

# LESSONS FROM THE AMERICAS: GUIDELINES FOR INTERNATIONAL RESPONSE TO AMNESTIES FOR ATROCITIES

DOUGLASS CASSEL\*

## I

### INTRODUCTION

The last two decades of the Cold War saw human rights reach a low ebb in Latin America. From Argentina's Dirty War<sup>1</sup> and Chile's General Pinochet in the South,<sup>2</sup> to bloodbaths of peasants in El Salvador<sup>3</sup> and indigenous peoples in Guatemala<sup>4</sup> in the North, the continent was overrun by serious violations of human rights.<sup>5</sup> Few countries escaped. Even today the region's two largest nations, Brazil and Mexico, suffer widespread and systematic patterns of police torture (among other abuses),<sup>6</sup> while massive violence stalks Colombia<sup>7</sup> and

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Executive Director, International Human Rights Law Institute, and Jeanne and Joseph Sullivan Program for Human Rights in the Americas, DePaul University College of Law.

The author gratefully acknowledges the research assistance of Ms. Barbara Goldberg, 1998 J.D. candidate, DePaul University College of Law.

1. *See generally* NUNCA MÁS, INFORME DE LA COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS (1st Am. Ed. 1986).

2. *See generally* REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Philip E. Berryman trans. 1993).

3. *See generally* FROM MADNESS TO HOPE: THE 12-YEAR WAR IN EL SALVADOR, REPORT OF THE UNITED NATIONS COMMISSION ON THE TRUTH FOR EL SALVADOR, U.N. Doc. S/25500 (1993) [hereinafter TRUTH COMMISSION REPORT].

4. *See, e.g.*, RICARDO FALLA, MASACRES DE LA SELVA: IXCAN, GUATEMALA, 1975-82 (1992).

5. "Serious" violations of human rights, for purposes of this article, mean violations committed by or with the acquiescence of states or organized insurgencies, which take lives or jeopardize the physical or mental integrity of human beings, and are done by acts that are criminal under national or international law. Examples are massacres of civilians, political assassinations, extrajudicial executions, forced disappearances, torture, rape and sexual assault, and prolonged detention in inhuman conditions.

This is not to denigrate other important rights, such as the right to vote, freedoms of speech and association, and discrimination. It merely reflects the concern of this article with human rights violations committed by means of felonious criminal conduct. It is analogous to the "serious" violations of international humanitarian law in the mandate of the International Criminal Tribunal for the Former Yugoslavia. *See* S.C. Res. 808, U.N. SCOR, 48th Year, 3175th mtg. at 1, U.N. Doc. S/RES/808 (1993).

6. *See, e.g.*, HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1997, at 80 (Brazil), 110 (Mexico) (1996) [hereinafter HRW 1997]. *See generally* PAUL CHEVIGNY, EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS 145-79 (Sao Paulo, Brazil), 227-48 (Mexico City) (1995); AMNESTY INTERNATIONAL, MEXICO: TORTURE WITH IMPUNITY 42 (1991) ("A principal factor why torture is widespread is the almost total impunity extended to torturers. Police officers implicated are rarely subject to investigation and even less frequently prosecuted."); MINNESOTA ADVOCATES FOR HUMAN RIGHTS AND HEARTLAND ALLIANCE FOR HUMAN NEEDS AND HUMAN RIGHTS, THE RULE OF LAWLESSNESS IN MEXICO: HUMAN RIGHTS VIOLATIONS IN THE STATE OF OAXACA 28-29 (1996)

rights are suspended in much of Peru.<sup>8</sup>

Part II of this article summarizes the impunity enjoyed by perpetrators of these violations, thanks in part to amnesty laws. It poses the question of how the international community should respond to amnesties conferred by national law. Rather than proposing new treaties or customary international law, it suggests that the international community and the United States adopt a form of "soft law"—guidelines to assist their own officials in responding to future amnesties. Part III reviews relevant jurisprudence of the Inter-American Commission and Court of Human Rights and pertinent Inter-American treaties. Part IV considers three illustrative cases (Guatemala, El Salvador, and Haiti), and Part V concludes with ten proposed guidelines, reflecting Inter-American jurisprudence and treaties, for future international responses to amnesties for serious violations of human rights in the Americas.

## II

### OVERVIEW OF IMPUNITY AND INTERNATIONAL RESPONSE IN THE AMERICAS

#### A. Impunity

Throughout the human rights tragedies of recent decades in the Americas, perpetrators of human rights violations have enjoyed impunity from criminal or civil prosecution.<sup>9</sup> Only in Argentina have senior leaders of a ruthless regime been prosecuted, and even this exception was due mainly to factors extraneous to human rights and circumscribed by impunity for most officers implicated in more than 10,000 disappearances.<sup>10</sup> Elsewhere in the region, only in isolated cases have prosecutions for serious violations of human rights been even partially successful.<sup>11</sup>

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("[C]ountless murders and other assaults on basic human rights have been ignored by both the Oaxacan and Mexican federal government.... Even when crimes are investigated, arrest warrants frequently remain unexecuted.... This consistent pattern of impunity itself violates Mexico's international obligation to ensure and respect human rights.")

7. See HRW 1997, *supra* note 6, at 88. See generally 1996 ANN. REP. INT.-AM. COMM'N H. RTS. 651-70 (1997) [hereinafter 1996 IAC].

8. See HRW 1997, *supra* note 6, at 116; 1996 IAC, *supra* note 7, at 735-39.

9. Impunity from criminal or civil prosecution, the focus of this article, need not mean impunity from all legal or moral consequences. For example, senior military and rebel commanders in El Salvador were publicly named as responsible for political assassinations and extrajudicial executions by the Truth Commission. See TRUTH COMMISSION REPORT, *supra* note 3, at 53-54, 152, 176.

10. See generally I TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 82-103, 146-53, 417-38 (Neil J. Kritz ed., 1995); II *id.* at 323-81.

11. Even these cases were arduous and imperfect at best. The following are among the prominent examples: In Bolivia, former dictator General Luis Garcia Meza was finally convicted in 1993 and extradited in 1995, after a prosecution lasting years, on both human rights and corruption charges arising from 1980. See generally Rene Antonio Mayorga, *Democracy Dignified and an End to Impunity: Bolivia's Military Dictatorship on Trial*, in TRANSITIONAL JUSTICE AND THE RULES OF LAW IN NEW DEMOCRACIES 61 (A. James McAdams ed., 1997). See Matt Miller & Arthur Golden, *Confronting the brutal past: Fledgling Democracies turn on ruthless rulers*, THE SAN DIEGO UNION-TRIBUNE, Dec. 17,

This blanket of impunity is both *de facto* and *de jure*. In most countries, police, prosecutors, and judges remain undertrained and underpaid. They labor in criminal justice systems hampered by grossly inadequate budgets, archaic and ineffective criminal procedures, endemic corruption, and politicized leadership. They are often selected through procedures that militate against their independence. And especially in human rights cases, they commonly face violence, threats, suborning, and external political interference.<sup>12</sup>

In the 1990s, these causes of *de facto* impunity continue,<sup>13</sup> even though mas-

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1995, available in NEXIS, News Library, Curnws File. Human rights groups argue that other high-ranking officers, equally guilty, were not prosecuted. See TRIBUNAL PERMANENTE DE LOS PUEBLOS, PROCESO A LA IMPUNIDAD DE CRIMENES DE LESA HUMANIDAD EN AMERICA LATINA, 1989-91, at 279, 286-87 (1991) [hereinafter PROCESO].

In Brazil in 1996, one military police agent and one policeman were convicted and sentenced to lengthy prison terms, but several others were acquitted, for the 1993 murder of eight street children at La Candelaria Church in Rio. See LATIN AMERICAN NEWSLETTERS, LTD., LATIN AMERICA REGIONAL REPORTS: Brazil, Jan. 1, 1997, available in LEXIS, News Library, Curnws File.

In Chile, the Supreme Court in 1995 upheld the convictions of the two top generals who formerly directed Chilean intelligence for ordering the 1976 murder in Washington of Orlando Letelier, in which American Ronni Moffitt was also killed. See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1996, at 75 (1995) [hereinafter HRW 1996]. But no senior officers have been convicted for the thousands of disappearances in Chile itself, and these two were jailed only after a prolonged stand-off between military and civilian authorities in Chile. *Id.* at 75-76. For other pending cases in Chile, see part III.A.5 below.

In Ecuador, the former police commander, General Gilberto Molina, was among those convicted and sentenced to two years imprisonment for covering up the 1988 disappearance and presumed deaths of the two Restrepo brothers. See COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1995, U.S. DEPT. OF STATE REPORT TO COMM. ON INT'L RELS., U.S. HOUSE OF REPS., AND COMM. ON FOREIGN RELS., U.S. SENATE, 104th Cong., 2d Sess., Joint Comm. Print April 1996, at 400 [hereinafter COUNTRY REPORTS FOR 1995].

In El Salvador, one colonel was convicted in 1991 for the murder of six Jesuit priests and their cook and her daughter in 1989, but he was amnestied in 1993, and the high command, found by the U.N. Truth Commission to have ordered the murders, was never prosecuted. See generally MARTHA DOGGETT, DEATH FORETOLD: THE JESUIT MURDERS IN EL SALVADOR (1993).

In Guatemala, an alleged assassin of anthropologist Myrna Mack was sentenced to prison in 1993, but prosecution of higher-ups continues to be thwarted, despite strong evidence. See HRW 1997, *supra* note 6, at 100; HRW 1996, *supra*, at 96-97.

In Honduras, a colonel was sentenced to 16 years imprisonment, and a sergeant to 10 years, for the 1991 rape and murder of a high school girl. See COUNTRY REPORTS FOR 1995, *supra*, at 451. Mid- and lower-level army personnel are currently being prosecuted for disappearances and torture in the 1980s, despite great difficulties, and the Supreme Court ruled in 1996 that amnesty laws passed in 1987 and 1991 do not preclude judicial investigations of human rights violations, but the senior officers responsible are yet to be charged. See HRW 1997, *supra* note 6, at 108-09; HRW 1996, *supra*, at 106-08.

12. With respect to *de facto* impunity, see, e.g., *Injustice for All: Crime and Impunity in Latin America*, 30 NACLA REPORT ON THE AMERICAS 16-43 (1996) (Brazil, Colombia, Haiti, Jamaica, and Venezuela); PROCESO, *supra* note 11 (Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Honduras, Panama, Paraguay, Peru, Uruguay); 1996 IAC, *supra* note 7, at 655-58 (Colombia), 716-18 (Guatemala); Kai Ambos, *Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina*, 18 H. RTS. L.J. 1 (1997) (discussing *de facto* impunity as well as impunity due to military justice and states of emergency).

13. See, e.g., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996, U.S. DEPT. OF STATE REPORT TO COMM. ON INT'L RELS., U.S. HOUSE OF REPS., AND COMM. ON FOREIGN RELS., U.S. SENATE, 105th Cong., 1st Sess., Joint Comm. Print Feb. 1997 [hereinafter COUNTRY REPORTS FOR 1996]. While noting improvements in several countries, the Country Reports for 1996 repeatedly cite problems of impunity. For example:

*Brazil:* "[S]pecial courts for the uniformed police are, in many cases, overloaded,

sively bloody regimes have now gradually given way to elected, civilian, constitutional governments in all of Latin America and the Caribbean except Cuba. Ironically, the transitions toward democracy have spurred yet another mechanism of impunity. Fearful that democratic change might bring accountability for human rights violations, outgoing military regimes have insisted on a sort of insurance policy, in case all other mechanisms of impunity fail: amnesty laws.<sup>14</sup>

## B. Amnesties

In at least eleven countries—Argentina,<sup>15</sup> Brazil,<sup>16</sup> Chile,<sup>17</sup> El Salvador,<sup>18</sup>

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rarely investigate effectively or bring fellow officers to trial, and seldom convict abusers. This separate system of special state police courts contributes to a climate of impunity for police elements involved in extrajudicial killings or abuse of prisoners and is thought to be the single largest obstacle to eliminating such abuses by police." *Id.* at 365.

*Colombia*: "Rampant impunity is at the core of the country's human rights violations. According to government reports, in from 97 to 99.5 percent of all crimes, the lawbreakers are never brought to justice." *Id.* at 390.

*El Salvador*: "[W]idespread impunity continues to be a problem." *Id.* at 442.

*Guatemala*: "[T]he PAC's, former civilian military commissioners, members of the army, and the police committed serious human rights violations, including extrajudicial killings, physical abuse, arbitrary arrest and detention, and death threats. The security forces generally enjoyed impunity from the law." *Id.* at 455.

*Mexico*: "The Government continued, with limited success, its attempt to end the 'culture of impunity' surrounding the security forces ...." *Id.* at 496.

*Peru*: "A 1995 law granted amnesty from prosecution to those who committed human rights abuses during the war on terrorism from May 1980 to June 1995.... These events created considerable concern over military and police impunity for past abuses." *Id.* at 541.

*Venezuela*: "The perpetrators of extrajudicial killings act with near impunity, as the Government rarely prosecutes such cases. The police often fail to investigate crimes allegedly committed by their colleagues ...[,] the civilian judicial system remains highly inefficient and sometimes corrupt, and military courts are often strongly biased in favor of members of the armed forces accused of abuse." *Id.* at 578.

14. See, e.g., Robert E. Norris, *Leyes de Impunidad y los Derechos Humanos en las Américas: Una Respuesta Legal*, 15 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 47, 48-56 (Chile), 56-60 (Brazil), 60-65 (Honduras), 65-71 (Guatemala), 71-83 (Argentina), 84-92 (Uruguay), 92-101 (El Salvador), 101-05 (Nicaragua), 106-09 (Suriname)(1992); I TRANSITIONAL JUSTICE, *supra* note 10, at 82-103 (Argentina, Chile, Uruguay), 146-53 (same), 319-20 and 327-29 (El Salvador), 417-38 (Argentina); II *id.* at 323-81 (Argentina), 383-430 (Uruguay), 431-52 (Brazil), 453-509 (Chile); III *id.* at 546-55 (El Salvador); Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEXAS INT'L L.J. 1 (1996) (Haiti); Ambos, *supra* note 12, at 3-4 (Argentina, Chile, Peru).

15. See Norris, *supra* note 14, at 71-83; I TRANSITIONAL JUSTICE, *supra* note 10, at 417-38; II *id.* at 323-81; Alicia Consuela Herrera et al., cases nos. 10.147 et al., 1992-93 ANN. REP. INT.-AM. COMM'N H. RTS. 41, 43 ¶ 6 (1993); see *infra* part III.A.2(b).

16. See Norris, *supra* note 14, at 56-60; II TRANSITIONAL JUSTICE, *supra* note 10, at 431-52.

17. See Norris, *supra* note 14, at 48-56; II TRANSITIONAL JUSTICE, *supra* note 10, at 453-509; Jorge Correa, *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 NOTRE DAME L. REV. 1455 (1992). See generally Garay Hermosilla et al., Case no. 10.843; 1996 IAC, *supra* note 7, at 156; *infra* part III.A.5.

18. See Norris, *supra* note 14, at 92-101; I TRANSITIONAL JUSTICE, *supra* note 10, at 319-20, 327-29; III *id.* at 546-55; Las Hojas Massacre Case, Case no. 10.287, 1992-93 ANN. REP. INT.-AM. COMM'N H. RTS. 88 ¶ 1 (1993) (Spanish)[hereinafter Las Hojas]; *Report on the Situation of Human Rights in El Salvador* 69-77, OAS Doc. OEA/Ser.L/V/II.85 (1994); DOGGETT, *supra* note 11, at 271-76; Margaret

Guatemala,<sup>19</sup> Haiti,<sup>20</sup> Honduras,<sup>21</sup> Nicaragua,<sup>22</sup> Peru,<sup>23</sup> Suriname,<sup>24</sup> and Uruguay<sup>25</sup>—new civilian leaders have chosen or been compelled, sooner or later, either to decree an amnesty for serious human rights violations,<sup>26</sup> or to accept one previously decreed by outgoing military rulers.

### C. The Response of the International Community

Much has been written on the vexing moral, political, and legal dilemmas confronted by these newly emerging democracies in deciding whether to prosecute serious violations of human rights committed by prior regimes.<sup>27</sup> Less attention, however, has been paid to the role of the international community<sup>28</sup> with regard to amnesties.<sup>29</sup> What has been the record of the United Nations,<sup>30</sup>

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Popkin, *El Salvador: A Negotiated End to Impunity?*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 198, 211-13 (Naomi Roht-Arriaza ed., 1995); see *infra* parts III.A.2(b) and 3, IV.B.

19. See Norris, *supra* note 14, at 65-71; see also HRW 1997, *supra* note 6, at 102; 1996 IAC, *supra* note 7, at 719-20; *infra* part IV.A.

20. See generally Scharf, *supra* note 14. See *infra* part IV.A.

21. See Norris, *supra* note 14, at 60-65; HRW 1997, *supra* note 6, at 108-09, *infra* part III.A.2(a)

22. See Norris, *supra* note 14, at 101-05; John J. Moore, Jr., Note, *Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador*, 43 *STAN. L. REV.* 733 (1991).

23. See, e.g., HRW 1996, *supra* note 11, at 116, 118, 119; 1996 IAC, *supra* note 7, at 739-41.

24. See Norris, *supra* note 14, at 106-09.

25. See, e.g., Norris, *supra* note 14, at 84-92; II *TRANSITIONAL JUSTICE*, *supra* note 10, at 383-430; Hugo Leonardo et al., cases nos. 10.029 et al., 1992-1993 *ANN. REP. INT.-AM. COMM'N H. RTS.* 154, 161-62 ¶ 38 (1993); see *infra* part III.A.2(b). See generally Lawrence Weschler, *The Great Exception: I—Liberty*, *THE NEW YORKER*, Apr. 3, 1989, at 43; Lawrence Weschler, *The Great Exception: II—Impunity*, Apr. 10, 1989, at 85.

26. Not all amnesties, of course, are contrary to human rights or the rule of law. For example, following non-international armed conflicts, article 6(5) of Protocol II to the Geneva Conventions calls for the “broadest possible amnesty.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 *U.N.T.S.* 609, 614; see part III.A.6 *infra*. Amnesties are also expressly contemplated by article 4 of the American Convention on Human Rights, *infra* note 76, and article 6(4) of the International Covenant on Civil and Political Rights, *infra* note 107.

27. See, e.g., Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 *HUMAN RTS. Q.* 1 (1990); *TRANSITIONAL JUSTICE*, *supra* note 11; Juan Mendez, *Accountability for Past Abuses*, 19 *HUMAN RTS. Q.* 255 (1997); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537 (1991); José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 *HASTINGS L.J.* 1425 (1992); José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in *STATE CRIMES: PUNISHMENT OR PARDON* 23, 26-65 (Aspen Institute, 1989), reprinted in I *TRANSITIONAL JUSTICE*, *supra* note 10, at 3.

28. “International community” is a term oft-criticized, with justification, as a contradiction in terms. Here it loosely refers, for purposes of Latin America and the Caribbean, to the U.N., the OAS, the U.S. as the dominant power in the hemisphere, and the nations comprising the various “groups of friends” in support of peace processes. For the Salvadoran peace process, for example, the group of friends consisted of Colombia, Mexico, Spain, Venezuela, and *de facto* the United States. See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 *VAND. J. TRANSNAT'L L.* 497, 499, 542-43 (1994). For the Guatemalan peace process, it consisted of Colombia, Mexico, Norway, Spain, the United States, and Venezuela. See, e.g., *Guatemalan Foes Renounce Use of Arms, Ending 35-Year War*, *N.Y. TIMES*, Dec. 5, 1996, at A9.

29. Although the book does not focus on the issue of amnesty, the broader context of U.N. insider

the Organization of American States ("OAS"), and their human rights and peacemaking arms, as well as of Uncle Sam? Before amnesties were enacted, did they discourage or encourage them? Afterward, did they validate or repudiate them?

With Latin America's systematically lawless regimes mostly in the past and a permanent international criminal court perhaps soon to be established, now is an opportune moment to study the international response to the region's wave of amnesties.

The question is important not only because its answer has not (to my knowledge) been systematically charted, but because in transitional situations, the international community is not limited, at least not to the same degree, by the agonizing choices facing national leaders of new democracies. A General Pinochet can warn a new civilian president "not to touch a single hair of a single soldier"<sup>31</sup> lest Chile's democratic process come to an abrupt halt. But the United Nations Security Council, the OAS Permanent Council, and the White House need not yield to the same blackmail. A General Pinochet can unseat a President Aylwin, but not a Secretary-General or a U.S. President.

This fact of *realpolitik* has two vital consequences. First, the international community, while not unconstrained,<sup>32</sup> has greater freedom of rhetoric and action than do national leaders in transitional situations. At best, if hopes for an international criminal court materialize through a treaty in 1998, that court may

attitudes toward human rights generally is brought to light in IAIN GUEST, *BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS* (1990).

30. In an article evidently completed shortly before the November 1995 Dayton Accords, Professor Scharf referred to the

modern practice of the United Nations, which in the last three years has worked to block mention of prosecuting former Khmer Rouge leaders for their atrocities from inclusion in the Cambodia peace accords, pushed the Mandela government to accept an unconditional amnesty for crimes committed by the apartheid regime in South Africa, and ... helped negotiate, and later endorsed, a broad amnesty for the Haitian military regime. As one commentator recently remarked, "[w]hereas the human rights organs of the United Nations have developed clearer and more elaborate guidelines on the required treatment of past human rights violations, the peacekeeping branches of the United Nations ... have subordinated those guidelines to an ill-advised effort to bring even mass murders into the political process, in the hopes they can be placated, reformed, or at least isolated."

Scharf, *supra* note 14, at 37 (footnotes omitted).

This "modern practice" is mellowed by the subsequent Dayton Accords, approved by the United Nations, in which negotiators refused to yield to strong pressures to allow an amnesty. See U.S. DEPT. OF STATE, *GENERAL FRAMEWORK AGREEMENT FOR PEACE IN BOSNIA AND HERZEGOVINA, TEXT OF DAYTON PEACE AGREEMENT DOCUMENTS OF NOV. 21, 1995*, 35 I.L.M. 75 (1996) [hereinafter *DAYTON PEACE ACCORDS*]; art. IX, *id.* at 90; Annex 4, art. III(8), *id.* at 120; Annex 6, art. XIII(4), *id.* at 135; Annex 7, art. VI, *id.* at 138; Annex 11, art. VI(1) and (2), *id.* at 152.

31. II TRANSITIONAL JUSTICE, *supra* note 10, at 454.

32. Haiti is a case in point. See, e.g., Scharf, *supra* note 14, at 12 ("during the negotiations with the Haitian military leaders, ... broader long-term concerns were eclipsed behind the overriding objective of avoiding American casualties in a military operation that did not have the support of the American people"), 15 ("the international community proved unwilling to pay the price for justice, which would have required sending troops into Haiti to dislodge the military regime and to protect the new government from rebellions while prosecutions of the military leaders were pending").

be able to prosecute internationally those who cannot be prosecuted nationally.<sup>33</sup> Of course, as experience with the International Criminal Tribunals for the former Yugoslavia<sup>34</sup> and Rwanda<sup>35</sup> shows, international prosecutions have unique problems of their own—mainly in securing physical custody of defendants and the cooperation of multiple states in investigations, apprehensions, detentions, and prosecutions.<sup>36</sup>

But the international community can at least refrain from accepting amnesties for serious violations of human rights as valid defenses before international prosecutions.<sup>37</sup> And between the extremes of national amnesties and international prosecutions, the United Nations and OAS have a range of options. Even if they cannot compel national prosecutions, they can still repudiate amnesties for human rights violators publicly<sup>38</sup> and diplomatically,<sup>39</sup> undercutting

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33. See generally Christopher Keith Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 AM. J. INT'L L. 177 (1997). According to one report, in the August 1997 Preparatory Committee meeting of the working group on complementarity, "It was generally agreed that amnesties should not serve the purpose of shielding the perpetrators from international criminal responsibility." NGO Coalition for an ICC (Aug. 13, 1997) (on file with author). However, in what may reflect a contrary view, the U.S. delegation circulated a draft entitled *State Practice Regarding Amnesties and Pardons* (Aug. 1997) (on file with author).

34. See *Report of the Secretary-General Pursuant to Para. 2 of S.C.Res. 808*, U.N. Doc. S/25704 (1993) [hereinafter Yugoslavia Statute].

35. See U.N. S.C. Res. 955, U.N. Doc. S/1994/1168 (1994), reprinted in 33 I.L.M. 1598 (1994) [hereinafter Rwanda Statute].

36. See generally Theodor Meron, *Answering for War Crimes*, 76 FOREIGN AFFAIRS 2 (1997); Richard J. Goldstone, *War Crimes: When Amnesia Causes Cancer*, WASHINGTON POST, Feb. 2, 1997 (available in NEXIS, News Library, Curnws File); Tom Warrick, *The Price of Justice in Rwanda/Bosnia-Herzegovina*, INTER PRESS SERVICE, Mar. 12, 1997 (available in NEXIS, News Library, Curnws File).

37. In the Las Hojas case, the Inter-American Commission on Human Rights found an El Salvador amnesty law, as applied to the perpetrators of an alleged massacre of 74 civilians, contrary to the American Convention on Human Rights. See 1993 ANN. REP. COMM'N H. RTS. 88 (1993) (Spanish). The Commission noted that article 27 of the Vienna Convention on the Law of Treaties bars a State from unilaterally invoking its national law as justification for not complying with international treaty obligations. See *id.* at 96 ¶ 12.

*Cf.* The Nurnberg Trial, 6 F.R.D. 69, 110 (1946) ("He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under International Law"); *Statute of the International Criminal Tribunal for the Former Yugoslavia* art. 7(4) ("The fact that an accused person acted pursuant to an order of a Government ... shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment ..."), in *Report of the Secretary-General*, *supra* note 34, at 15.

And the President of the Yugoslavia Tribunal, rejecting a U.S. proposal that rules allow low-level perpetrators immunity in exchange for their testimony, explained, "The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be." Scharf, *supra* note 14, at 37 (footnote omitted).

38. For example, U.N. Secretary-General Boutros Boutros-Ghali, albeit for insufficient reason (see part IV.B below), publicly criticized the amnesty passed by El Salvador after the Truth Commission report was published. See Evelyn Leopold, *U.N. Chief Signals Disapproval of Salvadoran Amnesty*, Reuters Mar. 24, 1993 (available in LEXIS, News library, Arcnews file).

39. Despite pressures, the United States refused to agree to an amnesty in the Dayton Peace Accords, *supra* note 30. See, e.g., Jonathan S. Landay & David Rohde, *Imperfect Peace Dogs U.S. in Bosnia*, THE CHRISTIAN SCIENCE MONITOR, Dec. 4, 1995 (available in, NEXIS, News Library, Curnws File).

claims of moral legitimacy by the beneficiaries. They can deny the legal validity of amnesties for such purposes as extradition<sup>40</sup> and political asylum.<sup>41</sup> And they can disallow amnesties as defenses to civil<sup>42</sup> and criminal<sup>43</sup> prosecutions in other states.

Second, the impact of the international community's posture on the internal balance of political power in transitional states is important for amnesties. Before transitions, that is, while wars rage or *de facto* regimes reign, a credible Security Council insistence on prosecution, precluding amnesty, may deter atrocities in the first place.<sup>44</sup> And clear international boundaries on what sorts of crimes may be amnestied can weigh heavily in national political debates.

In Guatemala in 1996, for example, one of the few cards held by amnesty opponents was the argument that the international community would not accept a blanket amnesty for crimes against humanity.<sup>45</sup> While the United Nations' record in Guatemala was far from exemplary, as discussed below, it did not entirely concede this issue. If it had, the amnesty would have been broader.

In short, the world and regional community's posture toward amnesties is important on both international and national planes.

#### D. Guidelines for International Organizations

This reality opens the way to greater flexibility in the procedural forms needed for effective international limits on amnesties. If all that mattered were *state* behavior, there might be little value in internal United Nations or OAS

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40. See, e.g. Convention on the Prevention and Punishment of the Crime of Genocide arts. IV and VII, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. VIII(2), IX, X, XI, Dec. 10, 1984, U.N. doc. A/RES/39/46 [hereinafter Torture Convention].

41. See, e.g., Genocide Convention, *supra* note 40, art. VII; *Declaration on Territorial Asylum*, G.A. Res. 2312, U.N. GAOR, 22nd Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1967) ("The right to seek and enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a ... crime against humanity ....").

42. See, e.g., *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

43. "Interior Minister says warrant for Galtieri's arrest 'inadmissible'," *BBC Summary of World Broadcasts*, Apr. 3, 1997 (reporting on Spanish judge's arrest warrant for former Argentine junta leader's role in kidnapping and murder of four Spanish citizens) (*available in* LEXIS, News Library, Curnws File).

44. "[A]s recently suggested by Professor Buergenthal in congressional hearings on the former Yugoslavia, the UN Security Council can play a preemptive role, with potential deterrent effect, by resolving in specific situations that no future amnesty for human rights violators will be internationally respected." I TRANSITIONAL JUSTICE, *supra* note 10, at 329 (excerpting Douglass W. Cassel, Jr., *International Truth Commissions and Justice*, 5 ASPEN INST. Q. 77 (1993)). Professor Scharf endorses this suggestion. See Scharf, *supra* note 14, at 41 & n. 266.

Consider, for example, the experience of the former head of Civil Affairs for UNPROFOR in Yugoslavia during 1992-94. See Cedric Thornberry, *Saving the War Crimes Tribunal*, 104 FOREIGN POLICY 72 (1996). He recounts, "We told the local Belgrade and Zagreb authorities that if they did not act, we would either tell the press or go to a higher authority: the secretary-general, the Security Council, or some future tribunal.... Our interlocutors plainly were skeptical that the 'international community' would do anything." *Id.* at 77. He concludes, "Had there been, from the start in Yugoslavia, a high probability of judicial punishment for those who committed crimes against humanity, there would have been less barbarism .... Those who tried to mitigate some of the horrors ... would have found their hand greatly strengthened." *Id.* at 81.

45. See *infra* part IV.A.



guidelines governing only the behavior of officials of these international organizations. Some form of international law would be essential to bind states. Indeed, treaties,<sup>46</sup> as well as declarations and other instruments giving rise to customary international law,<sup>47</sup> are critical in restricting the states' freedom of action to award amnesties for atrocities.

However, because the behavior of the international community can itself be an important constraint on amnesties, internal directives for United Nations or OAS officials can be helpful. Suppose, for example, that a U.N. policy directive governing the Secretariat's conduct of peacekeeping missions had provided clear guidance to negotiators on the scope of amnesty they could propose in Haiti or accept in Guatemala, and to the United Nations Truth Commission in El Salvador. In each case, as discussed below, that might have made a difference.

Guidelines could clarify as well as fortify international resistance to overbroad amnesties. For example, in Guatemala, part of the problem was that some senior U.N. officials simply did not know which crimes could be amnestied without transgressing the murky boundaries of relevant international human rights and humanitarian law. This confusion undermined their resolve.

Not only may guidelines for international organizations (even without directly binding states) be helpful in practice, they may also be easier to implement. Treaties limiting amnesties require ratification. If military regimes refuse to ratify them or to permit transitional governments to do so, the treaties may not apply in the very states in which they are most needed.<sup>48</sup> Similarly, customary law requires a general acceptance and consistent practice by states that may be difficult to achieve.<sup>49</sup>

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46. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, art. 148 (obligation to prosecute or extradite grave breaches); Genocide Convention, *supra* note 40, arts. 4, 5 (obligation to prosecute genocide, which could be an issue in, for example, Guatemala); Torture Convention, *supra* note 40, arts. 4, 5, 7(1); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 [hereinafter Imprescriptibility Convention].

47. See, e.g., *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, U.N. G.A. Res. 3074 (XXVIII) (1973), reprinted in 13 I.L.M. 230 (1974) (adopted by vote of 94-0, with 29 abstentions). Paragraph 8 provides, "States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity."

48. For example, only 43 States worldwide have ratified the Imprescriptibility Convention, *supra* note 46. See UNESCO, HUMAN RIGHTS: MAJOR INTERNATIONAL INSTRUMENTS STATUS AS AT 31 MAY 1997, at 20 (1997).

49. In 1988, the Aspen Institute and the Ford Foundation ... conference on "State Crimes: Punishment or Pardon" ... brought together ... leading academic and governmental experts on the issue of the responsibility of states to prosecute the gross violations of human rights committed by the prior regimes. The Conference participants reached consensus that there was no duty under customary international law to prosecute such violators .... Scharf, *supra* note 14, at 28 (footnote omitted).

There is a stronger argument, however, that customary international law prohibits amnesties for human rights violations that rise to the level of crimes against humanity. Compare, e.g., M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 492, 500-01 (1992), with Scharf, *supra* note 14, at 34-39.

Internal United Nations or OAS guidelines, on the other hand, may shortcut the slow processes of ratifying treaties or developing custom. A vote of the governing body, reflecting a momentary consensus or majority, may suffice. For example, the OAS General Assembly, by vote in 1991, adopted a Resolution on Representative Democracy requiring the organization to respond to interruptions of democracy in any American state, a step that would not have been politically feasible a decade earlier.<sup>50</sup> Similarly, taking advantage of the current relative absence of brutally repressive states in the hemisphere, the OAS General Assembly could adopt, for example, a "Declaration against Amnesties for Gross Violations of Human Rights," directing a comparable organizational response to amnesties.

#### E. Guidelines for Uncle Sam?

The United States, too, can have an important influence on amnesties for serious violations of human rights in the hemisphere, both through its role in the United Nations and OAS, and directly through its foreign policy. Serious questions may be raised, of course, about whether that is a good thing. U.S. military and intelligence relationships with Latin American human rights violators have too often served to reinforce impunity.<sup>51</sup> Recently, for example, the U.S. refused to extradite a former CIA asset accused of political murders to Haiti,<sup>52</sup> while the CIA was allegedly slow to inform the U.S. Ambassador that an asset in the Guatemalan military may have been involved in an extrajudicial

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Prohibiting amnesties for crimes against humanity is of more than academic interest for Latin America. Crimes against humanity include many offenses committed in Latin America in recent years, such as widespread or systematic assassinations and other inhumane acts directed against civilian populations for political or ethnic reasons, Yugoslavia Statute, *supra* note 34, art. 5; Rwanda Statute, *supra* note 35, art. 3, and forced disappearances. OAS General Assembly Res. AG/RES. 666 (XIII-0/83), Nov. 18, 1983, *cited with approval* in the Velásquez-Rodríguez case, 1988 ANN. REP. INT.-AM. CT. H. RTS., 35, 67 ¶ 153 (1988), and in the preamble to the Inter-American Convention on Forced Disappearances, *infra* note 145.

In addition, serious violations of human rights in armed conflicts in countries like Colombia, El Salvador, Guatemala, Nicaragua and Peru may be deemed war crimes, even when the conflicts are non-international in character. Tadic, Judgment of the Appellate Chamber of the International Criminal Tribunal for the Former Yugoslavia, Oct. 2, 1995, at ¶¶ 88, 134, *reprinted in* 35 I.L.M. 32, 61, 71 (1996). There are strong arguments that serious war crimes may not be amnestied. *See, e.g., Principles of International Cooperation, supra* note 47, ¶¶ 1 and 8; Scharf, *supra* note 14, at 20 and n.139.

50. OAS G.A. Res., *Representative Democracy*, Res. AG/RES. 1080 (XXI-0/91), June 5, 1991, *reprinted in* THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS, CASES AND MATERIALS 499-500 (4th rev. ed. 1995). In the event of an interruption of democracy, the Resolution instructs the Secretary-General to call for an immediate meeting of the Permanent Council, which is instructed to decide on a meeting of the Foreign Ministers or of the General Assembly to "adopt any decisions deemed appropriate, in accordance with the Charter and international law." *Id.* at 500.

51. *See, e.g.,* MARK DANNER, THE MASSACRE AT EL MOZOTE 110-39 (1994); HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1994, at 99 (1993); *see also* the statement of former CIA officer David MacMichael, *Participación de los Estados Unidos de América en la Impunidad de Crímenes de Lesa Humanidad en América Latina*, in PROCESO, *supra* note 11, at 455.

52. *See* HRW 1997, *supra* note 6, at 105; *see generally* the occasional articles by Allan Nairn in THE NATION, *e.g., Haiti Under Cloak*, Feb. 26, 1996; *He's Our S.O.B.*, Oct. 31, 1994.

execution.<sup>53</sup>

On the other hand, often under congressional pressure, the U.S. has at times used aid leverage to insist on prosecution of particular human rights cases in such countries as Chile,<sup>54</sup> El Salvador,<sup>55</sup> and Guatemala.<sup>56</sup> Building on such precedents, Congress could explore more general U.S. guidelines on impunity, at a minimum barring U.S. officials from endorsing or supporting amnesties for serious violations of human rights.<sup>57</sup> It might have been helpful, for example, if U.S. law or an Executive Order had imposed human rights boundaries on the discretion of presidential envoy Jimmy Carter to propose or accept an amnesty in Haiti.

#### F. Conclusion of Overview

A thorough study of the international community's record with regard to Latin American amnesties, although beyond the scope of this initial foray, is warranted. Even this preliminary sketch, however, suggests that the actions of the international community toward amnesty merit self-regulation through articulation of clearly defined boundaries on what amnesties may be accepted or proposed by U.N. and OAS diplomats and officials.

### III

#### APPLICABLE HUMAN RIGHTS LAW

In addition to treaties<sup>58</sup> and customary law<sup>59</sup> referred to above, since 1992, there has been a significant body of Inter-American human rights jurisprudence and treaty law on impunity that diplomats should have been aware of and taken into account in subsequent peace negotiations.

Part A of this section of the article summarizes the jurisprudence, beginning with the early (mid-1980s) guidance offered by the Inter-American Commission on Human Rights on amnesty laws. It then discusses the landmark 1988 ruling of the Inter-American Court of Human Rights on impunity for disappearances in Honduras. There follows an analysis of three resolutions of the Inter-American Commission in 1992 on amnesties in Argentina, El Salvador,

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53. See Tim Weiner, *In Furor Over Killings, President Warns of Shake-up in the CIA*, N.Y. TIMES, Mar. 25, 1995, A1; see also HRW 1996, *supra* note 11, at 98-99.

54. Congress made U.S. aid to Chile dependent on progress in prosecution in the Orlando Letelier murder case which, as a result, was exempted from Chile's amnesty. See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1990, at 127 (1991).

55. In 1990 Congress made aid to El Salvador contingent in part on a serious and professional investigation and prosecution of the Jesuits murder case. See *id.* at 167.

56. See *id.* at 181-83.

57. Professor Scharf suggests that perhaps U.S. policy on amnesties for serious violations of human rights should "parallel U.S. policy with respect to terrorism, which prohibits the government from 'making concessions of any kind to terrorists' on the ground that 'such actions would only lead to more terrorism.'" Scharf, *supra* note 14, at 39 (footnote omitted) (citing U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1988, at iii (1989)).

58. See *supra* note 46.

59. See *supra* note 49.

and Uruguay; the Commission's 1994 report on the 1993 amnesty in El Salvador; a 1994 United Nations Human Rights Committee decision on the Uruguayan amnesty; and the Commission's most recent decisions: its 1996 resolutions on Chile's failure to repeal the 1978 "self-amnesty" enacted by the military regime. After briefly considering the applicable international humanitarian law on amnesties in non-international conflicts, this part summarizes the guidelines emerging from the Inter-American jurisprudence.

Part B then reviews recent OAS treaties imposing duties to prosecute torture, forced disappearances, and violence against women.

## A. Jurisprudence

1. *The Inter-American Commission's Early Guidance.* Following the return of democracy in Argentina, the Inter-American Commission in 1986 published general guidelines on the responsibilities of democratic governments to investigate and remedy human rights violations under prior regimes.<sup>60</sup> Unfortunately, the Commission characterized the issue as one in which the contribution of international bodies is "minimal."<sup>61</sup> Still, it offered two guidelines for nations grappling with the problem. First, only amnesties enacted by democratically elected bodies, not self-amnesties by the abusive regime itself, have legal validity.<sup>62</sup> Second, even democratically enacted amnesties must respect the need to investigate, because both society and the families of victims have the right to know the truth.<sup>63</sup> "Every society," the Commission declared, "has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition... ."<sup>64</sup> "Moreover, the family members of the victims are entitled to information as to what happened to their relatives."<sup>65</sup> The Commission did not suggest, however, that judicial

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60. 1985-86 ANN. REP. INT. AM. COMM'N H. RTS. 191-93 (1986) [hereinafter 1985-86 REPORT] (in section entitled *Areas in which Steps Need to be Taken Towards Full Observance of the Human Rights Set Forth in the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights*).

61. The commission noted that it

recognizes that this is a sensitive and extremely delicate issue where the contribution it—or any other international body for that matter—can make is minimal. The response, therefore, must come from the national sectors which are themselves affected, and the urgent need for national reconciliation and social pacification must be reconciled with the ineluctable exigencies of an understanding of the truth and of justice.

*Id.* at 192.

62. The commission

considers that only the appropriate democratic institutions—usually the legislature—with the participation of all the representative sectors, are the only ones called upon to determine whether or not to decree an amnesty [or] the scope thereof, while amnesties decreed previously by those responsible for the violations have no juridical validity.

*Id.* at 192-93. For an eloquent elaboration of this point, see the Chilean Hermosilla case, *infra* note 111, at 163-66 ¶¶ 26-39.

63. See 1985-86 REPORT, *supra* note 60, at 193.

64. *Id.*

65. *Id.*

proceedings were essential: the truth could be pursued by either “investigating committees ... *or* ... the judiciary.”<sup>66</sup>

If, in hindsight, the Commission’s initial venture into the subject seems too timid, it should be borne in mind that the spread of democratic states in the Americas appeared far less assured in the mid-1980s than in the mid-1990s,<sup>67</sup> and that the Inter-American Court at that time had yet to develop its groundbreaking case law on the affirmative duties of states to “ensure” human rights.

2. *Inter-American Case Law As of 1992.* During 1988 through 1992, in cases from four countries, the Inter-American Court and Commission developed jurisprudence on impunity and amnesties for human rights violations. That jurisprudence has since been clarified by the Commission’s 1996 resolutions in the Chilean cases, discussed below. However, the cases through 1992 are discussed separately here, because they were available to U.N., OAS, and U.S. officials in negotiating and commenting on amnesties in the cases summarized below (Guatemala in 1996, Haiti in 1993-94, El Salvador in 1992-93).

All four cases through 1992 involved serious violations: forced disappearances in Honduras;<sup>68</sup> an army massacre of 74 civilians in El Salvador;<sup>69</sup> forced disappearances and kidnapping of children in Uruguay;<sup>70</sup> and forced disappearances, summary executions, torture, and kidnapping in Argentina.<sup>71</sup> Both the court and commission stressed the seriousness of the violations. In the Honduras case, the court was at pains to note that forced disappearances are crimes against humanity.<sup>72</sup> In the Uruguay case, the Commission emphasized that it

must also weigh the nature and gravity of the events with which the [amnesty] law concerns itself; alleged disappearances of persons and the abduction of minors, among others, have been widely condemned as a particularly grave violation of human rights. The social imperative of their clarification and investigation cannot be equated with that of a mere common crime.<sup>73</sup>

While the court and commission did not expressly limit their holdings to such

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66. *Id.* (emphasis added). “Such access to the truth presupposes freedom of speech ...; the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources so that the judiciary itself may undertake whatever investigations may be necessary.” *Id.*

67. The Commission concluded cautiously that it “considers that the observance of the principles cited above will bring about justice rather than vengeance, and thus neither the urgent need for national reconciliation nor the consolidation of democratic government will be jeopardized.” *Id.*

68. See Velásquez-Rodríguez, 1988 ANN. REP. INT.-AM. CT. H. RTS. 35 (1988) [hereinafter *Velásquez*]. There were three Honduran disappearance cases, but for this article, they are treated as one. The Court’s opinion in the second case, Godínez Cruz, 1989 ANN. REP. INT.-AM. CT. H. RTS. 15, 16 (1989), is nearly identical to *Velásquez*. In the third case, Fairén Garbí, 1989 ANN. REP. INT.-AM. CT. H. RTS. 69, 105-06 ¶¶ 156-61 (1989), the court found insufficient proof of Honduras’s responsibility because of the possibility the victims might have been disappeared in a neighboring country.

69. See *Las Hojas Massacre Case*, case no. 10.287, 1992-1993 ANN. REP. INT.-AM. COMM’N H. RTS. 88 ¶ 1 (1993) (Spanish) [hereinafter *Las Hojas*].

70. See Hugo Leonardo et al., case nos. 10.029 et al., 1992-1993 ANN. REP. INT.-AM. COMM’N H. RTS. 154, 161-62 ¶ 38 (1993) [hereinafter *Leonardo*].

71. See Alicia Consuela Herrera et al., case nos. 10.147 et al., 1992-93 ANN. REP. INT.-AM. COMM’N H. RTS. 41, 43 ¶ 6 (1993) [hereinafter *Herrera*].

72. See *Velásquez*, *supra* note 68, at 66-68 ¶¶ 149-58;

73. *Leonardo*, *supra* note 70, at 161-62 ¶ 38.

serious violations, in light of these statements and the factual context of the cases, their opinions may reasonably be read to concern impunity for serious violations of human rights.

*a. The inter-American court and impunity in Honduras.* The court's 1988 judgment in the Honduras case found a pattern of *de facto* impunity in the early 1980s, including repeated failures of habeas corpus petitions and criminal proceedings to locate or protect victims of disappearances.<sup>74</sup> The court concluded that Honduran judicial remedies were so "ineffective" that they need not be exhausted prior to recourse to the Inter-American system.<sup>75</sup>

The court also ruled that this pattern of impunity violated Honduras's duty under article 1(1) of the American Convention on Human Rights<sup>76</sup> to "ensure" the free exercise of human rights.<sup>77</sup> The court interpreted this language to impose on the state a "legal duty to take reasonable steps ... to use the means at its disposal *to carry out a serious investigation of violations ..., to identify those responsible, to impose the appropriate punishment[,]* and to ensure the victim adequate compensation ...."<sup>78</sup>

Under the court's ruling in the Honduras case, then, in cases involving serious violations of human rights, the state has a general duty to take reasonable steps to investigate, to identify those responsible, and to prosecute and punish. But what if the state enacts an amnesty? Can an amnesty relieve it of the duty to investigate and prosecute?

While the case was pending before the court, Honduras passed an amnesty apparently covering those responsible for the disappearance at issue.<sup>79</sup> The court was doubtless aware of the amnesty, enacted shortly before final hearings before the court.<sup>80</sup> Yet Honduras did not assert the amnesty in defense, and the court, in ruling that Honduras violated its prosecutorial duty, made no mention of it.

One might conclude, then, that a national amnesty provides no exemption from the international duty to punish serious violations of human rights.<sup>81</sup> However, the inference is not ironclad. The court ordered Honduras to compensate the family, but did not direct it also to prosecute and punish those responsible.<sup>82</sup> If Honduras had such a duty notwithstanding the amnesty, why did the court not order its execution?

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74. *Velásquez*, *supra* note 68, at 47-52 ¶¶ 50-81.

75. *Id.* at 52 ¶ 81.

76. American Convention on Human Rights, Nov. 22, 1969, OAS T.S. No. 36, at 1, OAS Off.Rec. OEA/Ser.L/V/II.23 doc. rev. 2.

77. Article 1(1) provides in part as follows: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination ...." *Id.*

78. *Velásquez*, *supra* note 68, at 71 ¶ 174 (emphasis added).

79. Decreto No. 199-87, adopted Nov. 29, 1987. *See generally* Norris, *supra* note 14, at 62-65.

80. *See* Decreto No. 199-87, *supra* note 79.

81. Robert Norris so concluded. *See* Norris, *supra* note 14, at 64-65.

82. *See Velásquez*, *supra* note 68, at 74-76 ¶¶ 189-94.

b. *The inter-American commission and amnesties in Argentina, El Salvador, and Uruguay.* In the three 1992 cases, the commission expressly addressed amnesties in light of the duty to prosecute human rights violations enunciated by the court in the Honduran case. The three amnesties before the commission covered the gamut—from worst to best—of responses by transitional governments to serious human rights violations under prior regimes.

In El Salvador, an “absolute and complete” amnesty, adopted in 1987 as part of the Central American Esquipulas peace process, barred both criminal and civil prosecutions, making no allowance for either investigations or compensation of victims.<sup>83</sup> If ever an amnesty violated a state’s duty to guarantee human rights, this was it.<sup>84</sup>

Argentina, by contrast, argued correctly that its amnesty process was the most defensible in all of Latin America: Despite amnesty laws, top military commanders were convicted and imprisoned, an official commission extensively investigated and publicly reported on disappearances, substantial compensation was available to victims’ families, and the government had proclaimed, “Never again.”<sup>85</sup> If ever an amnesty for serious human rights violations did not violate the state’s duties, this was it (at least in Latin America).<sup>86</sup>

The Uruguay amnesty was somewhere in between. Unlike any other Latin American amnesty, its democratic credentials were bolstered by its approval by voters in a referendum,<sup>87</sup> albeit in what might be called a “shotgun referendum.”<sup>88</sup> Moreover, in theory, Uruguay barred only criminal prosecution; civil suits for damages remained possible. However, the commission found that by barring judicial investigation and hence the possibility of compelling military and police officials to testify, the practical effect of the amnesty “substantially restricted” victims’ ability to pursue civil remedies.<sup>89</sup>

83. See *Las Hojas Case*, *supra* note 69, at 95-96 ¶ 11.

84. The same could be said of the Chilean military regime’s “self-amnesty,” discussed in subpart 5 below. At the time the Commission decided the *Las Hojas case* involving the Salvadoran amnesty law, it knew that the government had agreed in the January 1992 peace accords to a U.N. Truth Commission to investigate important cases of violence during the war. However, the Truth Commission report, *supra* note 3, was not issued until March of 1993. So when the Inter-American Commission decided *Las Hojas* in 1992, it could not know that the Truth Commission would later report on the case, naming names of those responsible. See *id.* at 76.

85. *Herrera*, *supra* note 71, at 43 ¶ 7, 46 ¶¶ 25-28, 50 ¶¶ 42-48.

86. One might argue that the South African approach, of allowing amnesty only in exchange for credible confession, is even more defensible than the Argentinian response. See, e.g., Peter Parker, *The Politics of Indemnities, Truth Telling and Reconciliation in South Africa; Ending Apartheid Without Forgetting*, 17 HUM. RTS. L.J. 1 (1996); Daniel F. Wilhelm, Note, *Azanian Peoples Organization v. President of South Africa*, 91 AM. J. INT’L L. 360 (1997). But no state in the Americas has to date adopted the South African approach.

87. See *Leonardo*, *supra* note 70, at 166 ¶ 22, 168 ¶ 31. See generally Weschler, *supra* note 25.

88. See *Norris*, *supra* note 14, at 85-90. The amnesty originally went into effect only one hour before a colonel was due to testify in court on a kidnapping; it was expected that the colonel would refuse to appear. *Id.* at 85. The amnesty was later approved by 57% of those voting in a referendum, but only after public threats by military leaders. *Id.* at 90.

89. *Leonardo*, *supra* note 70, at 165 ¶ 53. The United Nations Human Rights Committee later

Despite these variations, the commission reached the same result in each case. The amnesties violated at least three, and possibly four, distinct duties of the state under the American Convention. First, they violated the state obligation—part of its duty to “ensure” human rights under article 1(1)—to investigate violations.<sup>90</sup> Second, at least in states that permit victims to participate in criminal proceedings,<sup>91</sup> the amnesties violated the state duty under article 8(1) to afford victims a fair trial.<sup>92</sup> Third, the amnesties violated rights of victims and survivors to adequate compensation, required both by article 1(1)<sup>93</sup> and by the right to judicial protection under article 25.<sup>94</sup>

In other words, when serious violations of human rights are committed, states must investigate, must permit victims to participate in judicial investigations where permitted by national laws, and must ensure adequate compensation for violations. States may not excuse themselves by enacting amnesty laws.

reached the same conclusion. *Hugo Rodríguez v. Uruguay*, Comm. no. 322/1988, Views of July 19, 1994, at 7 ¶ 12.2, U.N. Doc. CCPR/C/51/D/322/1988 (1994) [hereinafter *Rodríguez*] (“[T]he Committee finds that the ... Law ... and subsequent practice in Uruguay have rendered the realization of the author’s right to an adequate remedy extremely difficult.”).

The Commission’s conclusion was not altered by the fact, which it noted with approval, that Uruguay had negotiated “important damages agreements” with a number of persons, including three of the complainants before the Commission, for their injuries. See *Leonardo*, *supra* note 70, at 165 ¶ 53.

90. See *Las Hojas*, *supra* note 69, at 95-96 ¶¶ 9-11, 97 ¶ 4; *Herrera*, *supra* note 71, at 49 ¶¶ 40-41; *Leonardo*, *supra* note 70, at 164 ¶¶ 50-51. Perhaps because El Salvador did not participate in the case prior to the commission’s resolution, *Las Hojas*, *supra* note 69, at 96 ¶¶ 14-15, the reasoning of the Salvadoran case is cryptic on the rights violated. Clearer explanations may be found in the Uruguayan and Argentinean cases.

91. Uruguay argued that the right of fair trial under the Convention protects only criminal defendants, not complaining victims. See *Leonardo*, *supra* note 70, at 158-59 ¶ 24. The commission rejected this contention, at least for those states, like Uruguay, which permit victims to participate as of right in criminal proceedings. *Id.* at 162-63 ¶¶ 39-46. In the Argentinian case, the commission similarly held that in those states, like Argentina, which grant victims the right to initiate criminal prosecutions, that “fundamental civil right” may not be amnestied away in cases involving human rights without violating the state’s duty to ensure the victim a fair trial. See *Herrera*, *supra* note 71, at 47-48 ¶¶ 33-37.

92. See *Las Hojas*, *supra* note 69, at 97 ¶ 3; *Herrera*, *supra* note 71, at 47-48 ¶¶ 32-37; *Leonardo*, *supra* note 70, at 169-71 ¶¶ 35-46. Article 8.1 of the American Convention, *supra* note 76, provides: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”

93. See *Las Hojas*, *supra* note 69, at 95 ¶ 9, 97 ¶ 4; *Herrera*, *supra* note 71, at 49 ¶ 40; *Leonardo*, *supra* note 70, at 164-65 ¶¶ 50, 53.

94. See *Las Hojas*, *supra* note 69, at 97 ¶ 3; *Herrera*, *supra* note 71, at 48 ¶¶ 38-39; *Leonardo*, *supra* note 70, at 163 ¶¶ 47-49. Article 25 of the American Convention, *supra* note 76, reads:

1. Everyone 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 the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted.



But what about the further duty to ensure prosecution and punishment of violators? On this point, the commission's three resolutions are not entirely clear or consistent. All three cite the Inter-American Court's language in the Honduran case on the state's duty to prosecute and punish human rights violators, without adding any suggestion that the language might not fully apply in cases of amnesties.<sup>95</sup>

The Uruguayan and Argentine resolutions also refer to victims' rights to participate in judicial investigations in order to pursue penal sanctions.<sup>96</sup> However, national laws in Uruguay and Argentina permit victim participation in criminal proceedings; it appears that amnesties would not infringe this right in states whose criminal procedures do not allow such participation.<sup>97</sup>

Finally, while the commission's resolution in the Salvadoran case recommends criminal punishment of violators,<sup>98</sup> the Uruguayan and Argentine resolutions, following the Inter-American Court's Order in the Honduras case, do not.<sup>99</sup> Again, if the duty to prosecute and punish notwithstanding an amnesty was clear, why not ask the State to carry it out?

This, then, was the state of Inter-American human rights case law on amnesties at the time the international community dealt with the amnesties in Guatemala, El Salvador, and Haiti, all of which are discussed below.

3. *The Inter-American Commission and the 1993 Amnesty in El Salvador.* The Commission's next comment on amnesties again left unresolved whether a State may, by amnesty, refrain from prosecuting and punishing violators so long as it conducts an investigation, allows victims to participate in judicial proceedings where such systems exist, and provides adequate reparations.

In its 1994 country report on El Salvador,<sup>100</sup> finding the "very sweeping" 1993 Salvadoran amnesty in violation of the American Convention,<sup>101</sup> the Commission reiterated its 1985-86 guidance and the criteria in its prior resolu-

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95. See *Las Hojas*, *supra* note 69, at 95 ¶¶ 9, 10; *Herrera*, *supra* note 71, at 49 ¶ 41; *Leonardo*, *supra* note 70, at 164 ¶ 50.

96. The Commission found the Uruguay victims "frustrated in their right to ... an impartial and exhaustive judicial investigation which clarifies the facts, determines responsibilities and imposes the corresponding penal sanctions." *Leonardo*, *supra* note 70, at 162 ¶ 39. It found that the Argentine amnesty "denied the victims their right to obtain a judicial investigation in a court of criminal law to determine those responsible for the crimes committed and punish them accordingly." *Herrera*, *supra* note 71, at 51 ¶ 50.

97. See *supra* note 91.

98. The Commission's resolution in the Salvadoran case recommends an "exhaustive, rapid, complete and impartial investigation concerning the event complained of, in order to identify all the victims and those responsible, and submit the latter to justice in order to establish their responsibility so that they can receive the sanctions demanded by such serious actions." *Las Hojas*, *supra* note 69, at 92 ¶ 5.

99. They recommend adoption of "measures necessary to clarify the facts and identify those responsible for the human rights violations," but without expressly calling for prosecutions, convictions, or punishment. *Herrera*, *supra* note 71, at 51 ¶ 3; *Leonardo*, *supra* note 70, at 165 ¶ 3.

100. *Report on the Situation of Human Rights in El Salvador*, at 69-77, OAS Doc. OEA/Ser.L/V/II.85 (1994).

101. *Id.* at 77.

tions on El Salvador, Argentina, and Uruguay,<sup>102</sup> but did not clarify whether amnesties may foreclose prosecution and punishment. However, it did identify at least one and possibly three additional limits on amnesties. First, the amnesty violated the Convention in part “because it applies to crimes against humanity.”<sup>103</sup> Second, amnesty could not be justified for perjury and other obstructions of justice by officers of the court and litigants, especially since many grave human rights violations went unpunished because the country lacked a “trustworthy, independent and effective judiciary.”<sup>104</sup> (Although the commission’s strong language implies that this deficiency violated the Convention, it did not expressly so state.) Finally, the commission found the amnesty in violation of the Convention “because it makes possible a ‘reciprocal amnesty’ without first acknowledging responsibility (despite the recommendations of the Truth Commission) ....”<sup>105</sup> This suggests that the Convention requires states to condition amnesties on a prior acknowledgment of responsibility. However, the Commission did not clarify the contours of such a duty, nor whether it would have applied absent the Truth Commission.<sup>106</sup>

4. *The United Nations Human Rights Committee and the Uruguayan Amnesty.* A 1994 United Nations Human Rights Committee decision on the Uruguayan amnesty partly addressed the question of prosecution and punishment, by opining that victims have no right under the comparable U.N. treaty<sup>107</sup> to insist on criminal prosecutions of particular persons, although they do have a right to investigation and compensation.<sup>108</sup> But to say that victims lack prosecutorial rights does not fully answer the question; states may have a duty to prosecute even if victims have no standing to enforce it. Indeed, the committee came close to declaring such a duty:

The [c]ommittee moreover reaffirms its position that amnesties for gross violations of human rights and legislation such as the [Uruguay amnesty law] are incompatible with the obligations of the [s]tate party under the Covenant. The [c]ommittee notes with deep concern that the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the [s]tate party from discharging its responsibility to provide effective remedies to victims of those abuses. *Moreover, the [c]ommittee is concerned that, in adopting this law, the [s]tate party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.*<sup>109</sup>

102. *See id.* at 75-76.

103. *Id.* at 77. *See supra* note 49 and accompanying text.

104. *Id.* at 74-75.

105. *Id.* at 77.

106. The Truth Commission recommended that El Salvador “look at and acknowledge what happened must never happen again,” and, among other measures, recognize “the good name of the victims and of the serious crimes of which they were victims.” TRUTH COMMISSION REPORT, *supra* note 3, at 185, 186.

107. International Covenant on Civil and Political Rights, Dec. 19, 1966, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).

108. *See Rodriguez, supra* note 89, at 5 ¶ 6.4, 7-8 ¶¶ 12.2-.4.

109. *Id.* ¶ 12.4 (footnote omitted) (emphasis added). In footnote 5, the committee cited its comments, adopted April 8, 1993, on Uruguay’s third periodic report under article 40 of the Covenant. *Report of the Human Rights Committee to the General Assembly*, at 102-11, U.N. GAOR, Supp. No. 40

5. *The Inter-American Commission's Most Recent Guidance: Chile's Failure to Repeal the Military Regime's "Self-Amnesty."* In two 1996 resolutions made public in early 1997, the commission found that Chile's continuing failure to repeal the military regime's 1978 "self-amnesty," and its consequent failure to prosecute cases of disappearances, summary and extrajudicial executions and torture, violate its duties under article 1 of the American Convention to "ensure" human rights, under article 2 to adopt legislative or other measures to that end,<sup>110</sup> under article 8.1 to ensure victims a fair trial, and under article 25 to afford them judicial protection.<sup>111</sup>

The commission's resolutions in the Chilean cases provide the most extensive and eloquent exposition in the jurisprudence on the commission's previously stated views that self-amnesties by extra-constitutional regimes are legal nullities,<sup>112</sup> that the seriousness of the crimes cannot be overlooked,<sup>113</sup> that amnesties violate both the state's duty to investigate<sup>114</sup> and the victim's right to

(A/48/48), U.N. Doc. CCPR/C/64/Add.4 (1993). *Accord, Comments of the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, ¶ 10, U.N. Doc. CCPR/C/79/Add.76 (1995) (Argentina); *Preliminary Observation of the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, U.N. Doc. CCPR/C/79/Add.67 (1996) (Peru); *see also*, *Bautista de Arellana v. Colombia*, Comm. No 563/1993, Views of the U.N. Human Rights Committee (Oct. 27, 1995).

110. Article 2 of the Convention provides, "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." American Convention, *supra* note 76, art. 2.

111. *Garay Herмосilla et al.*, case no. 10.843, 1996 IAC, *supra* note 7, at 156, 182-83 ¶¶ 105-09 [hereinafter *Herмосilla*]; *Irma Reyes et al.*, cases 11.228 *et al.*, 1996 IAC, *supra* note 7, at 196, 219-20 ¶¶ 103-08 [hereinafter *Reyes*]. The two cases are nearly identically worded; minor differences in the English versions appear to be due mainly to differing translations of the Spanish originals.

When the Commission in a 1990 country report on Chile first considered the new democratic government's approach to the prior regime's human rights violations, the Commission was not critical. Noting the dismissal pursuant to the amnesty of cases involving more than 130 disappeared persons, and creation of an investigating commission that would not identify perpetrators, the Commission nonetheless expressed its "decided support" for Chile's initiative. 1989-90 ANN. REP. INT.-AM. COMM'N. H. RTS. 135-40 (1990). However, at that time, the ultimate interplay of amnesty and investigations in Chile was not clear. The Commission quoted President Aylwin's announcement of the investigating commission, including his pledge that his government was "firmly resolved to cooperate with the courts to the extent possible to enable them to fully play their role in determining individual responsibility in every case that has or will come before them," and his explanation that "[i]f in the course of its work the Committee receives background information on acts that may be crimes, it will, confidentially and without delay, so inform the appropriate court." *Id.* at 138-39.

Indeed, when the investigating commission completed its report, President Aylwin asked the Supreme Court to instruct lower courts to reactivate human rights cases, and informed the Court that in his view, "the amnesty in force, which the Government respects, cannot be an obstacle to the realization of a judicial investigation and the determination of responsibilities, especially in the cases of disappeared persons." II TRANSITIONAL JUSTICE, *supra* note 10, at 501. The Court then instructed judges to pursue cases and to reopen closed cases. *See id.* at 502.

112. *Herмосilla*, *supra* note 111, at 163-66 ¶¶ 26-39; *Reyes*, *supra* note 111, at 200-04 ¶¶ 25-39. *See also* the eloquent concurring vote of Commissioner Fappiano in both cases. 1996 IAC, *supra* note 7, at 184-95, 222-33.

113. *See Herмосilla*, *supra* note 111, at 168-69 ¶¶ 46-48; *Reyes*, *supra* note 111, at 206-07 ¶¶ 46-48.

114. *See Herмосilla*, *supra* note 111, at 175-76 ¶¶ 73-78; *Reyes*, *supra* note 111, at 212-14 ¶¶ 72-77.

prosecute criminal charges in states that allow it,<sup>115</sup> and that amnesties also violate the victims' right to compensation<sup>116</sup> and judicial protection.<sup>117</sup> Perhaps even more important is the commission's clarification of two further points. Chile's new democratic government, like Argentina's in 1992, had taken a series of measures: It recognized its duty to investigate, establishing an investigating commission that issued a public report. Chile's President, in the name of the state, asked for pardon from the families of the victims and publicly protested the decision of Chile's Supreme Court to continue applying the amnesty law.<sup>118</sup> Chile also awarded a range of compensations to families of the victims, including the following: a pension not less than the average for Chilean families; expedited procedures to declare a presumption of death; special attention from the State with regard to health, education, and housing; assistance with debts; and exemption from obligatory military service for sons of victims.<sup>119</sup> Even so, said the commission, the "[g]overnment's recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation" were not enough, unless the right to justice was also satisfied, to comply with the state's obligations under the Convention.<sup>120</sup>

Removing whatever doubts might remain from its earlier cases, the commission clarified, first, that investigations must seek to identify perpetrators; otherwise victims will find it "virtually impossible" to establish civil liability of the wrongdoers for damages.<sup>121</sup> Accordingly, the commission further found that the amnesty violated the right to judicial protection under article 25 of the Convention, in part because it "rendered the crimes legally without effect, and deprived the victims and their families of any legal recourse through which they might identify those responsible for violating their human rights during the military dictatorship, and bring them to justice"—that is, in the more precise English translation of Reyes, make the violators "subject to the corresponding penalties."<sup>122</sup> Second, the commission made clear that, in its view of the Con-

115. See *Hermosilla*, *supra* note 111, at 172-73 ¶¶ 62-67; *Reyes*, *supra* note 111, at 210-11 ¶¶ 61-66.

116. See *Hermosilla*, *supra* note 111, at 173 ¶¶ 65-67; *Reyes*, *supra* note 111, at 210-11 ¶¶ 64-66.

117. See *Hermosilla*, *supra* note 111, at 173-74 ¶¶ 68-72; *Reyes*, *supra* note 111, at 211-12 ¶¶ 67-71.

118. See *Hermosilla*, *supra* note 111, at 167 ¶ 41; *Reyes*, *supra* note 111, at 204-05 ¶ 41.

119. See *Hermosilla*, *supra* note 111, at 171 ¶ 57; *Reyes*, *supra* note 111, at 209 ¶ 56.

120. See *Hermosilla*, *supra* note 111, at 171 ¶ 58, 176 ¶ 77; *Reyes*, *supra* note 111, at 209 ¶ 57, 214 ¶ 76.

121. *Hermosilla*, *supra* note 111, at 173 ¶ 66; *Reyes*, *supra* note 111, at 211 ¶ 65.

122. *Hermosilla*, *supra* note 111, at 174 ¶ 71; *Reyes*, *supra* note 111, at 212 ¶ 70. The English translation of *Hermosilla*, quoted in the text above and stating that the amnesty deprived the victims of a recourse by which to "bring [those responsible] to justice," is not as precise as it should be with respect to the state's obligation to punish. The original Spanish sentence is as follows:

El Decreto ley de amnistía dio lugar a una ineficacia jurídica de los delitos, y dejó a las víctimas y a sus familias sin ningún recurso judicial a través del cual se pudiese identificar a los responsables de las violaciones de derechos humanos cometidas durante la dictadura militar, e imponerles los castigos correspondientes.

*Hermosilla*, *supra* note 111, at 174 ¶ 71 (Spanish) (emphasis added).

The more accurate English translation of the same passage in *Reyes* states that the amnesty law "left the victims and their families with no judicial recourse whereby those responsible for the violations of human rights committed during the military dictatorship could be identified and made subject to the corresponding penalties." *Reyes*, *supra* note 111, at 212 ¶ 70 (emphasis added).

vention, an amnesty violates the state's duty to prosecute and punish perpetrators of serious violations. Citing the court's decision in the Honduran case, the commission stated: "According to the provisions of [a]rticle 1.1 [of the Convention], the State has the obligation to investigate all violations that have been committed within its jurisdiction, *for the purpose of identifying the persons responsible, imposing appropriate punishment on them* and ensuring adequate reparations for the victims."<sup>123</sup> Moreover, in this case (as in the 1992 Salvadoran case), the commission's recommendations to the state specified that the investigations must be for the purpose of "*identifying the guilty parties, establishing their responsibilities and effectively prosecuting them*, thereby guaranteeing to the victims and their families the right to justice that pertains to them." Again, in the more precise Reyes English translation, the state's duty is not merely that the guilty be effectively *prosecuted*, but that they be "effectively punished."<sup>124</sup>

After the Chilean cases, there seems little doubt that in the view of the commission, amnesties for serious violations of human rights violate multiple provisions of the Convention. It is now clear that nothing less than judicial investigations designed to identify perpetrators, name names, and punish the guilty will suffice. It remains to be seen whether Chile will comply with the commission's resolutions.<sup>125</sup>

123. *Hermosilla*, *supra* note 111, at 176 ¶ 77 (emphasis added); *Reyes*, *supra* note 111, at 214 ¶ 76.

124. *Hermosilla*, *supra* note 111, at 183 ¶ 111 (emphasis added); *Reyes*, *supra* note 111, at 221 ¶ 109. The English translation of *Hermosilla*, quoted in the text above with respect to the state's duty of "effectively prosecuting" the guilty, is imprecise. The original Spanish states that the investigations must be "a fin de que se individualice a los culpables, se establezcan sus responsabilidades y sean *efectivamente sancionados*, garantizando a las víctimas y a sus familiares el derecho a la justicia que les asiste." *Hermosilla*, *supra* note 111, at 183 ¶ 111 (Spanish) (emphasis added). As in the case of note 122 *supra*, the Reyes translation is more precise, stating that the investigation must be such that the guilty are "effectively punished." *Reyes*, *supra* note 111, at 221 ¶ 109.

125. As the Commission recognized in the resolutions, Chile's Government has attempted to overcome the 1978 amnesty, but the Senate, some of whose members are still not democratically elected, has to date refused to repeal the amnesty, and the judiciary continues to apply it. See, e.g., *Hermosilla*, *supra* note 111, at 167 ¶ 41, 172 ¶ 61, 177-80 ¶¶ 79-93, 181-82 ¶¶ 99-103. Even so, there may be hope. Aside from the conviction and imprisonment of two high-ranking officers in the Letelier murder case (exempted from the 1978 amnesty), see *supra* notes 11 and 54, at least two additional kinds of judicial human rights proceedings are pending in Chile. First, some human rights crimes occurring after the 1978 amnesty have been prosecuted. For example, Major Carlos Herrera received a ten-year sentence for a 1982 murder and has also been convicted for the 1984 death of a political activist. See COUNTRY REPORTS 1996, *supra* note 13, at 382.

Second is the so-called "Aylwin Doctrine." As explained by the U.S. State Department, that doctrine interprets the 1978 amnesty such that

the courts should not close a case involving a disappearance ... until either the bodies are found or credible evidence is provided to indicate that an individual is dead. This could affect up to 542 cases, which cover about 1,100 persons ... . The application of the Aylwin Doctrine, however, has been uneven, as some courts continued the practice of applying the 1978 amnesty to disappearances without conducting an investigation to identify the perpetrators. The courts closed 16 cases during the first half of [1996] through application of the amnesty; 170 cases are active; and an additional 356 cases are temporarily closed but subject to being reopened.

*Id.*

Most recently, former President Aylwin has publicly stated that General Pinochet should be judged in a "trial like Nuremberg" for the deaths and disappearances under the military regime. Calvin Sims,

6. *Applicable International Humanitarian Law.* Article 6(5) of Protocol II to the Geneva Conventions calls for the “broadest possible amnesty” following conflicts of a non-international character.<sup>126</sup> This provision has occasionally been cited as an international legal justification of amnesties for gross violations of human rights committed during the recent civil wars in Latin America.<sup>127</sup>

Such citations are misplaced. Article 6(5) seeks merely to encourage amnesty for combat activities otherwise subject to prosecution as violations of the criminal laws of the states in which they take place. It is not meant to support amnesties for violations of international humanitarian law.

This interpretation is confirmed by the International Committee of the Red Cross (“ICRC”), the agency under whose auspices the Geneva Conventions were negotiated and are administered. The ICRC’s interpretation of Article 6(5), communicated in 1995 to the Prosecutor of the International Criminal Tribunal for the former Yugoslavia and reiterated in 1997, is as follows:

Article 6(5) of Protocol II is the only and very limited equivalent in the law of non-international armed conflict of what is known in the law of international armed conflict as “combatant immunity”, *i.e.*, the fact that a combatant may not be punished for acts of hostility, including killing enemy combatants, *as long as he respected international humanitarian law*, and that he has to be repatriated at the end of active hostilities. In non-international armed conflicts, no such principle exists, and those who fight may be punished, under national legislation, for the mere fact of having fought, even if they respected international humanitarian law. The “travaux préparatoires” of [article] 6(5) indicate that this provision aims at encouraging amnesty, *i.e.*, a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. *It does not aim at an amnesty for those having violated international humanitarian law.*<sup>128</sup>

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*Killing Casts Focus on Abuse in Chile’s Military*, N.Y. TIMES, Apr. 16, 1997, at A8.

126. Protocol Additional to the Geneva Conventions, *supra* note 26, art. 6(5) (“At the cessation of hostilities, authorities in power shall procure granting the broadest possible amnesty to persons that have taken part in the armed conflict or that are deprived of their liberty, detained or interned by motives related with the armed conflict.”).

127. *See, e.g.*, Decision of the Supreme Court of Justice of El Salvador on the Amnesty Law, Proceedings No. 10-93 (May 20, 1993), *reprinted in* III TRANSITIONAL JUSTICE, *supra* note 10, at 549, 555.

128. Letter from Dr. Toni Pfanner, Head of the Legal Division, ICRC Headquarters, Geneva, to author (Apr. 15, 1977) (on file with author) (emphasis added). The ICRC interpretation goes on to cite a statement by the Soviet delegate at the Diplomatic Conference at which Protocol II was negotiated, that the provision which later became article 6(5) “could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever.” *Id.* at 1-2.

On the separate point of whether international humanitarian law *prohibits* amnesties for violations of its norms, the ICRC interpretation concludes ambiguously: “Conversely, one cannot either affirm that international humanitarian law absolutely excludes any amnesty including persons having committed violations of international humanitarian law, as long as the principle that those having committed grave breaches have to be either prosecuted or extradited is not voided of its substance.” *Id.* at 2. In any event, regardless of whether international humanitarian law prohibits such amnesties, Inter-American human rights law prohibits them as described in the text *supra*, to the extent the same conduct may also constitute serious violations of human rights. *See generally, e.g.*, TRUTH COMMISSION REPORT, *supra* note 3, at 22 (“With few exceptions, serious acts of violence prohibited by the rules of humanitarian law applicable to the Salvadoran conflict are also violations of the non-repealable provisions of the ... American Convention on Human Rights ...”).

International humanitarian law thus does not contradict or support an exemption from the restrictions imposed by Inter-American human rights law on amnesties for serious violations of human rights.

7. *Amnesty Guidelines Based on Jurisprudence.* In short, under OAS jurisprudence on amnesties for human rights violations, there remained some question after 1992 (since removed by the Chilean cases) as to whether states must prosecute and punish violators. But even by 1992, the following guidelines were clear for amnesties covering serious violations of human rights:

- (1) To be legally valid at all, amnesties must be adopted by democratic bodies, usually the legislature; self-amnesties by lawless regimes are not valid.<sup>129</sup>
- (2) Amnesties may not foreclose investigations of violations, sufficient to vindicate both society's right to know the truth and survivors' right to know what happened to their relatives.<sup>130</sup>
- (3) Amnesties must not preclude victims from initiating or participating in judicial criminal investigations, at least in states that have such procedures.<sup>131</sup>
- (4) Amnesties may not foreclose or in practical effect substantially limit the right of victims or survivors to obtain adequate compensation for violations.<sup>132</sup>

By 1994 the following additional guidelines were clear:

- (5) Amnesties must not apply to crimes against humanity.<sup>133</sup>
- (6) Amnesties should not apply to perjury and other obstructions of justice by officers of the court and litigants.<sup>134</sup>
- (7) Amnesties should not be given without an acknowledgment by the state of responsibility for past violations.<sup>135</sup>

And after publication of the Chilean cases in early 1997, the following additional guidelines are now clear:

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129. *See supra* notes 62, 111 and accompanying text. *See generally* the Inter-American Court's Advisory Opinion on "The Word 'Laws' in Article 30 of the American Convention on Human Rights," Adv. Op. OC-6/86, 1986 ANN. REP. INT.-AM. CT. H. RTS. 13, 22 ¶ 38 (1986) ("[T]he word 'laws' in Article 30 of the Convention [which allows restrictions of human rights by law] means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the [s]tates parties for that purpose.").

130. *See supra* notes 63-65, 90, 108, 114 and accompanying text.

131. *See supra* notes 91-92, 115 and accompanying text.

132. *See supra* notes 89, 93-94, 116 and accompanying text.

133. *See supra* notes 49, 103, 113 and accompanying text.

134. *See supra* note 104 and accompanying text.

135. *See supra* notes 105-06, 120 and accompanying text.

- (8) Investigations must seek to identify those responsible and name names; otherwise they are insufficient.<sup>136</sup>
- (9) States must prosecute and punish perpetrators of serious human rights violations; they may not be amnestied.<sup>137</sup>

OAS and U.N. officials, diplomats, and peacemakers should be made aware of these guidelines.

#### B. Recent Inter-American Treaties

In addition to the American Convention on Human Rights, three recent Inter-American treaties further restrict amnesties for serious violations of human rights and, at least in states parties, impose duties to punish which appear inconsistent with amnesties. The Inter-American Convention to Prevent and Punish Torture,<sup>138</sup> in force since 1987, has thirteen states parties and seven additional signatories as of April 1997.<sup>139</sup> It imposes on states a duty to take effective measures to punish torture<sup>140</sup> and other cruel, inhuman, or degrading treatment or punishment,<sup>141</sup> and either to take jurisdiction over or to extradite torturers.<sup>142</sup> States must also guarantee alleged victims "the right to an impartial examination," and must initiate an immediate investigation and, "whenever appropriate, the corresponding criminal process."<sup>143</sup> In addition, states undertake to adopt laws "guaranteeing adequate compensation for victims of torture."<sup>144</sup>

The Inter-American Convention on Forced Disappearance of Persons,<sup>145</sup> in force since 1996, has five states parties and eight additional signatories.<sup>146</sup> States parties undertake to punish forced disappearances<sup>147</sup> and either to take jurisdiction over or to extradite perpetrators.<sup>148</sup>

136. See *supra* note 121 and accompanying text.

137. See *supra* notes 123, 124 and accompanying text.

138. Dec. 9, 1985, OAS Treaty Series No. 67, OAS Doc. OEA/Ser.A/42 (SEPF) [hereinafter Inter-American Torture Convention].

139. See 1996 IAC, *supra* note 7, at 788. States parties are Argentina, Brazil, Chile, Dominican Republic, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Additional signatories are Bolivia, Colombia, Costa Rica, Ecuador, Haiti, Honduras, and Nicaragua. *Id.* The only reservation in force to date, by Chile, does not concern the duty to punish. See *id.* at 790.

140. See Inter-American Torture Convention, *supra* note 138, arts. 1, 6.

141. See *id.* art. 6.

142. See *id.* arts. 11, 12, 13. On treaties imposing a duty to punish or extradite, see generally M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995).

143. Inter-American Torture Convention, *supra* note 138, art. 8.

144. *Id.* art. 9.

145. June 9, 1994, OAS Doc. OEA/Ser.P AG/doc.3114/94 rev. 1, reprinted in 33 I.L.M. 1529 (1994) [hereinafter Inter-American Disappearances Convention]

146. See 1996 IAC, *supra* note 7, at 791. States parties are Argentina, Costa Rica, Panama, Paraguay, and Uruguay. Additional signatories include Bolivia, Brazil, Chile, Colombia, Guatemala, Honduras, Nicaragua, and Venezuela. There are no reservations to date. See *id.*

147. See Inter-American Disappearances Convention, *supra* note 145, art. I.

148. See *id.* arts. IV, V, VI.



Citing both of these treaties, the Inter-American Commission commented in the Chilean cases that some human rights crimes are “deemed sufficiently serious that they have been used to justify the adoption, in various international instruments, of measures specifically aimed at avoiding impunity, including universal jurisdiction and the removal of all time limits with respect to prosecuting crimes.”<sup>149</sup>

Finally, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women,<sup>150</sup> in force since 1995, has twenty-six states parties and one additional signatory.<sup>151</sup> States parties agree to pursue policies to punish and to apply due diligence to investigate and impose penalties for violence against women,<sup>152</sup> and to establish legal procedures with effective access to protective measures and a timely hearing,<sup>153</sup> as well as effective access to reparations.<sup>154</sup>

In short, in addition to the restrictions on amnesties based on jurisprudence set forth in the preceding subsection, states parties to these treaties assume a duty to prosecute and punish (or, in the case of torture and forced disappearances, extradite) perpetrators of torture; of other cruel, inhuman, or degrading treatment or punishment; of forced disappearances; and of violence against women. Since nothing in the language or object and purpose of the treaties contemplates amnesties,<sup>155</sup> the treaties may fairly be interpreted to preclude amnesties for these human rights violations.

#### IV

#### ILLUSTRATIVE CASES

Unfortunately, as shown in the following discussions of the U.N. roles in Guatemala in 1994-96 and El Salvador in 1992-93 and of the role of the international community in Haiti in 1993-94, diplomats have not put the Inter-American Human Rights jurisprudence (or, with the recent exception of Guatemala, treaty law) into peacemaking practice.

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149. *E.g., Hermosilla, supra* note 111, at 168-69 ¶ 47 & n.7 (citing, with regard to universal jurisdiction, article 11 of the Torture Convention and articles V and VI of the Disappearances Convention). With regard to imprescriptibility, the Commission cited article VII of the Disappearances Convention (which allows as an alternative, in states where prescriptions are mandatory, use of the prescription period corresponding to the most serious crimes recognized by the state).

150. June 9, 1994, *reprinted in* Inter-American Commission on Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System (Updated to May 1996)*, 95, OAS Doc. OEA/Ser.L.V/II.92, doc.31 rev.3 (1996), at 109 [hereinafter *Inter-American Violence Against Women Convention*].

151. *See* 1996 IAC, *supra* note 7, at 792. States Parties are Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Trinidad and Tobago, Uruguay, and Venezuela. The additional signatory is Mexico. No reservations have been made to date. *See id.*

152. *See* Inter-American Violence Against Women Convention, *supra* note 150, arts. 7, 7(b).

153. *See id.* art. 7(f).

154. *See id.* art. 7(g).

155. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31(1).

### A. The United Nations in Guatemala in 1994-96

Prior to the peace negotiations of 1994-96, Guatemalan military regimes had awarded themselves amnesties in 1982 and 1986 for political crimes and related common crimes.<sup>156</sup> As self-amnesties by undemocratic regimes, they plainly lack legal validity under the criteria set forth by the Inter-American Commission.<sup>157</sup>

In the most recent (and successful) round of peace negotiations between the government and the guerrillas mediated by the United Nations, a 1994 agreement on human rights held implicit promise that an amnesty for serious violations of human rights would not be permitted. Guatemala agreed that the “[g]overnment shall not sponsor the adoption of legislative or any other type of measures designed to prevent the prosecution and punishment of persons responsible for human rights violations.”<sup>158</sup> Guatemala agreed further that “[n]o special law or exclusive jurisdiction may be invoked to uphold impunity in respect of human rights violations.”<sup>159</sup> Yet the implicit promise did not fully materialize. A later 1994 agreement on a truth commission provided that “[t]he Commission shall not attribute responsibility to any individual in its work, recommendations, and report ....”<sup>160</sup> Absent some other mechanism, this appeared to fall short of Inter-American requirements at the time for exposing the truth and enabling victims to hold violators at least civilly responsible.<sup>161</sup>

By early 1996, there were indications that a “blanket amnesty” might be written into the final peace agreements.<sup>162</sup> A concerned Human Rights Watch wrote to United Nations Secretary-General Boutros-Ghali and the nations assisting the peace process, asking that “gross violations of human rights” be excluded from any amnesty. In August, United Nations Under-Secretary-General Marrack Goulding replied, assuring that the United Nations could not condone any agreement that would violate the principles of human rights and international law on which the United Nations was founded.<sup>163</sup> That was all well and good, but what did it mean? Lacking explicit U.N. guidelines for acceptable amnesties in the area of human rights, neither Human Rights Watch nor the United Nations itself could be sure.<sup>164</sup>

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156. See Norris, *supra* note 14, at 66-69. Guatemala also extended two other amnesties, in 1983 and 1987, that theoretically benefited guerrillas, but which had unrealistic conditions for acceptance. *Id.* at 67-68, 69-70.

157. See *supra* note 129.

158. *Comprehensive Agreement on Human Rights*, Mar. 29, 1994, § III(1), U.N. Doc. A/48/928 - S/1994/448, Annex 1 (1994).

159. *Id.* § III (3).

160. *Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan Population to Suffer*, June 28, 1994, section on “Operation,” ¶ III, U.N. Doc. A/48/954-S/1994/751, annex II (1994).

161. See *supra* notes 130, 132 and accompanying text.

162. See HRW 1997, *supra* note 6, at 102.

163. See *id.*

164. In December 1996, on the eve of the final agreement, this author met with a senior U.N. official in Guatemala, who acknowledged uncertainty as to which human rights violations could be amnestied without violating international law.

Following the final, December 1996 agreement on amnesty, a “Law of National Reconciliation” was adopted that same month. It allows extinction of criminal responsibility for the following: political crimes against the state, the institutional order, and public administration; common crimes “directly, objectively, intentionally, and causally” linked to political crimes; and common crimes perpetrated with the aim of preventing, impeding, or pursuing political and related common crimes.<sup>165</sup> However, it expressly excludes genocide,<sup>166</sup> torture,<sup>167</sup> and forced disappearances,<sup>168</sup> as well as any crimes for which amnesty is prohibited by Guatemalan law or by Guatemala’s international treaty obligations.<sup>169</sup> But what about extrajudicial executions, and even massacres of whole villages, that do not amount to genocide? The agreement and law said nothing of customary international law as a constraint on amnesties.<sup>170</sup> Moreover, at best, it may be left to victims to litigate before Guatemalan courts whether the crimes covered by the amnesty law are limited by the American Convention on Human Rights, which does not expressly address amnesties, but which has been interpreted by the Inter-American Commission to preclude them for serious violations of human rights.<sup>171</sup>

The Lawyers Committee on Human Rights predicts that the results of Guatemala’s amnesty law are likely to be “a wave of dismissed investigations involving allegations of serious human rights abuses; the termination of several landmark prosecution cases, ... [and] the release of the tiny fraternity of military personnel who have been jailed for human rights crimes.”<sup>172</sup> (Whether this prediction will materialize remains to be seen; as of the end of February 1997, requests for amnesty under the law had been denied in at least two prominent cases of alleged political assassinations, and a constitutional challenge to the law was pending.)<sup>173</sup> Yet a public statement by the United Nations Mission in Guatemala following adoption of the law, while interpreting the amnesty narrowly, added that the hard choice about the proper scope of an amnesty consistent with international obligations belonged “exclusively to the Guatemalan people.”<sup>174</sup>

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165. 1996 IAC, *supra* note 7, at 719-20.

166. *See id.* at 720.

167. *See id.*

168. *See id.*

169. *See id.*; *see also* Lawyers Committee for Human Rights, Advocacy Alert: Amnesty Law in Guatemala Threatens the Prosecution of Human Rights Violators, Including Those Responsible for the Myrna Mack Murder, Dec. 1996, unnumbered at 2.

170. *See id.*

171. *See* part III.A, *supra*. The amnesty procedures call for prompt judicial rulings on applicability of the amnesty to particular cases. Only if the court desires more information is there to be a hearing at which the defendant and victim can appear. *See id.* at 1-2.

172. *Id.* at 2.

173. *See* 1996 IAC, *supra* note 7, at 720.

174. MINUGUA comparte plenamente lo afirmado por el Moderador de las Naciones Unidas, quien, con ocasión de la firma del Acuerdo del 12 de Diciembre, reconoció cuán necesario y difícil es, para una sociedad que emerge de un prolongado enfrentamiento armado interno, encontrar el equilibrio aceptable entre las exigencias de la paz, la justicia, la verdad y la reconciliación nacional. Encontrar una solución adecuada a esta compleja exigencia, compatible

Had there been U.N. guidelines incorporating Inter-American jurisprudence on amnesties, at least for U.N. peacekeeping operations in the Americas, it would have been difficult either for the U.N. mediator to accept Guatemala's amnesty or for the United Nations Mission to condone it.

#### B. The United Nations in El Salvador in 1992-93

Prior to the U.N.-mediated peace negotiations of 1991-92, El Salvador in 1987 granted an amnesty for political crimes and for related common crimes when the number of perpetrators was not fewer than twenty (that is, when a military unit was accused of a massacre or other serious crime in violation of human rights).<sup>175</sup> In an opinion not published until after the January 1992 Salvadoran peace accords, the Inter-American Commission later found that amnesty to violate the American Convention on Human Rights.<sup>176</sup> Meanwhile, U.N. mediators were helping to negotiate the peace accords. The final, January 1992 agreement included the following paragraph, which, without addressing amnesty expressly, appeared to restrict it by implication:

##### 5. End to Impunity

The [p]arties recognize the need to clarify and put an end to any indication of impunity on the part of the officers of the armed forces, particularly in cases where respect for human rights is jeopardized. To that end, the [p]arties refer this issue to the Commission on the Truth for consideration and resolution. All of this shall be without prejudice to the principle, which the [p]arties also recognize, that acts of this nature ... must be the object of exemplary action by the law courts so that the punishment prescribed by law is meted out to those found responsible.<sup>177</sup>

In other words, recognizing that military impunity should be put to an end and human rights violations punished, the agreement deferred the specific application of these principles to the Truth Commission. Legislation adopted soon thereafter similarly deferred the issue, granting amnesty for all political and related common crimes during the war, except those committed by persons named by the Truth Commission.<sup>178</sup>

The Truth Commission's March 1993 report did not specifically address amnesty. Instead, it confronted a "serious dilemma":

The question is not whether the guilty should be punished but whether justice can be done. Public morality demands that those responsible for the crimes described here be punished. However, El Salvador has no system for the administration of justice

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con las obligaciones internacionales, compete exclusivamente al pueblo de Guatemala, a través de sus instituciones, tanto en el ámbito legislativo como en el jurisdiccional, y de las diversas expresiones de la sociedad civil.

Declaración Pública del Director de MINUGUA, Dec. 20, 1996, ¶ 5 (on file with author).

Together with Guatemala's Presidential Commission on human rights, the U.N. Mission did later take "steps to inform judges of the relationship between the provisions of this law and Guatemala's international treaty obligations." 1996 IAC, *supra* note 7, at 720.

175. See Norris, *supra* note 14, at 94-100.

176. See *supra* note 69.

177. TRUTH COMMISSION REPORT, *supra* note 3, at 192.

178. See I TRANSITIONAL JUSTICE, *supra* note 10, at 327.

which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably.<sup>179</sup>

Faced with the impossibility of fair prosecutions at least in the short run, the Commission might have given its blessing to an amnesty. Fortunately, it deliberately refrained from doing so. It concluded instead that “for now, the only judicial system which the Commission could trust to administer justice in a full and timely manner would be one which had been restructured in the light of the peace agreements.”<sup>180</sup> In other words, prosecutions would be contingent on prior reform of El Salvador’s judicial system, as called for by the peace accords.

In retrospect, it would have been preferable for the Commission not only to refrain from condoning an amnesty, but expressly to preclude one. Not only “public morality” as stated by the Commission, but international law as set forth in the text above, demanded prosecution of serious violations of human rights.

In any event, the government of El Salvador immediately shut the door on any possibility of prosecutions following judicial reform. In March of 1993, under pressure from the military, it enacted a “broad, absolute and unconditional amnesty ... in favor of all those who ... participated in political crimes, crimes with political ramifications, or common crimes committed by no less than twenty people, before January 1st 1992 ....”<sup>181</sup>

Had the United Nations Secretary-General been informed of the state of international law on amnesties, at least in the Americas, he could have denounced this amnesty as a violation of international law.<sup>182</sup> Instead, he issued a weak statement, characterizing the amnesty as a “matter of concern” because it related to the Truth Commission’s report. “It would have been better,” he offered, “if the amnesty had been taken after a broad degree of national consensus had been created in favor of it.”<sup>183</sup>

No, it would not have been better. Under Inter-American law as expounded by late 1992, the 1993 amnesty law violated El Salvador’s international legal obligations, a fact which no amount of public consultation could suffice to overcome.<sup>184</sup> In short, U.N. guidelines on amnesties might have led the Truth Commission to be more explicit beforehand, and the Secretary-General to be more critical afterward. And as El Salvador reforms its judi-

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179. TRUTH COMMISSION REPORT, *supra* note 3, at 178.

180. *Id.* at 179.

181. III TRANSITIONAL JUSTICE, *supra* note 10, at 546, 547.

182. The Supreme Court of El Salvador, in May of 1993, ruled that it could not pass judgment on the amnesty because amnesty is a political question. *See id.* at 549. It is unlikely that even a clear cut pronouncement by the United Nations that the amnesty violated international law, would have led the then still unreformed Salvadoran court to invalidate the law.

183. Leopold, *supra* note 38. In a July 1997 report, the successor Secretary-General characterized El Salvador’s March 1993 amnesty as a “clear rejection of the conclusions of the Truth Commission.” *Evaluation of the Peace Process in El Salvador*, Report of the Secretary-General, U.N.G.A. doc. A/51/917, July 1, 1997.

184. *See supra* notes 87-94 and accompanying text.

ary<sup>185</sup> and the political opposition gains seats in the national legislature,<sup>186</sup> the potential for timely and forceful U.N. condemnation of the amnesty eventually to bear prosecutorial fruit becomes more apparent.

### C. The International Community in Haiti in 1993-94

During 1993 and 1994, U.N., OAS, and U.S. diplomats sought to persuade the regime of General Raoul Cedras, which had ousted Haiti's democratically elected President Jean-Bertrand Aristide in 1991, to restore democratic rule and permit President Aristide's return to power.<sup>187</sup> During these efforts, which ultimately succeeded in September 1994, the diplomats negotiated two amnesty agreements to ease fears of the Haitian military that, if they ceded power, they would be prosecuted for the coup and for the 3,000 civilians murdered under their regime.<sup>188</sup>

The first agreement, signed at Governor's Island, New York in July of 1993, was mediated by the representative of the United Nations and OAS, former Argentinian Foreign Minister Dante Caputo, and by the U.S. Special Envoy, Ambassador Lawrence Pezzullo.<sup>189</sup> Contemplating Aristide's return to Haiti in October of 1993, the agreement envisioned "an amnesty granted by the President of the Republic within the framework of article 147 of the National Constitution."<sup>190</sup>

The Governor's Island amnesty, although vague and ambiguous, might reasonably have been interpreted in a manner consistent with international human rights law. Its "framework"—article 147 of Haiti's Constitution—provides that the president "may grant amnesty only for political matters as stipulated by law."<sup>191</sup> One could argue that the overthrow of Haiti's government was a "political matter," which could be amnestied, but that ensuing serious violations of human rights were not.

Unfortunately, the United States, at least, did not read it that way: "U.S. officials have acknowledged that during August and September of 1993, they presented [Haitian] Prime Minister designate Malval with drafts of amnesty laws similar to those passed in other countries, which covered not just crimes against the state but also serious human rights abuses against civilians."<sup>192</sup> In any event, the agreement came to naught, as the Cedras regime refused to relinquish

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185. See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1995, at 91 (1994).

186. See, e.g., Douglas Farah, *Salvadoran Left Finds Ballot Box a Potent Weapon; Moderate Leads Former Rebels to Uneasy Parity with Ruling Party*, THE WASHINGTON POST, Mar. 23, 1997, available in LEXIS, News Library, Curnws File.

187. See generally Scharf, *supra* note 14.

188. See *id.* at 4.

189. See *id.* at 5-7.

190. *Id.* at 6 (footnote omitted).

191. *Id.* at 6 n.33.

192. *Id.* at 6-7 (footnote omitted) (citing HUMAN RIGHTS WATCH AND NAT'L COALITION FOR HAITIAN REFUGEES, TERROR PREVAILS IN HAITI: HUMAN RIGHTS VIOLATIONS AND FAILED DIPLOMACY 35 (1994)).

power as agreed.<sup>193</sup>

As a result, at U.S. urging, the United Nations Security Council in July of 1994 authorized a military invasion to dislodge Cedras.<sup>194</sup> In September 1994, as U.S. invasion planes were already airborne, President Clinton's special mission to Haiti, headed by former President Jimmy Carter, negotiated a second amnesty agreement. General Cedras agreed to step down "when a general amnesty will be voted into law by the Haitian Parliament, or October 15, 1994, whichever is earlier."<sup>195</sup>

From the point of view of international human rights law, this "general amnesty" was even more troublesome than the ambiguous Governor's Island agreement. Gone was the express reference to the Haitian constitutional provision limiting amnesties to "political matters." Still, since the amnesty had to be enacted by Haiti's Parliament, one might argue that the Constitution implicitly constrained the Parliament's action. But since the entire agreement was extra-constitutional, who could be sure that its implementation was not as well?

U.S. public clarifications did not dispel the ambiguity. Secretary of State Christopher stated for the record that the United States interpreted the agreement to provide a "broad amnesty for all the members of the military."<sup>196</sup> Yes, but for which crimes—the coup itself or the subsequent murders of civilians?

When Haiti's Parliament enacted the amnesty law in October of 1994, the ambiguity was only partially resolved. The "political matter" limitation was restored, but it was defined so loosely that it might be construed to cover human rights violations. According to the law, the President's amnesty power under the Constitution "only applies to political matters, that is to say in all cases of crimes and misdemeanors against the state, *internal and external security, crimes and misdemeanors affecting public order and accessory crimes and misdemeanors* as defined by the Penal Code."<sup>197</sup>

By referring to presidential power, the law in effect passed the buck to President Aristide. His amnesty decree, issued the next day, was still ambiguous, granting amnesty to the "authors and accomplices" of the coup, without specifying whether they were amnestied only for the coup itself or for the subsequent brutality.<sup>198</sup> In practice, however, his administration did subsequently prosecute at least a few former military, police, and paramilitary personnel for assassinations of Aristide's major supporters.<sup>199</sup>

In short, it appears that if the Haitian amnesty was consistent with international human rights law at the time,<sup>200</sup> it was so in spite of, not because of the in-

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193. *See id.* at 7.

194. *See id.*

195. *Id.* at n.48.

196. *Id.* at n.49.

197. *Id.* at 15 (emphasis added).

198. *See id.* at 17.

199. *See id.* at 18 n.121.

200. Professor Scharf argues that the Haitian amnesty, which did not foreclose private suits for damages and was accompanied by a truth commission and at least some prosecutions, did not violate Inter-American jurisprudence at the time. *Id.* at 28. If interpreted to permit amnesty for serious hu-

ternational community's role.

## V

### CONCLUSION

The following guidelines reflect rulings of the Inter-American Court and Commission on Human Rights, as well as Inter-American Human Rights treaties.<sup>201</sup> They should be adopted for use by diplomats and officials of the United Nations, the Organization of American States, the U.S. government, and other governments involved in peacemaking, for amnesties covering serious violations of human rights in the Americas:

- (1) *Democratic Adoption*: To be legally valid at all, amnesties must be adopted by democratic bodies, usually the legislature; self-amnesties by lawless regimes are not valid.
- (2) *Investigations*: Amnesties may not foreclose investigations of violations, sufficient to vindicate both society's right to know the truth and survivors' right to know what happened to their relatives.
- (3) *Naming Names*: Investigations must seek to identify those responsible and name names; otherwise they are insufficient.
- (4) *Victim Participation*: Amnesties must not preclude victims from initiating or participating in judicial criminal investigations, at least in states that have such procedures.
- (5) *Compensation*: Amnesties may not foreclose or in practical effect substantially limit the right of victims or survivors to obtain adequate compensation for violations.
- (6) *Crimes Against Humanity*: Amnesties must not apply to crimes against humanity, including forced disappearances.
- (7) *Obstruction of Justice*: Amnesties should not apply to perjury and other obstructions of justice by officers of the court and litigants.
- (8) *Treaty Crimes*: In states parties to the applicable Inter-American Conventions, amnesties may not be given for torture, for cruel, inhuman, or degrading treatment or punishment, or for violence against women.
- (9) *State Acknowledgment of Responsibility*: Amnesties should not be given without an acknowledgment by the

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man rights violations, however, it would not likely meet the higher standards clarified in the later Chilean cases. See *supra* note 111.

201. See *supra* notes 129-55.



state of responsibility for past violations.

- (10) *Prosecution and Punishment*: States must prosecute and effectively punish perpetrators of serious human rights violations; such perpetrators may not be amnestied.

Plainly these guidelines, especially the last one, are a tall order. As written, they are absolute and inflexible; if the last guideline in particular were followed without exception, no amnesty for serious violations of human rights would ever pass muster. Creative approaches like South Africa's would be no more acceptable than the most cynical of self-amnesties. So unyielding a set of constraints poses a risk that policymakers might decline to accept.

This risk counsels caution in articulating and applying such guidelines. Soft law<sup>202</sup> offers one means of accommodating the need for caution. If the guidelines were embodied as hard law in a treaty, then either an absolutist approach, or exceptions or qualifications, might have to be expressly provided. Similarly, if they were asserted as hard customary law, courts might be compelled to consider potential exceptions and qualifications in defining and applying a customary rule.

A soft law approach does not altogether moot such problems. However, it avoids the necessity for their systematic and comprehensive resolution at the outset, in the abstract. Stating the norms as guidelines for the conduct of international and U.S. officials allows them to be treated as just that, guidelines. Like the jurisprudence from which they mainly derive, developed case by case, they could be applied and if necessary tailored to fit individual cases.

If they are to be honored in the practice and not in the breach, of course, the guidelines must not be taken lightly. To discard or amend them at will, or whenever convenient, would defeat their purpose. Still, guidelines for the conduct of officials may allow for a narrowly circumscribed degree of flexibility. For example, the United Nations, OAS, and United States could require that their officials presumptively follow them, unless extraordinary reasons were found to question their application in a particular case. In that event, prior to allowing any departure from the guidelines, those reasons would need to be clearly articulated and, at a minimum, to receive consideration and express approval by senior officials, following receipt of a legal opinion on all applicable treaties and jurisprudence relating to impunity.

Such an approach would be consistent with the policy-oriented approach of the New Haven School, which conceives of international law as an ongoing process of authoritative decisionmaking, in which legal criteria serve not as mechanical limits, but as explicitly postulated public order goals, reflecting values of human dignity, to guide decisionmakers.<sup>203</sup> While the policy-oriented ap-

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202. For the distinction between "hard" and "soft" international law—essentially, but not entirely, the difference between formally binding and non-binding obligations—see, e.g., Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L COMP. L. Q. 850 (1989); Gruchalla-Wesierski, *A Framework for Understanding Soft Law*, 30 MCGILL L.J. 37 (1984).

203. See, e.g., LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 14-15, 19-20 (1989).

proach may understate the potential of “hard” international law, it aptly describes the “soft law” function of the guidelines suggested here.

If international legal constraints on amnesties for serious violations of human rights are to serve their purpose, they must not only be sound as a matter of justice, they must be used in practice. Articulating strong presumptions against such amnesties, but doing so through the form suggested here— guidelines for the conduct of international community officials—may stand a better chance than either treaty or customary law of achieving both objectives.