

Latin American Amnesties in Comparative Perspective: Can the Past Be Buried?

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Throughout Latin America, following the end of authoritarian rule or the resolution of internal armed conflicts, new democratic or postwar governments have faced demands for transitional justice. Confronting these calls for justice is the military's insistence that its members not be held accountable for any past abuses that may have occurred in the effort to save the country from terrorism and subversion. Most Latin American countries that have traversed this process have enacted amnesties, which they claim will close the chapter on a painful past, allow the country to move on, and, above all, calm the disgruntled military. Countries outside Latin America have faced similar dilemmas. The outgoing apartheid regime in South Africa exacted an amnesty agreement before accepting majority rule.

Latin America's recent experiences with amnesty provisions have raised a number of issues: Can or must judicial investigations to determine the facts—particularly the fate and whereabouts of the disappeared—still be carried out, despite an amnesty law? At what point in the proceedings must a judge determine whether a crime fits the requirements for amnesty? Can an amnesty law foreclose civil as well as criminal liability? Can criminal charges be brought in another country after an amnesty has precluded prosecution in the country where the violations took place? The recent arrest of former Chilean dictator General Augusto Pinochet throws into sharp relief the political, legal, and ethical dilemmas surrounding amnesties for human rights violators. It also illustrates the pivotal role played by human rights groups and individuals in attempting to ensure that amnesty laws do not result in complete impunity for those responsible for egregious crimes.

This essay first reviews basic legal and conceptual issues relating to prosecution of, and grants of amnesty to, those responsible for gross human rights abuses during earlier periods. It then considers the specific situation of El Salvador, where a postwar amnesty following a controversial truth commission report sought to impose forgetting on the country by stopping attempts to uncover the truth and secure justice. El Salvador is considered first because of the impact of its amnesty law, which, of the cases examined here, constitutes the most compre-

hensive and successful action to *end* efforts to address past abuses. The essay then compares the Salvadoran experience with the situation of other Latin American countries where amnesty laws have been enacted. South Africa's novel decision to grant amnesty in exchange for the truth, which drew on the Latin American experiences, is then discussed. In comparing the impact of different amnesty laws, the essay looks at the various contexts in which these laws have been enacted and at the attitude and actions of government officials, the justice system, and civil society. This overview will show that some amnesty laws have been more effective than others in stifling efforts to uncover the truth about past human rights abuses and preventing victims from obtaining any form of reparation.

Amnesties: Ethical and Legal Issues

International law increasingly recognizes a duty to investigate and prosecute violations of protected human rights, such as the right to life.¹ Yet, notwithstanding the growing international consensus that there is a duty to prosecute certain crimes, the perpetrators of human rights violations have generally enjoyed impunity from criminal prosecution. Compromised judiciaries and insufficient resources have contributed to *de facto* incapacity to prosecute and punish grave human rights violations. In addition, most transitional regimes have enacted far-reaching amnesties for those accused of human rights and humanitarian law violations, citing a need to "move beyond" the past, reconcile societal differences, and avoid the lengthy, divisive public trials that prosecutions would entail. In many countries amnesty laws have been enacted to end or preclude prosecutions. In some instances—notably South Africa—the amnesty has been a necessary condition for a peaceful, negotiated transition from an authoritarian to a formally democratic regime. In the case of "pacted" transitions, some form of amnesty has been understood as the price of consolidating a fragile democratic regime.

From the perspective of the victims, however, the argument that substantive or even symbolic redress for their suffering is precluded by the higher national goal of "peace" rings hollow. Questions also remain about the foundation and durability of any peace brought about without adequate measures of account-

¹ D. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* 100 (1991), pp. 2537-615; N. Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York: Clarendon, 1995); N. Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," *California Law Review* 78 (1990), pp. 451-513.

ability. Victims whose injuries are not acknowledged and whose dignity is not fully restored are unlikely to be reintegrated into society.² Accountability through prosecution is one method of reasserting the rule of law over those who have abused power and engaged in serious rights violations.³

Constitutional challenges to amnesty laws have been rejected by the highest courts in El Salvador, Guatemala, Chile, and South Africa. Nevertheless, the Inter-American Commission on Human Rights has consistently held that amnesty laws passed in Latin America violate states' obligations under the American Convention on Human Rights. The commission's interpretation of Article 1(1) of the American Convention places upon states an obligation to investigate all violations that have been committed within their jurisdiction, for the purpose of identifying persons responsible, imposing appropriate punishment on them, and ensuring adequate reparations for the victims.

While the provisions of the amnesty laws reviewed by the commission varied considerably, it nevertheless reached the same conclusion in each case: the laws in question violated the states' obligations to investigate violations of protected rights; in states that permit victims to participate in or initiate criminal proceedings, the amnesties violated the duty of states under Article 8(1) to afford victims a fair trial; and amnesties violated the rights of victims and survivors to adequate compensation and judicial protection.⁴ For example, in 1996 the commission held that the Chilean government's failure to repeal the 1978 military self-amnesty, and its failure to prosecute cases of disappearances, extrajudicial executions, and torture, violated Articles 1(1), 2, 8(1), and 25 of the convention.⁵ The commission acknowledged that Chile's new democratic government had undertaken a number of measures to address past violations, such as establishing a truth commission, officially apologizing to the families of victims, protesting the Chilean Supreme

² Luc Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past," in Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1 (Washington, D.C.: United States Institute of Peace Press, 1995), pp. 337-49.

³ Carlos H. Acuña and Catalina Smulovitz, "Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts," in A. James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997), pp. 93-122.

⁴ See Arts. 1(1) and 25, American Convention on Human Rights, signed November 22, 1969, entry into force July 18, 1978, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.92, doc. 31, rev. 3 (May 3, 1996), pp. 25-53.

⁵ Inter-American Commission on Human Rights, report no. 36/96 (Chile), 95th Sess., OEA/Ser. L/V/II/95 (Oct. 15, 1996), pp. 157-83. On the applicability of the convention to acts committed before the state became a party, see *Genie Lacayo v. Nicaragua* (Inter-American Court on Human Rights, *Decision on Preliminary Objections in a Case of Alleged Arbitrary Killing of a Civilian Car Driver by Members of a Military Convoy*), reprinted in *Human Rights Journal* 16 (1995), pp. 414ff.

Court's decision to continue applying the amnesty law, and providing a range of compensation to families of victims. Nonetheless, the commission found that the "government's recognition of responsibility, its partial investigation of the facts, and its subsequent payment of compensation" were insufficient to meet the state's obligations under the convention, unless the right to justice was also satisfied.⁶

In January 1999 the commission held that El Salvador's 1993 amnesty law violated the state's obligations under the American Convention on Human Rights by not permitting the investigation of crimes committed by state agents, or the identification and sanction of those responsible. The commission noted that El Salvador had violated the right to truth, and that the truth commission's role could not be considered a substitute for judicial proceedings. Furthermore, the commission found that, in addition to violating the American Convention, El Salvador had violated Article 3 of the Geneva Conventions of 1949.

Latin American countries have not embraced the commission's rulings: no amnesty law has been overturned because the commission found it incompatible with the provisions of the American Convention on Human Rights. Argentine courts, however, have relied on the commission's rulings to uphold a "right to truth," even if punishment can no longer be imposed. And cases before the Inter-American Commission have been instrumental in leading states to recognize that reparations must be provided to victims.⁷

While ignoring international law requirements that those responsible for torture, war crimes, and crimes against humanity be prosecuted, the highest judicial authorities in several countries have turned to Additional Protocol II to the Geneva Conventions of 1949, Article 6(5), to uphold amnesty laws. Article 6(5) states:

At the end of hostilities, the authorities in power shall endeavour 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.

Courts invoking article 6(5) in support of the validity of an amnesty law tend to do so in conjunction with various policy reasons favoring amnesty, and without analyzing the intent of this provision of Protocol II. Relying on the *travaux préparatoires* to Protocol II, the International Committee of the Red Cross (ICRC) has concluded that Article 6(5) is inapplicable to amnesties that extinguish penal responsi-

⁶ Chile report, para. 77, citing *Velásquez-Rodríguez* case, Judgment, July 29, 1988, Ser. C, No. 4, para. 174.

⁷ Juan Méndez, afterword to *The Flight: Confessions of an Argentine Dirty Warrior*, by Horacio Verbitsky (New York: The New Press, 1996), pp. 160-79.

bility for persons who have violated international law. In the ICRC's view, the article is limited to the granting of "combatant immunity," that is, amnesty 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."⁸ Interpreting Article 6(5) to justify amnesty for perpetrators of humanitarian law violations also seems to contradict the purpose of Protocol II, which was designed to extend the application of international humanitarian norms to noninternational conflicts.⁹

Case Studies—Amnesties and Their Limits

The scope and implementation of amnesty laws vary significantly from country to country in Latin America. National and international civil society actors (such as churches, human rights nongovernmental organizations [NGOs], and opposition political parties) have played crucial roles in limiting amnesty laws' potential to preclude efforts to uncover the truth about violations and provide reparations, and to confer absolute impunity on perpetrators of grave human rights violations. Individual survivors, organized groups of victims' families, human rights activists, and coalitions of nonstate actors have invoked the emerging international and regional legal norms as a basis for overturning amnesty laws or, at least, circumscribing their application. A consistent theme in applications to prosecute or reopen unresolved cases in Argentina and Chile is an assertion of the right to know the truth through a judicial investigation of the crime, even if this does not ultimately result in the application of a criminal sanction. The following sections briefly examine the historical context of amnesties in El Salvador, Argentina, Chile, Honduras, Guatemala, and South Africa and compare the extent to which amnesty laws have contributed to impunity in each country.

EL SALVADOR: BURYING THE PAST

During 12 years of bitter armed conflict, the Salvadoran armed forces, supported by the United States, battled the insurgent leftist Farabundo Martí Liberation Front (FMLN). Severe political and economic exclusion in El Salvador, unbridled

⁸ Letter to Margaret Popkin from Toni Pfanner, Head of Legal Division, ICRC Headquarters, Geneva, April 15, 1997.

⁹ N. Roht-Arriaza and L. Gibson, "The Developing Jurisprudence on Amnesty," *Human Rights Quarterly* 20 (1998), pp. 847-85, at p. 867.

repression by security forces, and the Sandinistas' 1979 victory in Nicaragua all contributed to strengthening the Salvadoran guerrilla groups. The Salvadoran armed forces carried out massacres and massively displaced campesinos living in rural areas where the guerrillas were active. In urban areas, security forces and clandestine death squads working under their auspices targeted those they perceived to be political opponents. In addition, the FMLN carried out selective assassinations of political opponents. The justice system, whether through complicity or fear, utterly failed to hold perpetrators of human rights violations accountable.

The need to end impunity for the perpetrators and protect human rights was a major topic during the UN-mediated peace negotiations, which culminated in the January 1992 peace accords. The peace accords called for the formation of the Ad Hoc Commission, composed of three respected Salvadorans, to review the records of military officers and recommend the removal or transfer of those implicated in human rights violations or other unprofessional conduct. The commission recommended the removal or transfer of 103 officers, including virtually the entire high command. The government balked at complying fully with these recommendations, suggesting that forcing out the minister of defense and other high-ranking officers could destabilize the peace process. The accords also called for a commission to establish the truth about the worst abuses that had occurred during the war and to promote national reconciliation. This commission carried out its investigations between June and December 1992, and issued its public report in March 1993, several months after the Ad Hoc Commission had made its confidential findings.

Although no agreement regarding amnesty was included in the peace accords, there was an understanding that a broad amnesty would eventually be enacted. A limited amnesty was passed by the legislature in 1992 on the heels of the peace accords. Excepted from its terms were those cases within the mandate of the Truth Commission (although which cases would be addressed by the commission had not yet been determined).

Unlike its predecessors in Chile and Argentina, the Truth Commission in El Salvador was made up entirely of foreigners. The formation of this commission stemmed less from societal demands than from the dynamic of the negotiations between the parties to the conflict. Yet neither of these parties fully represented the interests of victims or their survivors—or of Salvadoran civil society.

The Truth Commission interpreted its mandate as requiring it to name those it could identify as having been responsible for serious acts of violence. Its work was aimed at establishing the truth—and responsibilities—in some of the most notorious cases “whose impact on society urgently demands that the public

should know the truth," creating confidence in the positive changes promoted by the peace process, and assisting in the transition to national reconciliation. The commission's report, issued in March 1993, implicated most of the army's high command in the 1989 killing of six Jesuit priests, their cook, and the cook's daughter. The commission made a series of recommendations in the report, which included removing those named from public office and the military and barring them from future public service; providing compensation to victims and their relatives; establishing a monument bearing the names of all the victims of the conflict; recognizing the good names of the victims and the serious crimes committed against them; instituting a national holiday in memory of the victims of the conflict; and carrying out a number of institutional and legal reforms. Given the sorry state of the judiciary, the report did not recommend that those named be prosecuted.

The Salvadoran government's reaction to the report was swift: a sweeping amnesty law, calling for the extinction of both criminal and civil liability, was passed by the legislative assembly on March 20, 1993, five days after the report was issued. As a result of the law, the few former military men in prison were, with five exceptions, released.¹⁰ The only officers forced to retire from the military were those whom the Ad Hoc Commission had earlier included on its confidential list of military officers to be removed. The political parties rejected the recommendation barring perpetrators identified by the Truth Commission from public office as counter to the constitution and the effort to promote reconciliation by including all former adversaries in the political process.

Human rights groups sought to have the amnesty law declared unconstitutional on a number of grounds, but were quickly rebuffed by the Constitutional Chamber of the Supreme Court, which itself had been harshly criticized by the Truth Commission. The court seemed to view the decision to pass an amnesty law as a political question—a matter of sovereignty outside its jurisdiction—and refused to consider arguments that the scope of the law did not comply with the constitution and relevant international norms. After the Supreme Court's decision, the proposition that the amnesty law precluded judicial investigations was widely accepted. Salvadoran human rights groups were unsuccessful in developing alternative strategies to keep the issue of the amnesty law's constitutionality alive.

¹⁰ Amnesty was not granted to the five former National Guards convicted for the 1980 murders of four American churchwomen. Amnesty was also denied to former FMLN combatants convicted of killing four U.S. marines and nine civilians in the 1985 Zona Rosa attack. The successor Supreme Court's Criminal Chamber ruled that amnesty could not be denied to two former FMLN combatants accused of executing two wounded U.S. military officers after their helicopter was shot down in early 1991: *Guevara Portillo Case, Sala de lo Penal de la Corte Suprema de Justicia, San Salvador, August 16, 1995.*

No serious effort has been undertaken to provide compensation of any kind to victims or their family members. Neither the president who signed the peace accords, Alfredo Cristiani, nor his successor, Armando Calderón Sol, publicly acknowledged state responsibility or proposed any programs to benefit the individuals or communities most affected by human rights violations. The FMLN, which had long called for justice and an end to impunity, abandoned the past in favor of the future. It demobilized and became a political party, focusing its energies on becoming a major political player. The Truth Commission's report had also found some FMLN leaders responsible for serious violations of human rights. Concerned that some of its key leaders could be prosecuted before an unreliable justice system subject to political pressure, the FMLN leadership was ready to move on.

El Salvador's postwar amnesty has not just protected those responsible for violations from prosecution or punishment. It has thus far effectively buried the past. One NGO effort stemming from testimonies to the Truth Commission has succeeded in identifying and locating 98 children taken away or separated from their families during war, often during military operations.¹¹ But aside from these efforts to locate missing children, virtually no advances have been made in uncovering the truth since the March 1993 publication of the Truth Commission report.

Many factors contribute to El Salvador's relative failure to address the past. The issue was entrusted to the negotiating parties, both of whom—though not in equal measure—had reasons to prefer that the whole truth not come out. Because the human rights violations occurred in the context of a full-blown armed conflict, there was perhaps more of a tendency to view them as the inevitable excesses that occur in war—despite the limitations imposed by humanitarian law.

One explanation for the failure to address the past is that most victims of human rights violations in El Salvador were campesinos and workers. Although the more educated and middle-class leadership made a relatively easy transition into political life, the same was not true for other sectors of society with less political clout. The campesinos, who had borne the brunt of the war, found starting over much harder, after losing their homes, their children, and other relatives and returning—or choosing not to return—to villages that were the sites of unspeakable violence and losses. These wounds remain open, in large part because no serious effort has been made to establish consensus about what happened and who was responsible, to recover the dignity of victims, or to provide any form of moral or material reparation to their relatives.

¹¹ Tina Rosenberg, "What Did You Do in the War, Mama?" *New York Times Magazine*, February 7, 1999, pp. 52, 93.

Timing was another problem in El Salvador. The Truth Commission began its work within months of the peace accords and while many of the FMLN's forces remained in camps awaiting demobilization. Ending military impunity was within the mandate of the Ad Hoc and Truth Commissions. It was undeniably necessary to undertake measures to address the past, but years of fear and distrust could not be dissipated overnight.

Many victims and their relatives were not yet ready to speak out. The trauma of the war was too recent, and the practice of holding pain inside and not talking about what had happened too ingrained. Many people did not even make the effort to go before the Truth Commission, because they were not ready, because they did not believe the Truth Commission would do anything, or because wartime leaders failed to inform them about the commission's work. Immersed in the immediate tasks of going through the difficult transformation from war to peace and all the changes this implied in their lives, many people were not yet ready to look backward. Even if the commission had received more testimonies, it was not prepared to investigate each case, as its focus was on establishing responsibilities in a limited universe of illustrative cases. There was no time for mourning, much less for memorials or legal actions.

After several years of discussion about the need to honor the war's civilian victims and provide a physical referent for their relatives, the first stone of a monument was laid in a San Salvador city park in February 1998. The effort was a nongovernmental initiative, which secured the support of San Salvador's mayor, elected on an FMLN ticket. When Prime Minister José María Aznar of Spain visited El Salvador in November 1997, Jesuits at the Central American University suggested that the 1989 Jesuit murders could be taken up by the Spanish courts. Like the victims in the Argentine and Chilean cases, the murdered Jesuits were from Spain. In 1998 human rights groups filed a petition to the new Supreme Court, again challenging the constitutionality of the amnesty law.

In the six years since El Salvador's bitter conflict ended through a negotiated peace, not one of those responsible for an estimated 75,000 civilian deaths has been brought to justice. The perpetrators of brutal crimes walk free, many in positions of power, without fear of prosecution or much concern that their past will interfere with their future prospects. At the same time, thousands of relatives of victims who disappeared or were murdered do not know the full truth about their fates and, in many cases, their whereabouts. They find themselves without official recognition of state responsibility, without any form of reparations, and without the possibility of discovering the fate of their loved ones, much less of bringing those responsible to justice.

The effectiveness of the Salvadoran amnesty in halting efforts to address the past reflects a conscious decision by political and military elites—most of whom were closely allied with one of the parties to the conflict—to impose a “forgetting” on past abuses.¹² In contrast to the elites of other countries, many members of these Salvadoran elites view the amnesty as something positive, and still more consider it necessary. Yet this legislated “forgetting” ignores both the dictates of international law and the rights of survivors and society to seek truth, reparations, and justice.

As the next accounts illustrate, official and civil-society efforts to address past human rights violations have gone much farther in Argentina, Chile, Honduras, and South Africa. Even in Guatemala there are indications that victims may have a greater chance of seeking redress and reparations than their neighbors in El Salvador. Despite the extent of human rights abuses committed in El Salvador during the 1980s, El Salvador lags far behind its neighbors in addressing its past.

ARGENTINA: REFUSING TO FORGET

From 1973 to 1979, the year it declared victory, the Argentine military systematically abducted those it viewed as suspected subversives, torturing them and holding them in clandestine detention before, in most cases, killing them and disposing of their bodies. At least 10,000 and as many as 30,000 Argentines are reported to have disappeared during the “dirty war.” When the discredited and defeated Argentine military turned over the reins of government to an elected democratic government in 1983, it enacted the Law of National Pacification, a self-amnesty intended to protect the military from prosecution for abuses committed during the dirty war.

The new democratically elected government of Raúl Alfonsín was committed to pursuing justice for the victims. Hence, following the return to democracy, the congress annulled the military’s self-amnesty. In 1984 the Alfonsín government formed a national commission to investigate disappearances, the CONADEP, made up of well-respected individuals from across the political spectrum. The investigation’s findings, published as *Nunca Más*, described the apparatus of repression and were turned over to the courts. Ultimately, the federal chamber tried nine junta leaders and convicted five of them. Further attempts at prosecution were halted in 1987 by a “full stop” law (passed December 23, 1986) ending the period in which charges could be brought, followed by a “due obedi-

¹² Ibid.

ence" law (passed June 4, 1987) exempting those who had followed orders from liability for their actions. Military protests had convinced Alfonsín that the price of continuing prosecutions would be too high. His successor, Carlos Menem, pardoned the few military officers still facing charges and, subsequently, those who had been sentenced.

Despite the decision to curtail prosecutions and release those convicted, the issue of the past has not disappeared in Argentina. Argentine civil society has refused to forgive and forget those responsible for disappearances. Attempts to promote officers linked to the dirty war have been met with a public outcry.¹³ Although civil claims against the state were barred by a two-year statute of limitations and claims against individual perpetrators were precluded by the lack of a finding of criminal liability, initially the claims of some 70 former detainees in a case brought before the Inter-American Commission on Human Rights were settled by the Menem government. Subsequently, the congress passed a law providing substantial reparations to some 8,000 persons who had been held under state-of-siege powers. The congress later extended reparations to the families of the disappeared, "acknowledging the wrong committed by the state against them."¹⁴

In 1995 the well-publicized confessions of Captain Alfredo Scilingo of the Argentine navy, who described how many of the abducted were drugged and dropped alive from airplanes into the sea, opened a new discussion about the fate of the disappeared.¹⁵ In April 1995 General Martín Balza, chief of the Argentine army, apologized to the nation for the military's crimes during the dirty war. Human rights groups in Argentina and relatives of victims attempted to convince the Argentine courts to investigate the fate of the disappeared, even if no punishment could be imposed. They based their petitions on the right of relatives to know what had happened to their loved ones and to mourn them. In its initial decision, a majority of the federal chamber recognized the right to know the truth and the right of relatives to mourn their dead. In a subsequent ruling relating to a similar petition, the same court found that the state had an unquestionable obligation to use legal means to reconstruct the past in order to discover the facts and thereby give a response to family members and to society.¹⁶ In 1998 the Supreme Court issued a ruling finding that further investigations in the second

¹³ See Méndez, afterword to *The Flight*, pp. 160-79.

¹⁴ *Ibid.*, p. 166.

¹⁵ Scilingo's account was published in Horacio Verbitsky, *El Vuelo* (Buenos Aires: Planeta, 1995), published in English as *The Flight: Confessions of an Argentine Dirty Warrior* (New York: The New Press, 1996).

¹⁶ For a discussion of these cases, see Martín Abregú, "La tutela judicial del derecho a la verdad en la Argentina," *Revista IIDH* 24 (1996), pp. 11-49.

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case were barred by the 1986 and 1987 exculpatory laws,¹⁷ but this decision has not stopped judicial efforts to investigate other cases.

Cases have also been brought outside Argentina. In both Italy and France, criminal proceedings were initiated against Argentine officers for crimes committed against victims who were nationals of those countries. Suing under the Alien Tort Claims Act, Argentine survivors living in the United States won substantial default judgments in U.S. district court against General Carlos Guillermo Suárez Mason in 1987, but have been unable to enforce the judgments. In 1996 Spanish judge Baltasar Garzón initiated criminal proceedings in Spain regarding the disappearance of Spanish citizens during Argentina's dirty war. In October 1997 Captain Scilingo, called as a witness in the Spanish proceedings, admitted his own involvement in several of these cases and provided detailed information, including names of many of those involved. President Menem objected that the Spanish criminal proceedings infringed on Argentine sovereignty and ignored the amnesty laws. Other Argentines see the Spanish proceedings as an avenue to continue the search for truth and justice that was foreclosed in Argentina. The Spanish proceedings have encouraged members of the military to testify and have provided impetus to Argentine efforts to force official investigations.

Spanish and Argentine courts have also begun to investigate the Argentine military's illicit enrichment through confiscation of property belonging to the disappeared, including recently discovered Swiss bank accounts. In January 1998, former navy captain Alfredo Astiz was detained and expelled from the navy after publicly justifying the military's methods. In February 1998, General Balza harshly criticized the actions of the military during the dirty war, noting that the illegal and ghastly procedures employed did not even allow families to bury their dead. He called for those with knowledge to reveal the truth about what happened, noting that it is just as immoral to say "I knew nothing" today as it was to say "there must be a reason for it" when the abductions and torture were taking place. He also rejected the notion of blind obedience to orders.¹⁸

On March 24, 1998, the anniversary of the military coup, the chamber of deputies voted to derogate the two exculpatory laws. By derogating, and not annulling, the law, the legislators took a symbolic action that was not intended to have retroactive effect. Unlike annulment, derogation simply removes these laws

¹⁷ See Francesco Relea, "La Corte Suprema argentina cierra la puerta a las investigaciones sobre los desaparecidos," *El País*, August 15, 1998. <http://www.elpais.es/p/d/19980815/internac/baires.htm>.

¹⁸ "El jefe del Ejército argentino reconoce los crímenes de la dictadura," *El País*, February 13, 1998. <http://www.elpais.es/p/d/19980213/internac/argem.htm>.

from the books but does not undo the effects of their prior application, which stopped prosecutions beginning in 1987.

Criminal charges have recently been brought against former military leaders for crimes not covered by the exculpatory laws. In June 1998 a federal judge in Argentina, investigating complaints brought by the Grandmothers of the Plaza de Mayo about children born in a clandestine detention between 1976 and 1977, ordered the arrest of former general Jorge Rafael Videla, who headed the military junta installed after the 1976 coup d'état. Videla was charged with having ultimate responsibility for the theft and concealment of minor children and the falsification of public documents.¹⁹ Other ranking officers have since been charged.

The exculpatory laws ended the possibility of Argentine prosecutions of the military for torture, murders, and disappearances. However, they did not preclude further efforts to establish the truth about what happened, obtain reparations, or prosecute military officers outside the country—or in Argentina itself—for crimes not covered by the exculpatory laws. The persistence of Argentine survivors and human rights NGOs and the willingness of some courts to take a restrictive view of the scope of the exculpatory laws have kept the issue of the past alive.

CHILE: DEALING WITH PINOCHET

The October 1998 arrest of former Chilean dictator General Augusto Pinochet in London has focused attention on Chile's transition from military dictatorship to democratic rule. The dramatic legal developments in the case and its international political implications have overshadowed the historical context of Chile's transition to democracy. After a September 11, 1973, military coup overthrew the democratically elected socialist government of Salvador Allende, Pinochet, whom Allende had appointed to head the army, became Chile's ruler. Under Pinochet's leadership, those who opposed—or were thought to oppose—military rule were systematically abducted, tortured, and secretly executed or made to disappear. In 1978, the military enacted an amnesty for itself, which covered the worst period of repression (from 1973 to 1978), when a state of siege was in effect.

In March 1990, Pinochet turned over the presidency to his democratically elected successor, Patricio Aylwin, after losing a 1988 plebiscite. Pinochet

¹⁹ "La justicia argentina busca a los culpables de cerca de 200 secuestros de niños en la dictadura," *El País*, June 11, 1998. [Http://www.elpais.es/p/d/19980611/internac/argent.htm](http://www.elpais.es/p/d/19980611/internac/argent.htm).

remained as commander in chief of the army until March 10, 1998, and, through constitutional provisions enacted under military rule, retained significant control over the Supreme Court and the legislature. A 1978 amnesty remained in effect, but no amnesty was enacted to cover human rights violations committed after March 10, 1978.

From the outset, President Aylwin called for "full disclosure of the truth, and justice to the extent possible." Aylwin appointed a national truth and reconciliation commission, known as the Rettig Commission, to look into cases of disappearances and torture leading to death between September 11, 1973, and March 11, 1990. The commission's mandate excluded naming those found to be responsible. The Rettig Commission heard accounts from the relatives of victims and collected other evidence to try to determine the fate of the disappeared and recommend appropriate compensation for their survivors. Following completion of the commission's work, a foundation was formed to continue its investigations. When the commission's report was issued, President Aylwin apologized to the nation for the actions of state agents.

President Aylwin urged the courts, despite the amnesty law, to investigate cases to determine the facts and who was responsible. Some courts have summoned members of the military to give testimony that would help to determine the fate of individuals who disappeared. Despite varying interpretations of the law and invocation of the amnesty at different stages of court proceedings,²⁰ a few cases have proceeded through the courts and a few military officers are currently in prison, most notably retired general Manuel Contreras and Brigadier Pedro Espinoza, who were convicted and sentenced to prison in 1995 for the 1976 murders in Washington, D.C., of Orlando Letelier, Allende's foreign minister, and his assistant, Ronni Moffitt. This crime had been specifically exempted from the 1978 amnesty law.

Chilean and Spanish NGOs initiated legal action against Pinochet in Spain in 1996, alleging his responsibility for the murder and disappearance of Spanish citizens and their relatives in Chile. The Spanish court opened a formal investigation into these crimes, as well as charges of genocide, terrorism, and crimes against humanity. The action was eventually joined with those pending against Argentine military personnel. An international warrant for General Pinochet's arrest was issued in October 1998, and he was detained on a visit to London pursuant to the United Kingdom's Extradition Act of 1989. Although the British Court of Appeal ruled unanimously that Pinochet's posi-

²⁰ See Jorge Correa Sutil, "No Victorious Army Has Ever Been Prosecuted . . .": The Unsettled Story of Transitional Justice in Chile," in McAdams, ed., *Transitional Justice*, pp. 123-54.

tion as head of state during the period in which the crimes were committed entitled him to immunity under the State Immunity Act of 1978, this decision was overruled by a 3-to-2 majority of the House of Lords. The Law Lords ruled that the State Immunity Act extended immunity only to acts performed in exercise of functions that international law recognizes as those of a head of state. The emergence of international norms criminalizing torture, terrorism, and genocide meant that such acts could not be considered legal functions of a head of state, and hence, immunity could not attach to them. The decision was subsequently annulled because one of the majority judges had served as a charity director of Amnesty International, which had intervened in the case as an *amicus curiae*. The substantive issues were reheard in January 1999 by a different panel of Law Lords.

Whether or not Pinochet is ultimately extradited to stand trial in Spain, his arrest has already had repercussions throughout the world. NGOs, particularly the Salvador Allende Foundation and Spain's Progressive Association of Prosecutors, played a critical role in initiating the action in Spain and in supporting the extradition effort in the United Kingdom. Amnesty International was an intervener in the first House of Lords hearing, and has been granted leave to appear in the new hearing. Human Rights Watch has received permission to present written arguments to the House of Lords in the new hearing.²¹ Through the use of creative legal strategies to demand compliance with international standards, domestic and international NGOs have given unprecedented credibility to the threat of prosecution under international criminal law.

The polarized response of left and right in Chile to Pinochet's arrest may indicate the extent to which the eight-year period after Pinochet's rule has left many wounds unhealed and the question of justice unresolved. Pinochet's arrest came at the end of a year in which there was renewed debate within Chile about his responsibility for the crimes committed during the dictatorship. Prior to his arrest in London and in response to petitions from victims' relatives, Chilean courts had initiated both criminal and civil proceedings against Pinochet for assassinations and disappearances that took place under his rule. These cases, should they proceed, would be unlikely to result in any punishment. In September 1998 the Chilean Supreme Court for the first time revoked a military court's grant of amnesty and ordered the reopening of a case involving a 1974 disappearance. The

²¹ "Chile Allowed to Participate in Pinochet Hearing," CNN, January 13, 1999.

Supreme Court relied on the Geneva Conventions, citing the governing military junta's September 1973 statement that the country was at war.²² Under Chilean law this decision does not constitute a precedent; two subsequent Supreme Court decisions accepted the application of the amnesty.²³ In its attempt to dissuade the British government from extraditing Pinochet to Spain, the Chilean government tried to convince the international community that Pinochet would be put on trial were he allowed to return to Chile. No steps have been taken, however, to limit the effect of the 1978 amnesty. The Chilean government's main arguments were that the European legal initiatives violated Chile's sovereignty and threatened to destabilize its transition process.

By enacting constitutional provisions while in power, General Pinochet was able to retain more control over the transition process than other former military rulers in the hemisphere. The military's 1978 self-amnesty remains in effect, even if it has not completely barred judicial investigations. Chile's Rettig Commission was able to document the fate of many of the military regime's victims, but it did not reveal the truth about those responsible. Successive democratic governments, voicing concerns about maintaining the stability of the transition process, have been unwilling to annul the 1978 amnesty law or invoke Chile's international law obligations to find ways to prosecute those responsible for crimes against humanity despite the amnesty law. The Spanish judicial proceedings indicate that the international community is not bound by a self-amnesty that violates international law.

HONDURAS: REQUIRING A FULL INVESTIGATION

Unlike its neighbors, Honduras did not experience a lengthy armed conflict. Nonetheless, U.S.-trained security forces bent on quashing any potential subversion carried out forced disappearances. Honduras passed broad amnesty laws in 1987, 1990, and 1991, applicable to all persons sentenced, tried, or subject to being tried for political and related common crimes. Although no peace accords were negotiated in Honduras—and there was no representative insurgency to negotiate them—it, too, has undergone a process of

²² "El fallo con que la Corte Suprema de Chile rechazó la aplicación de la ley de amnistía de 1978 a caso de desaparición forzada fue calificado, 25 años después del golpe de Estado de 1973, de precedente histórico," Inter-Press Service, September 13, 1998.

²³ Human Rights Watch, "Pinochet in Chile: Guaranteed Impunity" (December 1998).

democratization that has included police and judicial reform as well as efforts to come to terms with past human rights abuses.

In 1994 the Honduran commissioner for human rights, Leo Valladares, published a report on his investigation of 184 disappearances during the 1980s.²⁴ This report called on the relevant Honduran institutions to fulfill their duties to uncover the truth and prosecute those responsible. The Honduran human rights prosecutor's office initiated proceedings against several military officers. On January 18, 1996, the Supreme Court of Honduras ruled that the amnesty petition filed on behalf of nine military officials accused of abducting (and subsequently releasing) six students in 1982 could not be decided until the investigative stage of the proceedings had concluded. Thus, Honduran trial courts must carry out a full investigation of the facts of the case before they may determine whether the crime fits the requirements of the amnesty law. The Supreme Court emphasized that lower courts were not to "send to oblivion through amnesty human conduct that merits an investigative treatment appropriate to common crime."

Two years after the Supreme Court's decision, the trial court examined the facts of the case and ruled and granted amnesty to the defendants. This ruling is now being appealed. Faced with calls for the military to ask for pardon from the Honduran populace and from the relatives of victims, the Honduran army has chosen to justify its actions as having been part of "state policy."²⁵

Unlike the other Latin American cases reviewed here, Honduran efforts to establish the truth about human rights violations during the 1980s have been spearheaded by Honduran officials: the commissioner for human rights and the public prosecutor's office. Judicial efforts to determine the truth benefited, at least temporarily, from a Supreme Court interpretation of the amnesty law that required a judicial investigation before determining whether amnesty could be granted. Nonetheless, efforts to uncover the truth have advanced slowly, and a recent appellate court decision favors a broad application of the 1991 amnesty to members of the military accused of human rights violations during the 1980s.

²⁴ See Comisionado Nacional de Protección de los Derechos Humanos, *Los Hechos Hablan por Si Mismos* (Tegucigalpa, Honduras: Ed. Guaymuras, 1994), translated into English as *Honduras: The Facts Speak for Themselves* (New York: Human Rights Watch/Americas and Center for Justice and International Law, 1994).

²⁵ "El Ejército hondureño justifica la represión como 'política de Estado,'" *El País*, February 25, 1998. <http://www.elpais/p/d/19980225/internac/hondu.htm>.

GUATEMALA: LIMITING AMNESTY

In Guatemala, the military and human rights groups closely observed the Salvadoran Truth Commission. The Guatemalan military, which considered itself to have been victorious in the 36-year armed conflict between the Guatemalan government and the Guatemalan National Revolutionary Unity (URNG) guerrillas, was not about to suffer the indignity of having a truth commission assign individual responsibility for human rights abuses. Guatemalan human rights NGOs and relatives of victims became deeply concerned that the parties to the peace negotiations would agree to a sweeping amnesty law. They formed the Alliance against Impunity and lobbied against an amnesty for the military. In December 1996, just prior to the signing of the final peace accord, the parties agreed to amnesty provisions that were subsequently enacted by the Guatemalan Congress, with minor modifications. The National Reconciliation Law (NRL) provided that Guatemalan courts would rule on individual applications for amnesty for political crimes or common crimes related to the armed conflict. Amnesty was not to be granted to those responsible for torture, genocide, or disappearances, nor for crimes unrelated to the armed conflict.²⁶ Despite serious concerns that Guatemalan judges would simply grant amnesty to members of the military, amnesty has not, to date, been granted for any military crimes.

The Guatemalan National Reconciliation Law represents an advance over its predecessors in Latin America, with its explicit recognition that international law does not permit amnesty for all crimes. But unfortunately, the Guatemalan justice system remains highly unreliable. While amnesty may not be granted in many cases, there is no assurance that perpetrators will be tried and convicted.

During the Guatemalan peace negotiations, the parties agreed to the formation of the Historical Clarification Commission, which would examine the abuses that took place during the armed conflict without "individualizing responsibilities." The Historical Clarification Commission's report was released in February 1999.

Human rights groups criticized the agreement to form this commission as weak and inadequate to deal with the 36-year period of the armed conflict and the scale of violations that took place in Guatemala. Although the

²⁶ For a description of this law, challenges to it, and its early application, see M. Popkin, "Guatemala's national reconciliation law: combatting impunity or continuing it?" *Revista IIDH* 24 (1997), p. 173.

Clarification Commission agreement was negotiated between the URNG guerrillas and the Guatemalan government, different groups in Guatemalan civil society made it clear that they were not going to entrust the issue of the past to the commission. In 1995 the Guatemalan Catholic Church began its own project for the Recovery of Historical Memory (REMHI), training hundreds of lay workers to go out and take testimonies in local indigenous languages. With training and support from the Argentine Forensic Anthropology Team, a Guatemalan forensic anthropology team formed and began carrying out exhumations of massacre sites. On April 24, 1998, the REMHI project presented its report at a public ceremony in Guatemala City's cathedral. Two days later Bishop Juan Gerardi, who was responsible for the REMHI report and spoke at its presentation, was brutally murdered. Although this crime remains under investigation, it has been understood as a violent response to the report and a sign that powerful forces oppose efforts to establish the truth about Guatemala's past.

The Clarification Commission released its report at an emotional ceremony in Guatemala City on February 25, 1999. The report highlighted institutional responsibility for abuses, primarily by the Guatemalan state and armed forces, but also by the guerrillas and outside actors, including the United States. The commission's report estimated that at least 200,000 people were killed or made to disappear during the armed conflict. State forces were found responsible for 93 percent of the violations documented, including 626 massacres, while guerrilla forces were held responsible for 3 percent of violations and 32 massacres. The report found that the violence was "fundamentally directed by the state against the excluded, the poor, and above all, the Mayan people, as well as against those who fought for justice and greater social equity." The commission found that during a particular time period (1981 to 1983) and in four specific geographic areas, state agents committed "acts of genocide against groups of Mayan people." The commission cited Guatemala's obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, "which specifies that those who have committed genocide, whether they be heads of state, public officials or private individuals, be judged by the competent courts of the State where the act was committed."²⁷

In its recommendations, the commission called on the government and the judiciary, in collaboration with civil society, to initiate promptly investigations about all known forced disappearances. It further called for a national commission

²⁷ "Guatemala Memory of Silence, Report of the Commission for Historical Clarification, Conclusion and Recommendations" (February 1999), p. 41.

to search for children who were disappeared, illegally adopted, or separated from their families; an active policy of exhumation, as locating clandestine and hidden cemeteries is "in itself an act of justice and reparation"; individual and collective reparations for victims; and compliance with the National Reconciliation Law through prosecutions, trials, and punishment for those crimes not eligible for amnesty: "genocide, torture and forced disappearance, as well as those crimes not subject to prescription or that do not allow the extinction of criminal liability, in accordance with domestic law or international treaties ratified by Guatemala."²⁸

The Guatemalan government has not embraced any of the recommendations that were not already set forth in the peace accords. Still, the explicit limitations in Guatemala's National Reconciliation Law and the Clarification Commission's powerful conclusions and carefully crafted recommendations argue strongly against a blanket amnesty. In contrast to the other cases examined here, the Clarification Commission's conclusions and recommendations citing the Genocide Convention and the exceptions to the amnesty provisions of the NRL are based on provisions of international law. Despite these important advances, which owe much to the efforts of Guatemalan human rights NGOs, the pursuit of justice in Guatemala still depends on the initiative of victims and NGOs and faces the obstacle of a highly unreliable justice system.

SOUTH AFRICA: EXCHANGING AMNESTY FOR TRUTH

The South African transition process represents the most comprehensive effort to date to address gross human rights violations of the past as part of a reconciliation process. South Africa's interim constitution, drafted in 1993 as part of the negotiated political transition from apartheid to majority rule, specifically called for an amnesty: "In order to advance . . . reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past."²⁹ South Africans maintain that the apartheid-era leaders would not have agreed to the transition without an amnesty provision. Following the 1994 elections, the new minister of justice, Dullah Omar, moved to propose legislation that would establish the mechanisms and criteria for granting amnesty. Human rights NGOs and the new justice minister were firmly convinced that the interests of perpetrators could not be protected without

²⁸ *Ibid.*, p. 58.

²⁹ *South African Interim Constitution*, epilogue.

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simultaneously addressing the rights of victims to know the truth and obtain reparations. Following lengthy discussions and debate, in 1995 the parliament passed the Promotion of National Unity and Reconciliation Act, which called for the creation of a truth and reconciliation commission that would take a novel approach to the issue of amnesty. To be eligible for amnesty, perpetrators would need to make "full disclosure of all the relevant facts relating to [human rights violations] associated with a political objective." The innovative requirement that those seeking amnesty had to make full disclosure essentially permitted the exchange of amnesty for truth. The choice, according to the Truth and Reconciliation Commission (TRC), was not amnesty or prosecution but "qualified amnesty" or "blanket amnesty."

In 1996, South Africa's new constitutional court rejected a challenge to the constitutionality of the Truth and Reconciliation Act's amnesty provisions,³⁰ holding that international law was relevant to the interpretation of the South African constitution but did not form part of the domestic law unless enacted by the national legislature. Thus, the new legislature was entitled under the interim constitution to pass laws that were inconsistent with customary international law, or with international agreements entered into before the interim constitution came into effect. In other words, even if the amnesty arrangements were not entirely compatible with international law, they could be considered constitutional if the international law requirement at issue had not been specifically enacted into South African law. The court noted that, although victims could no longer pursue civil claims against those granted amnesty, they would be entitled to reparations pursuant to the recommendations of the TRC.

As of June 1998, the TRC's Amnesty Committee had received 7,060 applications for amnesty. Of these applicants, 4,510 had been refused amnesty administratively, most often because the crime for which they were seeking amnesty did not involve a political objective. As of December 9, 1998, 216 amnesty applications had been granted. The committee recently denied the amnesty applications of the police officers responsible for the death of Steve Biko because the killing was not associated with a political objective and was disproportionate to the purported objectives of the applicants. Moreover, the applicants had not fully disclosed the truth about what happened to Biko; their version was "so improbable and contradictory that it had to be rejected as false."³¹ Overwhelmed by the num-

³⁰ *AZAPO v. President of the Republic of South Africa*, CCT 17/96, at 29 (July 29, 1996).

³¹ "Amnesty Decision on Death of Steve Biko" (press release issued by Truth and Reconciliation Commission, South Africa, February 16, 1999). [Http://www.truth.org.za/pr/p990216a.htm](http://www.truth.org.za/pr/p990216a.htm).

ber of applications, the Amnesty Committee was expanded from its original five members to nineteen. Although the TRC report was issued in October 1998, the Amnesty Committee continues to process applications and is expected to complete its work during the first half of 1999.

Barring further legislation, South Africa's amnesty is actually more limited than is generally understood. Amnesty is in no case automatic, but requires an application before September 30, 1997. Applicants then had to meet the burden of showing that their act, omission, or offense was associated with a political objective and providing full disclosure. In its recommendations, the commission stated that in cases where evidence exists that individuals committed gross human rights violations and did not seek amnesty, or were denied amnesty, "prosecution should be considered." The TRC suggested that a time limit might be imposed on such prosecutions but insisted that "to avoid a culture of impunity and to entrench the rule of law," granting a "general amnesty in whatever guise should be resisted."³²

History strongly suggests that most perpetrators do not voluntarily choose to reveal their dirty deeds publicly. In South Africa, those involved in apartheid-era crimes have come forward with information not because they were granted amnesty, but because they hoped their revelations would earn them the protection of amnesty under the Truth and Reconciliation Act. Still, had there not been at least some credible risk of prosecution in South Africa, the Truth and Reconciliation Commission would not have heard from most of the thousands of amnesty applicants who have come forward, many of whom were already jailed or facing prosecution.

South Africa's "qualified" amnesty unquestionably led perpetrators to disclose substantial information about their deeds and methodology—something rarely revealed in other contexts. Moreover, the TRC frequently televised amnesty hearings that included perpetrators' admissions of responsibility, as well as testimony from their victims or relatives, thereby contributing to the creation of a "public memory" of past human rights abuses. The social impact of the testimony presented at these public hearings is considered by many as the most important accomplishment of the TRC, and will long be felt throughout South African society. As Aryeh Neier puts it, "Elsewhere, amnesties granted to all without the requirement of individual disclosure impeded the discovery of truth; in South Africa, the process encouraged truth and served to shame the perpetrators."³³

³² Truth and Reconciliation Commission, *Final Report*, October 29, 1998, vol. 5, chap. 8, p. 309.

³³ Aryeh Neier, *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice* (New York: Times Books, 1998), p. 105.

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Conclusion

All societies with a history of gross human rights abuses must face the tension between the pursuit of justice and the threat of destabilization by those who would be brought to justice. As the case studies examined in this article suggest, the plea for "reconciliation" and a "forward-looking attitude" often becomes the justification for impunity and enforced amnesia. In Latin America, amnesty laws have attempted to compel citizens to forgive and forget. But neither forgiving nor forgetting can be legislatively mandated. In most of the countries discussed above, important sectors of civil society have refused to forget, and have insisted that forgiving must be preceded by disclosure of the truth. They have creatively invoked international and domestic laws to challenge the validity and limit the application of amnesties. The Latin American experience demonstrates that the grievances of those who have suffered grave injustices cannot be hastily buried. Although fraught with difficulties, the efforts of human rights groups to limit amnesty laws have helped to produce an uneven (and at times contradictory) jurisprudence in which a few domestic Latin American courts have tentatively recognized a right of victims and society as a whole to know the truth, including the identity of perpetrators.³⁴ The Spanish prosecutions of officials responsible for crimes against humanity in Argentina and Chile, which made headlines with the arrest of General Pinochet in London, have opened unprecedented possibilities for prosecutions to hold accountable perpetrators who have enjoyed immunity.

The South African transitional process has given substance to the "right to truth" by making truth-telling a precondition for, rather than an exception to, the protection of amnesty. Thus far, even when Latin American courts have recognized a right to truth, their decisions have not led to the discovery of what really happened to the disappeared. With few exceptions, most notably Captain Scilingo in Argentina, perpetrators have not volunteered information. Outside South Africa, they have had little incentive to reveal what they know. Military leaders have rarely provided records that might implicate their predecessors.

This reality does not mean that attempts to open or reopen cases, or to reverse or limit the application of amnesty laws, are futile endeavors. Albeit incrementally, they contribute to the struggle to make the truth known for victims and

³⁴ See generally Roht-Arriaza and Gibson, "The Developing Jurisprudence on Amnesty."

survivors, and for society as a whole. Like a genuine reconciliation process, these are long-term struggles that last far beyond the immediate period of a transition to democratic rule or the end of a bitter civil conflict.

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