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The Developing Jurisprudence on Amnesty*

Naomi Roht-Arriaza** & Lauren Gibson***

I. INTRODUCTION

Transitional justice has been a troubling human rights issue. How should societies emerging from periods of grave human rights violations frame the relationships among truth, justice, and reconciliation? Some pose the issue as a difficult balance between punishment and reconciliation,¹ while others see truth or, alternatively, justice, as a precondition for reconciliation.² Human rights advocates generally have adopted the latter position, without clearly defining under what conditions and through what methods justice should be achieved.

International law and international lawyers have played an important role in defining the terms of the debate on transitional justice. The paths chosen by states are now viewed as issues of international concern, rather

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1. See Robert Post, *Introduction to HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* (working title) (Robert Post & Carla Hesse eds., forthcoming 1998) [hereinafter *HUMAN RIGHTS IN POLITICAL TRANSITIONS*].

2. See Richard Goldstone, *Exposing Human Rights Abuses—A Help or Hindrance to Reconciliation?*, 22 *HASTINGS CONST. L.Q.* 607, 615 (1995).

than solely domestic matters. In the last ten years, there has been a sea of change, prompted both by the end of the cold war, and by recognition that failure to come to terms with past cycles of violations may lead to future violations. International human rights groups now routinely demand and assess accountability for past violations, and anti-impunity measures are no longer simply a question of national choice. In the United States, for instance, accountability is announced as a mainstay of foreign policy, especially in situations of transition.³ US State Department Country Reports report impunity as a major problem in a number of countries.⁴

International human rights bodies regularly call for investigation, prosecution, and redress for victims. Increasingly, such bodies find that domestic blanket amnesties precluding both prosecution and civil redress violate states' obligations under international and regional human rights treaties.⁵ The Ad Hoc Tribunals on the Former Yugoslavia and Rwanda⁶ have helped advance human rights by signaling, at least in theory, that certain international crimes must be prosecuted. Additionally, the creation of an International Criminal Court is finally firmly on the agenda, with a Diplomatic Conference proceeding as this article goes to press.

Nonetheless, it is hard to gauge the impact of these changes at the domestic level. International law takes effect through a number of routes. The most direct route is through the decisions and views of international organs; however, these may have limited enforceability at the domestic level. A second route is through the incorporation of international law into

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3. For example, Steven Coffey, Principal Deputy Assistant Secretary of State, Bureau of Democracy, Human Rights and Labor, remarked on the importance of accountability in a recent speech. Steven J. Coffey, Rule of Law and Regional Conflict, Keynote Address at the Fourteenth Annual International Law Symposium, in 19 WHITTIER L. REV. 257, 262 (1997). Other administration spokespersons have reiterated the US government's concern that past international crimes and violations of human rights not be left unpunished.
 4. See, e.g., reports on Colombia, El Salvador, and others. U.S. DEP'T ST., 104TH CONG., 2d SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1995 (Joint Comm. Print 1996).
 5. The Inter-American Commission on Human Rights reached such a conclusion in three cases in El Salvador, Uruguay, and Argentina. See *Report on the Situation of Human Rights in El Salvador*, Inter-Am. Comm'n on Hum. Rts., O.A.S. Doc. OEA/Ser.L/V/II.82, doc. 26 (1992); *Report on the Situation of Human Rights in Uruguay*, Inter-Am. Comm'n on Hum. Rts., O.A.S. Doc. OEA/Ser.L/V/II.82, doc. 25 (1992); *Report on the Situation of Human Rights in Argentina*, Inter-Am. Comm'n on Hum. Rts., O.A.S. Doc. OEA/Ser.L/V/II.82, doc. 24 (1992). The Inter-American Court of Human Rights, in the *Velásquez Rodríguez* case, and the UN Human Rights Committee have also reached similar conclusions. *Velásquez Rodríguez Case*, Case 7920, Ser. C, No. 4, Inter-Am. Ct. H.R. 35, O.A.S. Doc. OEA/Ser.L/V/III.19, doc. 13 (1988); *Bautista de Arellana v. Colombia*, Communication No. 563/1993, U.N. GAOR, Hum. Rts. Comm., 55th Sess., U.N. Doc. CCPR/C/55/D/563/1993 (1995).
 6. See S.C. Res. 802, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993) (creating Ad Hoc Tribunal on the Former Yugoslavia); S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 (1994) (creating Rwanda Tribunal).

the domestic legal system through each country's own constitutional arrangements. In many states, especially in Latin America, constitutions provide that treaties are directly incorporated into domestic law, often with a superior status to conflicting domestic statutes. In others, like the United Kingdom, treaties become part of domestic law only when Parliament approves implementing legislation. Incorporation into domestic legal systems then allows international law to be adjudicated, and enforced, by local courts.

Another possible route to domestic incorporation is more indirect. It involves the diffusion of international norms into the domestic arena through political and legal discourse, the language in legal arguments before domestic courts, and by local political and legal actors.⁷ One measure of the impact of international law principles, but the most difficult to trace and document, is precisely how well they effectuate this indirect transfer into the national sphere.

One particularly troubling aspect of transition is what role the existing legal system can and should play. Courts in newly constituted or reemerging civilian regimes must contend with a legacy of a lack of independence, ties to the old regime, mistrust, fear and corruption, or the inexperience of newly appointed personnel. Under these conditions, some have suggested that courts are not a suitable vehicle for doing justice.⁸

To date, there has been little study of the permeability of international law-based rules and ideas of accountability into the jurisprudence of national courts. In particular, to what extent have these rules and norms influenced courts, when asked to rule on the legality of measures to limit accountability, in countries where massive human rights violations have taken place? Which arguments have been successful over time, and which have not? A detailed study of the court decisions in this area can help advocates refine their arguments, and help scholars evaluate to what extent, and on what terms, emerging international law principles influence national judiciaries. National court decisions will also be one element in discerning to what degree customary law obligations are emerging in the area of

7. See Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2013–15, 2078–79 (1997).

8. This was the conclusion, for example, of the Salvadoran Truth Commission. See UNITED NATIONS, FROM MADNESS TO HOPE: REPORT OF THE COMMISSION ON THE TRUTH FOR EL SALVADOR 178 (1993). A number of writers have analyzed the difficulties and conundrums faced by these courts when attempting to resolve large numbers of potential cases of human rights-related crimes, which may have involved many defendants and taken place many years before. See, e.g., Samuel Huntington, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991); Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1 (1990); Mark Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995).

accountability. In addition, such study will illuminate the evolving role of the judiciary in situations of transition.

This article considers the evidence from a number of countries: Chile, El Salvador, Guatemala, Honduras, Peru, South Africa, Argentina (including cases outside Argentina involving Argentine defendants), and Hungary. These are by no means all of the countries where accountability issues have arisen, or even all of those where the courts have played a major role. The study excluded countries such as Ethiopia and Rwanda, where prosecutions have proceeded unhindered by amnesty laws, or Haiti, where an amnesty law has been construed by the Executive and Legislative branches to exclude perpetrators of grave human rights violations.⁹ Rather, it focused on countries where courts confronted challenges to amnesties or other limitations on criminal or civil actions imposed by the legislature or the executive, generally in the name of social peace. The study found a number of recurring patterns in the courts' treatment of accountability, and a set of decidedly mixed outcomes.

Part II sets out the historical and legal background for the countries and cases we examined. Part III summarizes arguments found repeatedly in the jurisprudence on amnesty law. Part IV considers the international law arguments courts relied on in ruling on the legality of amnesties and similar measures. Part V looks at arguments regarding the role of international law in the domestic legal system, which are closely related to broader arguments about separation of powers and the role of the courts. Part VI tries to draw some lessons and conclusions from the decisions.

II. THE HISTORICAL SETTING AND SCOPE OF THE AMNESTY LAWS

Amnesties are usually executed after periods of extreme violence or civil war. In some cases, those responsible for the abuses are no longer in power, while in others they still play a preponderant role in national life, and in still others they are part of a "peace process" aimed at ending civil war. These differing contexts will color, to a greater or lesser degree, the type of challenge brought against an amnesty, and the response of the courts.

A. Chile

In 1970, the Popular Unity party won the presidential elections in Chile, and socialist senator Salvador Allende became President. He envisioned a socialist state, and immediately began working to transform Chile socially,

9. See Ken Roth, *Accountability in Haiti*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS, *supra* note 1.

politically, and economically. In September 1973, Allende was overthrown by a military junta led by General Augusto Pinochet.¹⁰ Via a campaign of disappearances, abductions, torture, and executions, the military "weeded out" suspected leftists and sympathizers.¹¹ The first victims targeted were peasant and union organizers, government members, and leftist party members.¹² The new government immediately declared a state of siege and "time of war," abolished Congress by decree, banned labor and leftist parties, and issued decrees amending the Constitution to allow the security forces to detain citizens incommunicado.¹³ By December 1973, 1,500 civilians had been killed.¹⁴ Between January 1974 and August 1977, at least 599 more were killed.¹⁵

In 1978, General Pinochet issued an amnesty decree to "all persons who committed . . . criminal offenses during the period of the State of Siege, between 11 September 1993 and 10 March 1978."¹⁶ As enacted, the law created a blanket amnesty which protected persons, whether convicted or not, from prosecution for nonexcluded criminal acts. Some common crimes were excepted from the amnesty, including infanticide, armed robbery, rape, incest, fraud, embezzlement, dishonesty, and drunk driving.¹⁷ However, murder, kidnapping, and assault were not.¹⁸

Although the language of the enactment granted amnesty to the opposition as well as to the military, the law mostly benefitted the military because it had committed most of the crimes, and because the majority of the opposition had been murdered, disappeared, or exiled. Therefore, the decree basically constituted a self-amnesty.¹⁹ The Chilean amnesty effectively prevented investigations into the human rights abuses under Pinochet's rule because it allowed courts to close cases and investigations before indictments are handed down.²⁰ Nonetheless, the amnesty in and of itself did not prevent investigation of the facts, and currently more than 200 cases remain pending.²¹

10. See Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 *FORDHAM L. REV.* 905, 905 (1994).

11. See Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995*, 2 *TULSA J. COMP. & INT'L L.* 253, 259-60 (1995).

12. See *id.* at 258.

13. See *id.* at 259-60.

14. See *id.*

15. See Quinn, *supra* note 10, at 916.

16. *Id.* at 917-18.

17. See *id.* at 906, 918.

18. See *id.*

19. See *id.* at 905, 906-07.

20. See Snyder, *supra* note 11, at 269.

21. See *Chile/Human Rights*, *LATIN AM. WEEKLY REP.*, 4 NOV. 1997, at 528.

The successor government of Patricio Aylwin could not rescind amnesty because it was unable to gather the necessary support from Congress.²² Nor could it legally annul the amnesty in accordance with Chilean legal tradition.²³ Instead it created the National Commission on Truth and Reconciliation. The Commission's mandate was to clarify the truth about the "most serious" human rights abuses where death occurred.²⁴ The Commission was also empowered to investigate kidnappings and attempted murder committed by private citizens for political purposes, and to identify victims, determine their fate if possible, and recommend reparations.²⁵ In accordance with its mandate, the Commission issued a report containing individualized information on a large number of cases of disappearances and deaths, and identified the groups responsible for these acts.²⁶ However, the scope of the Commission's work was quite limited. First, it was prevented from examining cases involving violations of human rights where the victims survived, including cases involving torture.²⁷ Secondly, it was restricted from identifying the individuals responsible for the crimes and recommending sanctions.²⁸

The Chilean amnesty law has been challenged at least twice.²⁹ The Supreme Court of Chile held in both cases that the amnesty was constitutional and consistent with international law.³⁰ In doing so, it overruled lower court opinions which had struck down the amnesty. However, certain lower courts continue to open investigations into cases of forced disappearance under the "Aylwin doctrine," which holds that the courts may investigate cases in order to determine whether, under their facts, the amnesty law is

22. See Jorge Mera, *Chile: Truth and Justice Under the Democratic Government*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 171, 181 (Naomi Roht-Arriaza ed., 1985) [hereinafter IMPUNITY AND HUMAN RIGHTS]. Senators appointed by General Pinochet under the transitional constitution blocked legislative efforts.

23. See *id.* at 183.

24. See Jo M. Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 338 (1994) (citing NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, *Report of the Chilean Commission on Truth and Reconciliation* 4 (1993)).

25. See *id.*

26. See Mera, *supra* note 23, at 173 (citing MINISTERIO GRL. DE GOBIERNO, *Report of the National Commission for Truth and Reconciliation* (Santiago, Chile 1991)). See also David Weissbrodt & P.W. Fraser, *Report of the Chilean National Commission on Truth and Reconciliation*, 14 HUM. RTS. Q. 601, 604 (1992).

27. See Mera, *supra* note 22, at 173, 177.

28. See Pasqualucci, *supra* note 24, at 338.

29. See *Insunza Bascuñán Case*, *Recurso de Inaplicabilidad*, Corte Suprema de Chile, *Revista de Derecho y Jurisprudencia y Gaceta de los Tribunales*, pt. 2, § 4, at 64 (May-Aug. 1990) [hereinafter *Insunza Bascuñán Case*]; *Romo Mena Case*, Corte Suprema de Chile (26 Oct. 1995) [hereinafter *Romo Mena Case*].

30. *Insunza Bascuñán Case*, *supra* note 29, at 64. *Romo Mena Case*, *supra* note 29.

applicable.³¹ Chilean courts have convicted military and secret police personnel of murder and other crimes in cases not covered by the amnesty, most notably the former head of the secret police, General Manuel Contreras, and his assistant, Brigadier Pedro Espinoza, for the murder of Orlando Letelier and Ronni Moffit.³²

B. El Salvador

The overthrow of democratically elected President Araujo triggered a peasant insurrection in El Salvador in January 1932. The new military government's response was to massacre between 10,000 and 30,000 peasants.³³ In the next few decades, El Salvador struggled through attempts at democratic reform, but the power and influence of the military remained strong throughout the period.³⁴ In the early 1970s, a leftist armed opposition as well as student, union, and church based peasant groups began to form.³⁵ Despite a coup by reformist officers in 1979, military hardliners continued to hold the high command and blocked many of the new junta's attempts at reform.³⁶ Such hardliners controlled subsequent governments as reformist officers were forced out of power.³⁷ Violence by the government's military forces and death squads escalated and the armed insurgency grew. Due to violence, repression, and the United States financial support of El Salvador's armed forces, the country declined into civil war.³⁸ The victims of this war were primarily people assisting the guerillas and those who were suspected of supporting the guerillas. By 1991, death squad killings, torture, disappearances, and bombing of civilian neighborhoods, in addition to targeted assassinations by the FMLN (Farabundo Martí National Liberation Front), resulted in a total of approximately 70,000 deaths.³⁹

31. See Mera, *supra* note 22, at 179–80.

32. The Letelier case was specifically excluded from the 1978 amnesty law due to pressure from the US government (Letelier was killed in Washington, DC). Contreras' conviction was finally upheld by the Chilean Supreme Court in May 1995. Contreras Sepulveda Case, *Apelacion sentencia definitiva*, Corte Suprema de Chile, 30 May 1995, *Revista de Derecho y Jurisprudencia y Gaceta de los Tribunales*, pt. 2, § 4, at 70 (May–Aug. 1995).

33. See Martin Diskin & Kenneth E. Sharpe, *El Salvador*, in *CONFRONTING REVOLUTION: SECURITY THROUGH DIPLOMACY IN CENTRAL AMERICA* 50, 51 (Morris J. Blachman et al. eds., 1987) [hereinafter *CONFRONTING REVOLUTION*].

34. See *id.* at 51–55.

35. See *id.* at 53–54.

36. See *id.* at 56.

37. See *id.* at 55–56.

38. See *id.* at 54–62.

39. See Reed Brody, *The United Nations and Human Rights in El Salvador's "Negotiated Revolution"*, 8 *HARV. HUM. RTS. J.* 153, 153 (1995).

A lengthy negotiated peace process between the FMLN and the Salvadoran government resulted in several accords.⁴⁰ These peace accords included provisions for the investigation of the military forces by an ad hoc commission that was to consist of respected Salvadorans, or "notables," and an international representative.⁴¹ Although implementing the recommendations of the commission was a controversial and highly debated aspect of the peace process, the government eventually removed the officers identified in the recommendations.⁴²

The accords also established, pursuant to a UN proposal, a Truth Commission, composed of international figures, to investigate the war's worst acts of violence and recommend reforms.⁴³ The Commission focused on a small number of cases involving the most notorious and representative crimes.⁴⁴ The Commission published a report which named over forty military officers and eleven FMLN members responsible for human rights abuses and detailed the previously unknown facts of several cases of massacres and extrajudicial killings.⁴⁵ It also recommended sanctions for the perpetrators, such as being banned from public office for a minimum of ten years, or from the police forces for life.⁴⁶ However, due to the judiciary's history of involvement with the executive and legislative branches and its contributions to rampant impunity, the Commission suggested that prosecutions could be counterproductive and unlikely to achieve fair results.⁴⁷

In reaction to the Commission's report, President Cristiani's government pushed through a sweeping amnesty that extinguished civil and criminal responsibility for political crimes by the FMLN and the government.⁴⁸ The definition of political crimes was extremely broad, including crimes against the public peace, crimes against the activities of the courts, and crimes committed "on the occasion of or as a consequence of the armed conflict, without regard to political condition, militancy, affiliation, or ideology."⁴⁹

In 1993, the Constitutional Court of El Salvador found the amnesty to be

40. See Margaret Popkin, *El Salvador: A Negotiated End to Impunity?*, in *IMPUNITY AND HUMAN RIGHTS*, *supra* note 22, at 198, 203.

41. See Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 L. & SOC. INQUIRY 79, 95 (1995).

42. See Popkin, *supra* note 40, at 204.

43. See *id.* at 205-06.

44. See Margaret L. Popkin, *Peace Without Justice: Obstacles to Building the Rule of Law in El Salvador* 89 (unpublished manuscript on file with author).

45. See Pasqualucci, *supra* note 24, at 341.

46. See *id.*

47. See Popkin, *supra* note 40, at 209.

48. Legislative Decree No. 486, art. 4, 318 DIARIO OFICIAL (22 Mar. 1993).

49. *Id.* art. 2.

consistent with the Salvadoran Constitution.⁵⁰ Since then, courts have applied the amnesty in several cases. For example, in the case of Santos Guevara Portillo, FMLN members shot down a US military helicopter that was on an unauthorized flight. One American soldier died in the plane crash. Two others were killed after the crash when the FMLN members allegedly shot them.⁵¹

C. Guatemala

In 1954, after ten years of attempted democratic and nationalistic reform under the presidencies of Juan Arevalo and Jacobo Arbenz, Guatemala returned to dictatorial military rule.⁵² In the next four decades, Guatemala continued under military rule and a brutal civil war ensued. Guerrilla groups had formed as early as the 1960s and reemerged with force in the 1970s.⁵³ In 1982, these groups joined under the banner of a coordinating group, the URNG (Guatemalan National Revolutionary Unity).⁵⁴ In the mid-1970s there was also a resurgence of grassroots organizations and political mobilization.⁵⁵ The government responded to this pressure with extreme repression.⁵⁶ Violence peaked in the early 1980s. Between 1978 and 1983, ruling Generals Romeo Lucas Garcia and Efraín Ríos Montt executed a "scorched earth" policy in vast rural areas composed mostly of indigenous peoples,⁵⁷ whom the government believed were guerrilla sympathizers.⁵⁸ At least 400 villages were destroyed, burned, and plundered by the Guatemalan government.⁵⁹ By 1984, stories of mass killings in the countryside had become a regular occurrence.⁶⁰ Secret summary military trials were established and executions of suspected enemies of the government

50. See *El Salvador: Supreme Court of Justice Decision on the Amnesty Law, Proceedings No. 10-93 (May 20, 1993)*, 3 TRANSITIONAL JUSTICE 549, 555 (1995) [hereinafter *El Salvador Decision*].

51. Guevara Portillo Case, Sala de lo Penal de la Corte Suprema de Justicia, San Salvador (16 Aug. 1995) [hereinafter Guevara Portillo Case].

52. See Robert Trudeau & Lars Schoultz, *Guatemala*, in CONFRONTING REVOLUTION, *supra* note 33, at 23, 28.

53. See *id.* at 34, 38.

54. See *id.* at 38.

55. See *id.*

56. See *id.* at 39.

57. See Tunku Varadarajan, *Hardcore Gunmen Threaten Guatemalan Peace Accord*, TIMES LONDON, 30 Dec. 1996, at 7.

58. See John Ward Anderson, *Guatemala Ends Years of Conflict*, TAMPA TRIB., 30 Dec. 1996, at 1.

59. See Varadarajan, *supra* note 57, at 7.

60. See Trudeau & Schloutz, *supra* note 52, at 39.

continued.⁶¹ In total, it is estimated that between 140,000 and 200,000 Guatemalans were disappeared or murdered throughout the civil war.⁶²

In December 1996, a peace agreement was signed ending the war.⁶³ The peace accords included a government commitment not to propose any measures "designed to prevent the prosecution of persons responsible for human rights violations."⁶⁴ On 18 December 1996, the Guatemalan Congress approved the National Reconciliation Law (NRL), which established the basis for the reincorporation of the URNG members into society.⁶⁵ The NRL included several amnesty provisions which extinguished penal responsibility for crimes committed by both sides during the war, with the exception of forced disappearances, torture, and genocide.⁶⁶ Guatemala has also established a "Historical Clarification Commission," whose mandate is to objectively report on all violence and human rights violations on both sides of the war and recommend measures to preserve the memory of the victims.⁶⁷ However, the Commission will not name the people responsible for the human rights violations it investigates nor can its work serve as the basis for legal proceedings.⁶⁸

Article 2 of the NRL grants amnesty to members of the armed insurgency who committed political and related common crimes.⁶⁹ Article 5 gives the appellate courts the power to grant amnesty to state actors for common crimes perpetrated to prevent or repress the crimes committed by the guerrillas.⁷⁰ The article excludes cases in which there is not a rational and objective relation between the goal of the crime and the crime committed.⁷¹ It does, however, place the burden of proof on the person opposing the amnesty.⁷² Article 6 allows the courts to grant amnesty for all

61. See *id.* at 38.

62. See Robert E. Lutz, *A Piece of the Peace: The Human Rights Accord and the Guatemalan Peace Process*, 2 SW. J. L. & TRADE AM. 183, 185 (1995).

63. See Juanita Darling, *War Ends in Guatemala*, SEATTLE TIMES, 30 Dec. 1996, at A6.

64. *Comprehensive Agreement on Human Rights*, U.N. GAOR, 40th Sess., Annex I, Agenda Item 40, at 3, U.N. Doc. A/48/928-S/1994/448 (1994) (entered into force 29 Mar. 1994).

65. See Juanita Darling, *Guatemalan Murder Case Tests Amnesty Legislation*, WASH. POST, 31 Jan. 1997, at A17.

66. Ley de Reconciliación Nacional [National Reconciliation Law], Decree 145-96, reprinted in Guatemala Constitutional Court Decision on Amnesty, No. 8-97 and 20-97, at 19-20 (7 Oct. 1997) [hereinafter NRL].

67. See Fiona Ortiz, *Guatemala Truth Commission Will Not Name Names*, REUTERS FIN. SERV., 23 Feb. 1997, available in LEXIS, News Library, Wires File.

68. See *id.*

69. See Rodriguez Galvez Case, *Acción de Inconstitucionalidad Parcial*, Corte de la Constitucionalidad de Guatemala, 7 (2 Jan. 1997).

70. NRL art. 5, *supra* note 66, at 19-20.

71. *Id.*

72. See Margaret Popkin, *Guatemala's National Reconciliation Law: Combating Impunity or Continuing It?*, 24 REVISTA IIDH 173 (1996).

acts carried out or ordered by state actors with the objective of avoiding a greater harm, including acts related to the peace negotiations.⁷³

Article 11 provides that eligibility for amnesty will be determined through expedited proceedings.⁷⁴ Cases that involve crimes falling under the law are to be transferred to the appropriate chamber of the Court of Appeals; apparently the idea was to remove pressures on individual judges in these cases by having a panel of judges consider them. Parties must submit their arguments to the Court of Appeals within ten days. Parties may appeal the decision of the Court of Appeals within three days to the Supreme Court, which has five days to rule.⁷⁵ In October 1997, the Guatemalan Constitutional Court found that Articles 5, 6, and 11 of the amnesty law were constitutional.⁷⁶ However, a number of lower courts have found the amnesty inapplicable "as applied" to certain cases.⁷⁷

D. Honduras

In the 1980s, violence in Honduras increased mostly as a result of US-sponsored militarization aimed at building a base from which the United States could help El Salvador fight its insurgents and "roll back" the Nicaraguan Revolution.⁷⁸ During this time, a government battalion funded by the US, Battalion 3-16, became infamous for its human rights abuses, including the forced disappearances and torture of opposition leaders.⁷⁹ Honduras began to experience systematic state terrorism, including disappearances and assassinations.⁸⁰ Many suspected leftists were killed or tortured by paramilitary squads.⁸¹ Attacks on popular organizations, including student organizations and labor unions, became common.⁸² A small guerrilla group arose, but was easily crushed.⁸³ By 1984, eighty-eight people

73. NRL art. 6, *supra* note 66, at 22-23.

74. NRL art. 11, reprinted in *Amicus Curiae: Acción de Inconstitucionalidad de la Ley de Reconciliación Nacional Presentado por la Oficina de Derechos Humanos del Arzobispado de Guatemala*, 24 REVISTA IIDH, at 263, 269-70 (1996).

75. *Id.*

76. See Guatemalan Constitutional Court Opinion on Amnesty, No. 8-97 & 20-97 (7 Oct. 1997) [hereinafter *Guatemalan Decision*].

77. See text accompanying notes 292-301 *infra*.

78. See Philip L. Shepherd, *Honduras*, in *CONFRONTING REVOLUTION*, *supra* note 33, at 125, 130, 134.

79. See *Honduras: Former Military Officer Confesses to Human Rights Violations But Remains in Hiding*, NOTISUR-LATIN AM. POL. AFF., 12 Apr. 1996.

80. See Shepherd, *supra* note 78, at 136.

81. See *High Court Upholds Trial of Officers*, FACTS ON FILE WORLD NEWS DIG., 22 Feb. 1996, at D1.

82. See Shepherd, *supra* note 78, at 137.

83. See *id.* at 143.

had been assassinated, 105 had been disappeared, and fifty-seven remained political prisoners. Additionally, 138 persons were released and turned over to the courts, after being temporarily disappeared or tortured.⁸⁴

In July 1991, the Honduran Congress passed a law, Decree No. 87-91, granting amnesty for all persons who had committed political and related common crimes in the 1980s.⁸⁵ Under the law, all persons who had been sentenced were to be immediately freed, while all current and future cases against defendants whose crimes fell under the law were to be dismissed.⁸⁶ The law applied to both insurgents and state actors.

Unlike other countries, an individual rather than a commission investigated human rights abuses in Honduras. An ombudsman's office, named the Commissioner for the Protection of Human Rights, was created by the President.⁸⁷ Leo Valladares Lanza, a member of the Inter-American Commission on Human Rights, was selected by Honduras' President Callejas as Commissioner.⁸⁸ Valladares began investigating the human rights abuses of the past and published a report on those who disappeared between 1980 and 1993. His investigation and report revealed the disappearance of 179 persons by Honduras' armed forces during that period.⁸⁹ It described in detail fourteen cases of disappearance.⁹⁰ Valladares set forth several recommendations, including that those who committed disappearances not be granted amnesty, that the government give reparations to the families of the victims, and that the judiciary be reformed.⁹¹

The Honduran courts have begun slowly prosecuting those involved in the disappearances. The Supreme Court has not yet decided the constitutionality of the amnesty. However, the Supreme Court and lower courts have limited its reach, as discussed below.⁹²

E. Peru

From 1912 to 1980, most Peruvian governments faced military coups.⁹³ In the latter part of this period, armed insurgencies including the Sendero

84. See *id.* at 137.

85. Decree No. 87-91, art. 1, LA GACETA No. 26.498 (24 July 1991).

86. *Id.* art. 3.

87. See Popkin & Roht-Arriaza, *supra* note 41, at 89.

88. See *id.* at 90.

89. COMISIONADO NACIONAL DE PROTECCION DE LOS DERECHOS HUMANOS, LOS HECHOS HABLAN POR SI MISMOS [THE FACTS SPEAK FOR THEMSELVES] 145-252 (1994) [hereinafter THE FACTS SPEAK FOR THEMSELVES].

90. *Id.* at 262-97.

91. *Id.* at 407, 408-11.

92. See *infra* text accompanying notes 279-88.

93. See Jeffrey D. Thielman, *Peru's Failure to Make the Military Subservient to Civilian Law: The Absence of Prosecution after the 1988 Cayara Massacre*, 12 B.C. THIRD WORLD L.J. 433, 442 (1992).

Luminoso [hereinafter "Sendero"], a Maoist guerrilla movement, grew steadily. In 1980, a democratically elected state was reestablished and, paradoxically, the Sendero Luminoso launched its first terrorist attacks.⁹⁴ After the Sendero caused a massive blackout in Lima in 1982, President Belaunde declared a state of emergency and responded with force. The military entered Ayacucho, the home department of the Sendero, and within six months 1,000 were dead.⁹⁵ A bloody conflict between the Sendero and the military followed that spread throughout much of Peru. States of emergency became common, with more than half of the Peruvian population under states of emergency in 1989, and rights being suspended.⁹⁶

The conflict continued through 1992. In April 1992, Alberto Fujimori took power in Peru through a self-coup. Soon after, the Sendero's terrorist activities increased to unprecedented levels.⁹⁷ The government responded with a campaign of detention, disappearances, and extrajudicial executions of suspected leftist sympathizers.⁹⁸ After the principal leaders of the Sendero were captured, the violence of the past decade began to decrease.⁹⁹ During the twelve years of Sendero's terrorist activities until 1992, close to 30,000 persons had been killed, of whom more than 11,000 were uninvolved in the conflict.¹⁰⁰

In 1995, three years after the Sendero's main leaders were captured, Peru passed a sweeping amnesty law.¹⁰¹ Unlike most other amnesties, this law was not passed in order to promote national reconciliation after the fall of authoritarian rule, or a negotiated end to a civil war. Rather, it grants amnesty only to police, military personnel, and civilians condemned for acts linked with the fight against terrorism for the fifteen year period between 1980 and 1995.¹⁰² As the amnesty is limited to counterterrorists, Sendero members, or those found to be associated with the Sendero or other armed groups, may be found criminally and civilly liable for any of their actions. Furthermore, there is no truth commission nor other means of reparation for victims of human rights abuses.

This amnesty was challenged in a case involving the murder of fifteen people in Lima who were presumed by the defendants to be members of

94. See Cesar Landa Arroyo, *Limites Constitucionales de la Ley de Amnistia Peruana*, 24 REVISTA IIDH 66 (1996).

95. See Thielman, *supra* note 93, at 445.

96. See *id.* at 446-47.

97. See Arroyo, *supra* note 94, at 65.

98. See *id.*

99. See *id.* at 64-65.

100. See *id.* at 63-64.

101. Law No. 26479, 15 June 1995, discussed in Salazar Monroe Case, Decimo Sexto Juzgado Especializado en lo Penal de Lima, 1-2 (16 June 1995).

102. *Id.* art. 1.

Sendero.¹⁰³ The defendants, the head of the intelligence service and four military officers, were alleged to be members of a military death squad known as the Colina group, which was also responsible for the kidnapping, torture, and murder of nine students and a professor at La Cantuta University in 1992. A lower court ruled that the amnesty was unlawful and inapplicable in this case.¹⁰⁴ However, two weeks later the Peruvian Congress passed a law stating that the amnesty did not violate international law or human rights, nor limit the independence of the judiciary (the Interpretative Rule).¹⁰⁵ It further extended the scope of the amnesty to apply to cases where no conviction had yet occurred.¹⁰⁶ In adherence to this expanded law, the Superior Court overruled the lower court's decision and applied the amnesty.¹⁰⁷ The Supreme Court upheld the Superior Court's decision.¹⁰⁸

F. South Africa

The brutal and extremely violent conflict that resulted from the fight against apartheid in South Africa ended in negotiations in 1993 that produced a new Constitution. During the negotiations, the de Klerk government pushed for a blanket amnesty, which the African National Congress (ANC) refused.¹⁰⁹ In the epilogue of the Interim Constitution of 1993 was an amnesty provision that granted protection from prosecution for "acts, omissions, and offenses associated with political objectives and committed in the course of the conflicts of the past."¹¹⁰ Pursuant to this provision, Parliament enacted the Truth and Reconciliation Act of 1995 (TRA). Section 20(7) of the TRA protects certain persons who have committed political human rights abuses from civil and criminal liability.¹¹¹

103. See *Peruvian Judge Challenges Amnesty Law*, U.P.I., 20 June 1995, available in LEXIS, News Library, UPI File; *Court Rules that Amnesty Law Applies to a Case of Officers Accused of Murder*, BBC SUMMARY OF WORLD BROADCASTS, 23 Oct. 1995, available in LEXIS, News Library, Papers File.

104. See *Salazar Monroe Case*, Decimo Sexto Juzgado Especializado en lo Penal de Lima, 4–5 (16 June 1995) [hereinafter *Salazar Monroe Case*, Judgment of June 1995].

105. Law No. 26492, 28 June 1995, discussed in Arroyo, *supra* note 94, at 68.

106. *Id.*

107. See *Salazar Monroe Case*, Decima Primera Sala Penal de la Corte Superior de Lima, 3 (14 July 1995) [hereinafter *Salazar Monroe Case*, Judgment of July 1995]; see also Arroyo, *supra* note 94, at 68.

108. See Arroyo, *supra* note 94, at 68, 75; *Peru Upholds Amnesty for Massacre Case Soldiers*, REUTERS N. AM. WIRE, 20 Oct. 1995, available in LEXIS, News Library, Wires File.

109. See Tim Smith, *A Nation Examines Its Conscience: South Africa, Truth and Reconciliation Commission*, AMERICA, 8 Nov. 1997, at 22, available in LEXIS, News Library, Magazine File; Lynn Berat, *South Africa: Negotiating Change?*, in IMPUNITY AND HUMAN RIGHTS, *supra* note 22, at 267, 272.

110. S. AFR. INTERIM CONST. epilogue.

111. Promotion of National Unity and Reconciliation Act, Act No. 34 of 1995, § 20(7), in GG16574 of 26 July 1995 (colloquially known as the Truth and Reconciliation Act) [hereinafter TRA].

South Africa's model of amnesty differs from previous cases. Persons do not receive amnesty unless they present themselves to the Truth and Reconciliation Commission (TRC) and make a "full disclosure of all the relevant facts relating to acts associated with a political objective."¹¹² The Commission's duties also include allowing the victims an opportunity to relate their own accounts of the violations, and recommending reparations.¹¹³ Thus, the particular circumstances and the party responsible for the crimes committed will be identified and the information will be viewed in conjunction with the victim's account of the acts of abuse.

Amnesty applies to security forces and liberation movement members engaged in a political struggle. The TRC must consider motive, context, gravity of the offense, whether the person was following orders, the relationship between the act and the objective pursued, and the act's proportionality to the objective.¹¹⁴ Those who do not come forward and request amnesty within the limited period of availability will be subject to prosecution. The TRC, in addition, has extensive subpoena and search powers, which facilitate the gathering of information.¹¹⁵ The constitutionality of the South African amnesty was challenged by, among others, the widow of Steve Biko.¹¹⁶ The 1996 Constitutional Court case upheld the amnesty.¹¹⁷ In other cases, family members of those killed have challenged amnesty applications as not making "full disclosure," to date with unknown results.¹¹⁸

G. Argentina

In Argentina, state violence surfaced in the early 1970s when paramilitary groups associated with the Peron government began kidnapping and assassinating members of insurgent groups that had emerged in the 1960s.¹¹⁹ In March 1976, after a military coup, military forces as well as paramilitary groups abducted thousands of persons labeled "subversives," which included

112. *Id.* § 3(1)(b).

113. *Id.* § 3(1)(c).

114. *Id.* § 20(3). See also Graeme Simpson & Paul Van Zyl, *Transitional Justice in its Historical Context: The Roots of South Africa's Truth and Reconciliation Commission* (1997) (unpublished paper on file with author).

115. TRA, *supra* note 111, at ch. 6. For a fuller discussion, see, for example, Jeremy Sarkin, *The Trials and Tribulations of South Africa's Truth and Reconciliation Commission*, 1996 S. AFR. J. HUM. RTS. 617 (1996).

116. See AZAPO v. President of the Republic of South Africa, CCT 17/96 (25 July 1996).

117. See *id.* at 44–45.

118. See Lizeka Mda, *South Africa: Lawyers Feast at the Body of Truth*, AFR. NEWS, 17 Oct. 1997, available in LEXIS, News Library, Newsletters File.

119. See Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina*, in IMPUNITY AND HUMAN RIGHTS, *supra* note 22, at 160, 166–67.

many workers, students, writers, lawyers, priests, and nuns.¹²⁰ During the next decade, Argentina was ruled by military juntas. By 1983, when Raul Alfonsín was elected the civilian President of Argentina, some 10,000 people had been assassinated, arbitrarily detained, and forcibly disappeared.¹²¹ This period of time is commonly known as the "Dirty War."¹²²

During Alfonsín's presidency, the judiciary annulled an amnesty that the military had granted to itself before leaving power and prosecutions began.¹²³ However, increasing unrest grew amongst the military, especially as lower-ranking officers were called into court. The government first responded by limiting the time frame for new complaints to be brought to sixty days. When this strategy was unsuccessful, the government passed a law in effect granting amnesty to many of those who had committed human rights abuses during the 1970s.¹²⁴ The law extinguished penal liability for persons below the rank of colonel, and others who were not chiefs of security forces, by creating an irrebuttable presumption that lower officers were merely following higher orders and thus were not liable for their actions.¹²⁵ Soon after, the Supreme Court of Argentina upheld the constitutionality of the law.¹²⁶

The Alfonsín government did manage to prosecute the commanders of the armed services, and several were sentenced to long prison terms. The Argentine Supreme Court upheld the convictions.¹²⁷ However, those high-ranking officers excluded from the amnesty, together with the convicted commanders, were subsequently pardoned by President Menem.

Several years later, a Navy captain, Adolfo Scilingo, came forward with a confession that he had helped implement a military policy of throwing political detainees to their deaths from airplanes.¹²⁸ Once the armed forces confirmed his accusations, local human rights groups filed suit, arguing that investigations must go forward so that victims and society would find out the truth.¹²⁹ A number of such cases concerning disappeared persons initially were received well by the courts, and documentary evidence

120. See *id.* at 167.

121. See *id.* at 161.

122. See *id.* at 162.

123. See *id.* at 161.

124. See *id.* at 162.

125. See *id.*

126. See *id.*

127. See Malamud-Goti, *supra* note 119, at 162. See also Alejandro M. Garro & Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 283, 319–31 (1987) (for details of the cases).

128. See Marcela Valente, "Repentant" Captain Scilingo Arrested in Spain, INTER PRESS SERV., 7 Oct. 1997, available in LEXIS, News Library, Wires File.

129. See Martín Abregú, *La Tutela Judicial del Derecho a la Verdad en la Argentina*, 24 REVISTA IIDH 11, 12–15 (1996).

requests in several cases were issued to branches of the military. After the military refused to cooperate, one of the cases was appealed to the Supreme Court, where as of this writing it remains pending.¹³⁰ Meanwhile, the legislature repealed, but did not annul, the amnesty law in April 1998.¹³¹

In March 1996, relatives of Spanish citizens killed during the Argentine Dirty War brought charges in Spanish courts against some forty high-ranking officers, alleging genocide, terrorism, and more generally, the death and disappearances of thousands.¹³² In June 1996 a Spanish judge found that the Spanish court had jurisdiction over such claims against Argentinian citizens.¹³³ Then in September 1996, a letter rogatory was issued requesting all information from Argentina that would help identify the authors of the abuses that occurred during the Dirty War.¹³⁴ In March 1997, in light of Argentina's refusal to cooperate and the gravity of the crimes, Judge Baltasar Garzon issued an international arrest warrant.¹³⁵ Subsequent rulings resulted in the freezing of the overseas assets of the forty accused.¹³⁶ Finally, on 7 October 1997, the first former Argentinian officer was arrested and jailed in Spain for involvement in the torture and disappearance of many during the Dirty War.¹³⁷

Similarly, over a hundred Italian families of victims of the Dirty War have brought claims before Italian courts. In 1994, Italian judges attempted to obtain documentary evidence through an international letter rogatory, but

130. See *id.* at 29–34. The cases involved persons disappeared by the Navy and held at the Naval Training School (ESMA) (case of Monica Mignone), and disappeared by the Army (cases of Alejandra Lapacu and the Athletic Club). See also *infra* note 183.

131. See, e.g., Marcela Valente, *Dissatisfaction with Repeal of Amnesty Laws*, INTER PRESS SERV., 25 Mar. 1998, available in LEXIS, News Library, Wires File. Because the law was repealed but not annulled, it will not apply to crimes already charged, or civil cases already brought during the early days of the Alfonsín administration—this includes most of the worst human rights offenses. Although human rights advocates argued that annulment was proper because of the unlawful nature of the original amnesty laws, legislators were concerned that re-imposition of criminal liability could violate the rights of criminal suspects to have the most favorable law apply. Nonetheless, ex-president Jorge Videla, who was tried, convicted, and pardoned on murder and torture charges, has now been charged with abduction of minors and jailed. See Marcela Valente, *Jurists Say Case on Theft of Minors Weakened*, INTER PRESS SERV., 12 June 1998, available in LEXIS, News Library, Wires File.

132. See Perfecto Andrés Ibáñez, *La Impunidad No Es Solo Cuestión de Hecho: Sobre la Persecución en España de los Crímenes de la Dictadura Militar Argentina*, 24 REVISTA IIDH at 49, 51 (1996).

133. See *id.* at 56.

134. See *id.*

135. See Orden de prisión provisional incondicional de Leopoldo Fortunato Galtieri, Juzgado Número cinco de la Audiencia Nacional española (25 Mar. 1997), available in <<http://www.derechos.org/nizkor/arg/espana/autogalt.html>>.

136. Marlise Simons, *Swiss Freeze the Assets of Four Argentines Accused in Spain*, N.Y. TIMES, 4 July 1997, at A4.

137. See Valente, *supra* note 128.

the Argentinian government refused.¹³⁸ Due to such difficulties, the criminal proceedings were almost dismissed, but in 1996 a judge allowed them to continue. Preliminary hearings began in July 1997.¹³⁹ Additional cases are underway or in preparation in Germany and Sweden.¹⁴⁰

H. Hungary

Hungary dealt with issues similar to those that surround the amnesty debate with the retroactive changes to the existing statutes of limitations for crimes committed in the 1950s. Although the statute of limitations issue is technically distinct from that of amnesty, the practical effect is the same: murders and other serious crimes, which would otherwise be subject to prosecution by a new government, are removed from the reaches of criminal justice.

In October 1956, a popular revolt arose as a result of a decade of repression under Communist rule.¹⁴¹ The revolt was crushed and a new leader, Kadar, came to power.¹⁴² Soon after, mass arrests became common and active members of the opposition became subject to the death penalty.¹⁴³ Repression continued throughout the years to come but abruptly came to an end close to 1960.¹⁴⁴ In 1983, Kadar was ousted. A new Hungarian Constitution went into effect in 1989, and in 1990 the Hungarian Constitutional Court began performing its Constitutional duties.¹⁴⁵ An interest arose in prosecuting human rights crimes that had occurred between 1944 and 1990, particularly those of the 1950s. Many of these crimes had not been prosecuted under the prior regimes, and the statutes of limitations on these crimes had run out.¹⁴⁶

On 4 March 1991, Congress adopted a law which reset the statute of limitations on crimes of treason, infliction of bodily harm resulting in death, and murder committed from 1944 through 1990.¹⁴⁷ It stated:

138. See Liga por los Derechos y la Liberación de los Pueblos, *El Juicio por los Italianos Desaparecidos en Argentina* (12 Sept. 1997), available in <<http://www.derechos.org/lidlip/grusol/index.htm>>.

139. See *id.*

140. See the Equipo Nizkor website (<<http://www.derechos.org/nizkor>>) for details of these cases.

141. See L.J. MACFARLANE, *HUMAN RIGHTS: REALITIES AND POSSIBILITIES* 171 (1990).

142. See *id.* at 72.

143. See *id.* at 173.

144. See Imre Karacs, *Obituary: Janos Kadar*, *INDEPENDENT [OF LONDON]*, 7 July 1989, at 28.

145. See László Sólyom, *The Hungarian Constitutional Court and Social Change*, 19 *YALE J. INT'L L.* 223, 223 (1994).

146. See *id.* at 232.

147. Zétényi-Takacs Act of 4 Nov. 1991, reprinted in Judgment of the Hungarian Constitutional Court, 1992/11 MK 2-3 (3 Mar. 1992). See also Krisztina Morvai, *Retroactive Justice Based on International Law: A Recent Decision by the Hungarian Constitutional Court*, *E. EUR. CONST. REV.*, Fall 1993/Winter 1994, at 34.

[T]he statute of limitations shall start again for the criminal offenses committed between December 21, 1944 and May 2, 1990 which constituted criminal offenses under the law in effect at the commission of said offenses and are otherwise defined in the Law IV of 1978 as treason, voluntary manslaughter, and infliction of bodily harm resulting in death, provided that the state's failure to prosecute said offenses was based on political reasons.¹⁴⁸

The law was enacted but never promulgated. The President chose to refer the law to the Constitutional Court for review prior to promulgation, and the Court declared it unconstitutional.¹⁴⁹ However, a similar law was later upheld on international law grounds, as detailed below.¹⁵⁰

III. A SUMMARY OF ARGUMENTS IN THE JURISPRUDENCE ON AMNESTY LAWS

After the amnesties in the above countries were passed, victims' relatives and human rights lawyers began challenging their legality on constitutional and international law grounds, both facially and as applied to specific cases. Patterns have emerged in the reasoning of the courts ruling to uphold or strike down amnesties. They are summarized here and will be discussed in detail in the following section.

The lower courts that have struck down amnesty laws have found that the Geneva Conventions of 1949,¹⁵¹ the American Convention on Human Rights,¹⁵² the Convention Against Torture and Other Cruel, Inhuman,

148. Zétényi-Takacs Act, *supra* note 148, at ¶ 1.

149. See Judgment of the Hungarian Constitutional Court, 1992/11 MK 2–3 (3 Mar. 1992) [hereinafter Hungarian Judgment].

150. Act 53/1993/(X.13.)AB of the Constitutional Court, 147/1993 HUNG. GAZETTE 8793 (1993) [hereinafter Hungarian Act]; see also *infra* text accompanying notes 233–36.

151. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), *adopted* 12 Aug. 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II), *opened for signature* 12 Aug. 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), *adopted* 12 Aug. 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), *adopted* 12 Aug. 1948, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956) [hereinafter Geneva Conventions].

152. American Convention on Human Rights, *signed* 22 Nov. 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979) (*entered into force* 18 July 1978), *reprinted in* 9 I.L.M. 673 (1970) [hereinafter American Convention].

or Degrading Treatment or Punishment (Convention Against Torture),¹⁵³ and the International Covenant on Civil and Political Rights (ICCPR)¹⁵⁴ are applicable and prohibit such laws. In some cases, the states involved were parties to the treaty when the underlying rights violations occurred. In others, courts find these international treaties binding because they apply specifically to the failure to provide judicial remedies or other reparations for victims post-ratification (despite the fact that the underlying crimes occurred prior to ratification), or as customary international law. The decisions are often unclear as to which theory the courts are using. To these courts international law is of equal or greater significance than domestic law.

Lower courts have also concluded that amnesties violate their constitutions, which guarantee the rights to life, liberty, and judicial protection. Under the doctrine of constitutional supremacy, these courts have found that amnesty laws violate constitutional provisions and must yield. Last, the lower courts have limited the scope of amnesties by taking active judicial roles in the application of these laws. They have limited judicial deference to the executive's power to decree amnesties. Furthermore, some courts have in essence approved the "Aylwin doctrine," under which it is up to the court to determine if an amnesty applies, which it can only do after an investigation of the relevant facts and a determination that a certain type of crime has been committed.¹⁵⁵

Courts upholding amnesties generally find that the amnesties are valid under international law. In several cases, they have applied Protocol II to the Geneva Conventions of 1949, which recommends broad amnesties in countries that have suffered noninternational armed conflicts.¹⁵⁶ Further, they reject arguments based on other international treaties on the ground that the treaties were ratified after the crimes for which amnesty was granted took place, and are not retroactive. They find these conclusions consistent with those resulting under an analysis of their domestic laws, and tend to view international law as being inferior to domestic law.

153. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985) (*entered into force* 26 June 1987), *reprinted in* 23 I.L.M. 1027 (1984), *substantive changes noted in* 24 I.L.M. 535 (1985) [hereinafter Convention Against Torture].

154. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).

155. See Mera, *supra* note 22, at 179–80.

156. Protocol II Additional to the Geneva Convention of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* 8 June 1977, U.N. Doc. A/32/144, Annex II, art. 4, 1125 U.N.T.S. 513 (*entered into force* 7 Dec. 1978), *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

These courts also generally find that amnesties are constitutional because they are enacted by the legislative and executive branches in the exercise of powers granted to them by their constitutions. They see amnesties as exercises of sovereign authority, which may not be trumped by international law and should not be interfered with by the courts. These courts rely heavily on separation of powers and “political question” arguments to restrict the role of the judiciary by preventing it from analyzing acts of the sovereign, i.e. amnesties, under domestic or international law.

What is striking in reading decisions from different countries and legal systems is the extent to which the same patterns of argument recur. A detailed analysis of these patterns can help map the degree to which recent advocacy, scholarship, and the views of international human rights bodies have penetrated the judiciary at the national level. It can pinpoint areas where further work needs to be done to refine arguments and rebut misconceptions. It may also be able to shed light on the role of the judiciary itself in times of transition.

IV. THE ROLE OF INTERNATIONAL LAW IN JURISPRUDENCE ON AMNESTY

A. Interpretation of Human Rights Treaty Law

In the cases challenging amnesties, petitioners often raised arguments based on international human rights law. Although courts differed in interpreting the relevance of certain treaty provisions, those that used international law at all restricted themselves to discussion of treaty law, rather than customary law. Two recurring issues dominated the discussion of international law: the provisions on amnesty in Protocol II of the 1949 Geneva Conventions,¹⁵⁷ and the timing of a state’s adherence to global and regional human rights treaties.

1. Protocol II of the 1949 Geneva Conventions

The most striking similarity among courts upholding amnesties has been the courts’ consistent use of what they perceive as international law legitimating the decisions. While other human rights law is downplayed or found inapplicable, courts point to Protocol II both as direct legitimation of their position and to argue that human rights/humanitarian law is not unanimous or consistent.

157. *Id.* art. 6.

The Geneva Conventions of 1949 set out the basic law of armed conflict.¹⁵⁸ In 1977, Protocol II was drafted to detail the obligations of parties to noninternational armed conflicts. Article 6(5) of Protocol II states, "At the end of the hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained."¹⁵⁹

Several courts have used this provision to support their findings that amnesties are valid under international law. They bolster their conclusions by emphasizing the need for reconstruction after violent wars, which they interpret to be the policy behind Article 6(5). For example, the Criminal Chamber of the Salvadoran Supreme Court found Article 6(5) applicable in the amnesty context.¹⁶⁰ It emphasized that amnesty was necessary in order for reconstruction to take place after years of a bloody civil war.¹⁶¹ It also stressed the fact that the amnesty was part of negotiated peace accords.¹⁶² South Africa's Constitutional Court similarly found that an amnesty was necessary to promote peaceful national reconciliation and reconstruction, and also cited Article 6(5).¹⁶³ The Chilean Supreme Court stated that the Chilean amnesty would be valid, among other reasons, because of Article 6(5).¹⁶⁴ The Court emphasized the need for amnesty under Protocol II in order to relieve the grave political tension from which Chile was suffering, and to restore social tranquility.¹⁶⁵

These court decisions ignore strong arguments against the applicability of Protocol II to the amnesties passed in these countries. Contrary to the opinion of the courts, there is much evidence that indicates that Article 6(5)

158. Geneva Conventions, *supra* note 151, at art. 3.

159. Protocol II, *supra* note 156, at art. 6(5).

160. See *Guevara Portillo Case*, *supra* note 51, at 11.

161. See *id.*

162. See *id.*

163. See *AZAPO v. President of the Republic of South Africa*, CCT 17/96, at 29 (25 July 1996).

164. See *Romo Mena Case*, *supra* note 29, at ¶ 12. The Court argued Article 6(5) in the alternative because it found that there was no noninternational armed conflict in Chile in 1974. *Id.* ¶ 11. The Court came to this conclusion despite a declaration of a state of war by the military in 1974. See *Romo Mena Case*, Corte de Apelaciones, ¶ 5(a) (30 Sept. 1994). It is interesting to note, as the Chilean Supreme Court found, that the Geneva Conventions are not always applicable to amnesty cases. For example, the period of time in question in Chile entailed more of a purging of the supporters of the previous socialist Allende regime by the new military regime than an armed conflict between the two. If no noninternational armed conflict existed, Chile cannot rely on Protocol II to justify its amnesty. Nor can the petitioners rely on the Geneva Conventions in order to invalidate an amnesty. Nonetheless, the petitioners in this case may have decided to use the military's argument that a state of war existed against it by raising humanitarian law claims.

165. See *id.* ¶ 19.

allows states a limited power to grant amnesties. More specifically, evidence strongly suggests that there are limits to the flexibility that Article 6(5) allows states. To begin with, the International Committee of the Red Cross (ICRC) has interpreted Article 6(5) of the Protocol narrowly.¹⁶⁶ It has concluded that Article 6(5) is inapplicable to amnesties that extinguish penal responsibility for persons who have violated international law.¹⁶⁷ The ICRC interprets this article as providing for "combatant immunity," which ensures that a combatant cannot be punished for acts of hostility, "including killing enemy combatants, as long as he respected international humanitarian law. . . ."¹⁶⁸ The ICRC based its conclusion partly on the history of Article 6(5) set forth in the travaux préparatoires, which indicate that "the 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 law."¹⁶⁹ The ICRC also based its interpretation on the fact that in the debate at the Diplomatic Conference elaborating Protocol II, the representative for the Soviet Union stated that his delegation was convinced that the draft Article 10 (now Article 6) of Protocol II "could not be constructed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever."¹⁷⁰

A second argument is that the intent behind the Geneva Conventions of 1949 and Protocol II itself undermines the courts' reasoning and indicates a desire to limit the reach of Article 6(5). The intent was to protect victims of conflict. The Geneva Conventions of 1949 contained one provision specific to noninternational armed conflicts, Article 3, which prohibited torture, cruel treatment, outrages on personal dignity, the taking of hostages, and extrajudicial killings of persons not actively involved in the hostilities.¹⁷¹ However, there was no requirement of penal sanctions for these acts, as there was for grave breaches of the Convention in the context of an international conflict.¹⁷² Protocol II was designed to ensure more protection for victims. The Preamble of the Protocol states:

166. See International Committee of the Red Cross, Interpretation of Article 6(5) of the Protocol Additional to the [Geneva] Conventions and Relating to the Protection of Victims of International Armed Conflicts (Protocol II) (letter on file with author).

167. See *id.*

168. *Id.*

169. *Id.*

170. *Id.* (citing *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974–1977, 9 Berne 319 (1978)).

171. Geneva Conventions, *supra* note 153, at art. 3.

172. *Id.*

Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949 constitute the foundation of respect for the human person in cases of armed conflict not of an international character . . . Emphasizing the *need to ensure a better protection for the victims of those armed conflicts*.¹⁷³

Allowing amnesties which prevent prosecution for all human rights abuses during a noninternational armed conflict is contrary to the stated goal of the Protocol: to ensure more protection for victims. If the possibility of prosecution is removed, victims are left with even less than what was guaranteed under the Geneva Conventions of 1949.

Furthermore, Article 6 regulates penal prosecutions for offenses arising under the Protocol, providing due process for defendants.¹⁷⁴ If the Protocol were intended to permit the elimination of penal prosecutions for human rights abuses committed in noninternational conflicts, these provisions would be unnecessary. Article 6, which except for 6(5) is mandatory, indicates an intent that some crimes would be prosecuted.¹⁷⁵

There is also textual support for the argument that Article 6(5) limits the flexibility of states in granting amnesties. Article 6(5) provides that a state "*shall endeavour to grant the broadest possible amnesty*."¹⁷⁶ The Latin American and South African courts have interpreted "the broadest possible" to include their far-reaching amnesty laws. However, this phrase need not be interpreted as completely relieving states of their duty to prosecute. This language could be interpreted as "the broadest possible amnesty" without destroying victims' hopes and needs for retribution and denunciation, "the broadest possible amnesty" without causing social unrest because of the injustice in letting these criminals go free, or "the broadest possible amnesty" *without infringing on other binding international treaties or customary international law*. This should be taken into account especially when the crimes committed may be characterized as crimes against humanity. Interpreting the language of Article 6(5) in this manner is more consistent with the underlying intent; perhaps the Protocol was meant to grant states some flexibility in dealing with war crimes and violations of fundamental human rights rather than to allow states to completely evade prosecuting these crimes.

173. Protocol II, *supra* note 156, at pmbl. (emphasis added).

174. *Id.* art. 6.

175. *Id.*

176. *Id.* art. 6(5) (emphasis added).

2. The Applicability of International Human Rights Treaties

Petitioners challenging amnesties raised a number of provisions of international treaties in arguing that amnesties were contrary to international law. These included the requirement to prosecute "grave breaches" of the Geneva Conventions of 1949, as well as Common Article 3 prohibiting certain grave acts in noninternational conflicts.¹⁷⁷ The Chilean lower courts that decided that the 1978 amnesty was inapplicable cited as support the provisions of the ICCPR requiring a right to a remedy,¹⁷⁸ those of the American Convention of Human Rights (ACHR) requiring a right to a remedy, a fair trial, judicial protection, and that rights be "ensured,"¹⁷⁹ and the provisions of the Convention Against Torture requiring investigation, prosecution or extradition, and civil redress to victims of torture.¹⁸⁰ Similarly, the Peruvian courts that found that the amnesty law could not preclude investigations into military killings and disappearances referred to the Universal Declaration of Human Rights¹⁸¹ and the American Declaration of the Rights and Duties of Man,¹⁸² both "soft law" instruments not binding as treaties, although without asserting that they had obtained customary law status.

Most recently, in October 1997 an Argentine court ordered investigations into crimes committed at the Athletic Club during 1976 and 1977, in order to determine the fate of those who disappeared there.¹⁸³ The court cited the ACHR as imposing duties on the state to ensure the rights to mourn, to bodily integrity, and to truth.¹⁸⁴ The right to truth, in particular, created an obligation on the state to provide every means possible to determine the final whereabouts of those disappeared between 1976 and 1983, in order to discover the reality of what happened and thus give an answer to the family members and the society.¹⁸⁵ In addition, the court held

177. Geneva Conventions, *supra* note 151, at art. 3.

178. International Covenant on Civil and Political Rights, *supra* note 154, at art. 2(3).

179. American Convention, *supra* note 152, at art. 8.

180. Convention Against Torture, *supra* note 153, at arts. 6, 7, 14.

181. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, part 1), at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L L. SUPP. 127 (1949).

182. AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN, *signed* 2 May 1948, OEA/SER.L/V/II.71, at 17 (1988).

183. See *Camara en lo Criminal y Correccional Federal, Sala II, Privaciones Illegales de Libertad en el centro clandestino de detencion Club Atletico*, Buenos Aires, 14 Oct. 1997.

184. See *id.*

185. Argentine lawyers have focused their arguments for reopening cases closed under the "Punto Final" law on a right to truth grounded in both international and national law, as well as on a right to mourn, which involves the ability to appropriately bury and say goodbye to the dead. See Abregú, *supra* note 129, at 18.

that this duty persists as long as the final fate of the disappeared is unknown, and that "the observance of international human rights legal norms does not only correspond to the head of the nation's Judicial Power, but to all the courts of the country."¹⁸⁶

The applicability of these provisions to blanket amnesties has been argued elsewhere¹⁸⁷ and has recently been affirmed both by the Inter-American Commission on Human Rights (Inter-American Commission) and the ICCPR Human Rights Committee.¹⁸⁸ The courts that found amnesties legal generally did not dispute the teachings of these treaties nor their interpretation. Rather, they found them inapplicable, either because of the status of international law in the domestic legal system, or because they found that the treaties did not cover the events being challenged. Most often, this latter finding was based on the nonretroactive nature of treaty commitments. In many cases, states only ratified the applicable treaties with the advent of civilian government, after the period of widespread human rights violations had passed.

Article 28 of the Vienna Convention on the Law of Treaties (Vienna Convention) states:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.¹⁸⁹

Thus, the issue becomes one of whether a state can be in violation of a treaty for failure to act, subsequent to ratification, on crimes that took place prior to ratification.

In the case of Romo Mena (Uribe case), the Chilean Supreme Court overruled the Court of Appeals' conclusion that the ICCPR, the ACHR, and the Convention Against Torture did not apply because they had not been ratified at the time the crimes in question were committed.¹⁹⁰ The Court cited Article 28 of the Vienna Convention as support for its holding.¹⁹¹

This issue has also troubled international bodies. The Inter-American

186. *Id.* at 20 (author's translation).

187. See, e.g., IMPUNITY AND HUMAN RIGHTS, *supra* note 22; Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 25 (1992).

188. See *supra* note 5.

189. Vienna Convention on the Law of Treaties, art. 28, U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331 (entered into force 27 Jan. 1980), reprinted in RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 540.1 (2d ed. 1990) [hereinafter Vienna Convention].

190. Romo Mena Case, *supra* note 29, at ¶ 13.

191. *Id.*

Commission interprets the ACHR as distinguishing between violations that took place before ratification from the nonenforcement of norms of judicial protection and the like which are subsequent to ratification.¹⁹² The Inter-American Court ruled similarly on the preliminary objections in *Genie Lacayo v. Nicaragua*.¹⁹³ Nicaragua objected to jurisdiction based on the fact that the disputed events occurred before Nicaragua ratified the ACHR. The Court, citing the Inter-American Commission's opinion on the preliminary objections, disagreed, stating:

[T]he purpose of the complaint is not limited to the violation of the right to life, which took place before the date of acceptance of the mandatory jurisdiction of the Court by Nicaragua, but rather to the subsequent events which have generated the international responsibility of the State for the violation of the rights to judicial protection and guarantees, equal protection and the duty to adopt domestic legal measures in relationship to the obligation to respect and ensure (Art.1(1)) the full enjoyment of the rights recognized in articles 2, 8, 24, and 25 of the American Convention of Human Rights.¹⁹⁴

Thus, while the state was not held responsible for the murder of Genie Lacayo, it was responsible for the failure, subsequent to ratification, to provide judicial protection and a fair trial in response to this murder. The Court viewed the duty to punish as a separate action from the crime that merited punishment.¹⁹⁵

192. See Inter-American Commission on Human Rights, *Argentina Report-Amnesty Laws and Presidential Decree of Pardon Violate the Victim's Human Rights*, 13 HUM. RTS. L.J. 336, 340 (1992).

193. Inter-American Court of Human Rights, Decision on Preliminary Objections in a Case of Alleged Arbitrarian Killing of a Civilian Car Driver by Members of a Military Convoy/ Genie Lacayo v. Nicaragua, 16 HUM. RTS. L.J. 414 (1995). This case involved the killing of a taxi driver by members of a military convoy prior to ratification of the ACHR. The plaintiff claimed that Nicaragua's failure to provide judicial protection and a fair trial post-ratification was a violation of the treaty. Plaintiff further claimed that Nicaragua had violated the right to equal protection contained in the ACHR. *Id.*

194. *Id.* at 416.

195. See Juliane Kokott, *No Impunity for Human Rights Violations in the Americas*, 14 HUM. RTS. L.J. 153, 156 (1993). According to the Inter-American Court in the *Blake* case, even though Guatemala ratified the ACHR after disappearance had taken place, failure to investigate constituted a separate and, in the case of disappearance, continuing, violation. *Comm'n v. Guatemala*, ¶¶ 33-40, Inter-Am. Ct. Hum. Rts. (Judgment on the Preliminary Objections of 2 July 1996), available in <<http://www.umn.edu/humanrts/iachr/contntus/htm>>. In the case of forced disappearances, the UN Declaration on the Protection of All Persons from Forced Disappearances, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, at 207, U.N. Doc. A/47/49 (1992) and the Inter-American Convention on the Forced Disappearance of Persons, signed 9 June 1994, O.A.S. Doc. OEA/Ser.P/AG/doc.3114/94 (1994), reprinted in 33 I.L.M. 1529 (1994) (not in force) both characterize disappearance as a continuing crime which extends until the person is found. This provides an alternative argument for applying human rights and humanitarian law treaties even if ratified after the date of a disappearance, but before the person is found.

Under the reasoning of the Inter-American Court, crimes committed in the past are distinct from the "act" of establishing an amnesty law in the present. Therefore, amnesties enacted post-ratification violate treaties which provide rights to judicial protection and a fair trial.

In contrast, the UN Committee Against Torture has refused to recognize such obligations under the Convention Against Torture. The Committee interpreted the duty to punish as applying only to "torture that occurs subsequent to the entry into force of the Convention."¹⁹⁶ The Committee does not appear to view the act of torture as being separate from the act of seeking judicial hearings and other protections in response.¹⁹⁷ To find otherwise, the Committee found, might conflict with the Vienna Convention's rule against retroactivity of treaties.¹⁹⁸ It is unclear how other international courts and commissions will rule on similar treaties.

B. The Role of International Law in Domestic Legal Systems

One of the most significant issues that arose in the amnesty cases were the views of the courts on the role of international law in their domestic legal systems. Those courts upholding amnesties tended to devalue the role of international law, while those invalidating amnesties stressed the integral role of international law in the domestic constitutional scheme.

One line of argument was that the granting of amnesty was a wholly political act over which the courts had no jurisdiction. The Constitutional Court of El Salvador stated:

- a) the tribunal charged with constitutional control within our juridical system, the Constitutional Chamber, cannot have hearings on purely political questions;
 - b) sovereignty resides in the people, even though deposited in the Constitution;
 - c) the faculty of granting grace or clemency is a manifestation of sovereignty; and that, consequently, it is an eminently political act;
 - d) amnesty constitutes a form of grace;
 - e) amnesty is also a derogation with retroactive effects of a penal norm.
- Amnesty appears thus, as a measure of character, in order to appease rancours and resentments inseparable from social and political struggles.¹⁹⁹

Thus, because the Constitutional Court viewed amnesties as political acts, they were removed from the categories of laws which could be overridden by international law.

196. UN Committee Against Torture, *Communication Against Argentina Inadmissible Ratione Temporis*, 11 HUM. RTS. L.J. 134, 137 (1990).

197. See Kolkott, *supra* note 195, at 153.

198. UN Committee Against Torture, *supra* note 196, at 135, 137.

199. *El Salvador Decision*, *supra* note 50, at 553-54.

A related argument tried to avoid the supremacy of treaty law by somehow ascribing constitutional force to what would otherwise be ordinary statutory provisions on amnesty. The Criminal Chamber of the Salvadoran Supreme Court used this reasoning in the *Guevara Portillo* case.²⁰⁰ The Court found that the amnesty law was consistent with the Salvadoran Constitution because the legislature had enacted the law through the sovereign power granted it by the Constitution.²⁰¹ However, the Court went further in seeming to ascribe constitutional force to the amnesty, describing it as a manifestation of sovereignty granted by the Constitution, which prevails over all treaties and ordinary laws.²⁰² Although the Court recognized the constitutional principle that treaties prevail when they conflict with domestic laws, it found that this principle had less relevance since the amnesty was not an ordinary law, but rather one enacted in accord with the power of the sovereign as set forth in the Constitution.²⁰³ Thus, the Court concluded that the amnesty law would prevail.²⁰⁴

The Court's conclusions seem to conflict with Article 144 of the Salvadoran Constitution, which clearly states that ratified international treaties constitute laws of the Republic and that in case of conflict with other domestic law, the treaty will prevail.²⁰⁵ Because the legislature's power to make *all* laws emanates from the Constitution, Article 144 would be rendered without significance if some laws can be ascribed constitutional force simply because the legislature's power to enact them is specified in the Constitution, and they are found to prevail over treaty law.

Peruvian courts have expressed similar views. In the case of *Salazar Monroe*, a Peruvian Superior Court explicitly stated that international laws had lesser status than constitutional norms and further, that they did not prevail even over domestic laws.²⁰⁶ The court found its holding justifiable and necessary for the legislative branch to be free to pass laws that would achieve peaceful living and economic, social, and political development.²⁰⁷ The Peruvian Supreme Court affirmed.²⁰⁸

Again, several of the provisions of the Peruvian Constitution seem to conflict with the higher courts' interpretation of the significance of international law. First, Article 55 of the Constitution states that ratified treaties are

200. *Guevara Portillo Case*, *supra* note 51.

201. *Id.*

202. *Id.* at 11.

203. *Id.* at 10–12.

204. *Id.* at 14.

205. See EL SALVADOR CONST. art. 144. Note, however, that in Article 149, the authority to declare the inapplicability of the provisions of a treaty contrary to constitutional precepts is given to courts within the jurisdiction of administrative justice. *Id.* art. 149. This could cause a conflict with Article 144.

206. *Salazar Monroe Case*, Judgment of July 1995, *supra* note 107, at 5.

207. *Id.*

208. See Arroyo, *supra* note 94, at 76.

part of the national laws.²⁰⁹ Second, under Article 57, treaties affecting constitutional rights must be approved in the same way as constitutional amendments.²¹⁰ Such a provision seems to assign ratified human rights treaties, such as the ACHR and ICCPR, a constitutional character within Peruvian law, in contrast to the opinion of the higher Peruvian courts.²¹¹ Last, the Peruvian Constitution states that norms relating to constitutionally guaranteed rights should be interpreted in accord with the UDHR and with ratified treaties pertaining to the same rights.²¹² This provision ascribes to international law a higher degree of significance than recognized by the Peruvian Superior and Supreme Courts.²¹³

Those courts which struck down amnesties stressed the importance of international law in the domestic legal scheme. Several courts mentioned Article 27 of the Vienna Convention, which specifically prohibits the use of domestic laws as a justification for the evasion of international obligations.²¹⁴ In a Guatemalan case concerning the ability of military courts to hear cases of common crimes committed by soldiers against civilians, the court emphasized that the rights to an independent judiciary and a free trial were guaranteed by international treaties to which Guatemala was a party.²¹⁵ It stressed that as a constitutional principle in the case of human rights, international treaties prevail over domestic law.²¹⁶ Thus, it found that the case at hand should be heard by a civilian trial court rather than a military court.²¹⁷

Perhaps the most surprising treatment of the role of international law in the domestic legal order comes from the South African Constitutional Court. The Court upheld the validity of the South African amnesty law in the face of a challenge by family members of several well known victims of the apartheid security forces. In *AZAPO v. The President of the Republic of South Africa*, the applicants argued that the extinction of criminal and civil liability through amnesty violated section 22 of the Consitution regarding the right to have disputes settled by a court of law, as well as South Africa's international obligations.²¹⁸ Petitioners argued, *inter alia*, that the Geneva

209. PERU CONST. art. 55.

210. *Id.* art. 57.

211. See Arroyo, *supra* note 94, at 118–19.

212. PERU CONST. Final Disposition No. 4.

213. See Arroyo, *supra* note 94, at 120–21.

214. Vienna Convention, *supra* note 189, at art. 27. Chile has ratified this treaty and is thus formally bound. However, El Salvador and Peru are only signatories, and South Africa has not yet signed. Thus, as of now, their amnesties can only be attacked on these grounds to the extent that the Vienna Convention is considered customary law.

215. Lacán Chaclán Case, Resolución de la Sala Quinta de la Corte de Apelaciones, Jalapa, 3–4 (22 Jan. 1996).

216. *Id.*

217. *Id.* at 4.

218. CCT 17/96, at 11, 24 (25 July 1996).

Conventions of 1949 required effective penal sanctions for persons committing grave breaches of the conventions.²¹⁹ The Court rejected the argument, finding that international law was "irrelevant."²²⁰ The Court viewed the relevant issue in the case as whether the Truth and Reconciliation Act (TRA) was consistent with the Constitution, not international law.²²¹ The Court explained that in the South African legal system, international law became a part of the domestic law of the country when the legislature not only ratified a treaty, but also enacted specific implementing legislation.²²² Thus, it concluded that, unless enacted by the legislature, international law and treaties are relevant only in the interpretation of the Constitution.²²³

Furthermore, the Court found that any act of Parliament "can override any contrary rights or obligations under international agreements entered into before the commencement of the Constitution."²²⁴ It based this conclusion on section 231(1) of the Interim Constitution, which provided that all rights and obligations under international agreements and customary law prior to the enactment of the new Constitution were valid and binding *unless otherwise provided by an act of Parliament*.²²⁵ As the amnesty clause in the epilogue of the Constitution and the TRA were provisions which were "otherwise provided" by Parliament, they overrode relevant international obligations.

While the South African rules regarding the incorporation of international law differ from those of other states, the Court seems to have reduced the legitimate function of international law in constitutional interpretation to a meaningless post hoc rationalization.²²⁶ Section 35(1) of the Interim Constitution said: "[i]n interpreting the provisions of this Chapter a court of law shall . . . where applicable, have regard to public international law applicable to the protection of the rights entrenched in the Chapter."²²⁷

219. *Id.* at 24. While the penal prosecution requirement of the Conventions only technically applies in cases of international armed conflict, the South African struggle could well be viewed as an "internationalized" conflict given its spillover effects in the rest of Southern Africa. In other cases where the exact status of the conflict is unclear, recent court decisions suggest that the distinction between international and noninternational armed conflicts is not important. *See, e.g., Prosecutor v. Tadić*, Case No. IT-94-1-T (1997), International Criminal Tribunal for the Former Yugoslavia (decision on admissibility of 7 May 1997).

220. *Azapo*, CCT 17/96, at 25.

221. *Id.*

222. *Id.* This differs from the systems of other countries, including El Salvador and the United States, which provide that ratified treaties immediately become part of the domestic law of the state.

223. *Id.* at 26.

224. *Id.*

225. S. AFR. INTERIM CONST. § 231(1) (emphasis added).

226. *See Simpson & Van Zyl, supra* note 114.

227. S. AFR. INTERIM CONST. ch. 3, § 35(1).

Thus, in a conflict between two constitutional provisions, international law should have played a role in interpretation, not merely as an after-the-fact potential limit on a decision already made.

Indeed, in other noted cases, this is precisely the route the South African Constitutional Court has taken. In its decision abolishing the death penalty, for example, the Court treated international and comparative law much less cavalierly.²²⁸ There, the Court cited section 35(1) of the Interim Constitution, noted that public international law included nonbinding as well as binding treaty and customary law, and cited some of the major human rights treaty bodies, especially the UN Human Rights Committee, as providing guidance to the correct interpretation of constitutional provisions.²²⁹ While noting that international law and foreign case law were not binding, the Court inquired in detail into the teachings of international bodies and foreign courts.²³⁰ In contrast, in the amnesty case, faced with an equally contentious and novel issue, the Court relied only on the presence of amnesty laws in Chile, Argentina, and El Salvador, without noting the very different contexts under which those laws were passed—especially the existence of military pressure to grant amnesty to the security forces,²³¹ and without considering the views of international bodies at all.

Thus, independently of the status of international law within the domestic legal system, the courts that upheld legislative amnesties tended to stress the primacy of national concerns and sovereignty and to relegate international law to a minor afterthought, while those that struck down amnesties tended to give much greater importance to international law arguments.

Hungary represents something of a compromise position. Issues of the proper role of international law were at the heart of the legal debate on Hungary's retroactive reopening of the statute of limitations period for specific politically related crimes. The Hungarian Constitutional Court initially declared the act resetting the statute of limitations unconstitutional because it violated the constitutional prohibition of retroactive punishment.²³² Congress redrafted the law based on Hungary's treaty obligations under the New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, and this time the Court upheld it.²³³ The Court reasoned that by ratifying the

228. *State v. T. Makwanyane*, CCT/3/94 (6 June 1995), *reprinted in* 16 HUM. RTS. L.J. 154 (1995).

229. *Id.* ¶ 35.

230. *Id.* ¶¶ 63–67.

231. See Simpson & Van Zyl *supra* note 114, at 17.

232. See Hungarian Judgment, *supra* note 149, at 1–3.

233. See Hungarian Act, *supra* note 150.

convention, Hungary became bound to "observe the absence of statutory limitations as governed by international law but also to acknowledge a broader definition of crimes against humanity established by international law as 'general.'"²³⁴ The Court noted: "The legal system of Hungary shall respect the universally accepted rules of international law, and shall ensure furthermore, the accord between the obligations assumed under international and domestic law."²³⁵ It further stated that its decision ensured the enforcement of "universally accepted rules of international law."²³⁶

The Hungarian case illustrates probably the most reasonable position: although an amnesty or other limit of prosecution may remain valid, international law will limit the reach of that amnesty. At least, some of the most "severe" human rights abuses will be punished. Furthermore, when given due importance, international law may provide an "escape mechanism" for countries whose courts are hesitant to find amnesties inconsistent with their domestic law for political reasons. Often, as discussed below, the judiciary lacks the independence to strike amnesties down under domestic laws as it would infringe on an all-powerful executive and legislative branch.

A related issue concerns the duty of courts to respect the amnesty of another state when that amnesty contravenes international law. In general, the courts of one state will recognize the validity of the governmental acts of another within its own territory.²³⁷ However, in several cases involving Spanish citizens who were disappeared by military personnel during the Argentine "Dirty War," a Spanish magistrate has issued an international arrest warrant based in part on a determination that Argentina's internal laws regarding amnesty are not binding on a Spanish court.²³⁸

On 25 March 1997, Magistrate Judge Garzon of the Fifth Tribunal of the Spanish National Audience issued an international arrest warrant for the former Argentinian General Leopoldo Fortunato Galtieri.²³⁹ Galtieri was accused of genocide and terrorism, for the murders and illegal detentions of

234. *Id.* § 5.

235. Morvai, *supra* note 147, at 34.

236. *Id.*

237. In the United States this is known as the "act of state" doctrine. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

238. Similar cases have been opened in Italy against Argentine military authorities, and in Spain and Ecuador against high-ranking Chilean military authorities. See *Presentan Denuncia Penal en Contra de Augusto Pinochet Ugarte*, INFORMACIÓN, 27 Nov. 1997, available at <<http://www.derechos.org/nizkor/press/ecu4.html>>.

239. See *Orden de prisión provisional incondicional de Leopoldo Fortunato Galtieri*, Juzgado Número cinco de la Audiencia Nacional española (25 Mar. 1997), available in <<http://www.derechos.org/nizkor/arg/espana/autogalt.html>> [hereinafter *Fortunato Galtieri Case*, Judgment of Mar. 1997]. Garzon subsequently issued indictments against another forty some military officers and froze the Swiss bank assets of all the indictees. See *supra* notes 132–36.

Argentine as well as Spanish citizens.²⁴⁰ The genocide charge applied under Spanish law because, when implementing the Genocide Convention into Spanish law in 1983, the legislature included as genocide an intent to destroy a "social" group, in whole or in part.²⁴¹ The terrorism charges were based on Spanish laws aimed at stopping nationalist terrorist activities. When the element of state and paramilitary action was added, the court found that these activities amounted to crimes against humanity.²⁴²

Judge Garzon found that the Argentine government's objections to his assumption of jurisdiction in the case violated Argentina's treaty obligations. Under a binding judicial assistance treaty, Argentina could only refuse to assist the Spanish court's investigations if the request for assistance was based on the commission of political or related common crimes, which the judge found was not the case here.²⁴³ Moreover, whatever the political authorities in Argentina thought of the merits of the case, that determination could not affect the provision of judicial assistance. By refusing to honor the Spanish court's requests, the judge found, Argentina had violated its treaty obligations.²⁴⁴

Judge Garzon also addressed the Argentine argument that the defendants had already been granted amnesty in Argentina and thus could not be tried. Under Spanish law, prosecution cannot proceed if the defendant has been acquitted, pardoned, or punished in another country.²⁴⁵ Thus, if the Punto Final and Obediencia Debida (Superior Orders) laws passed by the Argentine government were valid under Spanish law, there could be no prosecutions. Judge Garzon noted that the Argentine laws were contrary to Argentina's international treaty obligations. He specifically cited the Inter-American Commission's finding that these laws violated the ACHR, and the UN Human Rights Committee's similar finding with respect to the ICCPR.²⁴⁶ He then noted Article 27 of the Vienna Convention ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty") and added that, under Spanish law, general amnesties were not allowed.²⁴⁷ In an expanded discussion in his June 1996 prelimi-

240. Fortunato Galtieri Case, Judgment of Mar. 1997, *supra* note 239, at 1.

241. See CÓDIGO PENAL art. 137; Fortunato Galtieri Case, Auto del Juez, Juzgado Número cinco de la Audiencia Nacional española, 17 (28 June 1996) [hereinafter Fortunato Galtieri Case, Judgment of June 1996].

242. *Id.* at 19. The terrorism charges also allowed the case to be heard in the Audiencia Nacional, under recent amendments to the Penal Code designed to centralize anti-terrorist prosecutions.

243. Fortunato Galtieri Case, Judgment of Mar. 1997, *supra* note 239, at 7-8.

244. *Id.*

245. See Fortunato Galtieri Case, Judgment of June 1996, *supra* note 241, at 5 (citing art. 23.5 of the Criminal Procedure Law) (author's translation).

246. Fortunato Galtieri Case, Judgment of Mar. 1997, *supra* note 239, at 8.

247. *Id.*

nary decision, he concluded that laws exempting those who followed superior orders were disfavored in a number of countries, and that "the then-lack of freedom and autonomy of the Argentine Parliament when these laws were passed should not be forgotten."²⁴⁸ Thus, the Argentine amnesty did not preclude prosecution in a Spanish court.

Finally, the Spanish decision addressed the statute of limitations and collateral estoppel issues. Regarding the statute of limitations, the judge pointed out that disappearances and kidnapping of children are continuing offenses, and that genocide is not subject to a statute of limitations.²⁴⁹ On the collateral estoppel issue, the judge recognized the possibility of factual overlap with the Argentine trials of the junta members, but left the determination to the merits stage of trial.²⁵⁰

V. SEPARATION OF POWERS AND THE ROLE OF THE JUDICIARY

Recent history in all of the countries considered here features a more or less pronounced lack of judicial independence. For example, in Chile, despite numerous claims brought in the 1970s and 1980s, the courts did very little to punish those who had committed human rights abuses.²⁵¹ Chilean judges often "honored" the explanations given by the political authorities as the truth in cases of detention and disappearance.²⁵² Cases involving military personnel were routinely tried in military courts, with predictably few convictions.²⁵³ Furthermore, Latin American judges routinely denied habeas petitions without even minimal investigation.²⁵⁴ Often judicial appointments were based on political criteria and personal ties, as they were in El Salvador.²⁵⁵ While in some states efforts have been made to replace biased judges with independent judges, a lack of independence continues to be widespread.²⁵⁶

248. Fortunato Galtieri Case, Judgment of June 1996, *supra* note 241, at 5.

249. *Id.* at 9.

250. *Id.* at 8.

251. See Jorge Correa Sutil, *No Victorious Army Has Ever Been Prosecuted: The Unsettled Story of Transitional Justice in Chile*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* 123, 126 (A. James McAdams ed., 1997).

252. See *id.*

253. See *id.* at 127.

254. For Argentina, see the report of the Sabato Commission, ARGENTINA NATIONAL COMMISSION ON THE DISAPPEARED, *NUNCA MÁS*; for Honduras see the Valladares Report, *THE FACTS SPEAK FOR THEMSELVES*, *supra* note 89; for El Salvador, see UNITED NATIONS, *supra* note 8.

255. See Popkin, *supra* note 40, at 200.

256. For example, the entire Salvadoran Supreme court failed to be reelected in 1994. See Popkin, *supra* note 40, at 214. On the other hand, the executive still retains great influence over the judiciary in Peru. In 1992, President Fujimori fired thirteen of twenty-eight Supreme Court justices and dozens of other judges linked to a major

A. The Role of the Courts as Guardians of the Constitution

A lack of judicial independence helps explain the failure of the courts in these countries to invalidate amnesty laws and to uphold provisions of the constitution.²⁵⁷ The cases seem to demonstrate an abdication of the judicial role to executive or legislative prerogatives that seems out of step with current efforts to implement judicial reform as part of democracy building.²⁵⁸ The Constitutional Court of El Salvador enunciated this position quite clearly. The Court found that "the faculty of granting grace or clemency is a manifestation of sovereignty; and that, consequently, it is an eminently political act."²⁵⁹ As the Court has no jurisdiction over "purely political questions," it found that it had no jurisdiction over a constitutional challenge to the amnesty.²⁶⁰ The Court did state that its ruling should "not be [assessed] in absolute terms" because it was "evident that there are cases where there is constitutional jurisdictional control over amnesty."²⁶¹ However, it is questionable whether the Court would find such a case.

The Peruvian Superior Court decision upholding amnesty, and its approval by the Supreme Court, also reflect the abdication of a judicial role to the legislature and executive. The Superior Court's decision upholding the amnesty was heavily influenced by the Interpretative Rule, passed two weeks subsequent to the amnesty law.²⁶² In the rule, Congress expressly stated that the amnesty law did not conflict with the ACHR, affect other human rights, or violate the principle of independence of the judiciary. It required judges to apply the law.²⁶³ There is strong language in the opinion

opposition party. See *Peru President Fires Many in Judiciary*, CHI. TRIB., 10 Apr. 1992; *Peru's Opposition Strikes Back*, HOUSTON CHRON., 10 Apr. 1992, at A24. These judges included the entire seven member National Council of Magistrates, whose job is to propose candidates for judgeship and all twenty District Court chiefs in the Peruvian interior. He also suspended the Constitution and fired all nine members of a federal constitutional review panel. See *id.*

257. See Arroyo, *supra* note 94, at 80–82.

258. A number of current efforts at judicial reform in Latin America focus on making the judiciary less subservient to the executive and legislative branches, and more able to exercise independent review. On current efforts to reform the judiciary in Latin America, see generally Nicholas D.S. Brumm, *Divergent Models of Public Law in Latin America: A Historical and Prescriptive Analysis*, 24 U. MIAMI INTER-AM. L. REV. 1 (1992); Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L. 167, 174 (1995). Current "rule of law" initiatives of bodies like the World Bank and U.S. Agency for International Development stress the need for good governance, including an independent judiciary capable of exercising functions of judicial review. See, e.g., WORLD BANK, 1997 WORLD DEVELOPMENT REPORT; Timothy Dickinson, *Anti-Corruption and Rule-of-Law Plans are Section Targets*, NAT'L L.J., 4 Aug. 1997.

259. *El Salvador Decision*, *supra* note 50, at 553.

260. *Id.* at 554.

261. *Id.*

262. See Arroyo, *supra* note 94, at 68.

263. See *id.* The Interpretative Rule seemingly abrogates the judicial function of interpreting existing law and the Constitution.

stating that judges should respect the doctrine of separation of powers and not interfere with the sovereign powers of the state, especially when, as the court had previously found, the laws in question did not infringe upon the Constitution or international treaties.²⁶⁴ The courts should not, in this view, judge, interfere with, or infringe upon the administration of justice, being an expression of the right of grace that the Democratic Constituent Congress has approved which is not judicially revisable or questionable.²⁶⁵ Furthermore, the court prohibited magistrate judges from inquiring into the purposes that inspired the legislature to grant amnesty and from analyzing whether the law serves its alleged purposes.²⁶⁶

In addition to the Interpretative Rule, the Superior Court, similar to the Salvadoran courts, further supported its holding by emphasizing the constitutional power conferred on the legislature to implement an amnesty law in order to build a society based on peace, harmony, and reconciliation (although such purpose is doubtful in the case of Peru).²⁶⁷ It noted that political custom shows that amnesties have consistently been executed by legislatures and governments when they take into account the social needs and exceptional circumstances that make such laws necessary.²⁶⁸ In finding that amnesties were inherently "political decisions" completely within Congress' realm, the court further justified its abdication of any authority to hear a challenge to the amnesty.²⁶⁹

The broad reach of the Salvadoran and Peruvian courts' language leave little room for judges to have any role in overseeing the constitutionality or legality of legislative acts, leaving no check on legislative power. Moreover, it privileges the constitutional right to grant amnesty over all other possibly conflicting rights that may exist in national constitutions, including rights to court access and to redress.

The higher court decisions reflect a crabbed, nineteenth century civil law view of judges who merely apply written law.²⁷⁰ The function of the judiciary as guardians of fundamental rights and arbiters of constitutional meaning, central to contemporary constitutional theory and practice, is completely absent in this view. In part, then, the Peruvian case could be

264. Salazar Monroe Case, Judgment of July 1995, *supra* note 107, at 2.

265. *Id.*

266. *Id.* at 2-3.

267. *Id.* at 1. However, note that because the amnesty is limited to counterterrorists, and the conflict between the government and insurgent groups has not come to an end, it is hardly arguable that the Peruvian amnesty was passed with the intent to create peace, harmony, or national reconciliation. If anything, it will probably create more tension between the two groups, as one group received the right to amnesty and the other did not.

268. *Id.*

269. *Id.*

270. See Arroyo, *supra* note 94, at 81.

seen as exemplifying the uneven transition of the judiciary—and of the society as a whole—to a modern view of the proper role of the courts.

B. Courts' Ability to Define Their Own Jurisdiction Over Amnesty Related Cases

Even in cases where courts have declined to interfere with the provision of amnesty through a broad declaration of facial invalidity, they will still have to apply existing amnesty laws to specific cases. These "as applied" cases are perhaps the most promising ground for further development of jurisprudence in this area. They are also the proving ground for the courts' assertions of their own role in a democratic constitutional scheme. A few courts, like the Peruvian Superior Court, have stated that the courts should not interfere with "justice" even in the application of the amnesty law. However, most have taken a far more assertive view.

One common assertion of power by the courts in the context of amnesty laws is the right to decide, through at least a preliminary investigation, whether the facts implicate amnesty in the first place. In Chile, President Aylwin took this position with respect to the role of the courts faced with the military's 1978 "self-amnesty."²⁷¹ A number of lower courts are in fact carrying out investigations into disappearance cases, including subpoenaing the testimony of active army officers.²⁷² No military convictions have as yet resulted.²⁷³

In November 1997, a panel of the Chilean Supreme Court approved this strategy for the first time. In the case involving the disappearance of two high school students by secret police agents in 1974, the Court held that the amnesty law had been incorrectly applied.²⁷⁴ The case was originally tried in a military court, which found that an illegal arrest had occurred, that the amnesty law applied, and that the case should be closed.²⁷⁵ The Supreme Court held that there was no evidence linking the illegal arrest to the disappearance, and that the disappearance case, not having been proven, could not be subject to the amnesty. Therefore, the case was ordered partially reopened to allow for continuing investigation.²⁷⁶

271. See Mera, *supra* note 22, at 179–80. The "Aylwin doctrine" held that courts must investigate, at least in disappearance cases, until finding that the victim had been killed and that the circumstances were such that the amnesty would apply. See *id.*

272. See Correa Sutil, *supra* note 251, at 137.

273. See Monica Gonzalez, *Chile: inesperado fallo por derechos humanos*, Clarin, 21 Nov. 1997.

274. See *Un Tribunal de Chile revoca por primera vez una amnistia dictada por Pinochet*, 21 Nov. 1997, available in <<http://www.derechos.org/nizkor/chile>>.

275. See *id.*

276. See *id.*

The Honduran Supreme Court addressed the issue of amnesty after a trial court issued arrest warrants for three of four military officers accused of kidnapping and torturing six university students in the 1980s.²⁷⁷ A 1991 law provides unconditional amnesty for political crimes and related common crimes.²⁷⁸ The trial court judge reasoned that the crimes of kidnapping and torture were common crimes and thus were not subject to the benefits of the amnesty.²⁷⁹ A Court of Appeals reversed, holding that the amnesty covered crimes committed by the military during the 1980s, and extending such amnesty to the accused.²⁸⁰ Like the Salvadoran Supreme Court and the Peruvian Superior Court, the opinion emphasized that amnesty is an act of sovereignty.²⁸¹ The Supreme Court, in turn, reversed. The Court reasoned that it is the exclusive power of judges to determine the legal nature of a crime.²⁸² Since the amnesty only applied to political and related common crimes, the Court found that an initial judicial determination of the legal nature of the crimes committed was necessary in order to determine whether amnesty must be applied.²⁸³ Thus, the trial court is to determine how the Honduran amnesty is to be applied: if the crime is of a nature which falls under the amnesty (i.e., political and related common crimes), the proceedings will be dismissed. If the crime is not of such nature (i.e., common crimes), the criminal proceedings will continue.²⁸⁴ As a result, the Court reversed the court of appeals' grant of amnesty and upheld the trial court's finding that in such a case, kidnapping and torture constituted common crimes, unrelated to political crimes, and not subject to amnesty.²⁸⁵

This legal gambit changes the nature of the amnesty from a blanket pre-investigation bar to a case-by-case inquiry into the facts. Although a summary proceeding,²⁸⁶ this inquiry may include testimony from the

277. See Ginger Thompson & Gary Cohn, *Honduran Judge Orders Arrest of Three Officers*, BALTIMORE SUN, 6 Dec. 1995, at 1A. The accused were: Col. Alexander Hernandez, suspected former commander of Battalion 3-16, Lieutenant Colonel Juan Blas Salazar, former director of the National Department of Investigations, Major Manuel Trejo, former chief of the Honduran police, and Captain Billy Joya, who operates a security agency in San Pedro Sula. Salazar was already imprisoned on other charges.

278. Decree No. 87-91, LA GACETA NO. 26,498 (24 July 1991).

279. See *Honduran Officials Question Amnesty Law*, U.P.I., 20 Oct. 1995, available in LEXIS, News Library, UPI File.

280. See *Honduras: Supreme Court Overturns Lower Court Decision Granting Amnesty to Military Officers in 1982 Kidnap Case*, NOTISUR-LATIN AM. POL. AFF., 26 Jan. 1996; *Honduran Military Covered by '91 Amnesty*, BALTIMORE SUN, 7 Jan. 1996, at 1A.

281. See Hernandez Santos Case, Case 60-96, Corte Suprema de Justicia de Honduras, 13 (18 Jan. 1996).

282. *Id.* at 15-17.

283. *Id.*

284. *Id.* at 17.

285. *Id.* at 18.

286. See *id.* at 17.

accused, from witnesses, or others in an attempt to determine whether or not the amnesty applies. It also leaves significant discretion to the trial court to determine which crimes are covered, shifting the locus of power from the executive to the courts.

The Guatemalan courts are developing a similar approach to the amnesty issue. The Guatemalan Constitutional Court recently held amnesty constitutional.²⁸⁷ Like the Honduran Supreme Court, it emphasized that it is the constitutional power of the judiciary to apply such a law.²⁸⁸ Although the Court found that the amnesty was constitutional, it warned that several of the terms defining the crimes delineated in the amnesty were to be construed narrowly. For example, the court emphasized that crimes that qualified for amnesty under Article 5 of the NRL (applicable to state agents) had to meet *all* requirements delineated in that article.²⁸⁹ It further stated that the term "in the armed internal conflict," utilized in Article 5, should be restricted to its literal meaning, and that there had to be a "real" connection between the crimes listed in Article 5 and those listed in Articles 2 and 4.²⁹⁰

Guatemalan lower courts determine whether the amnesty provisions are applicable on a case-by-case basis, and have interpreted such provisions narrowly. Even before the passage of the NRL, the court in the Xaman massacre case denied jurisdiction to military courts because it found that the crimes involved, homicide and aggravated battery, were not subject to military jurisdiction.²⁹¹ Since the December 1996 passage of the NRL, a number of cases have reaffirmed the judiciary's role in a case-by-case determination of what is covered—and what is not—under the law.

In a number of high-profile cases, Guatemalan courts have refused to apply amnesty provisions. On 6 January 1997, a petition for amnesty was filed on behalf of those responsible for the killing of Myrna Mack, an anthropologist.²⁹² On 6 February, Judge Delgado of the Juzgado Primero de Primera Instancia Penal de Sentencia (trial court) refused to transfer the Mack case to an appellate chamber for a determination of the applicability of the amnesty.²⁹³ Judge Delgado reasoned that murder was not one of the crimes subject to the amnesty, as it was not identified as a "common crime

287. See Guatemalan Constitutional Court Decision, *supra* note 76, at 27.

288. *Id.* at 13.

289. Such requirements were: 1) that they had been committed in the armed internal conflict; 2) that such crime was committed with the objective of preventing, impeding, pursuing or suppressing crimes committed by insurgents; 3) a rational and objective relationship between the crime committed and the objectives listed in 2) above. *Id.* at 20.

290. *Id.* at 21.

291. Lacán Chaclán Case, *supra* note 215; Gody Gaitan Case, Case C-164-96, Juzgado de Primera Instancia Penal de Sentencia, 2 (6 Feb. 1997).

292. See Popkin, *supra* note 72, at 181.

293. Godoy Gaitan Case, *supra* note 291, at 3.

related to a political crime" in the amnesty law.²⁹⁴ On appeal, the Tenth Appeals Chamber agreed with the prosecutor that it had no jurisdiction to hear the appeal under the NRL.²⁹⁵ In the Carpio case, involving a politician and newspaper publisher who was shot to death, the same judge also refused to transfer the case for a determination of amnesty.²⁹⁶

Other cases where amnesty has been denied include: four soldiers convicted of killing Michael Devine; a former military commissioner convicted of drug trafficking; and an army captain convicted of kidnapping.²⁹⁷ The Ninth Appeals Chamber also denied amnesty to a former civil patrolman, Candido Noriega Estrada, who was accused of murders, kidnappings, rapes, and threats.²⁹⁸ In contrast, as of May 1997, amnesty had been granted to at least three URNG members charged with illegal possession of weapons, ammunition, and explosives.²⁹⁹ In the case of Timoteo Ruperto Navarajo Chutan, the Fifth Chamber of the Court of Appeals granted amnesty to a URNG member.³⁰⁰ The court found that the applicant's crimes were subject to the amnesty, as political crimes of treason, rebellion, and activity against the security of the nation, and the related common crimes of falsification of documents, using a fake name, and illegitimate use of documents.³⁰¹

Thus, through case-by-case review, the provisions of the Guatemalan amnesty may be clarified and interpreted in a manner consistent with international law. This method admittedly puts enormous pressure on a judiciary still suffering from the effects of decades of fear, corruption, and illegitimacy, a situation only partially ameliorated by the designation of appellate panels rather than individual judges as the court of first instance in amnesty cases. However, given the recent determination that the NRL is constitutional, it may be the best that can be expected.

The South African Truth and Reconciliation Commission's decisions on amnesty in specific cases may also face legal challenges. One avenue, already threatened by many lawyers, is to challenge the amnesty grant on grounds that the petitioner made less than full disclosure as required by the TRC's rules.³⁰² A more promising avenue, from the perspective of excluding at least crimes against humanity or the gravest human rights violations from

294. *Id.* at 2.

295. See Popkin, *supra* note 70, at 181. However, the defendants then filed a new petition for amnesty in the Third Appeals Chamber. See *id.*

296. See *id.*

297. See *id.* at 182.

298. See *id.*

299. See *id.*

300. Navarajo Chutan Case, Sala Quinta de la Corte de Apelaciones (26 Feb. 1997).

301. *Id.* at 4.

302. See Mda, *supra* note 118.

the scope of the amnesty, is to argue that these crimes cannot meet the TRC's requirement of proportionality of the act to the objective pursued.³⁰³ This would allow the South African courts to, in practice, limit the scope of the amnesty somewhat. It remains to be seen whether the South African courts would entertain such an "as applied" challenge to the TRC law, because the law itself does not provide for judicial review of amnesty cases.³⁰⁴ Nonetheless, the constitutional provisions on access to courts would favor the courts' ability to hear these cases.³⁰⁵

VI. CONCLUSION

What lessons can one draw from this review of the cases concerning domestic amnesties for human rights violations? The first one involves the scope of the amnesties themselves. Over time (with the major chronological exception of Peru) the trend has been from broader to more tailored, from sweeping to qualified, from laws with no reference to international law to those which explicitly try to stay within its strictures. Although no doubt many factors were involved, it is possible to trace this result at least in large part to the growing importance of a discourse about impunity and accountability on an international level. In tracing the routes by which international law principles become effective, then, it is important to look at court decisions within the context of the legislation involved—material which is in itself changing as a result of the permeability of national political and legal discourse to international law arguments.

Second, facial challenges to amnesty laws have generally fared badly, while limited, case-specific and as-applied challenges have done better. Courts are not in a position, especially in emerging or fragile democracies, to buck an elite consensus or negotiated settlement that includes an amnesty. Historically weak, such institutions may well fear a backlash should they assert themselves too early in a process of transition. This seems to be the case even where constitutionally the courts have the power to overturn domestic laws. It may be too much to expect courts to stand up to legislative or executive grants of amnesty if they fear (rightly or not) a constitutional crisis. Moreover, courts in many countries are hampered by a tradition of merely mechanical application of statutes and a lack of practice in exercising review over the actions of coordinate branches. Thus, the need for international review mechanisms, like the Inter-American Commission and Court, becomes more apparent.

303. See TRA, *supra* note 111, at § 20(3).

304. *Id.*

305. S. AFR. CONST. ch. 2, § 34.

The most successful line of argument to date involves more modest assertions of the power of the courts. This can take two forms, both focused on investigation rather than prosecution *per se*. Courts may allow prosecutions of defendants not present in the jurisdiction, as is the case with the Spanish, Argentine, German, and Ecuadorian prosecutions of Chilean or Argentine military defendants. In these cases, the court is no doubt cognizant of the scarce possibility of obtaining custody of most or all of the defendants, yet proceeds to an investigatory phase, seizes the assets of some of the defendants, and allows testimony on their alleged crimes.

Alternatively, courts may decide that in order to determine whether or not an amnesty law applies in a specific case of murder or disappearance, they must investigate—including calling witnesses and taking testimony—until they can assure themselves that the case comes within the bounds of the amnesty. Here again, at the end of the day the most likely result is a finding that the amnesty applies, yet the court insists on proceeding through an investigatory phase. One explanation is that these results allow judges to assert their proper power and role in a more modest, and therefore tenable, fashion. Another is that judges, especially lower court judges who disagree with the decision to uphold the legality of an amnesty, may look to these mechanisms as a way of discomfiting the alleged perpetrators, who are forced to respond to requests for testimony. They may also be seen as providing at least some closure, or solace, for the families of victims.

A third, and related, possibility is that judges have been receptive to the argument made by a number of scholars and activists, that “truth” is an important value in itself. By allowing charges to be filed, witnesses to be subpoenaed, and testimony to be taken, some limited version of “truth telling” is achieved. The focus shifts from the prosecution of a specific perpetrator to discovering the whereabouts of those killed and disappeared. This shifted focus not only allows receptivity to arguments about the right to truth, but also allows advocates to raise arguments about family members’ right to mourn, based on the respect traditionally afforded the bodies of the dead in both culture and law.³⁰⁶ This strategy, though more limited, may in the long run be the most fruitful one for litigators interested in ensuring accountability at the national, as well as international, level.

306. See Abregú, *supra* note 129, at 18.