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Political Reconciliation or Forgiveness for Murder-Amnesty and its Application in Selected Cases

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Political Reconciliation or Forgiveness for Murder—Amnesty and its Application in Selected Cases

By Claudio R. Santorum and Antonio Maldonado

The question of whether to grant amnesty to members of prior governments in countries that shifted from dictatorship to democratically elected governments is again the focus of debate. In Haiti, for example, recently restored President Jean Bertrand Aristide and the Haitian Parliament must decide how to address human rights violations committed by the former military regime. Human rights groups estimate that during Aristide's exile, soldiers and paramilitary units killed 3,000 Haitians and committed countless other atrocities.

The term amnesty usually refers to an official act prospectively barring criminal prosecution. This is often contrasted with pardons, which typically exempt convicted criminals from serving their sentences without expunging the conviction. This distinction, however, is inexact, as pardons, like amnesties, can be used to foreclose prosecutions while amnesties can cover persons already serving prison terms. As the word amnesty, like amnesia, derives from the Greek *amnestia,* meaning forgetfulness or oblivion, an amnesty constitutes a declaration that the government intends to obliterate rather than merely to forgive a crime.

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Are Amnesty Laws Permissible?

There is a division over what policies would best promote a democratic transition and the importance of identifying relevant principals of international law and the duties to punish human rights violations. In Argentina, a partial amnesty was granted by the Alfonsin administration, even for those who were prosecuted and convicted for their role in the Dirty War. Both *Obediencia Debida,* which gave amnesty to military personnel obeying orders, and *Punto Final,* which operated as a statute of limitations, were inspired by the premise that they would ease the transition to democracy. The central importance of the rule of law in civilized societies, however, requires prosecution of especially atrocious crimes. Principles of both customary and conventional international law already impose significant obligations in this regard.

The chief argument against a general rule requiring prosecutions is that fragile democracies may not be able to survive the destabilizing effects of politically charged trials. The Uruguayan government adopted this view when it took measures of magnanimity or clemency utilizing a mechanism provided for in the Constitution of the Republic granted by the *Ley de Caducidad.* The government argued that "the *Ley* was enacted with the requisite parliamentary majority and had been the subject of a national referendum expressing the will of the citizens."

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In the opinion of those who rejected the amnesty, however, by terminating judicial investigations and dismissing proceedings against the perpetrators, thereby denying petitioners their right to judicial recourse and remedies, the *Ley* was in clear violations of Articles 8.1, 25, and 1.1 of the American Convention on Human Rights. Conceptually, opponents of the amnesty argued that the law was also morally and legally perverse in its application since the state should not have the prerogative to abolish or forget its own crimes, or those of its agents, committed against its citizens. If this right exists, then it belongs only to the victims. Finally, opponents of amnesty laws claim that prosecution contributes to the rehabilitation of victims of past violations and, indeed, of society itself.

Every government has the prerogative to issue an amnesty or to pardon criminal offenses or offenders under its domestic law. When the effects of such measures deprive victims of judicial protection, however, that are guaranteed by an international instrument to which the state is a party, then the matter can no longer be regarded as purely domestic. For example, while the *Ley* could deny judicial remedy as a domestic legal matter, it could not deprive the petitioners of their rights under the American Convention nor relieve Uruguay of its duty to fulfill its obligations under that instrument since, according to international law and Article 27 of the Vienna Convention on the Law of Treaties, "a party may not invoke the provisions of its internal law as justification for failure to perform a treaty." The doctrine of *pacta sun servanda* under Article 26 of the Vienna Convention, which establishes that "every international agreement in force is binding upon the parties to it and must be performed by them in good faith," also reinforces states' obligations not to interpose their own domestic laws as justifications for non-compliance with international agreements.

Finally, Article 1.1 of the American Convention, as interpreted by the Inter-American Court, of Human Rights (*see* Manfredo Velasquez-Rodriguez Case, July 29, 1988), renders Uruguay internationally responsible not only for the violation of the infringed right, but also for the violation of its duty under Article 1.1 to respect and ensure that right and to prevent, investigate, and punish any violation of rights recognized under the American Convention.

Individual and Collective Amnesties

As Haitian lawmakers consider how to implement legislation authorizing an amnesty, they would do well to consider the experience of other countries with such laws. In working out the particulars of the amnesty, they may find it especially useful to look at South Africa, where the temporary Constitution, under which Nelson Mandela was elected and under which the country is now governed, mandates an amnesty.

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Human rights advocates often object that amnesties repudiate the principles

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WCL Students Preparing for Second Year at European Moot Court Competition

by Angela Collier

For the second consecutive year, the Washington College of Law (WCL) will field a team at the European Human Rights Moot Court Competition, *Concours Rene Cassin*. The team, composed of J.D. students Rupal Kothari and Opal McFarlane, and LL.M. alumni coaches Claudia Martín and Françoise Roth, will travel to Strasbourg, France, April 18–22. WCL students, Sergio J. Ramirez and Fernando González-Martín, both of whom participated in the event last year, are also helping the team prepare for this year's competition.

When the competition was first organized in 1984 by the Council of Europe, the Strasbourg International Institute of Human Rights, and the Robert Schuman School of Law, participation was limited to European teams. In 1993, however, the event was opened to non-European teams, and last year, WCL was the first and only U.S. law school to participate. This year, a team from La Universidad de los Andes in Bogota, Colombia will also participate.

The *Concours* is based on a fictitious case in which one state alleges that another has violated the European Convention for the Protection of Human Rights and Fundamental Freedoms. The teams represent either the applicant or the defending state, and prepare briefs and argue the case before a mock tribunal based upon the case law of the European Court and Commission of Human Rights.

Kothari and McFarlane began preparing for the competition in October 1994. McFarlane explained that she decided to participate because "the competition is very unique, requiring the participants to write and argue in French. Although the fact pattern is fictional, the competition increases international awareness of human rights and their importance." Kothari further explains that "I wanted to broaden my horizons in human rights law. Learning the European system is challenging and enjoyable." Roth, an alumni of Strasbourg Law School, is participating because "I not only know the experience that the competition gives to students, but, most importantly, I realize that it is a good avenue to give a European facet to the human rights curriculum offered by WCL."

Professor Claudio Grossman, Co-Director of the Center for Human Rights and Humanitarian Law and Dean of Graduate Studies at WCL, states that moot court competitions allow "students to take responsibility for their own education." He adds that "the *Concours* competition is the only human rights competition in the world, which creates tremendous opportunities for our students. As a human rights lawyer, I have seen how students develop and gain experience through this type of program. I am very proud of the students from our school who have overcome many obstacles to participate in this foreign competition. Because this is WCL's second year competing, we are on the verge of creating a tradition."

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of individual responsibility for criminality. It is difficult to build a society based on the rule of law unless it is understood that everyone is responsible for his or her own acts and that everyone, whether ordinary citizen or government official, is subject to punishment for violating the law.

By providing for individual rather than collective amnesties, and by insisting that these amnesties be accompanied by full disclosure, South Africa's proposal directly addresses some of the worst evils of amnesty laws. Most of the torturers and murderers will be spared a trial and imprisonment, but only if they acknowledge their individual responsibility.

The South African approach represents an innovative attempt both to honor a bargain that permitted a peaceful transfer of power, and to promote the interests of truth and justice, by requiring the perpetrators to publicly acknowledge their crimes as a precondition to receiving a pardon.

In Haiti, as in South Africa, there is a practical reason to favor such an approach. By covering up all the crimes of the Haitian military, and of police and *attaches*, a blanket amnesty would make it difficult to weed out those who should be barred from serving in a any reconstituted force.

According to WCL Professor, Robert K. Goldman, this suggested approach doesn't answer all the objections to amnesty. It does, however, conciliate the purpose of a peaceful framework for democratic consolidation without converting the victims to second class citizens, since those responsible will be socially stigmatized by proper publicity for their crimes.

Amnesty in Haiti

Prior to Aristide's return, the Haitian army had sought a general amnesty as a precondition for their stepping down from power. No specific agreement was ever worked out and army leaders and the Haitian government are currently arguing over whether an amnesty covers all of the military or only those leaders who fled into exile.

In December 1994, President Aristide established a seven-member commission to investigate crimes committed in Haiti during his exile. This commission is partly modeled on efforts to document similar crimes of authoritarian regimes in El Salvador, Brazil, and Chile. It, however, has no authority to indict or prosecute individuals, but only to investigate violations of human rights and humanitarian law and present its findings to the government.

By ordering an investigation into the killings and torture of thousands of Haitians during the last three years, the government of President Aristide has opened up one of the most sensitive issues it will ever face. Since his U.S.-orchestrated return, Aristide has made it a point of preaching reconciliation. Nonetheless, many Haitians fear that if the commission reveals names of perpetrators, the public may take the list as an incitement to seek revenge. But as noted in a draft document on the commission's mandate, "reconciliation cannot become a reality unless at least the truth is known about all the crimes committed between September 30, 1991 and October 15, 1994."

Claudio Santorum, an Argentinean attorney, recently completed his LL.M. degree at WCL. He is a former Fellow for the Center for Human Rights and Humanitarian Law.

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