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War Crimes

Brutality, Genocide, Terror, and the Struggle for Justice

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The Trouble with Amnesty

According to *Black's Law Dictionary*, an amnesty is the "abolition and forgetfulness of the offense; pardon is forgiveness. The first is usually addressed to crimes against the sovereignty of the nation, to political offenses; the second condones infractions of the peace of the nation." An amnesty that meets this definition was proclaimed by President Andrew Johnson in 1865, exempting from criminal punishment former Confederates who took an oath of unqualified allegiance to the United States. They had rebelled against the United States, and it was the prerogative of the United States to abolish their crimes in the interest of national reconciliation.

In our time, amnesties have been granted in a manner that stands this definition on its head. Instead of abolishing or forgetting crimes against their sovereignty—by those who attempt to secede from or overthrow them, for example—states have purported to abolish and forget the crimes of their own officials against their people. Those decreeing amnesties, as we have seen, often manage to be the main beneficiaries. This became popular sport in Latin America, a tragic twist on Follow the Leader. General Augusto

Pinochet's military regime led the way in Chile by issuing an amnesty in 1978 for crimes committed by the armed forces during the previous five years. Brazil's military followed suit the next year. Then came General Efraín Ríos Montt in Guatemala (1982), the generals in Argentina (1983), Uruguay (1986), the government of President José Napoleón Duarte (1987), the Sandinistas in Nicaragua (1990), the Fujimori government in Peru (1995), and Guatemala yet again (1996).

Defending the right of a state to declare an amnesty for its own officials as well as for their opponents, President Julio Sanguinetti of Uruguay argued that

> [t]he State's obligation to administer justice cannot be performed without taking into account other State functions, of which the most important are to ensure that its citizens live together in peace. . . . The severity of the law in prescribing a penalty must be attenuated when its application would result in a greater social ill than that of allowing a crime to go unpunished. . . . In a word, the renunciation of the power of punishment is merely another way of administering justice, since the political basis of the amnesty is the same as that on which the exercise of punitive power is based: the intention underlying both of these elements, amnesty and punitive authority, is ultimately to bring peace and tranquillity to all members of the community.[1]

It's certainly true that prosecutors must be free to choose which cases to bring. The reasons for this are manifold. Criminal laws cannot be drawn to anticipate every eventuality, resources must be allocated to the prosecution of cases that seem particularly important at a given moment, and the evidence in some cases is not strong or may be difficult to develop. The judicial process also needs to demonstrate evenhandedness in law enforcement and promote to the extent it can the goals cited by Sanguinetti—peace and tranquillity. In short, there are no formulas.

But Sanguinetti makes it seem that an amnesty law or decree benefiting government officials is an exercise in prosecutorial discretion. It isn't. To the contrary, what is everywhere condemned are determinations not to prosecute because of political connections between the prosecutor and the potential defendants, because certain defendants are considered beyond the reach of the law, or be-

cause some defendants have intimidated the prosecutor with threats to retaliate by violent or other means. The peace and tranquillity that Sanguinetti expected as a consequence of the failure to prosecute the Uruguayan armed forces for their crimes was that the military would not take reprisals against its civilian institutions and would permit the maintenance of civilian rule. He could not be blamed for wanting to avoid another military coup. Acknowledging this rationale for supporting an amnesty is quite a different matter, however, than arguing that an amnesty in such circumstances is another way to administer justice.

Characteristically, amnesty laws such as Uruguay's apply to opponents of the government as well as to the military and the police. This is intended to create an illusion of symmetry and, in fact, is an affront to common sense, since—in most cases—a great many more crimes will have been committed by government forces than by the opposition. Most important, such amnesties imply moral equivalence—that the crimes of the enemies of the state should be equated with those of the state itself. This, of course, is nonsense: It is the state that is supposed to be the embodiment of the rule of law.

There seems little question that successor governments enjoy the legal authority to repudiate amnesties. Even without explicit nullification, amnesties are invalid when they conflict with international treaties that obligate states to prosecute and punish. The Geneva Conventions require states to seek out those who have committed grave breaches, the Genocide Convention demands that genocide be punished, and the Convention Against Torture mandates that cases of torture be prosecuted.[2] The usual criteria for the exercise of prosecutorial discretion may be validly invoked to determine whether particular cases are pursued, but these requirements of international law cannot be reconciled with the abolition of crimes to which they apply.

Yet another treaty binds nations in the region where amnesties have become notorious. In Latin America, most governments are parties to the American Convention on Human Rights, a treaty adopted by the Organization of American States in 1969 that entered into force in 1978, when the requisite number of states had ratified it. The OAS has established two bodies to enforce the treaty: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The court's decisions are binding on governments that have accepted its jurisdiction.

The court decided its most important case, *Velasquez-Rodriguez*, in 1988.[3] It involved the disappearances conducted by Battalion 3–16 of the Honduran armed forces earlier in the decade. Families of some of the victims sued, and eventually the court found the government responsible for the abduction and murder of two of the men and ordered a number of remedies, including payment of damages to the families. In addition, the court established that the Honduran government had engaged in a practice of disappearances.

The court also heard arguments over whether Honduras had a duty to punish those responsible. There is such a duty, the Inter-American body decided. The convention that the court enforces provides that the parties shall take "such legislative or other measures as may be required to give effect to those rights or freedoms" it sets forth. Though this provision of international law is not as explicit as the Geneva Conventions or the Genocide Convention in asserting an obligation to punish, the court considered that it is sufficient to require action. "Subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of duty," the court said. "If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply." The court also held that the provision of the convention requiring the parties "to ensure to all persons . . . the free and full exercise of those rights and freedoms" requires them to "prevent, investigate and punish any violation of the rights recognized by the Convention." It was not until seven years later, in 1995, that Honduran civilian authorities demonstrated the courage and will to prosecute military officers connected to Battalion 3–16. The Inter-American Court's decision was undoubtedly a factor.

Amnesties for state officials who committed crimes against humanity may also be invalid under national constitutions and in states with unwritten constitutions that have a common-law tradition. Francis Bacon discussed the issue nearly four centuries ago: "The King [and, therefore, anybody exercising the power that once belonged to the king] can by no previous License, Pardon or Dispensation, make an Offense dispunishable which is *Malum in se* [inherently or essentially evil]; as being against the Law of Nature, or so far against the Public Good as to be indictable at Common Law, and that a Grant of this kind tending to encourage the doing of Evil, which is the chief End of Government to prevent, is plainly against Reason and the

Common Good, and therefore Void."[4] Genocide, crimes against humanity, and war crimes meet the test of *Malum in se* and are, therefore, not "dispunishable."

Conflicts with international law or higher domestic law are not the only grounds for a successor government to invalidate exemption from punishment crimes committed under state authority. In most cases, such amnesties have been decreed by self-benefiting military regimes that usurped power. Once legitimate government is established through a democratic process, its obligation to respect the laws decreed by its dictatorial predecessor is negligible under any circumstances, least of all when that regime promulgated laws for the personal advantage of its officials. Many successor regimes do not hesitate to invalidate laws providing outsize pensions or vast properties to their military predecessors. Exemption from prosecution and punishment for great crimes is even more dubious in its legality as a corrupt act of self-interest. Democratically chosen governments intent on adhering to the rule of law have every right to refuse to go along.

Two Republican administrations in the 1980s embraced the many transitions from military dictatorship to democracy in Latin America as a great achievement of American foreign policy. Though the United States looms large in the affairs of Latin America, the self-congratulation is open to some dispute. Still, the global campaign to promote democracy launched by President Reagan in mid-1982, a year and a half after he took office, and sustained by President Bush after he succeeded Reagan in 1989, clearly played a part. Unfortunately, the concept of democracy promoted by Reagan and Bush was narrow, focusing mainly on free and fair elections. Throughout, U.S. policy did not include significant attention to the rule of law.

One of the failures of the Reagan and Bush policies in Latin America was that their administrations almost never spoke out against amnesties. Though many European governments denounced the self-amnesty proclaimed by the Argentine military in October 1983, the United States was silent. The only exception was when the Reagan administration criticized the application of El Salvador's 1987 amnesty law to the killers of Americans—the military men who murdered four U.S. churchwomen and the left-wing guerrillas who attacked an outdoor café popular with U.S. embassy staff, killing four U.S. marines in the process. The main reason successor governments

in Latin America respected amnesties promulgated by dictatorial regimes was fear of a military coup if they did not. The United States might have made a big difference. If American policy in the region carried sufficient weight to foster transitions from military dictatorship to elected civilian government, it could also have bolstered civilian efforts to insist that the rule of law did not exempt military mass murderers from prosecution and punishment. Yet these concerns were ignored.

The Clinton administration did not diverge from the practices of its predecessors. Its biggest test case in the region was Haiti. In September 1991, the first freely elected president in the country's bloody history, Jean-Bertrand Aristide, was ousted by a military coup after just a few months in office. Aristide is something of a demagogue, but his brief tenure as president was marked by a dramatic reduction in human rights abuses. During the coup, however, and over the three years before he was reinstated, abuses proliferated. Reliable statistics are difficult to obtain, but it is widely estimated that the number killed in violent rights abuses during that period was between 3,000 and 4,000, making Haiti one of the most dangerous places in the hemisphere to express dissent.

The Bush administration sought Aristide's reinstatement as president, a cause taken up with vigor by the Clinton administration when it took office in January 1993. The priority Clinton gave the matter reflected his embarrassment over the flow of Haitian boat people to the United States. As a candidate for president in 1992, Clinton had criticized Bush for interdicting boats on the high seas and turning them back to Haiti. When Clinton won, there were predictions that a flotilla carrying many thousands of Haitians would be ready to set out for the United States on the day of the new president's inauguration. The prospect brought back memories of the Mariel boatlift of 1980, when more than 100,000 Cubans—many of them former inmates of prisons and mental hospitals—sailed to the United States, sparked widespread public resentment, and did considerable political damage to President Carter. Clinton reversed himself. He directed that the interdictions should continue but pledged that democratic government would be restored so that Haitians would not have to flee political persecution. Under international law, refugees fleeing because of a well-founded fear of persecution are entitled to asylum in other countries; those migrating for economic reasons have no such rights. Accordingly, the restoration of

Aristide would validate exclusion of Haitian migrants from the United States.

Negotiations with Haiti's military bosses proved difficult. They feared Aristide's oratorical powers and knew he enjoyed enormous support among Haiti's impoverished millions. If Aristide were to call for a popular uprising, it was possible that the relatively small, poorly equipped armed forces would be overrun. As long as Aristide was barred from the country, nothing of the sort was imaginable. One of the demands of the Haitian armed forces as part of the price for Aristide's return was an amnesty. Aristide himself was reluctant to agree. But the Clinton administration, like the Bush administration before it, insisted. Eventually, Aristide gave way and, along with other measures designed to reassure the military that they would be safe, a deal was concluded for the ousted president's return in October 1993, a little more than two years after he had been thrown out.

That deal was abrogated by the Haitian military, eventually leading the United States in July 1994 to seek United Nations authority for an invasion. Though the Clinton administration had lost patience with the Haitian military, the United States never abandoned its insistence on an amnesty as part of any arrangement to restore Aristide.

On September 15, 1994, President Clinton delivered a televised address to the American people to explain why the United States would invade Haiti. Human rights abuses by the military rulers of the country, headed by General Raoul Cedras, were high on the list. "Cedras and his armed thugs have conducted a reign of terror," Clinton said, "executing children, raping women, killing priests. As the dictators have grown more desperate, the atrocities have grown ever more brutal. . . . International observers uncovered a terrifying pattern of soldiers and policemen raping the wives and daughters of suspected political dissidents—young girls, thirteen, sixteen years old. People slain and mutilated, with body parts left as warnings to terrify others. Children forced to watch as their mothers' faces are slashed with machetes."

The speech implied an invasion was imminent, but Clinton made a last attempt to avoid force. A delegation headed by former president Carter that included General Colin Powell and Senator Sam Nunn of Georgia was dispatched to Haiti to negotiate with Cedras and his associates. When it was reported that U.S. troops were on their way to begin the invasion, a deal was struck by Carter and Cedras that included an amnesty—though its terms were left unclear. Despite the litany of horrors he had recited publicly, Clinton accepted the deal, and the invasion was transformed into a largely bloodless occupation. The Haitian Parliament dutifully enacted an amnesty law, but avoided specifying its elements, leaving the details to Aristide, who returned to Haiti in October 1994 to take up his duties.

Though he did not say so explicitly, it appeared that Aristide was inclined not to pursue prosecutions. He had previously resisted the efforts of the Bush and Clinton administrations to get him to agree to an amnesty. But by the time he returned to Haiti, inspired by the example of Nelson Mandela, who had taken office as president of South Africa a few months earlier, reconciliation had become the main theme of his public statements. (Mandela subsequently made plain that his concept of reconciliation did not preclude prosecutions.) One factor in Aristide's decision probably was his awareness that the Haitian judiciary lacked the capacity to conduct fair trials or even the lawyers needed to bring credible prosecutions. Critics would doubtless complain about denial of due process, and that might cost Haiti the international assistance the Clinton administration was promising (though ultimately failed to deliver) as part of the deal for Aristide's return.

At this writing, no prosecutions have been brought against Haitian military leaders or the organized thugs who were allied with them. Moreover, in mid-1996, the Clinton administration blocked a move to deport Emmanuel Constant. The founder and leader of the Front for the Advancement and Progress of Haiti (FRAPH), a paramilitary group blamed for a reign of terror during the three years of military rule, Constant had entered the United States illegally when Aristide was reinstated and, after his whereabouts were discovered, was confined in a Maryland jail for a year pending deportation. Apparently, the Clinton administration freed him as further recompense for his services to the CIA, which had paid him all the time he led FRAPH.

The case of Haiti typifies the considerations involving amnesties. There are almost always prudent reasons for going along with them, yet the effect has been to create a culture of impunity. In country after country, especially in Latin America, the armed forces have believed that they will not be held judicially accountable for torture, murder, and disappearances. The more countries that adopt

amnesties and allow them to stand unchallenged, the more difficult it is to end the practice. Haitian military officers were well aware that their Latin American counterparts were amnestied just before civilian governments took over. Under the circumstances, the difficulty of denying them exemption from prosecution and punishment for thousands of killings became all the greater. Bush, Clinton, and Carter all pressed for an amnesty because it had become de rigueur in such circumstances.

In South Africa, in contrast, some proponents of human rights were themselves outspoken advocates for an amnesty. "If there is a general amnesty and it brings democracy and peace to our country, I would be thrilled," Albie Sachs said prior to the transition to majority rule. "Even if the amnesty extends to the people who tried to kill me."[5]

Albie Sachs is a white lawyer who was prominent in the African National Congress. In 1988, he had been severely injured in Mozambique, where he was then living in exile, when a bomb planted in his car tore off most of his right arm, blinded him in one eye, and caused multiple additional injuries. Following the transition to democratic government, Sachs was appointed to serve as a member of South Africa's Constitutional Court by President Mandela. Despite his personal history, he supported an amnesty and in 1996, as a judge on the Constitutional Court, joined with his colleagues to uphold its validity.

Sachs wasn't alone. Many other longtime campaigners for human rights and true democratic rule in South Africa echoed his position, arguing that an amnesty was a price the black majority needed to pay for a more or less peaceful transition. The alternative, they feared, was a sharp increase in bloodshed. Military men and police who faced prosecution and punishment for assassinations and the torture of detainees were expected to fight to the death against a transition. An amnesty was required to persuade them to allow the transition to majority rule without still more bloodshed, and so a provision for it was duly incorporated in the Transitional Constitution under which Mandela was elected.

South Africa made the best of the situation. Amnesty was granted only individually—both for officials of the apartheid regime and for activists in the movements that sought its overthrow. Each person seeking amnesty had to apply by completing a prescribed form that required detailed information on the crimes for which amnesty was sought (the commission's Amnesty Committee diverged from this requirement by granting amnesty to ANC officials who had not individually acknowledged their crimes, but the full commission took the matter to court and invalidated those grants of amnesty). Crimes had to be fully disclosed. Following submission of the form, the applicant appeared at a public hearing of the Amnesty Committee of South Africa's Truth and Reconciliation Commission to answer questions on such matters as the comprehensiveness of the disclosure, the objective of the abuse, and whether it was committed with the knowledge and approval of the agency or organization with which the applicant was associated. Amnesty was denied when the commission determined that the crime was committed for reasons of personal malice or for personal gain.

These proceedings complemented the other work of the Truth and Reconciliation Commission in disclosing and compiling a record of severe abuses of human rights during the long period covered by its mandate, from March 1960, when the Sharpeville Massacre of fifty-nine blacks took place, until May 1994, when Mandela was inaugurated as president. The required individual disclosures meant that those who planned, directed, and carried out abuses all had to acknowledge them directly to benefit from amnesty.

The South African Constitutional Court, with Sachs as one of its members, upheld the amnesty against legal challenge. As Justice John Didcott asserted, "The amnesties made available to individuals are indispensable if an essential object of the legislation is to be achieved, the object of eliciting the truth at last about atrocities committed in the past and the responsibility borne for them. The primary sources of information concerning those infamies, the perpetrators themselves, would hardly be willing to divulge it voluntarily, honestly, and candidly without the protection of exemptions from liability."[6] Elsewhere, amnesties granted to all without the requirement of individual disclosure impeded the discovery of truth; in South Africa, the process encouraged truth.

It also served to shame the perpetrators. For example, South Africans heard the confessions of the police officers who killed Steve Biko in 1977. They learned that the masked men who wreaked havoc on the commuter trains to Johannesburg in the early 1990s were not black revolutionaries, as had been believed at the time, but military agents intent on discrediting the antiapartheid struggle. And they discovered the many crimes committed under the direction of Winnie Mandela, formerly an icon of the revolutionary struggle.

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From the moment the proposal for a war crimes tribunal for ex-Yugoslavia began to gather momentum, many proponents of prosecution and punishment feared that the process would be aborted by an amnesty. Their concern was that the parties—especially the Serbs—would decline to sign a peace agreement unless they were assured they would not face prosecution.

After indictments were issued, however, it became more difficult to make amnesty an element of a peace agreement. Early on, it might have been done with little notice; later, it would have created an uproar. It would have meant that named individuals were freed from accountability for particular crimes with which they had already been charged. When Radovan Karadzic and Ratko Mladic were reindicted for Srebrenica while the Dayton peace talks were under way, it ended any possibility of an amnesty. The public credit the United States obtained for brokering the agreement at Dayton would have been nullified if part of the deal was that the Bosnian Serb leaders escaped any penalty for a crime of that enormity.

After Dayton, Mladic continued to seek an amnesty, at least for himself. When NATO bombed Bosnian Serb positions a few months prior to Dayton, two French pilots were shot down and captured. Mladic informed the French that he would release them only if the charges against him were dismissed. Andrei Kozyrev, the Russian foreign minister who supported the proposed deal, even sought cooperation from the prosecution in The Hague. It was a nonstarter. When the pilots were released anyway, rumors abounded that the French had made a secret deal with Mladic not to arrest him. Paris vigorously denied any such thing, but suspicions have persisted to this day.

Where no indictments have been issued, general amnesties are seductive. The alternative is the potential for more conflict. To reject an amnesty may seem to manifest lack of concern for those who would suffer the consequences of a new military takeover or a prolonged war. Yet the grounds for resisting an exemption for great crimes are compelling.

That justice should be done and the appearance of justice maintained are the most important reasons to reject amnesties. But there are others—most prominently, that civilian successor governments and the international community should not yield to the equivalent of terrorist demands by ousted generals or rogue warriors. In a given

situation, such as an airplane hijacking, submitting to terrorist demands may save many lives. But a consensus has developed worldwide that giving in to the demands of terrorists only inspires more terrorism. The way to stop terrorists is to ensure that they derive no profit from their acts.

Standing up to terrorism is painful. It is the same with standing up to demands for an amnesty, only more so.