St. Mary's Law Journal

Volume 26 | Number 3 Article 5

1-1-1995

Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties Symposium - Human Rights in the Americas - Commentary.

Robert O. Weiner

TRYING TO MAKE ENDS MEET: RECONCILING THE LAW AND PRACTICE OF HUMAN RIGHTS AMNESTIES*

ROBERT O. WEINER**

I. INTRODUCTION

A credibility problem has long plagued public international law, born of the gap between written law and practice and exacerbated by its display on the grand stage of international affairs. Public international law has never compared well with domestic law, which enjoys, at least theoretically, the ready availability of the state's machinery to enforce its dictates.[1] While this fact may be frustrating to some observers, it is no surprise to most. After all, the issues in this realm are often ambiguous and are not easily reduced to universal jurisprudence. Furthermore, national conceptions of law and society differ radically.[2] Hence, uncertainty lingers

---

* This Commentary is a slightly revised version of a lecture presented at St. Mary's University on March 3, 1995 for the annual *St. Mary's Law Journal* Symposium.

** Americas Program Coordinator, Lawyers Committee for Human Rights; B.A., Cornell University; J.D., New York University. The views expressed here are solely those of the author.

1. Law is often said to perform three functions as part of its overall role of providing order. Two of these, constituting an ideology and an informal education about norms of behavior, also apply to other belief systems without the force of domestic law. *See* DAVID P. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 45–47 (2d ed. 1989) (distinguishing ideological legal standards from law in action). The third, however, sets law apart—the direct control of behavior by official enforcement of its commands.

2. *See id.* at 160–88 (describing three general philosophical orientations underlying views toward human rights and concluding that international action can be taken despite differences between them).

concerning whether questions of public international law are legal matters with political implications or just the reverse.[3]

Within this "semi-soft"[4] field of law, one might expect human rights law to closely approximate its domestic cousins because its closest analogue is criminal law, which is underwritten by the state's most coercive means of enforcement. Unfortunately, human rights law illustrates the credibility gap in public international law. A case in point is the problem of amnesty for widespread human rights violations in the Americas. Few issues offer a better opportunity to measure the distance between the requirements of law and the practice of nations—an opportunity that seems to present itself with disturbing frequency.

Broad amnesty laws have become a recurrent feature of the changing landscape in Latin America,[5] alongside the now-familiar images of military juntas yielding to elected civilians and the decades of war that have melted into peace agreements between previously implacable enemies. Experts on the topic often acknowledge the political, moral, ethical, and legal aspects of the problem of amnesty in times of transition from one era of government to another. However, discussion often focuses solely on the first three sides of this multifaceted issue.[6] Rarely does public de-

---

3. For an excellent treatment of this issue, see generally, Thomas M. Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 AM. J. INT'L L. 109 (1983) (using Falklands crisis to illustrate dangers arising when principles are either neglected or selectively applied).

4. Human rights law is intended to be enforceable within domestic and international jurisdictions. Therefore, it cannot be fully characterized as "soft law" in the sense in which that term is understood by scholars of international law. However, the all-too-familiar problems of enforcement in this area distinguish it, at least on a practical level, from "hard law."

5. In the last decade or so, general amnesties for human rights violations and other political crimes have been imposed in Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay, Suriname, and Uruguay. *See generally* DAVID P. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 207–10 (2d ed. 1989) (elaborating on steps United States has taken to protect human rights and noting violations in states such as Haiti, Chile, Nicaragua, and Paraguay).

6. This tendency persists even among lawyers. *See* Jorge S. Correa, *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 NOTRE DAME L. REV. 1455, 1455 (1992) (writing that "[d]ealing with the problem of past human rights violations . . . entangles in an inseparable way very different ethical, political, and technical issues"). *But see* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2540 (1991) (proposing to clarify misunderstood principles of international law); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L.

bate turn on analysis of the law itself to determine its implications for individual nations and the international community.

Understandably, human rights organizations have tended to insist on an expansive application of the black letter of human rights law while leaving it to governments to satisfy competing interests.[7] Most of the other actors and best known spectators, however, have chosen a political optic to consider the amnesty dilemma. From this perspective, there is significant agreement concerning a rather nuanced hierarchy for amnesties, within which varying degrees of political legitimacy are assigned depending upon the surrounding circumstances. For instance, the identities of the amnesty grantor and the amnestied are quite important. When a military regime grants itself amnesty for the crimes of its personnel, or compels the same from an intimidated civilian government, it is an exercise in power, not legitimacy. Politically speaking, greater legitimacy is perceived when the civilian government offers amnesty for military crimes as a means of moving toward a better future. Official forbearance can claim still greater democratic credentials when ratified by a popular vote than when imposed by either the military or the government.[8]

REV. 449, 462–512 (1990) (examining sources of law governing international community's obligations).

7. *See* DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA 9 (Alex Boraine et al. eds., 1994) (quoting human rights attorney José Zalaquett as stating that "[a]t times human rights organisations take the high ground during political transitions by stating: 'This is what the articles of the Universal Declaration of Human Rights and other instruments say. You do it. I don't care how.' "). Nothing herein is intended to suggest that human rights advocates or anyone else should seek less than the fullest application of the law for those criminal acts which violate national and international human rights norms. The author believes that such offenses merit criminal punishment as the most effective means of deterring future abuses and engendering universal respect for the rule of law. However, state amnesty practices in transition situations mark a pointed departure from punishment of past violations and threaten the credibility of norms understood to require such action. *See* Thomas M. Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 AM. J. INT'L L. 109, 123 (1983) (stating that "a principle with just enough life to rally defenders but not enough to deter violators is . . . a particular danger to world stability"). This Commentary therefore proposes one interpretation of human rights law that is consistent, under certain circumstances, with a state response which does not include criminal sentences for the guilty parties, but which, if heeded, would entail greater affirmative efforts than previously typically undertaken in such situations.

8. *See* José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints* (suggesting that human rights

Others emphasize the moral and ethical dimensions of the amnesty question, urging the superiority of forgiveness over retribution.[9] Those motivated by utilitarian concerns judge amnesties, however achieved, according to their outcomes.[10] By this reckoning, "good" amnesties are the currency that buys peace, avoiding the violence which might otherwise erupt if settlement terms are not reached.

The essence of these responses is their variety, offering individualized approaches to a phenomenon that arises from a myriad of situations and circumstances. The many hues and shades available to the political scientist or moral philosopher contrast sharply with the apparently monochromatic approach taken by the relevant legal instruments, which purport to cover nearly all circumstances with a single standard. Small wonder, therefore, that in times of transition, nations yearn for leaders, not lawyers.

This Commentary reviews applicable standards and attempts to identify a minimum state response to past human rights violations. It also examines the question of amnesties, offers certain legal interpretations, and presents some criteria for an amnesty framework that might be reconcilable with the state's international obligations. This Commentary's aim is not to suggest that amnesties, even if lawful under certain circumstances, are a proper response to the problem of past human rights abuses. However, it does acknowledge that amnesties have so far been the most common response. It further recognizes that, as the international community becomes increasingly involved in brokering or monitoring terms of transition, such laws may gain a dangerous imprimatur—of inevitability if not of legitimacy. Therefore, this Commentary articulates a less stringent, but defensible, interpretation of legal norms that might be demanded from governments and international bodies, in the hope that it might be vindicated rather than vitiated by state practice.

---

policy must represent people's will as condition of legitimacy), *in* THE ASPEN INSTITUTE, STATE CRIMES: PUNISHMENT OR PARDON 23, 34 (1988).

9. *See* DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA 10–11 (Alex Boraine et al. eds., 1994) (defining forgiveness as morally superior to punishment when both result in moral reconstruction, reparation, and prevention).

10. *See id.* at 11 (suggesting that amnesty serves purposes of reparation and prevention and be democratically approved).

This challenge is especially pointed for the three dozen nations of Latin America and the Caribbean, twenty-five of which are parties to the American Convention on Human Rights,[11] the principal human rights instrument for the Inter-American system. The American Convention on Human rights provides the primary point of reference for the following discussion. For purposes of comparison, consider also the International Covenant on Civil and Political Rights,[12] the International Covenant on Economic, Social and Cultural Rights,[13] and the Universal Declaration of Human Rights,[14] all of which form what is known as the International Bill of Human Rights. The Civil and Political Covenant, as the International Covenant on Civil and Political Rights is commonly known, also binds two-thirds of the nations in the Americas, although it is by no means limited to regional application.[15]

Analysis of other specific conventions dealing with particular human rights situations is beyond the scope of this Commentary. For example, in extreme cases such as genocide,[16] a specific treaty would explicitly require punishment of violators.[17] These laws are

---

11. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 9 I.L.M. 673 (1970) (entered into force July 18, 1978) [hereinafter American Convention].

12. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (entered into force Mar. 23, 1967) [hereinafter Civil and Political Covenant].

13. International Covenant on Economic, Social and Cultural Rights, *opened for signature*, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (entered into force Jan. 3, 1976).

14. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

15. Of the 185 member states of the United Nations, 129 are parties to the Civil and Political Covenant. *See* Civil and Political Covenant, *supra* note 12, 999 U.N.T.S. at 172 (listing parties to covenant).

16. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention] (defining genocide as murderous or life-threatening acts against national, racial, or religious group with intent to destroy that group). Other provisions of the Genocide Convention identify genocide as an international crime and call for punishment regardless of whether the participant is a public official or private individual. *Id.* at art. I, 78 U.N.T.S. at 280. Article V requires that contracting parties enact implementing legislation and "provide effective penalties for persons guilty of genocide." *Id.* at art. V, 78 U.N.T.S. at 280.

17. *See* Genocide Convention, *supra* note 16, at art. IV, 78 U.N.T.S. at 280 (providing mandatory punishment regardless of public or private status of offender). The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides an interesting, but slightly less powerful, formulation of the duty to prosecute. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

easy to analyze because of their explicitness,[18] but are hard to preserve in practice because the laws appear irreconcilable with the governmental practice of amnesty and non-prosecution. For both reasons, this Commentary excludes them from discussion.

II. THE TREATIES

First, the American Convention on Human Rights sets forth substantive human rights, such as life, physical integrity, and personal freedom, that state parties must respect.[19] The American Convention further contains certain procedural rights and responsibilities pertaining to domestic judicial systems.[20] Recognizing that rights associated with the legal process serve as both right and remedy, the American Convention devotes two separate articles to these rights.

Article 8 guarantees an individual the right to a fair hearing before a "competent, independent and impartial [court or] tribunal" to defend against a criminal accusation or to determine the individual's "rights and obligations of a civil, labor, fiscal or any other nature."[21] Article 25 addresses "judicial protection" for vic-

---

Punishment, *opened for signature* Feb. 4, 1985, 23 I.L.M. 1027 (1984), *as modified* U.N. Doc. A/39/51, 24 I.L.M. 535 (1984) (entered into force June 26, 1987). Article IV requires state parties to "ensure that all acts of torture are offenses under [their] criminal law" and Article VII requires state parties to either "extradite [alleged torturers] or submit the case[s] to [their] competent authorities for the purpose of prosecution." Since this language dictates only that cases of torture be *submitted* for prosecution, it does not appear to require any particular action thereafter by the prosecuting authorities, who would presumably retain the same range of discretion in deciding how to handle the case that they would normally enjoy under domestic law. Post-conviction amnesties or pardons might also be permissible. However, one commentator has noted that this provision, which effectively establishes a form of universal jurisdiction over torture cases, has as a practical matter proved to be a much more useful tool than the analogous clause of the Genocide Convention. *See* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2540, 2554 n.67 (1991) (discussing trend of adopting conventions that requires state parties to prosecute, criminalize, and punish certain offenses committed within the state's territorial jurisdiction). Because the international tribunal contemplated by the drafters of the Genocide Convention did not materialize, enforcement is left to domestic courts in the territory where the genocide occurred. *Id.*

18. For example, the U.S. rule on this issue provides that "a state violates customary international law if it . . . fails to make genocide a crime or punish persons guilty of it, or otherwise condones genocide." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporter's note 1 (1987).

19. American Convention, *supra* note 11, arts. 3–7, 9 I.L.M. at 676.

20. American Convention, *supra* note 11, art. 25, 9 I.L.M. at 682–83.

21. American Convention, *supra* note 11, art. 8, 9 I.L.M. at 678.

tims of violations of rights recognized in the Convention.[22] In addition to guaranteeing "recourse" before a competent court or tribunal, Article 25 requires state parties to develop the possibility of judicial remedies and to ensure that the competent authorities determine and enforce claims for such remedies.[23]

The Civil and Political Covenant, at Article 2(3), takes a very similar approach.[24] It obliges its state parties, through passage of legislation or other steps, to ensure that victims have an effective remedy, that claims to such a remedy be determined by the competent authorities, be they judicial, administrative, legislative, or such other authorities as the legal system may provide, and that the remedy, when granted, be enforced by the competent authorities.[25] As with the American Convention, state parties to the Civil and Political Covenant are required to develop the possibility of judicial remedies.

Both the American Convention and the Civil and Political Covenant command all state parties to act to ensure the rights, including the guarantees of judicial protection and fair hearing, embodied in

---

22. *See* American Convention, *supra* note 11, art. 25, 9 I.L.M. at 682 (stating that everyone has right to prompt recourse, and explaining what state parties undertake to ensure such recourse).

23. American Convention, *supra* note 11, art. 25, 9 I.L.M. at 682. Article 25 provides:

> [e]veryone has the right to simple and prompt recourse, or any other effective recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by this Convention, even though the violations may have been committed by persons acting in the course of their official duties.

American Convention, *supra* note 11, art. 25, 9 I.L.M. at 682.

24. Civil and Political Covenant, *supra* note 12, art. 2(3), 999 U.N.T.S. at 174, 6 I.L.M. at 369. Article 2(3) provides:

> Each state party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Civil and Political Covenant, *supra* note 12, art. 2(3), 999 U.N.T.S. at 174, 6 I.L.M. at 369.

25. *See* Civil and Political Covenant, *supra* note 12, art. 2, 999 U.N.T.S. at 173–74, 6 I.L.M. at 369 (explaining each state party's responsibilities under Covenant).

the respective instruments.[26] One cannot state more clearly that governments have an obligation to ensure a formal remedy for their victims. Yet, in the last decade or so, governments have granted numerous blanket amnesties for human rights violations. For example, amnesties rewarded the passing of several South American military dictatorships, and in Central America, they cropped up as extended armed conflicts drew to a close.[27]

Today, governments continue to grapple with this issue. Indeed, the pressure on governments to grant amnesty has hardly abated. For example, no sooner had U.S. Marines unwrapped their government-issued meals-ready-to-eat (MREs) in Haiti than President Jean-Bartrand Aristide and the Haitian Parliament had to address the question of amnesty for the departing generals and their minions. Even the international community actively promoted the idea of amnesty during negotiations in 1993 to facilitate the departure of the Haitian coup regime.[28] As a result, President Aristide issued an amnesty decree from exile; the military responded by terrorizing the civilian population and refusing to relinquish power until it was threatened with a U.S. invasion in September of 1994. On the verge of the U.S.-led intervention, only days after President Clinton's detailed public condemnation of human rights violations

---

26. The American Convention provides, in pertinent part, that "[t]he state parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons . . . full and free exercise of those rights and freedoms." American Convention, *supra* note 11, art. 1.1, 9 I.L.M. at 675. State parties to the Civil and Political Covenant undertake, pursuant to Article 2.1, to "respect and to ensure to all individuals . . . the rights recognized in the present Covenant." Civil and Political Covenant, *supra* note 12, art. 2.1, 999 U.N.T.S. at 173, 6 I.L.M. at 369. Professor Thomas Buergenthal, a former judge on the Inter-American Court of Human Rights, identifies in the "respect and ensure" clauses "an additional affirmative obligation on the state" that extends substantially beyond the duty to respect (*i.e.*, not to violate) the rights at issue. *See* Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations* (discussing character of state's obligation), *in* THE INTERNATIONAL BILL OF RIGHTS 72, 77 (Louis Henkin, ed., 1981).

27. *See generally* DAVID P. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 209 (2d ed. 1989) (discussing human rights violations that occurred during Carter and Reagan administrations).

28. During negotiation of two failed agreements between Haiti's elected government and the de facto military rulers (the 1992 Washington Protocols and the 1992 Governors Island accord) that preceded the recent U.S.-led intervention, U.N. and U.S. representatives urged language calling for a human rights amnesty to accompany a political settlement to the crisis. *See* Howard W. French, *Haitian Military and Aristide Sign Pact to End Crisis*, N.Y. TIMES, July 4, 1992, at A1 (explaining 1992 Governors Island accord between President Aristide and General Cedras).

in Haiti—acts in which Haitian military leaders either acquiesced or were more directly responsible—U.S. representative Jimmy Carter signed an agreement with the de facto Haitian president, Emile Jonassaint, that essentially called for a "general amnesty" by the Haitian Parliament.[29] Even after that agreement was considered a dead letter (legally *and* politically), the State Department continued to support rapid passage of amnesty to promote reconciliation.[30]

Perhaps the lesson learned so far, from the point of view of human rights enforcement, is that these problems cannot be trusted to the instincts of governments. Their calculus, no matter how well intentioned, will be political. If governments can be counted on to do one thing, it is to set aside the law books in fashioning a solution to the thorny problems of transition. The question then remains whether these international legal provisions provide any assistance to the "practitioner" of public international law.

III. CASES BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Within the Inter-American system, a handful of cases before the Inter-American Commission on Human Rights offer some guidance. The Commission is an international quasi-judicial body that can hear cases, make findings of facts and conclusions of law, and issue reports publicizing the results.[31] It can also issue recommendations to governments, but it has no additional enforcement power. The Commission can, however, refer cases to the Inter-

29. *See Text of the Agreement*, N.Y. TIMES, Sept. 19, 1994, at A17 (providing text of agreement signed by Jimmy Carter and Emile Jonassaint, which contemplated a general amnesty, voted into law by Haitian Parliament).

30. *See* Larry Rohter, *Haitian Bill Doesn't Exempt Military from Prosecution*, N.Y. TIMES, Oct. 8, 1994, at A4 (noting support of amnesty bill by Clinton Administration officials in Haiti). In its February 1995 Report on Human Rights in Haiti, the State Department cited passage of a law on amnesty, providing ground rules and limitations on any amnesty which might be cleared, as one of the accomplishments of the transition period. U.S. DEP'T OF STATE, HAITI HUMAN RIGHTS PRACTICES 1994 (1995) (on file with author).

31. *See* American Convention, *supra* note 11, art. 61, 9 I.L.M. at 691 (providing for Commission to hear cases contingent on compliance with procedures set out in American Convention).

American Court of Human Rights, which has binding authority over those state parties that have accepted its jurisdiction.[32]

Two recent cases framed the conflict rather well.[33] In these cases, victims and human rights organizations challenged the amnesty laws of Argentina and Uruguay before the Commission. The Argentine law[34] effectively barred prosecution of soldiers who claimed that the rights abuses in question resulted from following a superior's orders. The Uruguayan law, which had survived a national referendum for its repeal, simply foreclosed all possibility of prosecution for torture and crimes that had been perpetrated by the military.[35]

---

32. American Convention, *supra* note 11, art. 62, para. 1, 9 I.L.M. at 691.

33. Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Inter-Am. C.H.R. 1, OEA/ser.L/V/II.82, doc. 5 (1993) [hereinafter *Argentina Report*]; Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Inter-Am. C.H.R. 154, OEA/ser.L/V/II.82, doc. 29 (1993) [hereinafter *Uruguay Report*]. A third case, reported by the Commission a week earlier, concerned a 1987 amnesty law in El Salvador. Case 10.237, Inter-Am. C.H.R. 83, OEA/ser. L/V/II.82, doc. 26 (1993). Human rights groups challenged the amnesty law as violating the Convention's guarantees of remedies for victims of the 1984 Las Hojas massacre, in which Salvadoran soldiers killed up to 74 unarmed peasants. The Commission found that the amnesty law violated Articles 1, 4, 8, and 25 of the American Convention. *Id.* However, the Commission's report contains little of the discussion found in the Argentine and Uruguay reports. It is worth noting that the Salvadoran context was potentially very different from the other two in that El Salvador was, in 1987, in the midst of an armed conflict of sufficient intensity to qualify it for application of Article 3 of the Geneva Conventions. This situation would also constitute a "public emergency" within the meaning of Article 27 of the American Convention (and Article 4 of the Civil and Political Covenant), which permits state parties to suspend certain articles. Although the Convention's list of articles that may not be suspended does not include Articles 1, 8, or 25, the Convention does forbid suspension of the "judicial guarantees essential for the protection" of the specified untouchable rights. American Convention, *supra* note 11, art. 27, para. 2, 9 I.L.M. at 683. However, the government never responded to the petition. Thus, the Commission did not discuss what effect, if any, these circumstances might have had on the admissibility of the petition, at least during the conflict's duration.

34. Actually, three statutes were at issue. Law 23,492 set a 60-day deadline for terminating all criminal proceedings involving crimes committed as part of the "dirty war" that took place during the 1970s. Law 23,521 created an irrebuttable presumption that military personnel responsible for committing crimes during the "dirty war" acted in the line of duty, thus relieving them of any criminal liability. Presidential Decree 1,002 ordered the termination of any proceedings against those indicted for human rights violations who did not benefit from the prior laws. *Argentina Report, supra* note 33, at 2. The last decree ensured that superior officers who had given the orders upon which soldiers had presumptively relied would also escape prosecution.

35. Uruguay's Law 15,848, citing the objective of "complet[ing] the transition to full constitutional order," provided that "any State action to seek the punishment of crimes committed prior to March 1, 1985 by military or police personnel for political motives in

Drawing from the language of Articles 1, 8, and 25 of the American Convention, the Inter-American Commission found that the two nations' amnesty laws violated the victims' right to a fair hearing and to judicial protection. Reading Article 1.1 in conjunction with Article 25, the Commission further found the laws to violate the respective governments' obligation to investigate the crimes in question.[36] With the publication of the two opinions, the Commission had, in one day, announced that the Convention requires states to provide three distinct aspects of human rights protection via the domestic legal system. First, victims must be given access to the justice system to have their rights determined.[37] Next, the state must provide an effective recourse for violations; and last, the state must effectively investigate violations and determine who was responsible.[38] However, the report does not delineate how and to what extent these three protections overlap.

The Commission's broad interpretation of the "respect and ensure" clause contained in Article 1.1 of the American Convention is probably the most striking element of its findings. To support its position, the Commission relied upon language from a prior deci-

---

the performance of their functions or on orders from commanding officers who served during the de facto period, has hereby expired." *Uruguay Report, supra* note 33, at 155.

36. *Uruguay Report, supra* note 33, at 161–64.

37. *Uruguay Report, supra* note 33, at 162–63. In the Uruguayan case, the government objected to the claim that preclusion of criminal prosecution violated the victims' Article 8 right to a fair trial since the amnesty law merely extinguished the *State's* right to prosecute and private parties did not have the right to initiate a private prosecution. *Id.* at 162. Overruling the government's objection, the Commission noted that Uruguayan law permits private parties to intervene in the public prosecution and to request that certain actions be taken within a criminal proceeding. *Id.* By precluding prosecutions, the amnesty law forecloses exercise of those rights. The Commission's framing of the issue—that the cause of action under international law is partly dependent on the nature of the rights existing under domestic law—suggests that the analysis of an amnesty law in an Anglo-Saxon system such as that of the United States (*i.e.*, when there is no private right of intervention) might yield very different conclusions.

38. Stated differently, the Commission identified three independent bases, embodied in these three Articles, for voiding blanket amnesties. The Commission's report also clarified that violations of the rights and obligations set forth in Articles 1, 8, and 25 were distinct from the failure to respect the underlying rights of the individual to be free from violent abuse. *Argentina Report, supra* note 33, at 13. Hence, although the Argentine government correctly noted that the Convention entered into force for Argentina only after the physical abuse took place, the Commission found that the laws preventing prosecution, which came after Argentina became subject to the Convention, violated the provisions requiring opportunities for legal redress. *Id.* at 12.

sion of the Inter-American Court, the *Velásquez Rodríguez* case,[39] that did not concern amnesty, but rather addressed the phenomenon of disappearances, a horror so widespread in Latin America that it generated substantial international support for treating it as a crime against humanity. Although the concept of "crimes against humanity" has proven difficult to define, the result that flows from its application is generally quite clear: the state has a duty to punish the offending parties.[40]

Although the context of the cases before the Commission was different—the Argentine case faced a variety of serious abuses, and the Uruguayan cases involved torture—its decision does not appear to differentiate among types of human rights violations. Quoting at length from the *Velásquez* disappearance decision, the Commission adopted a general rule that, under Article 1.1, states have a duty to "*prevent, investigate and punish any violation* of the rights recognized by the Convention."[41]

Even a casual reader of the Commission's findings could conclude that the Commissioners felt strongly about, and clearly disapproved of, the amnesty. The Commissioners obviously believed that if the rights enumerated in the Convention were to have practical value, they had to be tied to some obligation for domestic enforcement.[42]

Some observers expressed surprise that the Commission did not choose to dispose of the Argentine and Uruguayan cases by elevating them to the Inter-American Court for a decision that would carry greater weight. One possibility, in speculation, may be that the Commission's lawyers dared not refer the case to the Court for fear of forcing the Court, with its binding jurisdiction and its responsibility for interpreting Inter-American human rights law, to choose between two difficult alternatives—on the one hand, taking the amnesty possibility away from fledgling civilian governments that were slowly trying to ease out from under abusive military rule; or, on the other hand, simply wiping away, without legal process, crimes that deprived thousands of basic human rights. Per-

39. Case 7920, Inter-Am. C.H.R. 43, OEA/ser.L./V./III.19, doc. 13 (1988), *reprinted in* 28 I.L.M. 291 (1989).

40. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2585–86 (1991).

41. *Argentina Report*, *supra* note 33, at 10; *Uruguay Report*, *supra* note 33, at 164.

42. *Argentina Report*, *supra* note 33, at 10; *Uruguay Report*, *supra* note 33, at 164.

haps the Commissioners decided that allowing international practice to continue under its watchful eye and precatory voice, in the hope that it would "voluntarily" evolve in the right direction, was preferable to submitting the question to a final determination by a court that had rarely tested the binding jurisdiction granted to it under the American Convention.[43]

Any lawyer in a position to question the Commission's choice must consider the alternatives. The Inter-American Court could have overruled the Commission, concluding that the latter had over-interpreted the Court's prior ruling and the American Convention. The Court might also have left the decision of how to handle issues of transition, punishment, and reconciliation to the judgment of the political branches of government. Perhaps worse, it could have merely invalidated amnesties and faced the possibility that no governments would heed the decision. Even if governments obeyed the no-amnesty rule, they could be rendered unstable by a military backlash, amidst renewed bloodshed.

The Commission's decision not to elevate the case may reflect an implicit recognition that the job of the judge is, in some respects, far more difficult than that of the politician faced with the same question. In addition to balancing competing societal interests, the judge must reconcile the decision with the requirements of a written set of principles, mindful that the decision will limit the judge's room for maneuvering in each successive case. Perhaps this factor helps explain the Commission's reluctance to test the Court's binding authority in these amnesty cases.

Opinions among practitioners in the field vary concerning the wisdom of pursuing the Commission's finding in the Court. However, it is important that human rights lawyers seek resolution of these issues. Acquiescence risks the erosion of international norms, while pursuit of an absolutist position against the possibility of amnesty may become a direct route to irrelevance.

In the face of widespread amnesties, lawyers must go beyond exhorting the state to prosecute human rights crimes. They must

43. *Velásquez* was, with two other cases, the first test of the Court's contentious jurisdiction. Velásquez Rodríguez Case 7920, Inter-Am. C.H.R. 35, OAS/ser.L./V.III 19, doc. 13 (1988), *reprinted in* 28 I.L.M. 291 (1988). *See generally* Michael Corbera, Note, *In the Wrong Place, at the Wrong Time: Problems with the Inter-American Court of Human Rights' Use of Contentious Jurisdiction*, 25 VAND. J. TRANSNAT'L. L. 919, 932–40 (1993).

seek to clarify the core meaning and purpose of the international legal provisions that purport to govern these situations. Perhaps there is an irreducible minimum consistent with international law and compatible with international practice. For example, a "judicial remedy" may not necessarily require a criminal investigation, trial, conviction, and sentence of the guilty. Perhaps criminal prosecution should not be applied to all types of human rights abuses. Certain circumstances might justify—in legal terms—the decision to suspend or somehow forego such a remedy.

IV. Suggested Minimum Requirements

This Commentary concludes by suggesting minimum requirements. The investigation should be the core of the remedy at issue. There are three components: first, an affirmative inquiry into the facts by the relevant authorities; second, an opportunity for victims to come forth and tell their stories; and third, an adjudication of sorts—a formal finding of the facts and conclusions of relevant law. Many of the truth commissions that have sprung up in transition situations around the world essentially serve this function. A body of experts, exercising quasi-judicial investigative authority, makes public findings intended to set the record straight and provide a public acknowledgment, on behalf of the state and for the benefit of its citizens, that certain wrongs were committed.

The state, however, may nonetheless decide not to proceed with prosecution at this point. Even after hearing witnesses and concluding that a clear basis exists for believing that crimes have been committed, the competent authorities can decide not to summon the presumed offenders before the nation's courts and formally prosecute them.[44] Based on the discussion thus far, the state is still within the limits of the law as far as its duties to investigate, offer a fair hearing, and provide a legal remedy are concerned.

However, current amnesty practices cut deeper into the principles of law. Amnesties have typically foreclosed the possibility of prosecution and have precluded civil remedies. Specifically,

44. National law may complicate this question. In much of Latin America, prosecutors have almost no discretion to decide whether to pursue cases. *See* Center for the Admin. of Justice, Florida Int'l Univ., Latin American Codes of Criminal Procedure 15 (José M. Rico and Luis Salas eds.) (noting limitation on prosecutorial discretion in Latin American laws).

amnesties have denied victims access to institutions where they might have laid claim to the truth of the matter, been awarded compensation, or instigated punishment of the guilty. Hence, any attempt to reconcile amnesty laws with the requirements of international law is difficult. Under certain conditions, however, amnesty might be drawn away from a conflict with state obligations under international law. The following conditions should be implemented for such an amnesty framework:

(1) that amnesty not preclude an individual investigation and adjudication of the facts in each case;

(2) that it not prejudice the victims' opportunity to seek and obtain reparations from the state, even if it does foreclose civil liability for the individual guilty parties;

(3) that it not preclude and should be offset by public acknowledgement and publication of the relevant facts, including the identities of the perpetrators;

(4) that it not be available to persons who have not submitted to the personal jurisdiction of the relevant authorities; and

(5) that those seeking amnesty must affirmatively petition, and that they participate in the investigation of the facts by making a full disclosure of their role in the acts or omissions for which amnesty is sought.

Other important considerations include:

(1) that whether a commission of inquiry or other body conducts this investigation, the applications for amnesty be brought before and decided upon by the regularly constituted judicial system;

(2) that discretion in applying the guidelines be limited by legislation setting forth the requirements and procedures governing amnesty applications;

(3) that the entire process be carried forward within the parameters of the state's constitutional framework;

(4) that to the extent possible, and in accordance with the confidentiality concerns of victims or other witnesses, the proceeding and the results be public; and

(5) that other sanctions, such as prohibition on holding public office or removal from armed services, not be waived as a result of a grant of amnesty.[45]

---

45. Some may object that the criteria permit a scheme for pardons rather than an amnesty. It is beyond the scope of this discussion to examine the practical consequences of

One recent approach approximates this model. South Africa's pending Bill for Promotion of National Unity and Reconciliation proposes a Truth and Reconciliation Commission, appointed by the President in consultation with the Cabinet to address "act[s] associated with a political objective," as that phrase is further defined in the bill over the last three decades.[46] To this end, the Commission is divided into three committees. One committee would be dedicated to investigating facts by drawing on testimony from witnesses, victims, and offenders. A second committee would entertain and make recommendations to the Commission concerning victims' claims for reparations. Finally, a third would review affirmative petitions for amnesty by those responsible for the acts.[47]

Petitioners would have the opportunity to attend, testify, and adduce testimony and evidence at a hearing on the application for amnesty.[48] So long as the acts at issue fall within the purview of the proposed law and the petitioner has fully disclosed the relevant facts, the Commission "shall grant amnesty in respect of that act or omission."[49] Regarding the acts at issue, a grant of amnesty would terminate any pending criminal or civil proceeding or sentence,[50] preclude future criminal or civil liability,[51] and cause a purging of the official record of conviction.[52] However, a grant of amnesty

---

such a distinction. In any event, the amnesty proceedings would probably be civil in nature, though they would provide the petitioner with some of the evidentiary protection (*i.e.* against self-incrimination or subsequent use) normally associated with criminal accusations. The effect of the amnesty would be to preclude subsequent criminal proceedings as well as nullify previous ones.

46. Bill for the Promotion of National Unity and Reconciliation, B 60--94 ch. 1, art. 1(1)(i) (1994) (S. Afr.) [hereinafter South Africa Bill].

47. The Amnesty Committee is authorized, however, to entertain petitions for any act, omission, or offense associated with a political aim, while the other two committees are limited to investigation and reparations for gross violations of human rights. Hence, one committee might grant amnesty and preclude prosecution for acts for which the other two committees could offer no relief.

48. South Africa Bill, *supra* note 46, at ch. 4, art. 15(1). The Committee would have authority to subpoena documents and witnesses. South Africa Bill, *supra* note 46, at ch. 4, art. 15(2)(A).

49. South Africa Bill, *supra*, note 46, at ch. 4, art. 16(1)

50. South Africa Bill, *supra* note 46, at ch. 4, art. 16(6).

51. South Africa Bill, *supra* note 46, at ch. 4, art. 16(5)(a).

52. The names of successful petitioners shall be published, along with "sufficient confirmation to identify the act or omission in respect of which amnesty has been granted." South Africa Bill, *supra* note 46, at ch. 4, art. 16(3).

would not affect the criminal liability of other persons that would have otherwise been contingent upon the liability of the amnestied party,[53] or civil liability and operation of civil judgments delivered prior to the granting of amnesty.[54] Amnesty would not disturb the functioning of either of the other two committees. Considering the Inter-American Commission's analysis in the Argentine and Uruguayan cases, preserving the power of these committees is very important.

Earlier drafts of the bill differed in at least one important respect; they left the final decision on amnesty petitions with the executive, exercising discretion, rather than the judiciary, operating under clear rules.[55] As introduced to the legislature, the bill places the decision making power in the hands of the Committee on Amnesty, which acts in a quasi-judicial capacity. This structure still leaves the nation's regularly constituted judicial system on the sidelines when it should play, and be seen to play, a protagonist's role in rebuilding the legal system's credibility.[56] However, the bill goes a long way toward satisfying the basic requirements of international law within the framework discussed herein.

There are, however, practical problems raised by these suggestions. For example, it may be problematic to insist on disclosure of factual elements establishing responsibility by the presumed offender as a precondition for the grant of amnesty. Suppose, however, that the Committee, perhaps relying on victim testimony which suggests a larger role than that admitted by the amnesty seeker, declines to give credit for the confession and denies the amnesty petition. What measure of discretion would the courts retain to make that determination? Furthermore, if a denial of amnesty were appropriate, could the petitioner's declarations be utilized in the course of a future prosecution? Although the South African proposal would make such evidence inadmissible in other

53. South Africa Bill, *supra* note 46, at ch. 4, art. 16(5)(b).

54. South Africa Bill, *supra* note 46, at ch. 4, art. 16(7).

55. Fortunately, this provision was deleted in the current version.

56. One might argue that, for purposes of preserving the judiciary's credibility, the judiciary should *not* be implicated in the granting of amnesties. However, significant public sentiment exists in favor of a decision to offer such amnesties. In addition, significant benefit might be gained if the security forces and the military were required to present themselves before the nation's courts for a formal determination of their juridical fates.

proceedings,[57] it is unclear how broadly "such evidence" is defined.[58] Another problem may exist if the petitioner's declaration implicates others. There may be circumstances under which the declaration could be used to prosecute those parties. Could the *successful* amnesty seeker be compelled, on the basis of the previous declaration, to appear as a material witness in the prosecution of his former colleagues?[59]

These problems are not insurmountable.[60] Indeed, U.S. lawyers have much experience in grappling with analogous problems under domestic law.[61] They are the sort of practical matters that will cry out for specific legal expertise. Such expertise is the province of lawyers, and they must be willing to enter the arena alongside the political theorists and the political leaders.

Although politics may ultimately provide the opportunity for the ambitious undertaking suggested herein, legal application has its

---

57. South Africa Bill, *supra* note 46, at ch. 1, art. 1(1)(i).

58. South African courts would have to exercise great care to prevent human rights violators from crippling and effectively precluding prosecutions through unsuccessful applications for amnesty. Article 17(1) of the bill provides:

> If the Committee refuses an application for amnesty, the information contained in the application of the applicant, the evidence given with regard thereto before the Committee, and any document or other information that may have come into the possession of the Committee when such application was dealt with, shall not be admissible in evidence against the applicant before any court or tribunal.

South Africa Bill, *supra* note 46, at ch. 4, art. 17(1). This rule might be interpreted to mean that any facts contained in documents or testimony from third parties that are submitted in response to an amnesty application could not then be used in court if the Committee decided, for example, that the applicant had not made a full disclosure. This might be addressed by adopting the practice of securing witness and victim testimony before calling the amnesty petitioner to testify and applying an "independent source" exception to the language of Article 17(1).

59. The South Africa Bill is silent on this issue. *See* South Africa Bill, *supra* note 46, at ch. 1, art. 1(1)(i) (outlining effect of granting of amnesty on particular individual's civil and criminal liability without addressing possibility of compelling individual's cooperation in related matters).

60. For instance, the amnesty petitioner would voluntarily testify in the hope of precluding action that the State has every right to take against him—prosecution for crimes they reasonably believe he has committed. There is no compulsion of testimony, except in exchange for special benefits. Second, petitioners would decide for themselves those crimes for which they wish to seek amnesty, and the required admissions would be limited to those offenses. They can choose to come forward and make full disclosure on their own terms.

61. Lawyers familiar with the mechanisms of "use" immunity from prosecution for certain witnesses would undoubtedly identify ready parallels with the approach suggested herein and that contained in the South Africa Bill.

relevance as well. Political factors may determine how much can be accomplished, but what is ultimately of greatest importance is that political space be exploited to support the rule of law, even as the state absolves the guilty.