Chinchón Álvarez, *supra* note 79, p. 100.

[92] Navanethem Pillay, United Nations High Commissioner for Human Rights. Foreword, V, in UNITED NATIONS, *Rule-of-law Tools ..., supra* note 14.

[93] Spanish Constitution of 1931, Article 7: "The Spanish state shall abide by the universal rules of international law, hereby incorporating them into its positive law" (Dec. 9, 1931).

[94] Burke-White, *supra* note 6.

[95] *Id.* at 471.

In considering the aspect of the legitimacy of the 1977 Amnesty Act, note should be taken that even though the Spanish government supervising the law's enactment had been democratically elected, the process by which the law was passed and applied was arguably not entirely reflective of the Spanish people's will as the ultimate source of authority.[96] Notwithstanding the purported domestic legitimacy of the law, the liberal perspective draws attention to "the inextricable links between the domestic and international contexts,"[97] and contends that international treaties represent "the aggregated preferences of individuals who, acting through governments, have created a regime that forbids certain acts and prohibits states from either committing or facilitating such acts."[98]

A. France: *The Prosecutor v. Klaus Barbie*, 1985

On December 20, 1985, the French Supreme Court overturned[99] the Lyon Court of Appeal's affirmative judgement[100] acknowledging the impossibility of prosecution for the crimes committed by former SS-Hauptsturmführer and Gestapo member, Klaus Barbie. As a preliminary matter, the Court of Appeal's attention was drawn to the crucial question of whether the acts perpetrated by Klaus Barbie qualified as "war crimes" or rather as "crimes against humanity." The Lyon Court of Appeals had characterized them as war crimes exclusively, and thereby terminated the proceedings against Barbie on the ground that French domestic law provided a statute of limitation of 10 years[101] for war crimes. The Supreme Court of France upheld the applicability of the statute of limitations as the 10-year period had indeed elapsed, but nonetheless found that some of the defendants' acts amounted to war crimes *and* crimes

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[96] Political theorist Robert A. Dahl argued that "a key characteristic of democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals" in POLYARCHY: PARTICIPATION AND OPPOSITION (1971), cited in Burke-White, *supra* note 6, p. 473. Also, Franck proposed two guidelines in FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995) in order to determine whether an amnesty law has been enacted through a legitimate process, i.e. the law must "treat like cases alike" and have been made "in accordance with the process established by the constitution", cited in Burke-White, *supra* note 6, p. 474. The Spanish Constitution was enacted in 1978, a year after the Amnesty Act entered into force.

[97] Burke-White, *supra* note 6, p. 475.

[98] *Id.* at p. 477.

[99] Cour de Cassation. Arrêt 20 décembre 1985 [*Supreme Court. Judgement of Dec. 20, 1985*].

[100] Cour d'Appel de Lyon. Arrêt 4 octobre 1985 [*Court of Appeal of Lyon. Judgement of Oct. 4, 1985*].

[101] *Id.* at p. 29. *See* Cour de Cassation, *supra* note 99, p. 2.

against humanity at the same time,[102] i.e. those specifically targeting non-combatant Jews for racial, religious, or political motives. The Supreme Court further contended that in the event where one action seemingly qualifies at the same time as a war crime and as a crime against humanity, the conduct should be prosecuted under the highest criminal category.[103] As a result, Barbie's case was sent back to the lower court so that proceedings could continue against him on charges of crimes against humanity.

With regard to the applicability of statutory limitations to crimes against humanity, the French Supreme Court alluded in the first place to the general principles of law, "acknowledged by all civilized nations"[104] and crystallized in the London Agreement of 1945.[105] It held that the norm covered both the public action and the sentence for the offense, as established in the latter agreement as well as in the French Act No. 64-1326, December 26, 1964.[106] The French Supreme Court conclusively found that no statutory limitation could possibly apply to crimes against humanity according to general principles of law, domestic legislation, and international treaty provisions, that is Article 6(c) of the Nuremberg Charter,[107] Article 7.2 of the European Convention on Human Rights[108] and Article 15.2 of the International Covenant on Civil and Political Rights.[109, 110]

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[102] Cour de Cassation, *supra* note 99, p. 17.

[103] *Id.* at p. 9. Note that there has been controversy around the question whether there exists such a hierarchy among international crimes. *See The Prosecutor v. Dražen Erdemović*, International Criminal Tribunal for the former Yugoslavia, IT-96-22, Separate and Dissenting Opinion of Judge Li (Appeals Chamber, 7 October 1997).

[104] *Id.* at 6.

[105] Agreement for Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945.

[106] Loi No. 64-1326 du 26 décembre 1964 tendant à constater l'imprescriptibilité des crimes contre l'humanité (1). Version consolidée au 29 décembre 1964. [*Act No. 64-1326 of 26 December 1964, determining the non-applicability of statutory limitations to crimes against humanity (1). Consolidated version of 29 December 1964*].

[107] Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (August 8, 1945).

[108] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, CETS No. 194 (1950).

[109] International Covenant on Civil and Political Rights, *supra* note 51, Article 15(2).

[110] Cour de Cassation, *supra* note 99.

B. Argentina and Italy: The Extradition of Erich Priebke, 1995

On November 2, 1995, in a landmark case Argentina's Supreme Court decided to grant the extradition to Italy of former SS-Hauptsturmführer Erich Priebke for his alleged participation in the so-called Fosse Ardeatine massacre, carried out in Rome in 1944 by German occupation troops, after proclaiming that "according to international law, no statutory limitation shall apply to war crimes and crimes against humanity."[111]

By the time the U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968)[112] and the corresponding European convention (1974)[113] entered into force, the principle enshrined in both treaties would have already existed in customary international law. This approach was endorsed by the military tribunal that convicted Priebke in Rome:

> *...the convention adopted through United Nations General Assembly Resolution 2391 (XXII) of 26 November 1968 has solemnly affirmed in international law "the principle of non-applicability of statutory limitations to war crimes and crimes against humanity," that such act on the part of the United Nations undoubtedly represents the point of arrival of a slow but ongoing process [...] toward the most efficient repression of the violation of the laws and customs of war; and that in such context the principle of non-applicability of statutory limitations to war crimes and crimes against humanity objectively assumes the character of* jus cogens, *inasmuch as it safeguards the general interests of the international society.*[114]

In Italy, two rulings from civilian courts soon followed to support the position taken by the military tribunal.[115] Interestingly enough, the non-applicability of statutory limitations to crimes against humanity was observed

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[111] Corte Suprema de Justicia de la Nación. Sentencia de 2 de noviembre de 1995, ¶15.- [*Supreme Court. Judgement of November 2, 1995, ¶ 15.*-].

[112] United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73.

[113] *Supra* note 38.

[114] § 1.1. Tribunal Militare di Roma. Sentenza, 22 iuglio 1997 [*Court Martial Rome. Judgement of July 22, 1997*].

[115] Corte Militare di Appello di Roma. Sentenza, 7 marzo 1998 [*Military Court of Appeals. Judgement of March 7, 1998*]; Corte di Cassazione. Sentenza, 16 novembre 1998 [*Court of Cassation. Judgement of November 16, 1998*].

despite the fact that Italy was not a State party to the U.N. Convention[116] on the ground that the *jus cogens* nature of the rule prevailed.

C. South Africa: The Truth and Reconciliation Commission, 1995

South Africa has widely been regarded as an archetype of affirmative action on the part of the state in which gross human rights violations have occurred. Its model of transitional justice achieved to combine truth telling with the selective granting of individual amnesties in a manner capable of successfully meeting the international community's expectations of accountability.[117]

The Truth and Reconciliation Commission was created through the Promotion of National Unity and Reconciliation Act 34 of 1995[118] ("Act 34"), and adopted by the South African Parliament in order to "provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights" committed during the Apartheid era.[119] It was deemed necessary to establish the truth regarding past events as a means of preventing future rights violations, ensuring sustainable peace, and advancing reconciliation among South African citizens.[120] In order to achieve these goals, the Truth and Reconciliation Commission was empowered to selectively facilitate the granting of amnesties to those applicants who took part in the perpetration of criminal acts, insofar as they were (1) associated with a political objective, and (2) provided full disclosure of all the relevant facts relating to them.[121]

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[116] *Supra* note 112.

[117] Meintjes & Méndez, *supra* note 89, p. 88. *See also* "Explanatory Memorandum To The Parliamentary Bill", available in THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, *Explanatory Memorandum To The Parliamentary Bill*, http://www.justice.gov.za/trc/legal/bill.htm (last visited August 18, 2015): "International experience shows that, if we are to achieve unity and morally acceptable reconciliation, it is necessary that the truth about gross violations of human rights must be:- established by an official investigation unit using fair procedures; fully and unreservedly acknowledged by the perpetrators; made known to the public, together with the identity of the planners, perpetrators and victims. International human rights norms demand that any newly established government should deal with past gross violations of human rights in a way that ensures that the abovementioned requirements are met."

[118] THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, *Promotion of National Unity and Reconciliation Act 34 of 1995*, http://www.justice.gov.za/legislation/acts/1995-034.pdf (last visited August 18, 2015).

[119] *Id.* at ¶ 1.

[120] *Id.* at ¶¶ 3, 4 and 5.

[121] *Id.* at Article 3(1)(b).

In defining an 'act associated with a political objective,' Act 34 pointed at all offenses advised, planned, directed, commanded, ordered, or committed by persons who broadly acted on behalf of the State or a known political organization or liberation movement.[122] Whether a particular act or omission fell within the scope was to be decided according to a range of criteria clearly set forth in Act 34, including the motive of the perpetrator, the context, legal, and factual nature of the act, and whether it was proportional to the objective allegedly pursued.[123]

The South African Truth and Reconciliation Commission produced a comprehensive five-volume report documenting the gross human rights violations committed in South Africa by all sides during the Apartheid era,[124] thanks in part to its willingness to grant amnesties only on a conditional basis. South Africa's individualized approach towards the granting of amnesties successfully avoided the dangers of the indiscriminate blanket amnesties, as it demanded instead "an active role of memory" underpinning a "quest for truth, which is owed to the victims for moral reasons, [...] strictly connected with the need for maintaining the roots of identity and for constructing the dialectics between tradition and change lying at the core of constitutional democracy."[125] And by requiring applicants to expressly acknowledge the criminality of their actions as well as their culpability, it also contributed to upholding, rather than denying, the victims' right to justice;[126] a right to justice whose fulfillment does not necessarily entail a classical form of punishment, but may instead be duly guaranteed through a good faith and thorough investigation into the facts.

Truth and reconciliation commissions, as institutions, appeared on the scene at a point where the international opinion had begun to move towards prosecution and away from amnesty with the aim to "satisfy the right to know and understand the past" and to foster reconciliation.[127] Since 1974, some seventeen truth commissions have been established to enquire into the past of particular societies.[128] In the challenge to the constitutionality of South

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[122] *Id.* at Article 20.2.

[123] *Id.* at Article 20.3, with reference to Article 20.2.

[124] Meintjes & Méndez, *supra* note 8, p. 90.

[125] Pinelli, C., *Legal Treatment of Past Political Violence and Comparative Constitutionalism,* 12 COMP. L. REV. (2011), p. 7.

[126] *Id.* at 90.

[127] Dugard, J., *Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?,* 12 LEIDEN J. INT'L L., 1001–1015 (1999), p. 1005.

[128] Hayner, P., *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study,* 16 HUMAN RIGHTS QUARTERLY, 600 (1994), as cited in Dugard, *supra* note 127, p. 1005.

Africa's amnesty legislation in *Azapo v. President of the Republic of South Africa*, Chief Justice Ismail Mahomed stated:

> *Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatizing to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The [Promotion of National Unity and Reconciliation] Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible.*[129]

D. Sierra Leone: The Lomé Peace Accord, 1999

A prototypical example of a blanket amnesty can be found in the 1999 Lomé Peace Accord ("The Lomé Accord"), between the Government of Sierra Leone and the rebel Revolutionary United Front ("RUF").[130] In 1991, the RUF had begun attacks on the south-eastern border of the country so as to gain control of diamond mines in the region. President Kabbah was thrown out of office in 1997 following a violent military coup by Johnny Koroma, leader of the Armed Forces Revolutionary Council ("AFRC"), who shortly after invited RUF leader Foday Sankoh into the government. Human rights violations including child conscription rapidly escalated. In 1998, the Nigerian-led Economic Community of West African States Monitoring Group reinstated President Kabbah but non-stop violence on all sides finally led him and Sankoh to sign the Lomé Accord.[131]

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[129] *Azanian Peoples Organisation (Azapo) And Others v. The President Of The Republic Of South Africa*. CCT 17/96. Constitutional Court. 25 July 1996.

[130] *See* Keiseng Rakate, P., *Is the Sierra Leonean Amnesty Law Compatible with International Law?,* 3 MENSCHENRECHTSMAGAZIN, 151–154 (2000), p. 152.

[131] Smith, R.W., "From Truth to Justice: How Does Amnesty Factor In? A Comparative Analysis of South Africa and Sierra Leone's Truth and Reconciliation

The initial proposal of agreement was *ex facie* deemed inconsistent with a number of international law instruments which call for the investigation and prosecution of human rights violations and the perpetrators thereof,[132] i.e. the 1949 Geneva Conventions[133] and 1977 Additional Protocols,[134] the Convention on the Prevention and Punishment of Genocide,[135] the principle of Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity,[136] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[137] In his Seventh Report to the Security Council on the United Nations Observer Mission in Sierra Leone, former U.N. Secretary-General Kofi Annan rejected the proposed amnesty law out of hand:

> *... some of the terms which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity [...] Hence the instruction to my Special Representative to enter a reservation when he signed the peace agreement stating that, for the United Nations, the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.*[138]

Commissions", Political Science Honors Thesis, University of Connecticut - Storrs, 2010, pp. 32–33.

[132] Keiseng Rakate, *supra* note 130, pp. 152–153.

[133] Geneva Convention I: for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 (1949), Geneva Convention II: for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85 (1949), Geneva Convention III: Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (1949), and Geneva Convention IV: Relative to the Protection of Civilian Persons in time of War, 75 U.N.T.S. 287 (1949).

[134] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 U.N.T.S. 3 (1977), and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1125 U.N.T.S. 609 (1977).

[135] G. A. Res. 260/3, U.N. Doc. A/RES/260/3 (Dec. 9, 1948). Convention on the Prevention and Punishment of the Crime of Genocide.

[136] G. A. Res. 23/2391, *supra* note 31.

[137] G. A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[138] Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, S/1999/836, 30 July 1999, ¶ 55.

Notwithstanding the above, Article IX of the final Agreement provided a blanket amnesty for all participants in the conflict in the following terms:

> *1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.*
>
> *2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.*
>
> *3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement...*[139]

The Special Court for Sierra Leone was established by an agreement between the United Nations and the Government of Sierra Leone on January 16, 2002,[140] as an *ad hoc* hybrid tribunal[141] for the prosecution of serious violations of international humanitarian law based on Security Council Resolution 1315.[142]

In 2004, the Appeals Chamber of the U.N. Special Court declared the blanket amnesty contained in the Lomé Accord internationally invalid.[143]

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[139] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone. Lome, Togo. June 7, 1999, Article IX.

[140] Agreement between the United Nations and the Government of Sierra Leone and Statute of the Special Court for Sierra Leone, Jan. 16, 2002.

[141] It incorporates a number of national elements in its Statute. Moreover, the Trial and Appeals Chamber were composed of judges appointed by the government of Sierra Leone and judges appointed by the Secretary-General. *See* Meisenberg, S. M., *Legality of Amnesties in International Humanitarian Law: the Lomé Amnesty Decision of the Special Court for Sierra Leone,* 86 ICRC CURRENT ISSUES AND COMMENTS, 837–851 (2004), pp. 837–838.

[142] S. C. Res. 1315, on the situation in Sierra Leone, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

[143] *The Prosecutor v. Morris Kallon and Birma Buzzy Kamara*, Special Court for Sierra Leone, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on the

Despite acknowledging that sovereign states may within their discretionary power lawfully grant amnesties, the Appeals Chamber found that domestic amnesties cannot cover crimes under international law as they are subject to universal jurisdiction by reason of the fact that "[a] State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive [...] the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."[144]

The *Lomé* decision has been hailed as a benchmark in the development of international humanitarian law as well as a step towards the abolition of blanket amnesties for mass atrocities. For the first time, an international criminal court stated that amnesties are no bar to prosecution for all international crimes before international or foreign courts.[145]

The Lomé Accord not only failed to end the armed conflict in Sierra Leone, but also failed to deter further atrocities.[146] A year after its adoption, RUF rebels kidnapped members of the UN Mission in Sierra Leone and killed many demonstrators. Attacks from both sides of the conflict repeatedly hindered peace efforts to achieve a large-scale disarmament agreement. The civil war was not declared officially over until January 18, 2002.[147]

E. Argentina: The Repeal of the *Full Stop* and *Due Obedience* Laws, 2005

In 2001, Argentinian Federal Judge Gabriel Cavallo became the first to formally declare[148] the unconstitutionality of Argentina's laws No. 23.492

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challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber, 13 March 2004).

[144] *Id.*, ¶¶ 67 and 71.

[145] Meisenberg, S. M., *Legality of Amnesties in International Humanitarian Law: the Lomé Amnesty Decision of the Special Court for Sierra Leone,* 86 ICRC CURRENT ISSUES AND COMMENTS, 837–851 (2004), pp. 843 and 851.

[146] UNITED NATIONS, *Rule-of-law Tools ..., supra* note 14, p. 3.

[147] Smith, R.W., "From Truth to Justice: How Does Amnesty Factor In? A Comparative Analysis of South Africa and Sierra Leone's Truth and Reconciliation Commissions", Political Science Honors Thesis, University of Connecticut - Storrs, 2010, pp. 33–34.

[148] Juzgado Nacional en lo Criminal y Correccional Federal 4. Auto de 6 de marzo de 2001. Juez Gabriel Cavallo. Causa Nro. 8686/2000 "Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años" del registro de la Secretaría 7. [*Federal Criminal and Correctional Court No. 4. Order of Mar. 6, 2001. Judge Gabriel Cavallo. Case No. 8686/2000 "Simon, Julio, Del Cerro, Juan Antonio on abduction of children under 10" Register of the Secretariat 7*].

—the *Full Stop Law* (1986)[149] and No. 23.521—the *Law of Due Obedience* (1987).[150] Both laws shielded individuals from prosecution for great scale and systematic crimes committed in the context of the political repression perpetrated during Argentina's military dictatorships.

On April 20, 1998, criminal proceedings were initiated at the request of a Federal Prosecutor to investigate the circumstances surrounding the detention and subsequent disappearance of three individuals in 1978.[151] As a result of the inquiries, charges were brought against former members of the Argentinian Armed Forces for their involvement in the disappearances.[152] Despite not explicitly[153] ruling out criminal prosecution or civil liability, Judge Cavallo characterized both the *Full Stop Law* and the *Law of Due Obedience* as true amnesties that acted as "barriers to the prosecution of the deeds committed within the framework of the clandestine system of repression (1976–1983)."[154]

The *Full Stop Law* (1986) set a 60-day limit on the initiation of new criminal complaints relating to the offences committed by the "military personnel in the Armed Forces,"[155] as well as "law enforcement and penitentiary personnel in the Security Forces under operational control of the Armed Forces, that participated from March 24, 1976 to September 26, 1983 in the operations undertaken for the aforesaid purpose of fighting terrorism."[156] The 60-day limit also applied to those offences "linked to the establishment of violent forms of political action until December 10, 1983."[157]

On the other hand, the law commonly referred to as the *Law of Due Obedience* (1987) established the conclusive presumption that "commanders, junior officers, lower officers and serving troops of the Armed, Security, police and penitentiary Forces cannot be held criminally liable for the

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[149] Ley Nº. 23.492, de Punto Final, 23 de diciembre de 1986 [*Law No. 23.492 December 23, 1986*].

[150] Ley Nº. 23.521, de Obediencia Debida, 4 de junio de 1987 [*Law No. 23.521. June 4, 1987*].

[151] *Case No. 8686/2000, supra* note 148, Part I, ¶ 1.

[152] *Id.*

[153] '*De facto* amnesties': while not explicitly foreclosing criminal prosecution or civil remedies, they may have the same effect as an explicit amnesty law. *See* UNITED NATIONS, *Rule-of-law Tools ..., supra* note 14, p. 8.

[154] *Case No. 8686/2000, supra* note 148, Part V.

[155] Ley Nº. 23.049, de 9 de febrero de 1084 [*Law No. 23.049 (February 9, 1984)*], Article 10.1, February 9, 1984 [by reference]. *See* Ley Nº. 23.492, *supra* note 149, Article 1. Exceptions: fugitives and those declared in contempt (Article 1), and at any rate usurpation of the civil state and child abduction offences (Article 5).

[156] Ley Nº. 23.492, *supra* note 149, Article 1.I. *See* also Ley Nº. 23.049, *supra* note 155, Article 10.-1º).

[157] Ley Nº. 23.492, *supra* note 149, Article 1.II.

offenses described in Article 10.1 of the Law 23.049 on the understanding that they acted rendering due obedience."[158]

Judge Cavallo characterized the defendant's conducts—which otherwise would have been protected by the aforementioned statutes—as crimes under international law that violated *jus cogens* norms[159] affecting the international community on equal terms and thereby precluding any possibility of domestic amnesty.[160] It was his contention that the *Full Stop Law* and the *Law of Due Obedience* were ultimately designed to "ensure impunity of those responsible for crimes against humanity," but that should nevertheless be deemed ineffective on the ground that they contravened a number of international treaties in force at the time, that in any event, prevailed over domestic law based on the principle of hierarchy of norms.[161]

Judge Cavallo's decision was appealed. According to the appellant, Argentina's amnesty laws could not be subject to constitutional review due to their higher purpose of attaining social and political peace at the time they were passed.[162] In 2005, however, the Argentina's Supreme Court upheld the lower court judgment and conclusively declared the unconstitutionality of both the *Full Stop Law* and the *Law of Due Obedience,* as well as the lack of effect of "any act based upon them likely to become a barrier to the progress of the investigations or prosecutions of those responsible [for] crimes against humanity committed in the national territory of Argentina."[163]

A parallel can be drawn with regard to the Spanish 1977 Amnesty Act provisions. The International Covenant on Civil and Political Rights had entered into force in both countries months before they each adopted their amnesty laws,[164] and, interestingly enough, both countries have been

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[158] Ley Nº. 23.521, *supra* note 150, Article 1.III: "[…] In such cases, they will be considered to have behaved under duress, subject to higher authority and following orders, without a chance to inspect, oppose or resist them…".

[159] *Case No. 8686/2000, supra* note 148, IV. C) 2).

[160] *Id.* at III. H) ¶ 4; III. J) ¶¶ 5, 6 and 7.

[161] *Id.* at VI. A) ¶ 1.

[162] Corte Suprema de Justicia de la Nación. Sentencia de 14 de junio de 2005 [*Supreme Court. Judgement of June 14, 2005*], ¶ 6.

[163] *Id.* at 1 and 3.

[164] Argentina signed the Covenant on February 16, 1968, and ratified it on August 8, 1986. It entered into force on November 8, 1986. The *Full Stop* and *Due Obedience* laws entered into force on December 23, 1986 and June 4, 1987, respectively. *See* UNITED NATIONS, *Chapter IV. Human Rights. 4. International Covenant on Civil and Political Rights,* UNITED NATIONS TREATY COLLECTION https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV4&chapter=4&lang=en (last visited August 18, 2015).

requested to repeal the statutes by the Human Rights Committee.[165] After considering the second periodic report submitted by Argentina,[166] the Committee expressed concern that *Full Stop Law* and the *Law of Due Obedience* "deny effective remedy to victims of human rights violations during the period of authoritarian rule, in violation of articles 2(2, 3) and 9(5) of the Covenant."[167] Furthermore, it noted that "amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence," which clearly contributed to the fostering of "an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces."[168] These considerations led the Human Rights Committee to recommend that "appropriate care be taken in the use of pardons and general amnesties," "procedures be established that members of the armed forces or security forces against whom sufficient evidence of involvement in past gross human rights violations exists be removed from their posts," and the State party "continue to investigate the whereabouts of disappeared persons."[169]

Part IV. Spain's Amnesty Act, 1977–2014

Spain's 1977 Amnesty Act has been widely characterized as a blanket amnesty and remains in force today, despite allegations of non-compliance with international law and numerous requests from United Nations bodies to repeal it.

As previously discussed, on July 22, 2014, Pablo de Greiff, the U.N. Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, issued a report[170] after his first official visit to Spain. De Greiff, a transitional justice expert, was sent to Spain by the United Nations

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[165] Spain: Human Rights Committee. 94th Session. Consideration of the reports submitted by States parties under article 40 of the Covenant. Concluding observations of the Human Rights Committee. Spain. U.N. Doc. CCPR/C/ESP/CO/5 (2009). Argentina: Human Rights Committee. Consideration of the reports submitted by States parties under article 40 of the Covenant. Comments on Argentina. U.N. Doc. CCPR/C/79/Add.46 (1995).

[166] Human Rights Committee. Second periodic reports of States parties due in 1992: Argentina. U.N. Doc. CCPR/C/75/Add.1 (State party report) (1994).

[167] Human Rights Committee. Consideration of the reports submitted by States parties under article 40 of the Covenant. Comments on Argentina. U.N. Doc. CCPR/C/79/Add.46 (1995), ¶ 10.

[168] *Id.* at ¶ 10.

[169] *Id.* at ¶¶ 15 and 16.

[170] de Greiff, *supra* note 2.

Human Rights Council to assess the measures adopted by the Spanish authorities in relation to the gross human rights violations occurred during the Spanish Civil War (1936–1939), and the Francoist regime (1939–1975).[171] His goal was to become acquainted with the different initiatives undertaken by the Spanish democratic government since 1975, and to make recommendations on how to address the remaining challenges.[172] In his report, he notes that the Spanish authorities present the 1977 Amnesty Act as "the main obstacle to the opening of investigations and the initiation of criminal proceedings concerning the grave violations of human rights and humanitarian law" committed during the war and the subsequent dictatorship.[173]

A. Differing Legal Interpretations by National Courts

On very few occasions have Spanish domestic courts ruled on the interpretation of the 1977 Amnesty Act since it was enacted and entered into force. The cases listed below constitute a representative sample of how diverging the perspectives taken so far have been, and of how much the approach seems to differ depending on whether the crimes were allegedly committed in Spanish territory or abroad.

1. The *Ruano* Case (1995): Requirement of Political Intent and Non-Preclusion of Investigation into the Facts

On January 20, 1969, law student and left-wing activist Enrique Ruano died under suspicious circumstances. His death occurred three days after he was detained by the Franco regime's investigating brigade (*Brigada Político Social*) and remained under the custody of Francoist law enforcement officials.[174] His body was found lacking the collarbone in the inner courtyard next to the police station after he allegedly fell from the seventh floor. In the officers' version, the young man committed suicide by voluntarily jumping off the window. The regime endorsed this account of the events and on the day following Ruano's death, a regime-friendly newspaper published an alleged excerpt from the activist's personal diary reflecting suicidal thoughts. However, the thesis supported by Ruano's relatives in their constant attempts to have the authorities launch a real in-depth investigation differed: they claimed he had been murdered while in detention, and that part of the

[171] *Id.* at p. 4, ¶ 2.
[172] *Id.* at p. 4, ¶ 2.
[173] *Id.* at p. 14, ¶¶ 67 and 68.
[174] DOMINGUEZ RAMA, A., ENRIQUE RUANO: MEMORIA VIVA DE LA IMPUNIDAD DEL FRANQUISMO (Editorial Complutense, S.A., 1st ed. 2011), p. 19.

collarbone had been removed in an attempt to cover up evidence—a bullet impact.[175]

Twenty years after Ruano's death, three police officers were brought before Madrid's Provincial Court but were acquitted due to insufficient evidence as the missing part of the collarbone was never found, and therefore the murder could not be proved beyond a reasonable doubt.[176] Throughout the process, consideration was given to the possibility of applying the 1977 Amnesty Act:

> *The defense and the Public Prosecutor request the application of the Amnesty Law 46/77 of October 15, which entails a value judgment around the political intent of the accused. Such value judgment, which is referred to an inner and personal subjective element, must be inferred from a series of data, both previous and contemporary to the facts, which remain so far unknown. It cannot be said that the conduct of the intervening police officers was politically-motivated on the ground that the relevant evidence has not been examined. Consequently, the matter ought to be addressed at trial, where broader criteria and more data will provide with an insight into an issue full of nuances.... For now the Amnesty Act will not be applied to the case, without prejudice to the possibility of the discussion being re-opened at trial.*[177]

Two important consequences followed from the acquittal issued by Madrid's Provincial Court on December 19, 1995: first, a restrictive interpretation of the 1977 Amnesty Act was offered, which required the element of

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[175] *See* EL PAÍS. Archivo. *'Reabierto el 'caso Ruano' 25 años después',* by Bonifacio de la Cuadra. January 28, 1994. http://elpais.com/ diario/1994/01/28/ espana/759711607_850215.html (last visited August 18, 2015); EL PAÍS. Archivo. *'Absueltos por falta de pruebas los policías acusados de la muerte de Ruano',* by José Yoldi. July 25, 1996.http://elpais.com/diario/1996/07/25/ espana/838245619_850215. html (last visited August 18, 2015); EL PAÍS. Reportaje: Memoria Histórica. "*No se tiró, lo mataron*", by Natalia Junquera. January 17, 2009. http://elpais.com/ diario/2009/01/18/domingo/1232254357_850215.html (last visited August 18, 2015).

[176] "None of them [expert witnesses] is able to generalize as to the manner in which [the deceased] fell or committed suicide. None of them can assure that Mr. Ruano was shot." Audiencia Provincial de Madrid, Sentencia nº 308/96 (19-VII-1996) [*Provincial Court of Madrid, Judgment 308/96 (19-VII-1996)*], Hechos Probados [*Facts*], ¶¶ 5 and 6.

[177] Audiencia Provincial de Madrid. Auto (Sección 2ª), de 19 de diciembre de 1995 [*Provincial Court of Madrid. Order, Section 2, Dec. 19, 1995*].

political motivation even in the case of the so-called *special* amnesties; and second, the Act was not interpreted as precluding the investigation and fact-finding missions.[178] The Court's approach in *Ruano* is very similar to that in the case discussed below, where domestic courts interpreted the Pinochet-era amnesty narrowly, allowing cases to go forward in a way that circumvented the amnesty's clear attempt to secure high levels of impunity.[179]

2. The *Pinochet* Case (1998): Bypassing Chile's Blanket Amnesty for the Purpose of Extraditing and Trying General Augusto Pinochet

On April 18, 1978, the Chilean military *Junta* issued Decree Law No. 2191 ("the Decree")[180] in order to shield from prosecution the systematic violation of human rights that took place in the country following the 1973 military coup that overthrew the democratically elected government of President Salvador Allende. During the five years of military rule under the command of General Augusto Pinochet, agents of the Chilean government and the National Intelligence Directorate (*Dirección de Inteligencia Nacional* or "DINA")[181] killed over 2,115 civilians and bore responsibility for the arbitrary arrest, prolonged incommunicado detention, torture, and enforced disappearance of thousands of others—*desaparecidos*.[182]

The Decree excluded liability for "all persons who committed, as perpetrators, accomplices, or as covering up, criminal offenses during the

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[178] GIL GIL, *supra* note 74, p. 86.

[179] UNITED NATIONS, *Rule-of-law Tools ..., supra* note 14, p. 2.

[180] Decreto-Ley Nº. 2191, de Amnistía, de 18 de abril de 1978. Diario Oficial No. 30.042 [*Decree-Law No. 2191, of Amnesty (April 18, 1978). Official Journal No. 30,042*].

[181] Dirección de Inteligencia Nacional (*National Intelligence Directorate*). Created by virtue of Decree Law No. 595 (1974) and formally dissolved by Decree Law No. 1876 (1977). The DINA was a secret group of military officers under the command of General Pinochet specializing in 'counterinsurgency' which undertook a comprehensive program to 'eliminat[e] what it regarded as the ultraleft' through tactics that typically included summary executions, torture, enforced disappearances, prolonged incommunicado detention and forced exile. *See* Quinn, R.J., *Will the Rule of Law End? Challenging Grants of Amnesty for Human Rights Violations of a Prior Regime: Chile's New Model,* 62 FORDHAM L. REV., Issue 4 (1994), pp. 912–913.

[182] Quinn, R.J., *Will the Rule of Law End? Challenging Grants of Amnesty for Human Rights Violations of a Prior Regime: Chile's New Model,* 62 FORDHAM L. REV., Issue 4 (1994), pp. 905–906 and 913. *See also* Informe de la Comisión Nacional de Verdad y Reconciliación (Informe Rettig) [*Report of the National Commission on Truth and Reconciliation (Rettig Report)*], PROGRAMA DE DERECHOS HUMANOS. MINISTERIO DEL INTERIOR Y SEGURIDAD PÚBLICA. GOBIERNO DE CHILE, http://www.ddhh.gov.cl/ddhh_rettig.html (last visited August 18, 2015), p. 899.

period of the State of Siege, between September 11, 1973 and March 10, 1978, unless they [were] on trial or [had] been convicted."[183] The provision has been deemed to be a blanket amnesty due to the fact that an extremely broad range of crimes—including the most abhorrent violations of human rights, i.e. the international *core crimes*—did not count among the exceptions provided for in Article 3 of the same Decree.[184]

Acting on a provisional arrest warrant issued at the request of Spanish Judge Baltasar Garzón and on the basis of Spain's universal jurisdiction legislation at the time, Scotland Yard officers arrested General Augusto Pinochet—still a Chilean Senator and holder of a diplomatic passport—at the London Bridge Hospital on October 16, 1998, for extradition to Spain.[185] While the lower court granted amnesty,[186] on November 25, 1998, in a landmark case, the U.K. House of Lords overturned the first amnesty ruling and held that immunity did not cover such acts as torture, hostage-taking, and crimes against humanity, since these did not amount to official acts performed in the exercise of the functions of a Head of State.[187] On January 15, 1999, the House of Lords' ruling was unexpectedly annulled as a result of allegations of bias concerning Lord Hoffman—from the majority in the previous decision—and his alleged links with Amnesty International.[188] However, on March 24, 1999, the House of Lords announced a new decision.[189] General Pinochet could now only be extradited for crimes of torture and conspiracy to torture committed after December 8, 1988, when the UN Convention Against Torture came into force in the United Kingdom. Judge Garzón presented new cases to

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[183] Decreto-Ley Nº. 2191, *supra* note 180, Article 1.

[184] Quinn, *supra* note 182, p. 905.

[185] Audiencia Nacional. Juzgado Central de Instrucción No. 5. Auto de 16 de octubre de 1998 [*National High Court. Central Court of Investigation No. 5. Order of October 16th, 1998*]. *See also* Article 23(4) of the Spanish *Organic Law 6/1985, of 1 July, on the Judiciary* before the reforms passed on November 3, 2009 (*Organic Law 1/2009*), and on March 13, 2004 (*Organic Law 1/2014*).

[186] High Court of Justice. Queen's Bench Division, Divisional Court. *In the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum. Re: Augusto Pinochet Duarte.* October 28th, 1998. Pursuant to the UK State Immunity Act 1978, the Divisional Court of the Queen's Bench Division unanimously held that General Pinochet was entitled to sovereign immunity from prosecution on the ground that the was Head of State at the time the alleged crimes were committed.

[187] House of Lords. *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte,* 3 W.L.R. 1456 (H.L. 1998).

[188] House of Lords. *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte,* 2 W.L.R. 272 (H.L. 1999).

[189] House of Lords. *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte,* 2 W.L.R. 827 (H.L. 1999).

the Crown Prosecution Service and a (second) Authority to Proceed approving the extradition was issued by the U.K. Home Secretary.[190]

Ultimately, on October 8, 1999, the Bow Street Magistrate's Court ruled in favor of Spain's request to extradite General Pinochet, subject to the Home Secretary's final approval.[191] For the first time, a former Head of State was going to be judged by a foreign court of justice.

At the same time, the Appeals Chamber of the Spanish National High Court (*Audiencia Nacional*) held that domestic amnesty laws of other states could not prevent Spanish courts from carrying out prosecutions, and, in particular, that the Spanish judiciary was not bound by Chile's (blanket) amnesty legislation which, in turn, contravened international *jus cogens* norms:

> *Regardless of the fact that Decree-Law No. 2191 of 1978 may be regarded as contrary to international* jus cogens*, this Decree-Law ought not to be seen as a true pardon measure according to applicable Spanish law and is to be deemed as a decriminalization norm based on political expediency, so its application does not reach the acquitted defendant or the defendant pardoned abroad (Article 23.2.c of the Organic Law 6/1985, on the Judiciary), but the case of non-punishable conduct—by virtue of subsequent decriminalization norm—in the country where the crime was committed (Article 23.2.a), which no effect has whatsoever in the cases of extraterritoriality of the Spanish jurisdiction by application of the principles of universal protection and prosecution, having regard to Article 23.5 of the Organic Law 6/1985, on the Judiciary.*[192]

Ultimately, General Pinochet dodged extradition to Spain. On March 2, 2000, the U.K. Home Secretary, Jack Straw, decided under Section 12 of the Extradition Act 1989, that the Senator should not be extradited to Spain due to his lack of '*mental fitness to stand trial,*' and authorized his free return to Chile, despite initial medical records and having issued two previous Authorities to Proceed which were favorable to extradition.[193] However,

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[190] *Id.*

[191] Bow Street Magistrates' Court. *The Kingdom of Spain v. Augusto Pinochet Ugarte.* October 8th, 1999.

[192] Merits § 8, ¶ 6. Audiencia Nacional. Sala de lo Penal, Sección 1.ª, Auto de 5 de noviembre de 1998, Recurso de Apelación núm. 173/1998 [*National High Court. Criminal Division, Section 1, Order of November 5, 1998, Appeal 173/1998*].

[193] *'Statement on the release of General Pinochet'.* Home Secretary Jack Straw. BBC News. March 2, 2000. *See also* BBC NEWS. *'Pinochet "unfit to face trial."'*

Pinochet was stripped of his immunity upon his return to Chile at the request of Judge Guzmán, and the lower court decision was later upheld by the Chilean Supreme Court.[194] Pinochet died in 2006, after having been placed under house arrest in Santiago several times[195] for his alleged responsibility in the systematic killing of opponents of the 1973 military coup.[196]

3. The *Scilingo* Case (2007): *Jus Cogens* Norms and Non-Applicability of Statutory Limitations to Crimes Against Humanity

In 2007, Spanish courts found a way to respect both domestic law and the principle of non-applicability of statutory limitations to international crimes in the case of former Argentine navy officer Adolfo Francisco Scilingo. In 1997, upon his arrival in Spain for a television appearance,[197] Scilingo was arrested and later indicted for crimes committed in Argentina during the dictatorship years.[198] On November 4, 1998, the Spanish National High Court (*Audiencia Nacional*) upheld[199] Judge Garzón's order, and ruled that Spanish courts had jurisdiction to prosecute the crimes of torture, genocide, and terrorism committed in Argentina during the military dictatorships of the late 1970s and early 1980s by virtue of the principle of universal jurisdiction:

> *... arguing that, those Laws [Argentine Laws No. 23.492 and 23.521] have already produced their legal effects and continue to remain in force based on the principle of applicability of the*

January 12, 2000. http://news.bbc.co.uk/2/hi/uk_news/599526.stm (last visited August 26, 2015).

[194] KORNBLUH, P., THE PINOCHET FILE: A DECLASSIFIED DOSSIER ON ATROCITY AND ACCOUNTABILITY. (The New Press, 2003), p. 24.

[195] THE WASHINGTON POST. *'A Chilean Dictator's Dark Legacy'*, by Monte Reel and J.Y. Smith. December 11, 2006. http://www.washingtonpost.com/wp-dyn/content/article/2006/12/10/AR2006121000302.html (last visited August 26, 2015).

[196] BBC NEWS. *'Chile Caravan of Death: Eight guilty of murder'*. December 23, 2013. http://www.bbc.com/news/world-latin-america-25499373 (last visited August 26, 2015).

[197] EL PAÍS. España. '*Adolfo Scilingo, el recluso modelo que no se arrepiente de sus crímenes*', by Manuel Altozano. March 28, 2015. http://politica.elpais.com/politica/2015/03/28/actualidad/1427535034_826071.html (last visited August 28, 2015).

[198] Providencia (Juzgado de Instrucción nº5), de 28 de julio de 1998, Procedimiento Sumario 19/97 [*Order, Investigating Court No. 5, July 28, 1998, Summary Procedure 19/97*].

[199] Auto (Sala de lo Penal, Sección 3.ª), de 4 de noviembre de 1998, Recurso de Apelación núm. 84/1998 [*Order, Criminal Division, Section 3, Nov. 4, 1998, Appeal 84/1998*].

> *more lenient criminal law [...] Regardless of the fact that those laws may contravene* 'jus cogens' *norms of international law as well as international treaties ratified by Argentina at the time, the aforementioned are decriminalization rules, either based on the non-exercise of criminal action from a particular moment onwards or on the condition of that subordinated to the official or military hierarchy [...] which under no circumstance prevents the Spanish courts from exercising their extraterritorial jurisdiction by virtue of the principle of universal protection and prosecution as provided in article 23.5 of the Organic Law on the Judiciary... .*[200]

In order for extraterritorial criminal jurisdiction to lawfully apply under Spanish law in circumstances such as these, the individual must not have been acquitted, pardoned, or punished abroad—and, in the latter case, the sentence must not have been served.[201] The Spanish National High Court interpreted the requirement narrowly to the extent that Argentina's *Full Stop* laws were bypassed on the ground that they did not provide for pardons[202] but for decriminalization norms.[203]

Despite the lack of jurisdiction to prosecute crimes against humanity which occurred outside the national territory where neither the perpetrator nor the victims have links to Spain,[204] the Spanish National High Court contended in *Scilingo* that the conferral of jurisdiction in favor of Spanish courts to try crimes against humanity committed in Argentina was underpinned by the

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[200] *Id.* at Merits § 8.

[201] GIL GIL, *supra* note 27, p. 49.

[202] As to the difference between pardons (*indultos*) and amnesties (*amnistías*): "*An amnesty consists in a 'temporary derogation of the law' whereby a plurality of individuals benefit from a general law that cancels their criminal records, suspends the judicial proceedings in course and precludes the initiation of new proceedings regarding the crimes falling within the scope of the amnesty, whereas through a pardon, which can be both individual or general, the convicted individual is given either a total or a partial remission of the sentence*" GRACIA MARTÍN, L., LECCIONES DE CONSECUENCIAS JURÍDICAS DEL DELITO EN EL NUEVO CÓDIGO PENAL ESPAÑOL (2000), pp. 281–282, cited in GIL GIL, *supra* note 27, p. 49.

[203] Auto (Sala de lo Penal, Sección 3.ª), *supra* note 199, Merits § 8. *See* GIL GIL, *supra* note 27, p. 49.

[204] Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial [*Organic Law 6/1985, of 1 July, on the Judiciary*], Article 23.

international nature of such crimes, i.e. a *jus cogens* norm endowed with *erga omnes* validity that already existed in customary international law:[205]

> *... account taken of the fact that this amounts to individual responsibility for crimes against humanity, the possibility of prosecution is afforded to every State [...] In the end, one of the essential features of crimes against humanity—which from our perspective really defines them—is their prosecutability beyond the principle of territoriality... We therefore hold that it is lawful for a State to take on the defense of the interests of the international community and prosecute the offenders based on the principle of individual responsibility.*[206]

The Spanish Supreme Court partially overturned[207] the National High Court's ruling in *Scilingo* based on a breach of the principle of legality (crimes committed in 1976 had been punished according to a provision that first came into force in 2004).[208] The Court ultimately held Scilingo liable for crimes against humanity,[209] ruled against the applicability of statutory limitations, and recalled the obligation of all states to prosecute in these

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[205] IGNACIO ANITUA, G. *et al.*, DERECHO PENAL INTERNACIONAL Y MEMORIA HISTÓRICA. DESAFÍOS DEL PASADO Y RETOS DEL FUTURO. (Fabian J. Di Placido. Buenos Aires, 1st ed. 2012), p. 442.

[206] Sentencia de 16 de abril de 2005 [*Judgement on April 16 2005*]. It quotes Judge Cavallo's ruling of March 6, 2001 (*supra* note 148), whereby Argentina's *Full Stop* and *Due Obedience* laws were first declared to be unconstitutional (*see* V.4): "*However,* the entire Mankind and the States in which it is organized have an equal interest in the prosecution and punishment of the perpetrators and participants. *In order to ensure that the interest be effectively satisfied,* the law of nations affords jurisdiction to all States to prosecute the crimes committed against (universal jurisdiction) (…) *by prosecuting and punishing those responsible the State (even that of the territory where the crimes occurred)* will proceed in the interest of the international community as a whole, superior to that of the individual", cited in GIL GIL, A., *supra* note 27, p. 64.

[207] Sentencia de 1 de octubre de 2007 [*Judgement on October 1, 2007*].

[208] Article 697bis of the Spanish Criminal Code [Organic Law 10/1995, November 23] (version in force since Oct. 1, 2004). *See* IGNACIO ANITUA, *supra* note 205, p. 442 and 448: "... facing the problem of the applicable provision, [the Supreme Court] turns to the version of the [Spanish] Criminal Code in force at the time of the offence, i.e. articles 474 and 476 [and not article 607bis], which established the types of illegal detention".

[209] EL PAÍS. Archivo. '*El Supremo eleva a 1.084 años la pena de Scilingo por crímenes contra la humanidad*', by José Yoldi. July 5, 2007. http://elpais.com/diario/2007/07/05/espana/1183586418_850215.html (last visited August 28, 2015).

cases.[210] It appeared to endorse the proposition that neither a statute of limitations nor an amnesty law could preclude investigation into crimes against humanity.[211]

Scilingo is currently serving the sentence in a prison in Madrid. His request for semi-custodial regime was recently denied by Judge de Castro, partly on the ground that he has so far failed to show any remorse.[212]

B. Disregard for the Requests from U.N. Bodies

1. Requests for the Repeal of the 1977 Amnesty Act

In 1993, the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights, explicitly urged states to "abrogate legislation leading to impunity for those responsible for grave violations of human rights [...], thereby providing a firm basis for the rule of law."[213] In similar terms, the Human Rights Committee requested a number of states[214] to repeal their amnesty laws to the extent that they were incompatible with the obligations arising from the International Covenant on Civil and Political Rights. In the case of Spain, this observation has been made with regard to the 1977 Amnesty Act. In 2008, the Human Rights Committee expressed concern over the act's "continuing applicability" by recalling that "crimes against humanity are not subject to a statute of limitations,"[215] and drew the country's attention to the following two General Comments:

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[210] IGNACIO ANITUA, *supra* note 205, p. 447–448. *See also* Roht-Arriaza, N., *The Spanish Civil War, Amnesty and the Trials of Judge Garzón,* 16 INSIGHTS AM. SOC. INT'L L., Issue 24 (2012), p.2: "Judge Garzón had found that the [Spanish] Civil War era crimes constituted a continuing crime of illegal detention, which given the circumstances, was at the same time a domestic crime and a crime against humanity under customary international law. This dual nature of acts that are simultaneously national and international crimes has been used widely in Latin American courts to allow prosecution of crimes that were not defined as international crimes in the penal codes of the time." *See also supra* note 197.

[211] Roht-Arriaza, N., *The Spanish Civil War, Amnesty and the Trials of Judge Garzón,* 16 INSIGHTS AM. SOC. INT'L L., Issue 24 (2012), p. 1.

[212] *Supra* note 198.

[213] *Vienna Declaration and Programme of Action,* Jul. 12, 1993. U.N. Doc. A/CONF.157/23, ¶ 60.

[214] Nigeria, Republic of the Congo, Uruguay, El Salvador, Argentina, Peru, France (with regard to New Caledonia) and Chile. *See* PIGRAU SOLÉ, *supra* note 19, p. 75.

[215] Human Rights Committee. 94th Session. Consideration of the reports submitted by States parties under article 40 of the Covenant. Concluding observations of the Human Rights Committee. Spain. U.N. Doc. CCPR/C/ESP/CO/5 (2009), ¶ 9.

> *General Comment No. 20 (1992),* on Article 7, according to which amnesties are generally incompatible with the duties of States to investigate violations of human rights, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future.[216]

And,

> *General Comment No. 31 (2004),* on the nature of the legal obligations imposed on States parties to the Covenant, whereby the "obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole", and the "failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant."[217] With regard to those public officials allegedly responsible for violations of the Covenant, the comment also provides that "State Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties" and shall "assist each other to bring [them] to justice.[218]

In the light of these general comments, the Human Rights Committee urged Spain to consider repealing the amnesty law and to take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity.[219] Spain has widely argued that its 1977 amnesty law does not qualify as a *full stop* law[220] on the ground that it was adopted by the first democratically elected parliament after the dictatorship.[221] Nevertheless, although the Act cannot be strictly regarded as a *self*-amnesty, it has in effect ended up functioning as a complete *full stop* law inasmuch as it has been systematically used to file the complaints that have been brought before the national courts.[222]

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[216] Human Rights Committee. *General Comment No. 20 on Article 7,* 44th Sess. (1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/ Rev.1 at 30 (1994), ¶ 15.

[217] Human Rights Committee. *General Comment No. 31,* 80th Sess. (2004), Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), ¶¶ 4, 15, 18.

[218] *Id.* at ¶ 18.II.

[219] Human Rights Committee, supra note 215, ¶ 9 (a) and (b).

[220] In allusion to Argentina's *Full Stop* Law: Law No. 23.492, *supra* note 149.

[221] OHCHR News, *supra* note 64, ¶ 28.

[222] *Id.*

2. Requests Regarding Enforced Disappearances

Also during the Human Rights Committee's ninety-fourth session,[223] note was taken with concern of the reports from Spanish families on the obstacles encountered in the judicial and administrative formalities they had to undertake in order to obtain the exhumation of the remains and the identification of their disappeared relatives. Consequently, the Human Rights Committee suggested the creation of a commission of independent experts to establish the historical truth about human rights violations committed during the Spanish civil war and the Franco dictatorship, and emphasized the need for the State to allow families to exhume and identify victims' bodies as well as provide them with adequate compensation where appropriate.[224]

A year later, the U.N. Committee against Torture recalled that Spain should ensure "that acts of torture, which also include enforced disappearances, are not offences subject to amnesty" and "that the victim of an act of torture obtains redress and has an enforceable right to compensation [under article 14 of the Convention]."[225] This Committee finally encouraged the State to "continue to step up its efforts to help the families of victims to find out what happened to the missing persons, to identify them and to have their remains exhumed."[226]

Finally, in November 2013, the U.N. Committee on Enforced Disappearances[227] adopted some concluding observations regarding Spain's report[228] submitted in accordance with Article 29, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance[229] (2006). This Committee expressed concerns around the information received about the Spanish Supreme Court's ruling regarding the investigation of alleged cases of enforced disappearance where, among other considerations such as the existence of an amnesty law, it held that

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[223] Human Rights Committee, 94th Session, 13–31 October 2008.

[224] Human Rights Committee, *supra* note 215, ¶ 9 (c) and (d).

[225] Committee Against Torture, 43rd Session, 2–20 November 2009.

[226] Committee Against Torture. 43rd Session. Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Spain. U.N. Doc. CAT/C/ESP/CO/5 (2009), ¶ 21.II.

[227] Committee on Enforced Disappearances, 74th Session, 4–15 November 2013.

[228] Committee on Enforced Disappearances. Report of State parties pursuant to article 29, paragraph 1, of the Convention due in 2012. Spain. U.N. Doc. CED/C/ESP/1 (2012).

[229] International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, U.N. Doc. A/61/448 (2006). Spain signed it on September 27, 2007, ratified it on September 24, 2009.

> *... the argument regarding the continuing nature of the offence is nonetheless a fiction that defies legal logic. It is not reasonable to argue that a person unlawfully detained in 1936, whose remains have not been found in 2006, can be rationally thought to have continued in detention beyond the 20-year term of limitation, to take the maximum.*[230]

In this context, the Committee urged the State to "ensure that the term of limitation actually commences at the moment when the enforced disappearance ends, i.e., when the person is found alive, his or her remains are found, or their identity restored."[231]

Another Committee recommendation underscored the State's duty under the Convention to investigate all disappearances "thoroughly and impartially, regardless of the time that has elapsed since they took place and even if there has been no formal complaint."[232] Most importantly, the Committee deemed the interpretation given to the 1977 Amnesty Act to be the strongest legal impediment to the performance of such investigations in domestic law, and suggested that it should be removed in order to pave the way for legislative and judicial measures intended to fulfill the country's international obligations.[233]

C. The *de Greiff* Report

1. Specific Observations

In his 2014 report, Special Rapporteur Pablo de Greiff endorses[234] the recommendations made by the different U.N. bodies in the past and calls on the Spanish executive to repeal the 1977 Amnesty Act.[235] Specific observations are made in the following areas.

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[230] Spanish Supreme Court. Judgement 101/2012. February 27, 2012. [As translated in the Committee's concluding observations, ¶ 11].

[231] Committee on Enforced Disappearances. 74th Session. Concluding observations on the report submitted by Spain under article 29, paragraph 1, of the Convention. U.N. Doc. CED/C/ESP/CO/1 (2013), ¶ 12.

[232] *Id.*

[233] *Id.*

[234] de Greiff, *supra* note 2, p.14, ¶ 71.

[235] *Id.* at p. 22, Recommendation q).

a. Truth

The report notes how in Spain there has never been an official census properly reflecting estimates of the total number of victims of the civil war and the dictatorship.[236] Attention is also drawn to the fact that, despite the progress achieved by the *Historical Memory Law*,[237] no comprehensive plan has ever been devised as a matter of state policy to promote the establishment of the truth concerning past abuses.[238] Finally, important military and police archives remain classified because declassification would pose a risk to national security.[239]

b. Justice

The 1977 Amnesty Act continues to be regarded as the main obstacle to the investigation and prosecution of the grave human rights violations that occurred during the civil war and the Franco dictatorship.[240] De Greiff urges[241] the Spanish authorities to repeal it on the grounds that such law is incompatible with several international obligations undertaken by Spain—notably Article 2(3) of the International Covenant on Civil and Political Rights—and conflicts with the principle of non-applicability of statutory limitations to crimes against humanity.[242] The Rapporteur also encourages the Spanish national courts to uphold such obligations and principles in the same way they did in the cases against navy officer Scilingo and General Pinochet,[243] where comparable blanket amnesties were bypassed and full recognition was given to the *jus cogens* nature of the crimes in question.

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[236] *Id.* at p.10, ¶ 45.

[237] Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura ("Ley de la Memoria Histórica") [*Law 52/2007, of December 26, whereby the rights of those who suffered persecution or violence during the civil war and the dictatorship are recognized and extended, and measures in their favor are established ("Historical Memory Law")*]. Note that no budget funds have been allocated for the implementation of the law since 2011. *See* de Greiff, *supra* note 2, p. 13, ¶ 63.

[238] De Greiff, *supra* note 2, p. 11, ¶ 46. The *Historical Memory Law* does not provide for a state policy on the matter, rather it delegates full responsibility for the exhumation projects to families and private organizations. *See also* de Greiff, *supra* note 2, p. 14, ¶ 64; and at p. 20, Recommendation i).

[239] *Id.* at p. 12, ¶ 54.

[240] *Id.* at p. 14, ¶ 68.

[241] *Id.* at p. 22, Recommendation q).

[242] *Id.* at p. 14, ¶¶ 71 and 72.

[243] *Id.* at p. 15, ¶ 73.

c. Reparation

The report insists on the importance of extending the recognition and coverage of the existing reparation programs[244] and urges the Spanish state to give due effect to the annulment of sentences handed down in violation of due process during the civil war and the Franco regime.[245]

d. Guarantees of Non-Recurrence

De Greiff notes with concern that training programs for judges and prosecutors do not address the obligations of the State in the prosecution of international crimes.[246] He puts forward recommendations to strengthen the human rights training of civil servants as a means of promoting education and awareness of subjects related to the civil war and the Franco era.[247]

2. Events of Concern

Finally, the Special Rapporteur expresses concern around three events that took place during his official visit. First, the passage of an amendment to the Organic Law 6/1985, on the Judiciary,[248] whereby the scope of the exercise of universal jurisdiction will be dramatically undercut; thus Spain will only be able to prosecute crimes against humanity committed abroad insofar as the perpetrator is a Spanish citizen or permanent resident, or an alien on Spanish territory at the time whose extradition has been refused by the Spanish authorities.[249] Second, the Public Prosecutor's stance before the National High Court contrary to allowing the extradition to Argentina of an alleged Franco-era torturer. And third, the fact that the Constitutional Court has so far been prevented from ruling on the application and interpretation of the 1977 Amnesty Act.[250]

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[244] *Id.* at p. 21, Recommendation n).
[245] *Id.* at p. 21, Recommendation p).
[246] *Id.* at p. 10, ¶ 41.
[247] *Id.* at p. 21, Recommendation m).
[248] Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial [*Organic Law 6/1985, of 1 July, on the Judiciary*].
[249] Article 23(4)(a), Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial [*Organic Law 6/1985, of 1 July, on the Judiciary*].
[250] OHCHR News, *supra* note 64, ¶ 32, 33 and 34.

Part V. Conclusions

> "*Las virtudes de la transición se han convertido en vicios de la democracia*" ["*The transition's virtues have become vices of the democracy*"].[251]

Spain's current approach to the investigation of the crimes committed during the civil war and the dictatorship years is ultimately underpinned by the existence—or at least the interpretation—of the 1977 Amnesty Act. Special Rapporteur Pablo de Greiff makes a strong case for showing institutional commitments and designing national policies aimed at ensuring full observance of the rights to truth, justice, reparation, and guarantees of non-recurrence in addressing gross violations of human rights.[252] The large gap existing between the perpetration of such *core crimes* and the few initiatives put in practice to date justifies a call for immediate action directed at governmental and judicial authorities. As de Greiff notes, it would be a mistake to frame the relevance for policy making and policy implementation in the field as a matter of partisan politics since the full observance of the rights at stake theoretically represents a common enterprise shared by all Spaniards.[253]

The Spanish 1977 Amnesty Act was enacted within the framework of a transitional process threatened by the constant fear of a military coup and an eventual relapse into a civil war. Against this backdrop, a reformist stance as opposed to a groundbreaking stance was taken and thus no substantial departure was made from the Francoist political and judicial structures. However, the threat of institutional breakdown is no longer such and there certainly seems to be no reason why the State should refrain from reexamining past legislative steps, especially when these are repeatedly called into question by the most authoritative experts in the field.

On certain occasions, amnesty provisions can play a valuable role within transitional processes. International laws and the United Nations policies are not opposed to the granting of amnesties *per se,*[254] rather they strive to set limits on their permissible scope since they ought not to be enacted in order to shield perpetrators of international crimes from prosecution. Even when adopted for the pressing purpose of advancing national reconciliation as a legitimate response to the "peace versus justice" dilemma,

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[251] COLOMER, J.M., LA TRANSICIÓN ESPAÑOLA: EL MODELO ESPAÑOL (Anagrama, 1998), p. 181.

[252] de Greiff, *supra* note 2, ¶¶ 15, 17, 22 and 23.

[253] *Id.* at p. 5, ¶ 10.

[254] UNITED NATIONS, *Rule-of-law Tools ..., supra* note 14, p. 44

certain principles must be immune to the balancing of interests based on both legal and moral standards.

It is nowadays widely acknowledged that the complete lack of prosecutorial and investigation measures whenever gross human rights violations have been detected amounts to a failure on the part of the State to abide by its obligations under international law. The Spanish amnesty has been condemned internationally. The 1977 Act constitutes an all-encompassing immunity law that (1) prevents the prosecution of individuals who could be held accountable for crimes against humanity, (2) interferes with the victims' right to an effective remedy, and (3) restricts the collective right to know the truth about the violations of human rights that occurred during the civil war and the Franco dictatorship. Furthermore, it is clearly inconsistent with Spain's obligations under the International Covenant on Civil and Political Rights (1966), and it might even amount to a violation of customary international law.

Within the current international legal framework, amnesties are no longer assumed to be unconditionally lawful.[255] They are legitimate insofar as they apply to crimes that the State has no international requirement to prosecute or extradite for prosecution.[256] Account taken of the fact that it covers crimes that cannot be subject to statutory limitations and whose prohibition has the status of a *jus cogens* norm, the 1977 Amnesty Act must not be accorded international legal recognition, and should not prevent prosecution before foreign or international courts in the future.

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[255] Laplante, *supra* note 17, p. 918.

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