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Impunity: Elements for an Empirical Concept

Jorge E. Viñuales*

This Article attempts to set the basis for a new approach to the concept of impunity. Drawing upon the experience of the author as launcher and director of a project to develop a quantitative concept of impunity for the Swiss Section of Amnesty International, this piece discusses the main difficulties, both methodological and substantial, as well as the advantages that an empirical conceptualization of impunity could have. In the last section, the author puts forward a proposal aimed at developing an international impunity index that would help monitor and compare the impunity phenomenon across countries.

What is time? . . . We surely know what we mean when we speak of it. We also know what is meant when we hear someone else talking about it. What then is time? Provided that no one asks me, I know.¹

Introduction

Augustine's famous *dictum* could easily be applied to the less mystic, though not less mysterious, question of what is impunity. The number of reports, declarations, speeches, and legislative acts using the term impunity has skyrocketed in the last few decades.² Everybody is against impunity, provided they know what it is. In an interesting article focusing on the definition of impunity, a

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1. SAINT AUGUSTINE CONFESIONS 230 (Henry Chadwick trans., Oxford Univ. Press) (1991).

2. See, e.g., Mary Margaret Penrose, *Impunity - Inertia, Inaction, and Invalidity*, 17 B.U. INT'L L.J. 269, 273 (1999) (comparing definitions of impunity).

young scholar noted: "Impunity, much like accountability, is a term with a distinct legal meaning. Yet it is rare to find either phrase adequately defined in a particular work. Rather, these terms have become so ubiquitous that their respective meanings are deemed obvious."³ She then explored a number of useful characterizations of the term impunity, such as those of Cherif Bassiouni, Christopher Joyner, Charles Harper, Louis Joinet, and Amnesty International, among others.⁴ These characterizations all join in their attempt to spell out, to de-condense the myriad implications that the term impunity both hides and suggests. This article is premised on the idea that in doing so, each interpreter tends to emphasize one or more situations that could be referred to as impunity, the reasons for this particular emphasis seldom being explicit.

The most authoritative characterization of the term impunity so far is probably the one given by Louis Joinet, the U.N. Special Rapporteur on the question of the impunity of perpetrators of violations of human rights.⁵ As it will be shown, Joinet's characterization underwent significant changes over time, which can be organized around two axes.⁶ The first axis concerns the relationship between impunity and punishment. The fluctuations on this front can be retraced by reading the definitions of impunity given in consecutive U.N. reports.⁷ In his 1996 Report to the Sub-Commission on Prevention of Discrimination and Protection of

3. *Id.* at 273.

4. *Id.* at 274-76 (citing U.N. Econ. & Soc. Council, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political Rights)*, U.N. Doc. E/CN.4/Sub.2/1996/18 (June 29, 1996) (prepared by Louis Joinet) [hereinafter ECOSOC (June 29, 1996)]; Amnesty Int'l, *Disappearances and Political Killings: Human Rights Crises of the 1990's*, AI Index ACT 33/01/94, Jan. 1, 1994; Charles Harper, *From Impunity to Reconciliation*, in *IMPUNITY: AN ETHICAL PERSPECTIVE* viii, ix (Charles Harper ed., 1996); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice*, *AUTUMN LAW & CONTEMP. PROBS.* 9, 18 (1996); Christopher C. Joyner, *Redressing Impunity for Human Rights Violations*, 26 *DENV. J. INT'L L. & POL'Y* 591, 595-96 (1998).

5. ECOSOC (June 29, 1996), *supra* note 4, at 9.

6. The reports do not use this categorization; however, I think it is helpful to present the major developments that occurred over time.

7. ECOSOC (June 29, 1996), *supra* note 4, at 9; U.N. Econ. & Soc. Council, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political): Final Report* 15-16, U.N. Doc. E/CN.4/Sub.2/1997/20 (June 26, 1997) (prepared by Louis Joinet) [hereinafter ECOSOC (June 26, 1997)], U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political): Revised Final Report* 17, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997) (prepared by Louis Joinet) [hereinafter ECOSOC (Oct. 2, 1997)].

Minorities,⁸ Mr. Joinet introduced the following concept of impunity: "Impunity means the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to them being accused, arrested, tried and, if found guilty, convicted."⁹ The following year, the definition was amended by the incorporation, immediately after the word "convicted," of the phrase "and to reparations being made to their victims."¹⁰ That same year this definition was further amended as follows: "[A]nd, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."¹¹ These changes reflect the underlying idea that impunity cannot be addressed if the victims do not receive adequate reparation; however, while this is certainly a desirable objective, it is not an obvious addition. More precisely, it is not obvious whether punishment without compensation or compensation without punishment constitutes "impunity."¹² In this respect, the Rapporteur took a clear stance, thereby introducing an ideological element into his definition of impunity.

The ideological component of any attempt to spell out the concept of impunity is even more apparent from the perspective of the second axis, which refers to the type of human right that has been violated. After the presentation of preliminary reports on the question, the Sub-Commission adopted resolution 1993/37, requesting that the study cover not only breaches to civil and political rights, but also grave violations to economic, social, and cultural rights.¹³ This openness to an area as difficult to

8. Subsequently named Sub-Commission on the Promotion and Protection of Human Rights. U.N. Econ. & Soc. Council, Sub-Comm. on the Promotion and Protection of Human Rights, *Annotations to the Provisional Agenda 1*, U.N. Doc. E/CN.4/Sub.2/2000/1/Add.1 (June 23, 2000).

9. ECOSOC (June 29, 1996), *supra* note 4, at 9.

10. ECOSOC (June 26, 1997), *supra* note 7, at 15-16.

11. ECOSOC (Oct. 2, 1997), *supra* note 7, at 17.

12. One could recall, for instance, the transitional process in South Africa. There, despite substantial efforts to create and implement an accountability method (the Truth and Reconciliation Commission, with power to grant or deny individual amnesties), in practice reparations did not seem to be in the government's agenda. The question is whether one should consider the efforts undertaken to ensure accountability sufficient to exclude the term impunity or insufficient because of the inadequate progress regarding reparations.

13. See U.N. Econ. & Soc. Council, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Question of the Impunity of Perpetrators of Violations of Human Rights 3*, U.N. Doc. E/CN.4/Sub.2/Res/1993/37 (Aug. 26, 1993) [hereinafter ECOSOC (Aug. 26, 1993)] ("*Decides*, having regard to the interdependence and

circumscribe as economic, social, and cultural rights was, no doubt, a huge burden for the Special Rapporteur, Mr. El Hadji Guissé, who clearly was aware of the many controversies affecting the actual enforceability of these rights.¹⁴ His report provided the following characterization:

Impunity can be understood as the absence or inadequacy of penalties and/or compensation for massive and grave violations of the human rights of individuals or groups of individuals. This definition is applicable to civil and political rights, as well as economic, social and cultural rights, and also to collective or communal rights.¹⁵

This definition, like the more precise one presented in Mr. Joinet's Report, leaves substantial room for different and possibly conflicting interpretations. More importantly, it is not clear who should be held responsible for apparent possible violations such as an inadequate supply of water or the ramifications of an excessively heavy burden. In this context of vagueness and controversy, it could be useful to look for a more empirical basis to help bridge the gap between the concept of impunity and its actual uses.

Many organizations have been actively involved in detecting and fighting impunity in practice.¹⁶ The efforts of Amnesty International ("AI") in this area are noteworthy. While AI has its own way to flesh out the contents of the term impunity,¹⁷ such

indivisibility of civil and political rights and economic, social and cultural rights, to request the Special Rapporteurs to continue their study on the second aspect of the question, concerning economic, social and cultural rights.").

14. See U.N. Econ. & Soc. Council, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Final Report on the Question of the Impunity of Perpetrators of Violations of Human Rights (Economic, Social and Cultural Rights)* 5, U.N. Doc. E/CN.4/Sub.2/1997/8 (June 27, 1997) (prepared by El Hadji Guissé) [hereinafter ECOSOC (June 27, 1997)] ("This document, based on the latter two reports mentioned above, thus constitutes the final report on the impunity of perpetrators of violations of economic, social and cultural rights - a final report in which very many questions of great importance are nevertheless raised.").

15. See *id.* ¶ 20.

16. To name but a few of them: Human Rights Watch, Transparency International, TRIAL (Track Impunity Always).

17. AI seems to link the concept of impunity to that of international crimes. A possible current statement of such policy can be found in the *Brussels Principles Against Impunity and for International Justice* elaborated during a Conference organized jointly by AI-Belgium and other organizations in March 2002. See COAL FOR THE INT'L CRIMINAL COURT, BRUSSELS GROUP FOR INT'L JUSTICE, BRUSSELS PRINCIPLES AGAINST IMPUNITY AND FOR INT'L JUSTICE 3 (2002), <http://www.iccnw.org/?mod=country&iduct=17> (last visited Sept. 15, 2006) ("'Impunity' is understood as failing to investigate, prosecute and try natural and legal persons guilty of serious violations of human rights and international humanitarian law. For the purpose of these Principles 'serious violations of human rights and international humanitarian law' mean in particular war crimes, crimes

contents may lose pace with actual practice. This piece is an attempt to tie the concept of impunity to its practice, as reflected by AI's efforts in this area. I will discuss the main elements of what would be an empirical concept of impunity, one that would be based on the practice of a number of authoritative organizations and whose conceptual expression would be constantly updated through the use of a quantitative index of impunity.

Throughout 2005, I had the opportunity to initiate and conduct a project for the Swiss section of AI aimed precisely at identifying a measurable concept of impunity.¹⁸ The project was an exploratory study undertaken by a group of volunteer members of AI Switzerland. In what follows, I would like to present my personal views regarding some of the results this research yielded. For confidentiality reasons, I have removed every piece of AI's internal information and asked for AI's authorization before submitting this piece. As part of this authorization, I must note that the study and its findings do not necessarily reflect current or future AI policy and/or practice and that AI does not necessarily agree with them. The data discussed is, moreover, strictly limited to that publicly accessible on AI's online library, and with this comes all the methodological implications that such an approach may have.

These results are worth sharing for five main reasons. First, the concept of impunity derived from this project is not merely the result of introspection. The team considered more than 3,000 AI public documents of which more than 1,000 were reports, selecting a representative sample of ninety-eight reports from this narrower pool to then analyze in detail.¹⁹ Second, the authoritative character of AI's research in the field and its wide use as a source

against humanity, genocide, torture, extrajudicial executions and forced disappearances . . .").

18. The project involved thirteen young scholars and professionals to whom I am indebted, particularly Ms. Sina Zintzmeyer, who was the co-author of the final report, as well as to Marko Bandler, who designed the methodology to select the sample. The other participants were E. Alvarez, M.-L. André, D. Carnal, C. Cosenza, S. Dubach, V. Druz, M. Lecerf, F. Messina, I. Ovando, D. Schmidiger, and D. Yared.

19. Initially, the project entailed analyzing more than 1,000 reports instead of a representative sample, but for a number of organizational and time constraints, this could not be done. The number of reports available at AI's online library on the theme "impunity" changes regularly. See AI library archive for "impunity" results, <http://web.amnesty.org/library/eng-325/index>. As of October 10, 2006, there were 3,366 documents under this heading, of which 1,542 are reports. At the time the team undertook the research (the second half of 2004), the number was lower (approximately 3,000 documents, with roughly 1,000 reports). For further detail, see the description of the methodology followed in Appendix 1.

by external observers and analysts draw attention to the way AI envisions the concept of impunity in its everyday research and monitoring practice.²⁰ Third, as will be shown, the analysis conducted highlighted areas of the concept of impunity that appear to be relatively neglected.²¹ The existence of such gray areas seems to be particularly important, considering that visibility is a necessary preliminary step for any attempt to counter impunity effectively. Fourth, the experience of trying to grasp this concept in a more empirical way suggested that much could be gained from building a quantitative concept of impunity. Indeed, despite the inherent difficulty of the task, I think that such a concept can be built without disqualifying losses in terms of flexibility, objectiveness, or overall relevance. Finally, an empirical concept of impunity could serve as the dependent variable of future regression models seeking to explain impunity. Such models would represent an invaluable tool to support qualitative approaches to the fight against impunity, such as the ones proposed by the U.N. Special Rapporteurs or that of AI.²²

It is important to note that, for the most part, the analysis assumes that the work of AI is a reasonable indicator of what the term impunity covers in practice. This assumption can be seen as either controversial or preliminary. It can first be considered controversial given the obvious fact that, from a methodological point of view, one cannot expect to derive a general empirical concept of impunity from the work of a single organization, no matter how important or influential this organization may be. Nonetheless, I prefer to approach this assumption as a preliminary one in two main respects. First, as stated in the title, the analysis only aims at providing some elements towards an empirical concept of impunity. For this reason, I have been cautious to use the conditional mode in virtually all the assertions made throughout this piece. Second, and more generally, I think that in trying to distill an empirical concept of impunity, AI's work is a reasonable place to start.²³

20. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL AGREEMENTS* 162-66 (1995) (noting the importance of non-governmental organizations in general, and AI's yearbook in particular, in monitoring and reporting human rights abuses, and the UN's near-total reliance on such reports).

21. See *supra* notes 3-17 and accompanying text.

22. See *id.*

23. AI's documentation is an important primary source for the study of human rights violations as a whole. This is largely due to both its rigorous information gathering and analysis standards and its strong commitment to make this

I begin with a review of the procedure followed to derive a broad empirical concept of impunity before turning to the ways in which this concept could be used to organize the understanding of this phenomenon. The piece ends with a proposal to develop a quantitative index of impunity that could be used to comparatively assess the levels of impunity across countries.

I. An Empirical Concept of Impunity: Where to Start?

Impunity is a vague term. Its vagueness resides in the subtle tension between what it suggests and what it hides. For instance, while it is quite obvious that a pardon given to a torturer would be perceived as impunity by most observers, such a perception would be much more ambiguous when the term impunity is used to describe “crimes against creation or letting jobs be cut for thousands of men and women because they are not competitive in the Free Market.”²⁴ These two cases reflect the tension inherent in most attempts to spell out the idea of impunity, which are, quite naturally, value-laden.

Ambiguity pervades the use of the term impunity and may arise even in cases where it would seem fully appropriate. Suppose that a military officer receives the order to torture a terrorist in order to get information as to the location of a bomb about to blow up in one of the city’s schools. Suppose further that this officer executes the order and that the information obtained turns out to be critical in saving the lives of hundreds of children. Should such an officer be punished, and, if yes, to what extent? Should the hypothetical terrorist or his/her family be compensated? Does this fact pattern involve impunity? This example,²⁵ which sadly enough may not be the result of pure

information easily available. Moreover, AI’s broad focus on human rights violations of different sorts reduces, to a considerable extent, the existence of prior biases in the issues covered. Furthermore, AI has played a major role in shaping human rights norms, including the fight against impunity. For further detail on AI’s internal practices and influence see generally ANN MARIE CLARK, *DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS* (2001); STEPHEN HOPGOOD, *KEEPERS OF THE FLAME: UNDERSTANDING AMNESTY INTERNATIONAL* (2006).

24. Raul Soza, *The Church: A Witness to the Truth on the Way to Freedom*, in *IMPUNITY: AN ETHICAL PERSPECTIVE* 60, 66 (Charles Harper ed., 1996). Soza’s position is, of course, especially controversial. This is in fact what it makes it an illuminating example of the extent to which the term impunity may be ideologically loaded. While one may think this use of the term impunity is extremely controversial, it is not as far from the mainstream characterization as one may think. See, e.g., ECOSOC (June 26, 1997), *supra* note 7, at Annex II, Section II.A.

25. It must be clear that this example does not reflect AI’s policy on this issue. See Amnesty Int’l, *Torture and ill-treatment: the arguments*, at

conjecture, poses a dilemma. The circumstances surrounding the case perhaps would attenuate the reaction both from politicians and the public opinion in the country; however, the prohibition of torture is widely recognized as absolute, as a prohibition that a country cannot derogate under any circumstance.²⁶ Similar tensions also may arise in less ambiguous cases. Some people in Latin America may feel that crimes committed by the Chilean or Argentine dictatorships were “worth” the cause of fighting communist subversion.²⁷ For such people, the term impunity as applied to Pinochet or Videla would make little sense.²⁸ On the other hand, a large portion of international public opinion and virtually all non-governmental organizations (“NGOs”) active in the fight against impunity welcomed the Pinochet affair and its multiplier effect.²⁹

<http://web.amnesty.org/pages/stoptorture-arguments-eng> (last visited Sept. 14, 2006), for a detailed statement of AI’s policy on the issue of torture.

26. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 4.2, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/2890 (Dec. 16, 1966) (excluding torture from the articles that a State Party may derogate in times of emergency); Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 222, 232 [hereinafter ECHR] (commonly referred to as the European Convention on Human Rights) (same); Organization of American States, American Convention on Human Rights art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR] (same); Arab Charter on Human Rights art. 4, Sept. 15, 1994, *translated in* 18 HUM. RTS. L.J. 151, 152 (1997) (not in force) (same). The existence of a hierarchy has been asserted several times by the International Court of Justice. See FREDERIC SUDRE, *DROIT INTERNATIONAL ET EUROPÉEN DES DROITS DE L’HOMME* 59-64 (3d ed. 1997), for examples of that court’s decisions and advisory opinions.

27. *But see* Amnesty Int’l, *supra* note 25, at Questions 3-4 (challenging the argument that torture is justified when dealing with suspected terrorists).

28. The views of some sectors of the population regarding the role played by the dictatorships in Chile and Argentina in a historical context characterized by terrorist action from communist guerrillas are less settled than what a foreign observer may tend to conclude. Hesitations as to how to assess the crimes committed during the two dictatorships is only occasionally visible. One could for instance refer to the public protest of certain sectors of the population when Pinochet was under arrest in London. See Jacques Secretan, *Le Sort de Pinochet Divise l’Opinion*, in PINOCHET FACE À LA JUSTICE ESPAGNOLE 7ff (Paz Rojas B., Victor Espinoza C., Julia Urquieta O., Hernán Soto H. eds, 1999).

29. See NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSITIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* 170 (2005). The idea of a “multiplier effect,” in reference to the Keynesian multiplier, simply means that after the Pinochet affair many other cases were brought to court in different countries on the basis of universal jurisdiction. See *generally* MITSUE INAZUMI, *UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW* (2005) (tracing the development of universal jurisdiction and compiling guidelines for its use); LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* (Ian Brownlie & Vaughan Lowe eds., 2003) (constructing a framework for the exercise of universal jurisdiction and examining how several

This brief discussion is only intended to suggest that what the term “impunity” conveys is far from obvious. More importantly, introspective attempts at spelling it out may, at times, be too ideologically biased to serve as a definitive basis for conceptualizing impunity. In this context, a useful complementary approach could consist of analyzing a large amount of cases that have been characterized in part or in whole as impunity cases while trying to derive, through aggregation and condensation, a more empirically based concept of impunity. The pool from which such cases are picked would have to be as large and objective as possible, covering most of the “legitimate” or “appropriate” uses of the term impunity.³⁰ In this regard, using the impressive amount of information gathered by AI appeared as a reasonable starting point.³¹

For the project, the team selected a representative sample of ninety-eight reports out of a pool of more than 3,000 documents, including 1,000 reports, catalogued under the heading of “Impunity” in AI’s public online library.³² These reports were analyzed first by region³³ to see if the underlying concept guiding AI’s research and advocacy differed at the regional level. Such differences would have stemmed, for instance, from the specific cultural, social, and political conditions of the countries in each of these regions.³⁴ Overall, a single concept of impunity could be

countries exercise such jurisdiction); JURIDICTIONS NATIONALES ET CRIMES INTERNATIONAUX, (Antonio Cassese & Mireille Delmas-Marty eds., 2002) (discussing the development and use of universal jurisdiction).

30. By “legitimate” or “appropriate” uses of the term impunity, I simply mean those uses that are more accepted or less controversial. The underlying assumption is that it is possible to draw a representative inventory of how most people would use the term impunity. Such an approach has been widely popular in the areas of legal and political philosophy and can be traced at least as far as the works of Aristotle. See, e.g., ARISTOTLE, *Nicomachean Ethics* bk. V, in *THE COMPLETE WORKS OF ARISTOTLE* 1729, 1781-97 (Jonathan Barnes ed., W.D. Ross trans., J.O. Urmson rev. trans., Princeton Univ. Press 1984) (defining what is just and unjust on the basis of an analysis of how words such as justice, just, and unjust are used in practice).

31. Admittedly, one cannot expect such raw materials to be either comprehensive or fully objective. A possibility for enhancing these materials would be to bring in cases reported by other NGOs with enough credibility not to harm the desired objectivity of the project.

32. See *infra* app. 1 (outlining the methodology).

33. The traditional approaches used by AI distinguished five main regions: Africa, Americas, Asia-Pacific, Europe and Central Asia, Middle East and North Africa. See *Regions*, Amnesty International, <http://web.amnesty.org/library/engworld> (last visited Sept. 11, 2006), for a list of the countries covered under each heading.

34. I am aware that assuming that such regions share a common set of underlying features is highly controversial. For example, one may intuitively think

distilled that is at the same time large and flexible enough to describe the issues arising in the different regions while leaving enough room for adjustment to particularities. This concept is based on the intersection between two dimensions, taking into account, respectively, the status of the author that would benefit from impunity and the conditions that grant/maintain this state of impunity. Thus, in practice, impunity would not be seen as a “phrase” settling once and for all the meaning of the term impunity, but rather as a loosely circumscribed set of practices involving different types of actors.

The procedure for deriving such a notion involved two steps. First, each regional group was asked to develop a limited, though detailed, set of dimensions covering the cases it analyzed.³⁵ Second, these dimensions were compared and put together into a general framework,³⁶ which looks as follows:

Figure 1: Dimensions of Impunity

	STATE ACTORS	NON-STATE ACTORS
STRUCTURAL ASPECTS	A	C
FUNCTIONAL ASPECTS	B	D

that Europe and Central Asia may be, in terms of cultural and social characteristics, further from each other than from other regions. This choice was made on purely operational grounds and is subject to be refined through further research.

35. See *infra* app. 1 (outlining the methodology).

36. See *infra* app. 1 (outlining the methodology).

Figure 1 displays the two-dimensional concept of impunity.³⁷ The first dimension concerns the causes/conditions of impunity³⁸ and is divided into structural and functional aspects.³⁹ The expression *structural aspects* refers to all institutional and legal measures that would need to be taken in order to increase

37. See KAI AMBOS, *IMPUNIDAD Y DERECHO PENAL INTERNACIONAL* 34-43 (2d ed. 1999), for a conceptual definition of impunity to some extent comparable to the one provided here. Professor Ambos approaches the idea of impunity at three levels. First, he introduces a distinction between normative impunity (that immediately derived from legislation) and factual impunity (that immediately derived from practice). *Id.* at 34. Second, he distinguishes between substantial (that related to the substance of the offenses that can be prosecuted) and procedural impunity (that stemming from procedural hurdles). *Id.* at 34-35. Third, he notes that impunity may stem from structural problems present in a particular society. *Id.* at 35. There are several differences between this characterization and the one provided in this piece. First and foremost, the methodology at the basis of the two definitions is, as can be discerned from Professor Ambos's analysis, completely different. While this piece attempts to identify an "empirical" concept of impunity, as understood in the social science jargon, Professor Ambos's characterization is apparently based on a purely qualitative methodology. Second, there is no dimension accounting for the type of actor involved in the facts. While, as later discussed, this may be problematic from an analytical point of view, it remains a conspicuous feature of the way in which impunity is approached in practice and must therefore be accounted for in any attempt to derive an "empirical" concept of impunity. Third, even in those aspects where both notions appear to be highly similar—in particular with respect to the distinction between normative and factual impunity and its similarity to the distinction between structural and functional aspects—appearances are misleading. A measure falling under the structural aspect does not necessarily belong to what Professor Ambos calls a normative measure. In any event, Professor Ambos's characterization remains extremely useful to grasp the subtleties of the impunity phenomenon, in particular those that cannot be sketched using an empirical approach.

38. The concepts of cause and condition are different. A condition may be necessary but not sufficient to cause a particular effect. For the purpose of the impunity framework, the first dimension involves both causes and conditions. For instance, a widespread practice in the judicial system of not prosecuting the former military or the authors of gender-motivated crimes could be viewed as a cause of impunity, while the non-ratification of a treaty may only be a condition. Of course, in the end, it all comes down to the particular impact of each condition. Thus, the practice we have just characterized as a cause could be the result of the absence of ratification of a particular treaty, and so on.

39. In a first version of the model, both the structural and the functional aspects were subdivided into another two categories. These categories would establish in each case whether the corresponding failure was caused by a lack of political will or by a lack of capacity; however, such categorization was abandoned since the lack of will or capacity often are dissimulated by the government, and the analyzed reports did not provide enough material to sort out this issue.

accountability, from the ratification of a treaty or the abrogation of an amnesty law to the building of better penitentiary facilities or the establishing of national legislation in fields such as human rights or transparency. The expression *functional aspects* is used to cover those cases where all institutional/legal structures are in place but they are simply not used, whether this inertia is itself legal or not. The idea underlying the distinction is simply that institutional/legal measures are not enough to fight impunity.⁴⁰ Cultural and political circumstances are as important as legal frameworks.

The second dimension identified relates to the status of the authors of the alleged acts. Here, the basic distinction is between *state* and *non-state* actors.⁴¹ It is interesting to note that impunity tends to be linked to individuals or groups which act either as part of the state apparatus or in close connection with it;⁴² however, there is an increasing need to cover other cases involving non-state actors, including not only rebel forces but also private individuals who are not part of any open conflict. Indeed, as will be illustrated in the following section, only a few reports of the sample examined dealt with such cases. As to paramilitary groups, they were considered state or non-state actors according to

40. See *infra* notes 51-54 and accompanying text.

41. It is worth noting that non-state actors are not limited here to private militias or the like, as usually has been the case in qualitative attempts to define impunity. See U.N. Econ. & Soc. Council, Comm. on Hum. Rts., Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Progress report on the question of the impunity of perpetrators of violations of human rights*, ¶ 6, U.N. Doc. E/CN.4/Sub.2/1995/18 (June 28, 1995) (prepared by Louis Joinet) [hereinafter ECOSOC (June 28, 1995)] ("It will be recalled that a previous report (E/CN.4/Sub.2/1993/6) stated that only violations committed by the State or its agents, or by individuals acting on their orders or with their connivance, fell within the scope of the study. This point deserves discussion in the Subcommission in order to see whether the study should be extended to violations committed by non-State groups, as implied in some statements made by representatives of Governments to the Commission on Human Rights. Two arguments are advanced in this respect: first, in a situation of civil war, the virtual absence of the State - or its disintegration - encourages the committing of atrocities or acts of barbarity which are not all of State origin; second, in certain armed struggles, serious crimes and violations may be committed by non-State groups (national liberation movements, guerrillas, etc.). The question also arises in specific terms when a peace agreement emerges and negotiations concern, among other things, a possible amnesty. In this light, it would be valuable to analyze the observations made by non-governmental organizations and Governments in order to determine whether the study should be extended to violations committed by such groups.").

42. U.N. Econ. & Soc. Council, Comm. on Hum. Rts., Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Progress report on the question of the impunity of perpetrators of human rights violations*, U.N. Doc. E/CN.4/Sub.2/1993/6 (July 19, 1993) (prepared by El Hadji Guisse & Louis Joinet) [hereinafter ECOSOC (July 19, 1993)].

whether they acted with state endorsement.⁴³

The two dimensions applied simultaneously yield four possible types of scenarios. Type (A) focuses on institutional/legal deficiencies making it difficult or impossible to provide some form of accountability for crimes committed by state (or state-endorsed) actors. In type (B), deficiencies are the result of inaction from state officials in general. In type (C), the state fails to make non-state actors accountable for their crimes because adequate accountability mechanisms are lacking. For instance, one could think of a state where gender-related abuses are not criminalized. Type (D) also can be illustrated with this latter example; however, in type (D) situations, while all the necessary institutional mechanisms are in place, for cultural or political reasons they are not implemented.

These types can be seen either as zones of higher density within the overall notion of impunity, or, alternatively, as sub-concepts of impunity, and they can serve different purposes. One possible use would be to better understand how an organization such as AI is balancing the focus of its impunity-related work. Another possibility would be to help identify the root causes of impunity in more circumscribed contexts such as a country, a region, or a cultural area. In this piece, we will limit the inquiry to the first of these purposes, with the explicit assumption that such a focus can have a more general informative potential.

43. This choice is by no means evident. Some paramilitary groups or militias operating, for instance, in Colombia or in sub-Saharan Africa are in fact enemies of estatal forces. The question arose, therefore, of whether a separate category should be created in the framework, accounting for such a special situation. The team decided not to treat them as a separate category for two reasons. First, they can be dealt with adequately using the two broader categories of state and non-state actors. Second, granting such groups a particular status would have brought us too close to the specificities of a limited number of cases, requiring in some way that other actors' specificities, such as those of transnational terrorist groups or even private individuals committing gender-related offenses, be taken into consideration as well. In other words, the choice did not seem to be between the state/non-state and a tripartite distinction, but between the state/non-state and a multi-partite distinction, with each category involving a different degree of generality. This point was raised by AI staff in discussions of earlier versions of this paper. But their suggestions, which were aimed specifically at characterizing in more detail each non-state actor, would have thwarted the very effort of conceptualization. I do not mean to say that conceptual distinctions cannot be made amongst different types of non-state actors, only that any effort of conceptualization requires some generalization. In any case, I think this question requires further reflection, and I would be grateful for any suggestions on how to improve it.

II. Mapping Impunity

The team then proceeded to place each report analyzed under the most suitable of the four types.⁴⁴ Although this operation was conducted according to a pre-determined set of guidelines,⁴⁵ differences in the way a particular report is understood and assigned to one type or the other cannot be totally eliminated. Despite this difficulty, the results obtained appeared clear enough to suggest a trend:

Figure 2: A Map of Impunity⁴⁶

	STATE ACTORS	NON-STATE ACTORS
STRUCTURAL ASPECT	<p>A</p> <p>AFR AFR AFR AFR AFR AFR AM AM AM AM AM AM AM ASA ASA ASA ASA ASA ASA ASA EUR EUR EUR EUR EUR EUR EUR EUR EUR EUR EUR EUR MDE MDE MDE MDE</p>	<p>C</p> <p>AFR</p>
FUNCTIONAL ASPECT	<p>B</p> <p>AFR AFR AFR AFR AFR AFR AFR AFR AFR AFR AFR AFR AM AM AM AM AM AM AM AM AM AM AM AM AM AM ASA ASA ASA ASA ASA ASA ASA ASA ASA ASA ASA ASA ASA ASA EUR EUR EUR EUR EUR EUR EUR EUR EUR EUR EUR EUR EUR EUR EUR MDE MDE MDE</p>	<p>D</p> <p>AFR AFR AFR AFR AM AM</p>

44. See *infra* app. 1.

45. See *infra* app. 1 (discussing the methodology).

46. AFR: Africa; AM: Americas; ASA: Asia-Pacific; EUR: Europe and Central Asia; MDE: Middle East and North Africa. For a full list of reports by area see Appendix 2.

Figure 2 displays the distribution of the sample across types. A visualization of the entire set of approximately 3,000 documents dealing with impunity would, no doubt, have given a more precise image, allowing for a more detailed analysis. Nevertheless, the present sample offers enough grounds for comment.

The first point is that the sample overwhelmingly is concentrated on the state actors' side of the framework.⁴⁷ This could be interpreted in at least three different ways. One could first think that the sample is biased and does not reflect the actual amount of reports focusing on non-state actors. This is a methodological issue that could only be definitively solved by reviewing all the reports and documents on impunity. It therefore goes beyond the explicit limitations of this piece. A second interpretation would emphasize that AI's work has, by and large, privileged a particular concept of impunity. This is a policy question that I do not intend to address here.⁴⁸ Still a third interpretation would seek to generalize from the practice reviewed that non-state actors seem generally less likely to be associated with the term impunity or, in other words, that the use of the term impunity implies some sort of "favoritism" in the sense that it is the very existence of ties with the state apparatus that would

47. See *supra* fig. 2.

48. AI staff reviewing this piece strongly emphasized that AI has a carefully elaborated conception of impunity, which it purportedly follows. In particular, they made it clear that the views I advance in this piece should not mislead potential readers into thinking that AI does not have a clear conception of the meaning of impunity. Such a conception rests, according to them, on the way international law defines impunity. See *supra* note 13. It is arguable that international law clearly characterizes what impunity means. States may be obligated to investigate and prosecute a number of crimes considered particularly heinous and failure to do so may result in the lack of accountability. See Stephen Macedo, *Introduction in UNIVERSAL JURISDICTION* 1, 4 (Stephen Macedo ed., 2004); see also *supra* footnote 29. The difficulties involved in circumscribing the use of the term impunity in the area of economic, social, and cultural rights provide a good illustration of how ambiguous the purported international legal concept of impunity may be. In my view, international law may be useful to develop a basic understanding of the rules and standards that, if breached and left unaccounted, may lead to a widely recognized use of the term impunity. But such a characterization is very limited. Too much focus on these "settled" uses of the term impunity may result in neglecting other legitimate (and historically more fundamental) fact-patterns constituting impunity. It is by no means the task of AI to cover all uses of the term impunity. This is a policy question, with obvious implications for any attempt to distill a general concept of impunity from the work of a single organization.

“favor” impunity.⁴⁹ This latter view seems intuitively plausible. The question is whether the term impunity should be restricted to the activities of state (or state-endorsed) actors, thereby neglecting non-state actors.

The second point is that type (B) situations seem to be the most frequent.⁵⁰ Again this could be interpreted in different ways. Aside from methodological difficulties, one might think that AI has tended to concentrate more on implementation issues than on the absence of institutional/legal frameworks. But, again, if one views AI's work as a preliminary indicator of an empirical concept of impunity, the results would suggest that impunity is a *de facto* phenomenon. In other words, the concentration on type (B) would suggest that while accountability mechanisms may be in place, there are shortcomings in their actual use.⁵¹ It is interesting to note that this intuition seems compatible with an investigation currently being conducted by Harvard Professor Beth Simmons into the impact of international commitments to ban torture from state practice.⁵² The study suggests that, as a rule, ratification of the U.N. Convention Against Torture⁵³ does not make a state less likely to use torture. It only does so in transitional democracies.⁵⁴ While the detailed implications of this research are yet to be determined, overall it appears to point in the same direction as the impunity project. The relative importance of this *de facto* impunity can be appraised better graphically.

49. ECOSOC (July 19, 1993), *supra* note 42.

50. *See supra* fig. 2.

51. The reasons underlying this phenomenon are unclear. One obvious possibility is the absence of political will to use the structures in place. Another possible reason that has been advanced to explain non-compliance with international treaties (although not only or mainly in the area of human rights) is the actual inability of a number of States to live up to the demands involved in ratifying an international treaty. On this “managerial” approach to compliance’ see ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1995); Abram Chayes & Antonia Handler Chayes, *On Compliance*, 48 INT’L ORG. 175, 175-205 (1993); Abram Chayes et al., *Managing Compliance: A Comparative Perspective*, in *ENGAGING COUNTRIES* 39-62 (Edith Brown Weiss & Harold K. Jacobson eds., MIT Press 1998).

52. Beth Simmons, *Untitled Investigation into Compliance with International Human Rights Treaties* (on file with Professor Simmons). The work was presented on September 15, 2005, at an International Law Workshop at Harvard organized by Professors William Alford and Ryan Goodman. Professor Simmons suggests that ratification of the convention against torture only appears to have a significant impact on states that have undergone a transition to democracy. *Id.* Although this is a work in progress, it is particularly interesting because it draws largely upon Amnesty International’s data.

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

54. Simmons, *supra* note 52.

Figure 3: Relative Share of Each Type

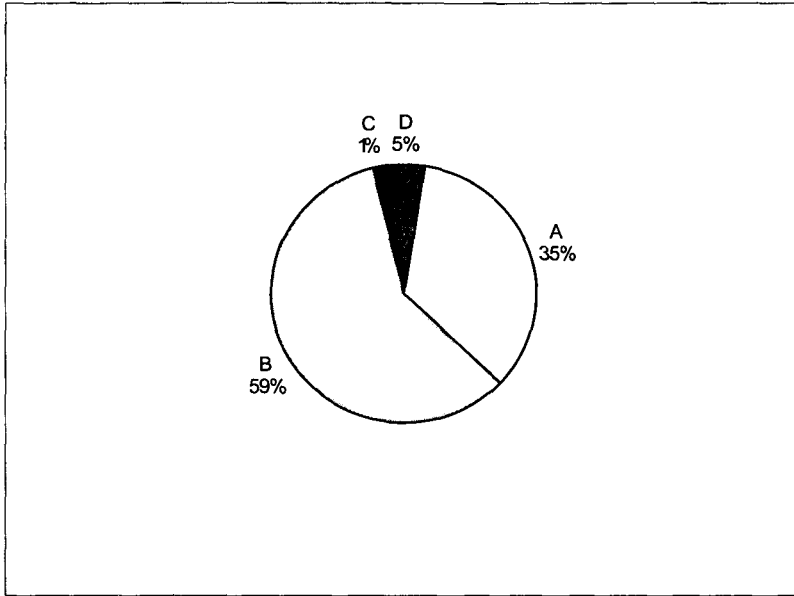


Figure 3 displays the relative percentages for each type. Type (B) covers significantly more than one half of the cases, and it appears to affect all areas in a roughly similar proportion:

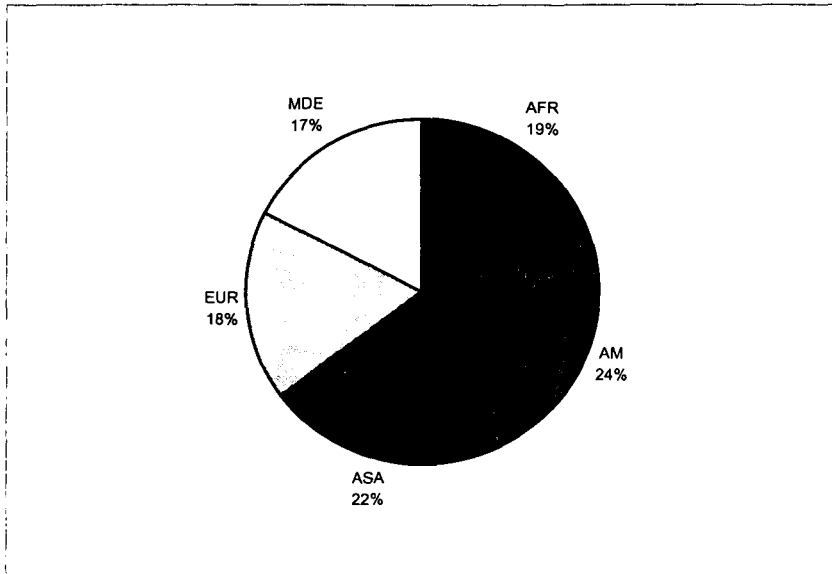
Figure 4: Regional Distribution of Type (B)

Figure 4 shows, for each geographical region, the number of reports belonging to type (B) divided by the overall reports analyzed for the respective region. These proportions are put together to represent the relative regional distribution within type (B). While one would intuitively expect type (B) to occur more frequently in regions where the structural aspect is more developed, the analysis lends no support for such a conclusion. Indeed, one could think that, relative to other areas, impunity in Europe or North America would be more related to functional aspects than to the lack of accountability structures. The results of the analysis tend to counter such intuition, as illustrated by Figure 5.

Figure 5: Regional Distribution of Type B with Sub-Regions

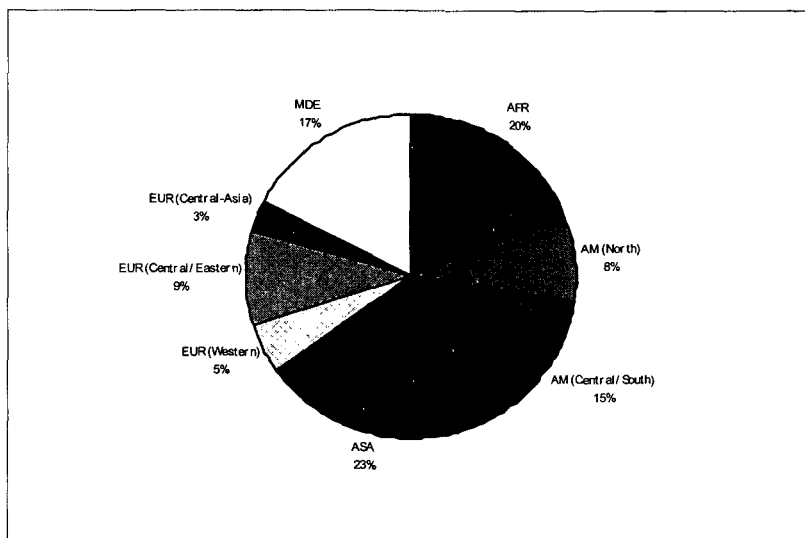


Figure 5 shows that North America and Western Europe, as sub-regions of the Americas and Europe/Central Asia, are not visibly over-represented in type (B). Given the sample's relatively small size,⁵⁵ it is hard to draw any strong conclusion from the slight differences present. It is therefore difficult to venture beyond the general assertion that type (B) is the most frequently reported form of impunity irrespective of the regional contexts. That being said, it is possible to dig deeper into the substance of what has been outlined so far. Indeed, while it might be difficult to draw detailed conclusions in the aggregate, a qualitative analysis of the data reviewed can be illuminating in many respects, particularly regarding regional idiosyncrasies.

Let us start with Africa. Compared to other regions, Africa has the highest percentage of reports (approximately 22%) located in the non-state actor dimension.⁵⁶ The reports listed under type (D) concern situations of civil conflict where armed militias of the opposition have committed gross human rights violations.⁵⁷ This seems to be a recurrent pattern in Africa and could serve as a basis for fine-tuning the concept of impunity to the specific

55. See *supra* app. 1.

56. See *supra* fig. 2.

57. The relevant reports are identified in Appendix 2 and can be accessed at AI's online library at <http://www.amnesty.org>.

circumstances of the continent. It is important to note that armed militias in Africa, such as União Nacional para a Independência Total de Angola (“UNITA”) or Revolutionary United Front (“RUF”), have tended to be seen as the paradigmatic illustration of a non-state actor.⁵⁸ In turn, the use of such a characterization could help explain why there are so few reports falling under this dimension. As long as the idea of a non-state actor evokes mostly armed militias, a large array of cases where other kinds of actors bearing no particular relation to the state escape accountability for human rights violations may be overlooked. Illustrations of this idea include the report on Kenya under type (C), which addresses domestic violence by people for which there is no relevant legislation, as well as the one on El Salvador under type (D), which deals with the failure to prosecute a prominent case of violence against women.⁵⁹ A relevant question would be whether non-state actors’ criminality is being overlooked as one substantial aspect of impunity or whether it is consciously considered as being beyond the boundaries of the concept of impunity.⁶⁰

The public sector in the Americas, in particular the police, is reported to benefit from impunity. The most widespread impunity issues on which AI has been focusing in South, Central, and North America appear to be ill-treatment, torture, and coercion of prisoners and civilians for which the perpetrators were never duly prosecuted and/or punished.⁶¹ Most often this is attributed to the malfunctioning of the judicial system, which seems intricately related to the challenges of democratic transition characterizing

58. See *infra* app. 2.

59. See *infra* app. 2; see also Amnesty Int’l, *Four Years of Impunity: Amnesty International Declaration on the Case of Katya Miranda*, AI Index AMR 29/001/2003, Apr. 4, 2003, available at [http://web.amnesty.org/library/pdf/AMR290012003ENGLISH/\\$File/AMR2900103.pdf](http://web.amnesty.org/library/pdf/AMR290012003ENGLISH/$File/AMR2900103.pdf) (last visited Oct. 9, 2006); Amnesty Int’l, *Kenya: Violence against women: Women at risk of domestic abuse*, AI Index AFR 32/002/2002, Mar. 8, 2002, available at [http://web.amnesty.org/library/pdf/AFR320022002ENGLISH/\\$File/AFR3200202.pdf](http://web.amnesty.org/library/pdf/AFR320022002ENGLISH/$File/AFR3200202.pdf).

60. Historically, the term “impunity” was used in the context of ordinary criminality. International crimes and international human rights are a relatively recent phenomenon. One can trace them roughly back to the end of the Second World War. The fact that AI or a sector of the international law community has focused on violations by state actors needs to be revisited. For instance, a significant portion of gender-related abuses seems to be perpetrated by individuals with no connection whatsoever with the state apparatus. Such abuses would normally fall under the category of ordinary criminality, for which a large sector of the international law community refuses to apply the term impunity. This exclusion is by no means obvious either idiomatically or technically and should, if maintained, be explained and made explicit.

61. See *generally infra* app. 2.

the region.⁶² Approximately 70% of all the reports focusing on the Americas are indeed located on the functional side, whereas only 30% focus on structural deficiencies;⁶³ however, most of these reports address the same problem, the behavior of the security forces.⁶⁴ Regarding non-state actors' impunity, the Americas and Africa are the only regions represented.⁶⁵ Interestingly, the two reports concerned address the same issues as those raised by the reports on Africa, namely the misdeeds of armed militias and private violence against women.⁶⁶

Moving to Asia-Pacific, again, the functioning of the administration of justice is involved in the large majority (approximately 63%) of the reports.⁶⁷ Within this category, two main patterns can be identified. From the fifteen reports included in this 63%, ten deal with police abuses and ill-treatment of prisoners, and five focus more specifically on the repression of opposition forces.⁶⁸ Regarding type (A), the majority of the cases (four out of seven) concerns governmental restrictions on fundamental rights.⁶⁹

In Europe and Central Asia, although the trend seems to emphasize the functional aspect of impunity (59%), the structural aspect is also significantly represented (41%).⁷⁰ The cleavage between the functional and structural aspects is apparently less important in Europe than in Asia. It is hard to draw detailed conclusions as to the regional concentration within type (B); however, it is noteworthy that five out of seven Western European countries are located in type (B).⁷¹ This requires some comment. First, the conceptual consistency of the heading "Europe and Central Asia" is far from obvious and raises the question of

62. See generally *infra* app. 2.

63. The relevant reports are identified in Appendix 2 and can be accessed at AI's online library at: www.amnesty.org.

64. See generally *infra* app. 2 (listing all relevant reports under the title "Americas").

65. See *supra* fig. 2.

66. See Amnesty Int'l, *Columbia: Extrajudicial Killings, "Disappearances", Death Threats and Other Political Violence in the Department of Sucre*, AI Index AMR 23/030/1996, June 1, 1996, available at [http://web.amnesty.org/library/pdf/AMR230301996ENGLISH/\\$File/AMR2303096.pdf](http://web.amnesty.org/library/pdf/AMR230301996ENGLISH/$File/AMR2303096.pdf); Amnesty Int'l, *Four Years of Impunity: Amnesty International Declaration on the Case of Katya Miranda*, AI Index AMR 29/001/2003, April 4, 2003, available at [http://web.amnesty.org/library/pdf/AMR290012003ENGLISH/\\$File/AMR2900103.pdf](http://web.amnesty.org/library/pdf/AMR290012003ENGLISH/$File/AMR2900103.pdf).

67. See *supra* fig. 2.

68. See generally *infra* app. 2.

69. See generally *infra* app. 2.

70. See *supra* fig. 2.

71. See *supra* fig. 2.

whether such a heading is analytically useful or adequate.⁷² Second, while there is hardly a difference between the distribution of Western Europe and Central/Eastern Europe across types (A) and (B) respectively, the data suggests quite clearly that the structural aspect is relatively more pressing in Central Asia than in Europe: five reports out of seven are located in type (A).⁷³ In other words, there appears to be a stronger structural problem in these countries.

Finally, regarding the Middle East and North Africa,⁷⁴ the region is relatively under-represented in terms of reporting. Only seven reports in a sample of ninety-eight focused on the Middle East.⁷⁵ Perhaps this comes from the fact that the “Middle East and North Africa” as a geographical category is smaller than the other four regions.⁷⁶ Based on fewer observations, the results of the analysis must be handled more carefully. Let me note what appears to be the most salient point with respect to this area, namely that it is the only area in which the reports are almost equally distributed between types (A) and type (B), four and three

72. Any aggregation of this sort is inherently subject to controversy. This is, of course, not the place to discuss the epistemological and theoretical foundations of “area studies” or the many critiques that have been advanced against the feasibility or usefulness of geographical and/or disciplinary aggregation. See Robert H. Bates, *Area Studies and the Discipline: A Useful Controversy?*, 30 PS: POL. SCI. & POL. 166 (1997); Richard D. Lambert, *Blurring the Disciplinary Boundaries: Area Studies in the United States*, 33 AM. BEHAV. SCI., 712 (1990). The point I am trying to make is simply that even assuming area studies are epistemologically sound, Europe and Central Asia have traditionally been approached as different (or belonging to different) areas. See M.R. DJALILI & T. KELLNER, *GÉOPOLITIQUE DE LA NOUVELLE ASIE CENTRALE: DE LA FIN DE L'URSS À L'APRÈS-11 SEPTEMBRE*, (Publ'ns of the Univ. Inst. of the High Int'l Studies, ed., Univ. Presses of Fr. 2003) (2001) (providing an “area” approach to Central Asia).

73. See *infra* app. 2.

74. Here, again, one may ask whether the aggregation of these two regions is adequate. One possible argument that it is somewhat less controversial than the category “Europe and Central Asia” stems from the large influence of Islam in both regions, although many other regions could also be included if Islam was the underlying basis for aggregation. In any case, I use this category here because AI uses such a categorization.

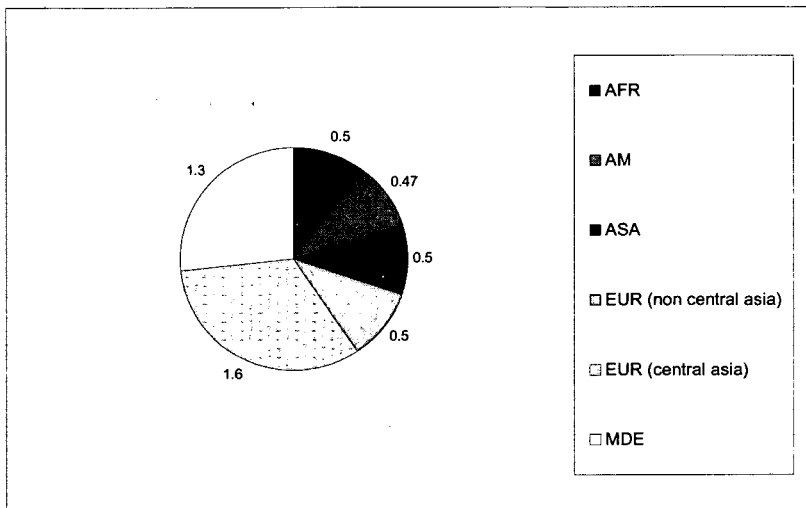
75. See *supra* fig. 2.

76. I have not verified the relative share of AI reports on this geographical area with respect to topics other than impunity. It may be possible that other “themes” regarding the Middle East and North Africa in AI’s library include relatively more reports than those on impunity, in which case the smaller size of the geographical region would not provide a helpful explanation. It should be noted that this is by no means intended to suggest that AI has focused less on the Middle East than on other regions. As a matter of fact, there seems to be a conscious commitment to provide information on and to the Middle East, as reflected in the choice to make Arabic one of the four languages in which documentation is made available.

reports respectively.⁷⁷ Indeed, unlike the other four regional categories, structural aspects seem to be equally or more pressing than functional aspects in the Middle East and North Africa.⁷⁸

Figure 6 takes up this latter point through a synthesis of the relative distribution between types (A) and (B) for each region:

Figure 6: Relative Distribution of Each Region between Types (A) and (B)



Each area of the circle in Figure 6 represents the ratio of the number of reports located in type (A) to the number located in type (B) for each geographical region. Taking the Middle East as an example, figure 2 shows 4 reports in type (A) and 3 in type (B), yielding a 1.3 ratio. The basic insight to be derived is that, as pointed out before, Central Asia and the Middle East/North Africa present relatively more structural issues than the other regions reviewed.

This difference constitutes one of the many possible criteria that could be used to build a quantitative concept of impunity. Indeed, one could, for instance, assume that where a number of empirically pre-defined basic structural conditions for accountability are lacking, the country in question could be considered, for purposes of the fight against impunity, less

77. *Supra* fig. 2.

78. *Supra* fig. 2.

advanced than other countries where such structures are in place. This type of reasoning could provide the basis for an international index of impunity to be developed.

III. An International Impunity Index: A Proposal

An obvious preliminary question to any proposal to develop an international impunity index: why? There are a number of reasons why this could be a worthwhile undertaking. First, such an index would provide a snapshot comparative view of the "level" of impunity in different countries at a given point in time. Second, it would help focus the attention of human rights organizations in more organized and targeted ways. Indeed, by providing a thorough empirical understanding of how this issue is being handled in practice, human rights organizations could adjust their focus on their intended policies. Third, it could add considerable leverage to the work of human rights organizations by making the impunity phenomenon in a particular country more ascertainable. Fourth, it also would allow countries that are truly committed to fighting impunity to show that they are obtaining concrete results. Fifth, such an index would additionally represent a very useful tool for human rights organizations to raise funds for their activities, since it would help assess their concrete impact in a way more easily understandable to donors. Sixth, and more generally, it could serve to accumulate disparate but precious information on impunity issues that may otherwise be extremely hard to aggregate in a meaningful and systematic way. There are, of course, many challenges involved in such an undertaking. In order to better identify these challenges, it is first necessary to discuss another question: how?

Suppose we focus exclusively on one of the four types of the impunity framework and try to establish a typology of the main categories of issues it covers so that most reports can be located into one of these categories. Such a methodology would follow the same logic as the one leading to the overall framework in the first place, but with respect to one single type. For instance, if we focus on types (A) and (C),⁷⁹ among the sub-categories that would take us closer to the structural conditions of the impunity phenomenon, one could mention the following: the non-ratification of certain treaties dealing with human rights; humanitarian law and international accountability mechanisms; the existence of amnesty laws or other similar statutes preventing prosecution; structural

79. See *supra* fig. 1.

obstacles to transparency such as state ownership of mass media; structural lack of protection of witnesses, lawyers, prosecutors, and judges; lack of victim compensation mechanisms; etc. One could go even further and display more detailed, and therefore numerous, sub-categories. Of course, the closer we get to reality, the harder it will be to keep an overall conceptual view. There is no point in building a city map as large and detailed as the city itself; however, I think that finding a satisfactory compromise between conceptual and empirical considerations is far less unrealistic than what is usually assumed. This can be explained more clearly once the purpose of such sub-categories is understood.

The main function of sub-categories is to serve as criteria for a "questionnaire" reflecting the impunity profile of a particular country at a given time. Suppose that somewhere between twenty and thirty sub-categories are identified, and all four main types considered. These sub-categories would become the criteria against which to compare the data we have on a particular country. Such data could be derived from a number of human rights organizations and bodies that periodically report on issues related to impunity and would be constantly updated as the organizations issue new data. In practice, this would mean that for each country we would have a profile broken down into a set of items to which a specific weight will be assigned. This latter point is particularly delicate. In order to move from a qualitative notion to a quantitative one, it is necessary to assign values to each criterion, values on the basis of which the situation in a country can be weighted. A simple example would be asking whether the country ratified the U.N. Convention Against Torture.⁸⁰ The country would receive a different number of points according to the answer. A less straightforward criterion would be the number of police ill-treatment allegations or of extra-judicial executions. In such cases, a scale of answers could be introduced, with each value of the scale representing a different number of points. A function would then integrate the points for each criterion, yielding a result reflecting the level of impunity in a particular country at a given time. The normative weighting could either be included in the number of points allocated to each value for each criterion or be performed (at least partly) by this function, for

80. This same criterion could of course be presented in a wide array of forms from the very general "Has the country ratified the most important human rights/humanitarian treaties?" to a more precise "Has the country signed the U.N. Convention against torture? Has it ratified it? Has it taken any steps to make its provisions fully operational within the system?"

instance, by adjusting the counting whenever two criteria related in their substance are both met.

Admittedly, the main problem would not be the math, but rather this very normative weighting. Indeed, such weighting could introduce a large amount of arbitrariness into the whole measure, thereby fundamentally undermining the credibility of the proposal. This was what I had in mind when I mentioned the daunting challenges that the proposal faces at the beginning of this section. Is there any way around such a difficulty? Obviously, there is no perfect way to perform such weighting, but this does not mean that a sensible and intuitive weighting is out of reach. Most indices reflecting normative ideas, such as the U.N.'s Human Development Index,⁸¹ to name but one famous example, are confronted with this problem. The basic answer is to keep in mind the normative choices underlying the weighting when interpreting the index. But one could go further. For instance, it may be possible to subject the specific weighting to a process of consultation with actors such as NGOs, intergovernmental organizations, and governments. This process should be public and as transparent as possible in order for parties to participate constructively, contributing only those views they judge morally acceptable enough to be expressed in public.⁸²

This is not the only difficulty that would arise, as there are many other challenges that must be taken into account. The information gathering and selection procedure raises several difficult questions, including that of the sources of such information,⁸³ the updating mechanism, and the biases that may result from an imbalance in the coverage of different countries. One should also consider the political and diplomatic externalities

81. See U.N. Development Programme, HUMAN DEVELOPMENT REPORT 88-101 (Oxford Univ. Press) (1991).

82. The model would come close to the idea of a reasonable debate in the line of the German philosopher Jürgen Habermas. See, e.g., J. Habermas, ERLÄUTERUNGEN ZUR DISKURSETHIK (Suhrkamp Verlag 1991), translated in JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS (Ciaran Cronin trans., The MIT Press 1993).

83. A basic problem concerns the reliability of governmental sources of information. This could be dealt with in many ways. For instance, one way would be simply to "discount" the value of governmental information by a given factor (such a factor could be fixed or dynamic, and dependent upon the performance of other variables such as freedom of speech and press). Another way would be to rely on data gathered by independent NGOs that issue reports based on direct factual observation, as opposed to information released by governments. Large NGOs such as AI and Human Rights Watch, as well as more narrowly focused organizations such as Transparency International or TRIAL, could provide much of the information required to develop the index.

of participating in such an enterprise. Some states may modify their attitude toward participating organizations that, until that point, were having a positive impact on human rights issues due precisely to either cooperation or indifference from the government concerned.

These challenges should not be underestimated, but it may be equally detrimental to overestimate them. If the term impunity is to move beyond the status of an extremely vague category, subject both to abuse and, most importantly, to dilution in the verbal cacophony often surrounding international fora, an empirical concept of impunity may become a very useful tool, complementary to the efforts so far conducted by scholars, NGOs, and intergovernmental organizations to define impunity from a qualitative perspective.

Appendix 1: A Note on Methodology

The sample, consisting of ninety-eight reports, was extracted from a total of slightly more than 1,000 reports selected out of 3,000 documents catalogued under the rubric “impunity” in AI’s public online library (covering documents from 1992 on).⁸⁴ We randomly selected 12% of the overall number of reports corresponding to each of the five geographical areas used by AI (as of January 2005), which yielded the following number of reports per area: nineteen for Africa, twenty-two for the Americas, twenty-one for Asia-Pacific, twenty-nine for Europe and Central Asia, seven for the Middle East and North Africa. We then proceeded to do an intuitive check to make sure that the countries most frequently covered in the reports were represented accordingly in the sample. The reports were analyzed by separate groups focusing on specific regions, whose task was to derive a number of dimensions of impunity that would make sense of the cases reviewed. These dimensions were then discussed and merged, yielding the overall impunity framework discussed above. The next step was to place each report into the framework according to a common set of guidelines. Whenever the substance of the report fit unambiguously into one of the four types, the report appeared only in that type. Reports addressing both state and non-state actors were placed in both sectors, provided that both played a roughly equal role in the report (which means that more than the original ninety-eight reports appear in the corresponding exhibits).⁸⁵ In cases where states had adopted the instruments of international law but had not taken the necessary steps to implement them in their national legal system, the problem was dealt with in the following manner: whenever there were institutional obstacles (either the absence of an implementation law or decree, or the existence of a legal instrument impeding the implementation of the treaty) the report was listed under type (A) or (C), namely the structural aspect. On the contrary, when the legal structure was in itself sufficient but the treaty was not actually being implemented (because of lack of will or incapacity), the report was placed under the functional aspect in types (B) or (D). In cases where these facts could not be established precisely, the decision was taken upon the analysis of the indicators for one

84. See AI’s online library, available at <http://web.amnesty.org/library/engindex> (last visited July 29, 2006).

85. The number of reports placed in two types are follows: four for Africa, five for the Americas, two for Asia-Pacific, none for the other two regions.

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or the other case.

Appendix 2: Reports Analyzed by Region

AFRICA	AMERICAS	ASIA-PACIFIC	EUROPE/CENTRAL ASIA	MIDDLE EAST/NORTH AFR.
Angola- Namibia	Argentina	Australia	Albania	Algeria
Burundi	Bolivia	Bangladesh	Armenia	Egypt
Chad	Brazil	Cambodia	Belarus	Iraq
Dem. Rep. Congo	Brazil	East Timor	Bosnia-Herz.	Israel
Dem. Rep. Congo	Chile	India	Bosnia-Herz.	Israel/Palestine
Ghana	Colombia	India	Bulgaria	Morocco
Kenya	Colombia	Indonesia	Croatia	Saudi Arabia
Liberia	Colombia	Indonesia	Ex-Yugoslavia	
Mali	Ecuador	Indonesia	Fed. Rep. Yug.	
Niger	El Salvador	Iraq	France	
Nigeria	Guatemala	Malaysia	Georgia	
Rwanda	Guatemala	Myanmar	Georgia	
Senegal	Haiti	Nepal	Greece	

	AFRICA	AMERICAS	ASIA-PACIFIC	EUROPE/CENTRAL ASIA	MIDDLE EAST/NORTH AFR.
Sierra Leone	09/25/1996	Jamaica 04/10/2001	Nepal 03/10/1997	Ireland 08/01/2000	
Sudan	12/16/2004	Mexico 03/25/2003	Pakistan 09/01/1998	Kosovo (FRY) 05/01/1999	
Sudan	10/13/2004	Mexico 04/30/1997	People's Rep. China 01/01/2003	Malta 05/18/2004	
Togo	12/01/2001	Peru 03/01/2000	People's Rep. China 04/01/1997	Romania 09/05/2002	
Uganda	06/23/2003	Uruguay 02/21/2003	People's Rep. China 06/01/1998	Romania 03/01/1998	
Zimbabwe	03/01/2002	USA 12/16/2002	Rep. of Maldives 07/30/2003	Russian Fed. 06/23/2004	
		USA 05/24/2000	South Korea 11/01/1996	Russian Fed. 10/29/2002	
		USA 09/01/1999	Thailand 11/05/2003	Russian Fed. 04/03/1997	
		USA 12/16/2003		Slovak Rep. 09/11/2003	
				Spain 06/24/1999	
				Turkey 06/02/2004	
				Turkey 12/14/2000	
				Turkey 10/01/1996	
				UK 06/01/2002	
				UK 06/18/2003	
				Uzbekistan 05/14/2002	

