No. 06-6234

In the
United States Court of Appeals
for the Sixth Circuit

JOSE OSCAR CHAVEZ; *et al.*,
Plaintiffs-Appellees,

v.

NICOLAS CARRANZA,
Defendant-Appellant.

On Appeal from the United States District Court for the Western District of Tennessee at Memphis

BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE
(*Amici* are listed inside)

NAOMI ROHT-ARRIAZA
PROFESSOR OF LAW
UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW
200 MCALLISTER ST.
SAN FRANCISCO, CA 94102
(415) 565-4629

Counsel for Amici

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

AMICI CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

M. Cherif Bassiouni is Distinguished Research Professor of Law and President Emeritus, International Human Rights Law Institute, at DePaul University College of Law; President of the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, as well as the Honorary President of the International Association of Penal Law;
Christopher L. Blakesley is Cobeaga Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas;
Bartram S. Brown is Professor of Law and Co-Director of the Program in International and Comparative Law at the Chicago-Kent College of Law, at the Illinois Institute of Technology;
John Cerone is Professor of law and Director, Center for International Law & Policy, New England School of Law;
Christina Cerna is Adjunct Professor of International Human Rights at Georgetown University Law School;
Roger S. Clark is Board of Governors Professor, Rutgers University School of Law, Camden, New Jersey;
Connie de la Vega is Professor of Law and Director, International Human Rights Clinic, University of San Francisco;
Ariel Dulitzky is Visiting Professor of Law and Latin American Studies & Associate Director, Bernard and Audre Rapoport Center for Human Rights and Justice, University of Texas School of Law;
Karen Engle is Professor of Law at the University of Texas School of Law;
Valerie Epps is Professor of Law and Director of the International Law Concentration, Suffolk University Law School, Boston, MA and Vice President and Co-Director of Studies, International Law Association (American Branch);
Stephanie Farrior is Professor of Law and Director of the Center for Applied Human Rights Research at Pennsylvania State University's Dickinson School of Law;
Martin Flaherty is Professor of Law and Director, Leitner Center for International Law and Justice, Fordham University School of Law;
Robert Goldman is Professor of Law & Louis C. James Scholar, American University Washington college of Law;

(continued on next page)

(*Amici* continued)

David Luban is University Professor and Professor of Law and Philosophy, Georgetown University Law Center;
Jennifer Martinez is Associate Professor of Law and Justin M. Roach, Jr. Faculty Scholar at Stanford Law School;
Juan Méndez is the President of the International Center for Transitional Justice, an organization that assists countries pursuing accountability for past mass atrocity or human rights abuse all over the world. He is a past President of the Inter-American Commission for Human Rights and former Professor of Law and Director, Center for Civil and Human Rights, Notre Dame University;
Julie Mertus is professor and co-director of the program in Ethics, Peace and Global Affairs, American University, Washington, DC.;
Jennifer Moore is Professor of Law, University of New Mexico School of Law;
James Nafziger is Thomas B. Stoel Professor of Law and Director of International Legal Programs, Willamette University Law School;
Ved Nanda is Professor of Law, University of Denver School of Law;
Jordan J. Paust is Mike and Teresa Baker Law Center Professor, University of Houston Law Center;
Naomi Roht-Arriaza is Professor of Law, University of California, Hastings College of the Law;
Leila Nadya Sadat is Henry H. Oberschelp Professor of Law and Director, Whitney R. Harris World Law Institute, Washington University School of Law;
Charles Siegal is a partner at Munger, Tolles and Olsen and President, American Branch, International Law Association;
Ronald C. Slye is associate professor and director of international and comparative law programs at Seattle University School of Law. He is also Honorary Professor of the University of Witwatersrand School of Law in South Africa;
Jon M. Van Dyke is Professor of Law at the William S. Richardson School of Law, University of Hawaii at Manoa;
Beth Van Schaack is Assistant Professor of Law, Santa Clara University School of Law.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Amici Curiae make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

   NO.

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   NO.

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

Naomi Rohr-Arriaza/mee
(Signature of counsel)

May 14, 2008
Date

TABLE OF CONTENTS

Page

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION 1

ARGUMENT 5

I. COMITY AND INTERNATIONAL LAW 5

II. THE SIXTH CIRCUIT COURT OF APPEALS SHOULD NOT GIVE EXTRA-TERRITORIAL EFFECT TO THE PATENTLY ILLEGAL SALVADORAN AMNESTY 8

A. The Inter-American Court of Human Rights Declared El Salvador's Amnesty to Contravene the State's Treaty Obligations 8

B. The Inter-American Commission has Denounced El Salvador's Amnesty 10

C. The Salvadoran Supreme Court Declared Articles of the Salvadoran Amnesty Unconstitutional 14

D. Other International Human Rights Treaty Bodies have Denounced El Salvador's Amnesty as Inconsistent with its Treaty Obligations 15

III. BLANKET AMNESTIES CONTRAVENE INTERNATIONAL LAW BY PREVENTING THE PROSECUTION OF SERIOUS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW 17

A. International Treaties Require Prosecution of Certain Human Rights Violations 17

B. International Criminal Tribunals have Found Amnesties to be Unlawful and Therefore have not Applied Amnesties Extra-territorially 19

C. The Inter-American System has Found Similar Amnesties to be Illegal, and States have then Limited or Annulled Them 22

D. Other Regional Bodies Also Disfavor Amnesties 23

E. The United Nations has Consistently taken the Position that Amnesties for Serious Violations of Human Rights are Illegal Under International Law and need not be Given Effect 24

IV. BLANKET AMNESTIES ARE IMPERMISSIBLE EVEN IN THE WAKE OF CIVIL WAR OR CONFLICT 27

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

CASES

Almonacid-Arrellano et al v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006) 22, 23

Argentine and Chilean cases, Spanish Audiencia Nacional (Pleno), Nov. 5 1998 27

Assenov et al. v. Bulgaria, 1998-VIII Eur. Ct. H.R. 652 24

Aydin v. Turkey, 1997-VI Eur. Ct. H.R. 1866 24

Bautista de Arellana v. Colombia, No. 563/1993, Oct. 27, 1995 19

Blake v. Guatemala, 1996 Inter-Am. Ct. H.R. (ser. C) No. 27 (July 2, 1996) 9

Bulacio v. Argentina, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100 (Sept. 18, 2003) 23

Cases 24-97 and 21-98, Constitutional Chamber, Supreme Court, Sept. 26, 2000 15

El Mozote Massacre v. El Salvador, Case 10.720, Report No. 24/06, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2006) 13

Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002) 20

Hartford Fire Ins. Co. v. Cal., 509 U.S. 764 (1993) 6

Hilton v. Guyot, 159 U.S. 113 (1895) 5, 6

Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007) 28

Kurt v. Turkey, 1998-III Eur. Ct. H.R. 1142 24

Lucio Parada Cea et al. v. El Salvador, Case 10.480, Report No. 1/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 (1998) 14

Masacre Las Hojas v. El Salvador, Case 10.287, Report No. 26/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 (1993) 12

Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador, Case 11.481, Inter-Am. C.H.R. Report No. 37/00, OEA/Ser.L/V/II.106, doc. 3, rev. (1999) 11, 12, 13

Musayeva et al. v. Russia, Judgment, European Court of Human Rights (26 July 2007) 24

O.N.E. Shipping Ltd. v. Flota Mercante Grancolumbiana S.A., 830 F.2d 449 (2d Cir. 1987) 7

Ould Dah case, French Court of Cassation Oct. 23, 2002 27

Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgement, 10 December 1998 20

Prosecutor v. Kondewa, Case No. SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, Separate Opinion of Justice Robertson (25 May 2004) 27

Prosecutor v. Morris Kallon, Brima Bazzy Kamara, Case No. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004) 21

Serrano-Cruz Sisters v. El Salvador, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 218 (Mar. 1, 2005) 8, 9

Societe Nationale Industrielle Aerospatiale et al. v. U.S. Dist. Ct. for the S.D. of Iowa, 482 U.S. 522 (1987) 7

Taveras v. Taveraz, 477 F.3d 767 (6th Cir. 2007) 5

Timberland Lumber Co. v. Bank of Am. Nat'l Trust and Sav. Ass'n, 749 F.2d 1378 (9th Cir. 1984) 7

Yasa v. Turkey, 1998-VI Eur. H.R. Rep. 408 (1998) 24

Zimbabwe Human Rights NGO Forum v. Zimbabwe, Comm. 245/2002, Annex III. 21st Annual Activity Report, EX.CL/322 (X) 24

STATUTES

Justice and Peace Law, Law 975/2005, 27 June 2005 28

Law of National Reconciliation, Decree 145/1996, 27 Dec. 1996 28

Legislative Decree No. 486, General Amnesty Act to Consolidate Peace, art. 4, 318 Diario Oficial (22 Mar. 1993) 4

OTHER AUTHORITIES

Commission on Historical Clarification, Guatemala: Memory of Silence (1999) 28

Committee Against Torture, Conclusions and Recommendations: Bahrain 18

Committee Against Torture, Conclusions and Recommendations: Chile, CAT/C/CR/32/5 (CAT, 2004) 18

Committee Against Torture, Conclusions and Recommendations: Colombia, CAT/C/CR/31/1 (CAT, 2004) 18

Committee Against Torture, Conclusions and Recommendations: Croatia CAT/C/CR/32/3 (CAT, 2004) 18

Committee Against Torture, Conclusions and Recommendations: Guatemala, CAT/C/GTM/CO/4 (CAT, 2006) 18

Committee Against Torture, Summary Record of the First Part (Public)* of the 429th Meeting: El Salvador, Netherlands, CAT/C/SR.429 (Summary Record) (May 19, 2000) 17

Concluding Observations of the Human Rights Committee, Congo, U.N. Doc. CCPR/C/79/Add.118 (2000) 19

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 ..... 16, 17

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 17

Diane Orentlicher, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, E/CN.4/2005/102/Add.1 (Feb. 8, 2005) 26

El Salvadoran Peace Agreement 2, 3

General Recommendations of the Special Rapporteur on Torture 18

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, concluded 12 Aug. 1949, entered into force 21 Oct. 1950, 75 U.N.T.S. 287 17

Human Rights Committee (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994) 19

Human Rights Committee, Conclusions and Recommendations: El Salvador, ICCPR/CO/78/SLV (HRC, 2003) 16

Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994) 17

Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, Feb. 28, 1987 17

James Lemoyne, Rights Advocates and U.S. Condemn Salvador Amnesty, New York Times, Jan. 2, 1988 5

OHCHR, Rule of Law Tools for Post Conflict States: Truth Commissions 26

Organization of American States, Charter, Dec. 13, 1951, 119 U.N.T.S. 3 ..... 8, 10

Report of the Secretary General on the U.N. Observer Mission in El Salvador, U.N. Doc. S/25812/Add.1, May 24, 1993 4

Report of the Secretary-General of the UN, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, U.N. Doc. S/2004/616 (Aug. 3, 2004) 25

Report on the Situation of Human Rights in El Salvador (OEA/Ser.L/II.85, Doc. 28 rev., Feb. 11, 1994) 11, 12

Restatement (Third) of the Foreign Relations Law of the United States (1987) 6, 7

The Secretary-General, Seventh Report of the Secretary-General on the United Nations Military Observer Mission in Sierra Leone, U.N. Doc. S/1999/836 (July 30, 1999) 25

Truth and Reconciliation Commission of South Africa, Report of the Amnesty Committee 27

U.N.S.C. Res. 1315, preamble, U.N. Doc. S/RES/1315 (14 Aug. 2000) 25

Vienna Declaration and Programme of Action, 14-25 June 1993, U.N. Doc. A/CONF.157/23, 12 July 1993 25

INTEREST OF AMICI CURIAE

Amici are a broad coalition of law school professors who have a direct interest in the development of U.S. and international law, including claims arising under the Alien Tort Statute ("ATS"), the Torture Victims Protection Act ("TVPA"), and in the particular issues under consideration in this case. Amici include authors of scholarly works regarding international and domestic law, experts who provide advice to governments and teachers of international law. Many are recognized experts in the field who have a long-standing and well-known interest in the development of U.S. jurisprudence consistent with relevant domestic and international human rights law. The questions under consideration in this appeal implicate important principles of jurisprudence and human rights. These issues also have broad ramifications for the equitable and just administration of the laws. The source of authority to file this Amicus Brief is by leave of court under Federal Rule of Appellate Procedure 29, pursuant to the accompanying Motion for Leave to File Amicus Brief.

INTRODUCTION

Amnesty refers to a formal promise to forego prosecution, and to treat the alleged crimes as though they never happened. A "blanket" amnesty refers to an amnesty law that absolves any and all crimes that occurred during specific years, usually relating to and characterized by internal conflict. Some States may pass

amnesties at the end of conflicts. However, while not all amnesties are prohibited, the weight of international authority indicates that blanket amnesties granting impunity for serious violations of human rights or humanitarian law contravene international law and are therefore illegal. As such, these amnesties are due no recognition by other countries, or by judicial bodies outside the territorial state.

Between 1980 and 1991 El Salvador endured a violent civil war that left over 75,000 people dead.[1] It is well documented that during the war the Salvadoran security forces committed extra-judicial executions, practiced widespread and systematic torture, carried out forced disappearances, massacred peasants, and participated in death squad assassinations.[2] Between 1989 and 1992 the Salvadoran government and the opposition forces negotiated an end to the war under the auspices of the United Nations. On January 16, 1992 the Salvadoran government and the opposition signed a Peace Agreement.[3]

A primary purpose of El Salvador's Peace Agreement was to "clarify and put an end to any indication of impunity on the part of officers of the armed forces,

---

[1] See Trial Exhibit 28, Truth Comm'n Report, pp. 18-25.

[2] See id. at 26-31. The plaintiffs in this case were victims of torture, and of the extrajudicial killing of their family members.

[3] See id. at 9-17.

particularly in cases where respect for human rights is jeopardized."[4] Article 5 of the Peace Agreement further stated the goal of ending impunity, clarifying that "acts of this nature, regardless of the sector to which their perpetration belongs, must be the object of exemplary action by the law courts so that the punishment prescribed by law is meted out to those found responsible."[5] Far from including or sanctioning an amnesty, the Peace Accord contemplated a process of eventual investigation and prosecution.

The Peace Agreement established a cease-fire and created a Commission on the Truth ("Truth Commission"). El Salvador agreed to "refer this issue [of avoiding impunity] to the [Truth Commission]."[6] The Truth Commission was sponsored and administered by the United Nations. It was mandated to "investigate[ ] serious acts of violence that [ ] occurred since 1980 and whose impact on society urgently demands that the public should know the truth."[7] The Truth Commission registered over 22,000 complaints of grave acts of violence that occurred during the war.[8] A majority of complaints concerned extrajudicial

---

[4] El Salvadoran Peace Agreement, Ch. I, Sect. V, available at http://www.usip.org/library/pa/el_salvador/pa_es_01161992.html.

[5] Id.

[6] See id. at 18-25.

[7] Id. at 9-17.

[8] See id. at 43-45. The Truth Commission recognized that this sample represented only a fraction of existing complaints.

executions, and 85 percent of complainants attributed the acts of violence to the State.[9]

Based on its investigation, the Truth Commission recommended, among other things, that El Salvador undertake judicial reforms in order to combat impunity, finding that the unacceptable state of the judiciary made fair prosecutions impossible. Unfortunately, the Salvadoran legislature, dominated by the same political party that had waged the war, passed an amnesty law days after the release of the U.N. Truth Commission's report. On March 22, 1993, El Salvador declared a general amnesty, granting:

> [A]mple, absolute and unconditional amnesty to all those who, in any way, participated in committing political crimes, related common crimes, and common crimes committed by at least 20 persons, before March 1, 1992, even if judgment has been delivered against such persons, and whether or not proceedings have been initiated for the same crimes, and this benefit is conceded to all those who participated.[10]

The United Nations Secretary General immediately expressed his concern about the timing and scope of the amnesty law.[11] The U.S. Embassy issued an official

---

[9] See id.

[10] Legislative Decree No. 486, General Amnesty Act to Consolidate Peace, art. 4, 318 Diario Oficial (22 Mar. 1993). While the amnesty law technically covers only criminal prosecution, under Salvadoran procedure it also precludes civil suits, as civil damages are dependent upon a finding of criminal guilt.

[11] United Nations, Report of the Secretary General on the U.N. Observer Mission in El Salvador, U.N. Doc. S/25812/Add.1, May 24, 1993; see also Thomas
(footnote continued)

protest after it learned that the convicted killers of two American advisers had been pardoned under the amnesty.[12]

International courts and authorities have determined El Salvador's amnesty and similar amnesties to contravene international law. In addition to violating freely accepted treaty obligations, El Salvador's amnesty goes against the regional trend in Latin America of national courts invalidating, limiting, or repealing blanket amnesties. Furthermore, overwhelming international consensus indicates that any blanket amnesty precluding the prosecution of individuals who have engaged in the most serious human rights violations is unlawful. For these reasons, this Court should not give extraterritorial effect to El Salvador's amnesty.

ARGUMENT

I. COMITY AND INTERNATIONAL LAW

Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other

---

Buergenthal, The United Nations Truth Commission for El Salvador, 27 Vand. J. Transnat'l L. 497 (1994) ("[T]he manner in which this amnesty was rushed through the Salvadoran legislature-a legislature in which the FMLN was not represented- with no time or opportunity for a full national debate on the subject, was unseemly at the very least, indicative of a lack of respect for democratic processes, and thus incompatible with the spirit of the Peace Accords.").

[12] James Lemoyne, Rights Advocates and U.S. Condemn Salvador Amnesty, N.Y. Times, Jan. 2, 1988.

persons who are under the protection of its laws."[13] Where domestic and foreign law conflict, an international comity analysis is appropriate;[14] however, a court is not obligated to extend or deny extra-territorial application of the foreign law.[15]

The Restatement (Third) of Foreign Relations ("Restatement") describes factors a court may consider when engaging in a comity analysis.[16] While U.S. courts have not adopted a uniform method of analyzing comity, to varying degrees,

---

[13] Hilton v. Guyot, 159 U.S. 113, 164 (1895); see also Taveras v. Taveraz, 477 F.3d 767, 783 (6th Cir. 2007).

[14] See Hilton, 159 U.S. at 164; Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 799 (1993) ("No conflict exists, for these purposes 'where a person subject to regulation by two states can comply with the laws of both.'").

[15] See id. at 163-64 ("Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other.").

[16] Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987) ("Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and(h) the likelihood of conflict with regulation by another state.")

circuit courts have adopted the Restatement factors or similar ones when considering conflicting foreign and domestic laws.[17] The Restatement specifically acknowledges the need to consider the "importance of the [foreign] regulation to the international political, legal or economic system" and further advises courts to consider "the extent to which the regulation is consistent with the traditions of the international system."[18] Members of the United States Supreme Court have affirmed the importance of domestic courts considering international perspectives for purposes of comity, advocating a tripartite comity analysis: "[t]he interests that are relevant to a comity analysis are those of the foreign body, the domestic body, and the interest in a well-functioning international order."[19]

The district court determined that no comity analysis in this case would be necessary because the Salvadoran amnesty and U.S. law are not in conflict. To the extent this Court disagrees with that finding, El Salvador's amnesty law should not be given extra-territorial application under principles of international comity because it contravenes international law.

---

[17] See Timberland Lumber Co. v. Bank of Am. Nat'l Trust and Sav. Ass'n, 749 F.2d 1378 (9th Cir. 1984); O.N.E. Shipping Ltd. v. Flota Mercante Grancolumbiana S.A., 830 F.2d 449, 451 (2d Cir. 1987).

[18] Restatement, supra note 5, at §403(2)(e-f).

[19] Societe Nationale Industrielle Aerospatiale et al. v. U.S. Dist. Ct. for the S.D. of Iowa, 482 U.S. 522, 556 (1987) (Blackmun, J., dissenting).

II. THE SIXTH CIRCUIT COURT OF APPEALS SHOULD NOT GIVE EXTRA-TERRITORIAL EFFECT TO THE PATENTLY ILLEGAL SALVADORAN AMNESTY

A. The Inter-American Court of Human Rights Declared El Salvador's Amnesty to Contravene the State's Treaty Obligations

The Inter-American Court of Human Rights ("Inter-American Court") found El Salvador's amnesty law to violate the country's treaty obligations under the American Convention on Human Rights ("American Convention") in Serrano-Cruz Sisters v. El Salvador.[20] The Organization of American States ("OAS") established the Inter-American Court in 1979 with the primary objective of applying and interpreting the American Convention and related human rights treaties.[21] El Salvador became a party to the American Convention in 1978, and accepted the jurisdiction of the Court in 1995.

The Serrano-Cruz Sisters case involved the military's involvement in the disappearance of two young girls as they fled from their home with their family during military operations.[22] Although El Salvador's amnesty law was in force, the Inter-American Court ordered El Salvador to prosecute and punish the individuals

---

[20] See Serrano-Cruz Sisters v. El Salvador, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 218 (Mar. 1, 2005).

[21] The United States is a member state of the OAS and subject to the recommendations of the Inter-American Commission; it has signed but not ratified the American Convention on Human Rights.

[22] See id.

responsible for the forced disappearance of the Serrano-Cruz sisters because a failure to investigate the disappearances and take appropriate action against those responsible violates articles 1, 8 and 25 of the American Convention.[23] Specifically, the Inter-American Court stated:

> The Court observes that [El Salvador] must ensure that the domestic proceedings to investigate what happened to [the girls] and, if appropriate, punish those responsible, has the desired effect. The State must abstain from using figures such as amnesty and prescription or the establishment of measures designed to eliminate responsibility, or measures intended to prevent criminal prosecution or suppress the effects of a conviction.[24]

The Serrano-Cruz Sisters case exemplifies the Inter-American Court's disapproval of El Salvador's current amnesty as violating a treaty to which the Salvadoran state is bound.[25] It also illuminates the negative consequences of the Salvadoran amnesty for families unable to seek justice following human rights violations affecting the most vulnerable of populations.

---

[23] See id. at ¶¶ 107, 218.

[24] Id. at ¶ 172.

[25] It is true that the torture, ill-treatment and other violations committed in the instant case took place before El Salvador accepted the jurisdiction of the Inter-American Court. However, that Court has consistently held that the underlying torture, disappearance, summary execution or other crimes are separate and distinct from the violation of failing to provide adequate remedies and judicial process, which occurred after El Salvador became a part of the treaty regime – and continues to this day. See, e.g., Blake v. Guatemala, 1996 Inter-Am. Ct. H.R. (ser. C) No. 27 (July 2, 1996); Serrano-Cruz Sisters v. El Salvador, supra, ¶ 55.

B. The Inter-American Commission has Denounced El Salvador's Amnesty

The Inter-American Court works in conjunction with the Inter-American Commission on Human Rights ("Inter-American Commission"), a quasi-judicial body which is charged with promoting the observance and protection of human rights in the Americas and is located in Washington, D.C.[26] In 1993, immediately after the Salvadoran legislature passed the amnesty law and within the term available to El Salvador's former President Alfredo Cristiani to enact or veto the State's amnesty, the Inter-American Commission strongly conveyed its concern that the general amnesty law would be an obstacle to carrying out the recommendations of the U.N. Truth Commission. The Inter-American Commission cautioned El Salvador that its amnesty law would contravene Article 27 of the Vienna Convention on the Law of Treaties.[27] The provisions of that treaty, now recognized as customary international law, mandates that "a State cannot unilaterally invoke provisions of its domestic law as justification for its failure to perform the legal obligations imposed by an

[26] Organization of American States, Charter, Dec. 13, 1951, 119 U.N.T.S. 3, Ch. XV, Art. 106, available at http://www.oas.org/juridico/english/charter.html. The United States is a party to the OAS Charter.

[27] Jan. 27, 1980, 1155 U.N.T.S. 331.

international treaty."[28] Further, the Inter-American Commission emphasized that El Salvador's own Constitution precluded such an amnesty law; El Salvador's Constitution declares that "the law shall not modify or derogate that agreed upon in a treaty in effect in El Salvador. In the event of a conflict between the treaty and the law, the treaty will prevail."[29] Finally, the Inter-American Commission warned that El Salvador's proposed amnesty would violate the State's obligations to conduct serious investigations of human rights violations, identify those responsible, impose appropriate punishment and ensure victims adequate compensation under the American Convention.[30]

Nonetheless, former President Cristiani did not exercise his veto power and El Salvador's amnesty law entered into force. The Inter-American Commission then strongly denounced the amnesty; beginning in 1994 the Inter-American Commission found El Salvador's "sweeping amnesty" to be inconsistent with its

[28] Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador, Case 11.481, Inter-Am. C.H.R. Report No. 37/00, OEA/Ser.L/V/II.106, doc. 3, rev. at 671, ¶ 131 (1999) (citing Inter-American Commission, Report on the Situation of Human Rights in El Salvador).

[29] Id.

[30] See id.

obligations under the American Convention, assuring the rights to criminal and civil liability and reparations for victims.[31]

For over 15 years, the Inter-American Commission, through its case-based decisions, has informed El Salvador that its amnesty is illegal. In Masacre Las Hojas v. El Salvador, the Inter-American Commission considered a complaint against the Government of El Salvador for the extra-judicial execution of approximately 74 civilian victims.[32] The Inter-American Commission concluded that the Salvadoran amnesty "constitutes a clear violation of the obligation of the Salvadoran Government to investigate and punish the violations of the rights of the Las Hojas victims, and to provide compensation for damages resulting from the violations."[33]

Although El Salvador has consistently argued that the amnesty was originally necessary for peace and continues to assure stability within its borders,[34]

---

[31] Report on the Situation of Human Rights in El Salvador (OEA/Ser.L/II.85, Doc. 28 rev., Feb. 11, 1994).

[32] Masacre Las Hojas v. El Salvador, Case 10.287, Report No. 26/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 (1993).

[33] See id. at ¶ 83 (1993).

[34] See Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador, Case 11.481, Report No. 37/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 671, ¶ 3 (1999) (arguing that the Amnesty should be upheld as a "measure aimed at ensuring the existence of a new democratic State at peace as the only way to safeguard human rights.").

the Inter-American Commission has repeatedly rejected that argument and recommended its annulment in order to allow prosecutions in compliance with international legal norms. For example, in the case of the assassination of Salvadoran Catholic Archbishop Oscar Romero, the Inter-American Commission recommended that El Salvador:

> [C]arry out a complete, impartial, and effective judicial investigation, expeditiously, so as to identify, try, and punish all the perpetrators, both the direct perpetrators and the planners of the violations established, notwithstanding the amnesty decreed; that it make reparation for all the consequences of the violations set forth and that it bring its domestic legislation into line with the American Convention, so as to render null and void the General Amnesty Law approved by Decree N° 486 of 1993.[35]

In particular, the Inter-American Commission noted that the Inter-American Court expounded a "clear doctrine" disallowing amnesties to justify States' failure to carry out their duties to investigate and grant access to justice.[36] Likewise, the Inter-American Commission opined that El Salvador's "amnesty laws eliminate the most effective measure for the observance of human rights, i.e. the trial and punishment of those responsible for violations of human rights."[37]

---

[35] Id. at ¶ 4.

[36] Id. at ¶ 129.

[37] Id. at ¶ 126; see also El Mozote Massacre v. El Salvador, Case 10.720, Report No. 24/06, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2006) at ¶ ¶ 37-38.

Similarly in Lucio Parada Cea v. El Salvador, the Inter-American Commission considered a case against El Salvador for the Army's involvement in torturing several farmers, two of whom died as a result.[38] The Inter-American Commission commented: "the enforcement of amnesties renders null and void the international obligations imposed on States Parties by the [American] Convention" and the amnesty "deprives large segments of the population of the right to justice in their just claims against those who committed excesses and acts of barbarity against them."[39] The Inter-American Commission ultimately concluded that "in promulgating and enforcing the Amnesty Law, El Salvador ha[d] violated the right to judicial protection" and its obligation to investigate the alleged acts of torture.[40]

C. The Salvadoran Supreme Court Declared Articles of the Salvadoran Amnesty Unconstitutional

Despite upholding the blanket amnesty law in 1996, in 2000 the Salvadoran Supreme Court qualified its approval of the law, leaving it to each investigative judge to determine whether application of the amnesty in a particular case would interfere with El Salvador's treaty obligations or with the reparation of a fundamental right; if the investigative judge made such a finding the amnesty law

---

[38] Lucio Parada Cea et al. v. El Salvador, Case 10.480, Report No. 1/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 531, ¶ 1 (1998).

[39] Id. at ¶¶ 107-108.

[40] Id. at ¶¶ 129-131.

could not be applied.[41] The Supreme Court held that if a fundamental human right was at stake, the amnesty law could not stand as a barrier.

However, under El Salvador's legal system it is the province of the public prosecutor's office to characterize potential crimes as involving a fundamental human right or not, and for the last eight years the prosecutor's office has not designated a single case as meeting this definition. That is, despite the determination of El Salvador's highest court that the prosecutor and lower courts were free to find an exception to amnesty for cases involving torture, extrajudicial execution and other similar crimes, the executive branch of the government has refused to give any practical effect to the Supreme Court's ruling. Thus, despite the apparent liberalization of the amnesty law, in practice it continues to function as an absolute bar to prosecutions for serious violations of international law due solely to the actions of the Salvadoran executive branch – the same executive branch that is now asking this Court to apply that amnesty.

D. Other International Human Rights Treaty Bodies have Denounced El Salvador's Amnesty as Inconsistent with its Treaty Obligations

The United Nations Human Rights Committee ("U.N. Human Rights Committee"), the body vested with monitoring States' compliance with the

[41] Cases 24-97 and 21-98, Constitutional Chamber, Sup. Ct., Sept. 26, 2000.

International Covenant on Civil and Political Rights ("ICCPR"),[42] has found that El Salvador's amnesty contravenes its obligations under the ICCPR. Disconcerted by the amnesty, the U.N. Human Rights Committee commented that the Salvadoran amnesty law:

> [I]nfringes the right to an effective remedy set forth in article 2 of the [ICCPR], since it prevents the investigation and punishment of all those responsible for human rights violations and the granting of compensation to the victims.[43]

Consequently, the U.N. Human Rights Committee recommended that El Salvador amend its amnesty law "to make it fully compatible with the [ICCPR]" and further, "respect and guarantee the application of the rights enshrined in the [ICCPR]."[44]

In a similar vein, although without making specific reference to the Salvadoran amnesty, the U.N. Committee Against Torture, the Convention Against Torture's[45] ("CAT's") monitoring treaty body "urged [El Salvador to] adopt

---

[42] Dec. 16, 1966, 999 U.N.T.S. 171, entered into force March 23, 1976. Nearly every state, including the United States, is a party to the ICCPR.

[43] Human Rights Committee, Conclusions and Recommendations: El Salvador, ICCPR/CO/78/SLV (HRC, 2003) at ¶ 6.

[44] Id.

[45] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

measures ensuring that any allegation of suspected torture is promptly and impartially investigated and, if proved, suitably penalized."[46]

III. BLANKET AMNESTIES CONTRAVENE INTERNATIONAL LAW BY PREVENTING THE PROSECUTION OF SERIOUS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW

A. International Treaties Require Prosecution of Certain Human Rights Violations

Numerous widely-accepted international treaties require state parties to investigate and prosecute allegations of torture, crimes against humanity and other grave violations of human rights or humanitarian law that constitute international crimes.[47] The CAT requires that the State investigate alleged torture and, if warranted by the facts, either extradite the offender or "submit the case to its competent authorities for the purpose of prosecution."[48] Likewise, the Special

---

[46] Committee Against Torture, Summary Record of the First Part (Public)* of the 429th Meeting: El Salvador, Netherlands at ¶ 24 CAT/C/SR.429 (Summary Record) (May 19, 2000). Ratified by the United States on October 21, 1994 and by El Salvador on June 17, 1996.

[47] See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, concluded 12 Aug. 1949, entered into force 21 Oct. 1950, 75 U.N.T.S. 287, art. 149 (grave breaches); Inter-American Convention on Forced Disappearance of Persons, art. 6, 33 I.L.M. 1429 (1994); Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, art. 14, Feb. 28, 1987; Convention on the Prevention and Punishment of the Crime of Genocide, art. IV, Dec. 9, 1948, 78 U.N.T.S. 277.

[48] CAT, Art. 7; see also CAT, Art. 14, requiring civil redress for victims of torture.

Rapporteur on Torture has published General Recommendations, which state that "legal provisions granting exemptions from criminal responsibility for torturers, such as amnesty laws (including laws in the name of national reconciliation or the consolidation of democracy and peace), indemnity laws, etc. should be abrogated."[49] Similarly, the Committee Against Torture has repeatedly recommended that states repeal their amnesty laws, and has taken a particularly strong stance against "blanket amnesties."[50]

Although the foundational global human rights treaty, the ICCPR, is silent on its face on the issue of amnesty, it does provide for a right to a remedy for victims of human rights violations. The U.N. Human Rights Committee in 1994 commented:

> The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from

---

[49] General Recommendations of the Special Rapporteur on Torture, available at http://www2.ohchr.org/english/issues/torture/rapporteur/standards.htm (last visited April 14, 2008).

[50] Committee Against Torture, Conclusions and Recommendations: Chile, CAT/C/CR/32/5 (CAT, 2004) at ¶ 7(b) (recommending that Chile "[r]eform the Constitution to ensure the full protection of human rights…and to this end abolish the Amnesty Law."); Guatemala, CAT/C/GTM/CO/4 (CAT, 2006) at ¶ 15 ("The State party should strictly apply the National Reconciliation Act, which explicitly excludes any amnesty for the perpetrators of acts of torture and other grave human rights violations."); see also Croatia CAT/C/CR/32/3 (CAT, 2004) at ¶ 5; Colombia, CAT/C/CR/31/1 (CAT, 2004) at ¶ 5; (Committee expressing satisfaction that amnesties will not include acts of torture).

> such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[51]

The U.N. Human Rights Committee further observed that amnesties are incompatible with "Article 2, paragraph 3 of the [ICCPR], which requires that any person whose rights or freedoms recognized by the [ICCPR] are violated shall have an effective remedy."[52] Even where amnesties have allowed for administrative sanctions against responsible government officials and reparations to victims' families, the Human Rights Committee has still found them insufficient to meet international legal obligations. [53]

B. International Criminal Tribunals have Found Amnesties to be Unlawful and Therefore have not Applied Amnesties Extra-territorially

U.S. courts are "increasingly turning to the decisions by international criminal tribunals for instructions regarding the standards of international human

---

[51] Human Rights Committee, General Comment 20, art. 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

[52] Concluding Observations of the Human Rights Committee, Congo, U.N. Doc. CCPR/C/79/Add.118 (2000) at ¶ 12.

[53] Bautista de Arellana v. Colombia, No. 563/1993, Oct. 27, 1995, at ¶ 8.2 (finding that "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant," and requiring criminal prosecution).

rights law under our civil ATCA."[54] In 1998, the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[55] observed that a domestic amnesty covering crimes, such as torture, that have attained the status of *jus cogens* or peremptory norms applicable to all states, would violate obligations *erga omnes*, obligations owed to the community of states. The Tribunal therefore concluded that such an amnesty "would not be accorded international legal recognition."[56] Further, it declared that an individual could be susceptible to prosecution for torture notwithstanding a domestic amnesty in international tribunals, a foreign state, or in the domestic state under a subsequent regime.[57]

In March 2004, the Appeals Chamber of the Special Court for Sierra Leone[58] heard a defendant's challenge to jurisdiction based on a prior amnesty prohibiting prosecution of rebel forces. The defense argued that because the Lomé Peace

---

[54] Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1290 (11th Cir. 2002) (noting that cases of international tribunals provide insight for applying TVPA).

[55] The ICTY was established to address serious violations of international humanitarian law committed in the territory of the former Yugoslavia. See http://www.un.org/icty/ (last visited Apr. 14, 2008).

[56] Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgement, 10 December 1998, at ¶ 155.

[57] Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgement, 10 December 1998 at ¶ 155.

[58] The Special Court for Sierra Leone was set up jointly by the Government of Sierra Leone, and the United Nations. See http://www.sc-sl.org/about.html (last visited Apr. 14, 2008).

Accord was signed by foreign heads of state, it constituted an internationally binding treaty and therefore, the Special Court for Sierra Leone would be in violation of international legal obligations were it to allow prosecution of any of the amnestied crimes.[59] The Appeals Chamber found that the amnesty did "not bar the prosecution of an accused for international crimes."[60] Further, the Chamber noted that it was entitled to:

> [A]ttribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity.[61]

While the Sierra Leone tribunal declined to decide whether the norm prohibiting blanket amnesties had fully ripened into a norm of customary international law, the tribunal recognized that, at the very least, such a norm is developing and is "amply supported" by, among other things, the widespread ratification of the aforementioned treaties, the views of international quasi-judicial bodies, and the decisions of international and national tribunals.[62] The international tribunals' unanimity in denouncing

---

[59] Prosecutor v. Morris Kallon, Brima Bazzy Kamara, Case No. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004) at ¶¶ 37-43.

[60] Id. at ¶ 42.

[61] Id. at ¶ 84.

[62] Id. at ¶ 82.

amnesties in order to allow for the prosecution of crimes against humanity and torture further supports the position that prohibitions on blanket amnesty for these crimes are becoming customary under international law.

C. The Inter-American System has Found Similar Amnesties to be Illegal, and States have then Limited or Annulled Them

In addition to its ruling on El Salvador, referenced above, The Inter-American Court has found amnesties in other countries in the Americas to violate the American Convention to the extent they nullify states' obligations to investigate, prosecute and remedy serious violations of human rights. In Almonacid-Arrellano v. Chile, the Inter-American Court denounced the Chilean amnesty precluding the investigation and prosecution of individuals responsible for an extra-judicial killing.[63] The Court declared that "[s]tates cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty."[64] The Chilean government is, as a result, in the process of nullifying or reinterpreting the amnesty law to comply with its international obligations.

---

[63] See Almonacid-Arrellano et al v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 3, 82 (Sept. 26, 2006).

[64] Id. at ¶ 114.

Similarly, in Barrios Altos v. Peru, the Inter-American Court stated:

> This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[65]

The Peruvian government has annulled the amnesty law under review.

After the Inter-American Commission and Court rejected the Argentine amnesty on similar grounds,[66] the Argentine legislature and the Supreme Court both annulled the law. In the entire continent, only the government of El Salvador has defied a direct injunction by the Inter-American Court to abolish an amnesty law that precludes the investigation and prosecution of serious violations of human rights and makes it impossible for the victims of such crimes to obtain redress.

D. Other Regional Bodies Also Disfavor Amnesties

Other regional bodies have similarly emphasized a need for investigation and prosecution. Although the European Court of Human Rights ("European Court") has not ruled specifically on whether an amnesty contravenes the European Convention, jurisprudence indicates that any amnesty that prevents the right to an

---

[65] Chumbipuma Aguirre et al. v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 83 (March 14, 2001).

[66] See Bulacio v. Argentina, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶¶ 2, 114-117 (Sept. 18, 2003).

investigation and effective remedy for certain crimes would violate the European Convention.[67] In particular, the European Court has emphasized the need to conduct investigations in cases involving rape, torture,[68] a substantial risk of enforced disappearance,[69] and violations of the right to life.[70] The African Charter similarly recognizes victims' right to a remedy for violations of fundamental rights.[71] In Zimbabwe Human Rights NGO Forum v. Zimbabwe, the African Commission explained that "[s]tates must [take] active measures to protect, prosecute and punish private actors who commit abuses."[72] Regional treaty bodies unanimously condemn blanket amnesties.

E. The United Nations has Consistently taken the Position that Amnesties for Serious Violations of Human Rights are Illegal Under International Law and need not be Given Effect

The U.N. has rejected amnesties in relation to internationally recognized crimes, including torture and crimes against humanity. In 2004 for example, then

[67] Musayeva et al. v. Russia, Judgment (Eur. Ct. H.R, 26 July 2007), ¶ 116.

[68] See, e.g., Aydin v. Turkey, 1997-VI Eur. Ct. H.R. 1866, ¶ 103; Assenov et al. v. Bulgaria, 1998-VIII Eur. Ct. H.R. 652, ¶ 102.

[69] See, e.g., Kurt v. Turkey, 1998-III Eur. Ct. H.R. 1142, ¶ 140.

[70] See, e.g., Yasa v. Turkey, 1998-VI Eur. H.R. Rep. 408, ¶ 114 (1998).

[71] African Charter on Human and Peoples' Rights, June 27, 1981, 21 ILM 59 (1981), art. 7(1)(a).

[72] Zimbabwe Human Rights NGO Forum v. Zimbabwe, Comm. 245/2002, Annex III. 21st Annual Activity Report, EX.CL/322 (X), ¶160.

Secretary-General Kofi Annan wrote that the U.N. should ensure that all peace agreements and Security Council resolutions and mandates:

> [R]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, [and further] ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court. [73]

Similarly, while taking part in peace negotiations, the U.N.'s representative appended a reservation to the Lomé Peace Accord (re Sierra Leone), stating that the United Nations could not endorse a blanket amnesty that would apply to genocide, crimes against humanity, war crimes, and other serious violations of international crimes.[74]

In 2004, then-U.N. Secretary-General Annan appointed Diane Orentlicher as an independent expert on combating impunity. Orentlicher's Principles represent the U.N.'s current position on amnesties and limit amnesty agreements to, among

---

[73] Report of the Secretary-General of the UN, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, ¶ 64, U.N. Doc. S/2004/616 (Aug. 3, 2004); see also U.N.S.C. Res. 1315, preamble, U.N. Doc. S/RES/1315 (14 Aug. 2000).

[74] The Secretary-General, Seventh Report of the Secretary-General on the United Nations Military Observer Mission in Sierra Leone, ¶¶ 7, 54, U.N. Doc. S/1999/836 (July 30, 1999); see also Vienna Declaration and Programme of Action, 14-25 June 1993, U.N. Doc. A/CONF.157/23, 12 July 1993, par. 60, which states that governments should repeal legislation that favors impunity for those responsible for grave human rights violations like torture, and punish those violations.

other things, exclude perpetrators of serious crimes under international law, and allow for a victims' right to reparation.[75] The U.N. Office of the High Commissioner for Human Rights, the U.N.'s central human rights organ, has taken an even more forceful stance declaring amnesties for serious violations of human rights to be outright illegal. The High Commissioner for Human Right's Rule of Law Tools for Post Conflict States declares:

> [A]mnesties for serious violations of human rights and humanitarian law—war crimes, crimes against humanity and genocide—are generally considered illegal under international law, regardless of whether they are given in exchange for a confession or apology. Such an amnesty would violate the accepted Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution.[76]

For years, the UN has taken a clear stance against the use of blanket amnesties due to their contravention of international obligations to prosecute serious violations of human rights, and has further clarified that other courts or governments need not give effect to such amnesties.[77]

---

[75] Diane Orentlicher, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Principle 24: Restrictions and Other Measures Relating to Amnesty, E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

[76] OHCHR, Rule of Law Tools for Post Conflict States: Truth Commissions, p. 12, available at www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf (last visited Apr. 14, 2008).

[77] National courts have agreed, and have not applied blanket amnesties in force in other states. See, e.g., Ould Dah case, French Court of Cassation Oct. 23, (footnote continued)

IV. BLANKET AMNESTIES ARE IMPERMISSIBLE EVEN IN THE WAKE OF CIVIL WAR OR CONFLICT

Governments that pass amnesty laws habitually justify such laws as necessary to establish peace and reconciliation in the wake of conflict. However, state practice shows that more recent amnesties avoid blanket indemnity for alleged serious violations of human rights and humanitarian law. For example, South Africa's post-apartheid government passed the best-known post-conflict amnesty as part of an overall scheme that also included truth telling and reparations.[78]. South Africa only granted conditional amnesty to individuals who met certain criteria, not blanket amnesty. The criminal act must have been proportionate to the objective and politically motivated, and the perpetrator was required to publicly disclose all details of the crime. Yet, even under these

---

2002; Argentine and Chilean cases, Spanish Audiencia Nacional (Pleno), Nov. 5 1998.

[78] The Amnesty Committee of South Africa's Truth and Reconciliation Commission asserted that the country's "amnesty process was unique in that it provided not for blanket amnesty but for a conditional amnesty, requiring that offences and delicts related to gross human rights violations be publicly disclosed before amnesty could be granted." Truth and Reconciliation Commission of South Africa, Report of the Amnesty Committee, Vol. 6, § 1, Ch. 5, ¶ 1; see also Prosecutor v. Kondewa, Case No. SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, Separate Opinion of Justice Robertson, ¶ 32 (25 May 2004) ("amnesty was not 'blanket' because each person had to be considered in the circumstances of individual cases by a Truth and Reconciliation Commission").

exceptional conditions, U.S. courts have declined to afford full deference to the South African conditional amnesty.[79]

El Salvador's neighbor, Guatemala, suffered a contemporaneous armed conflict that left over 200,000 dead or missing.[80] Yet its amnesty law, passed in 1996, excludes serious international crimes like torture and crimes against humanity from its ambit.[81] Colombia, where an ongoing civil war has claimed tens of thousands of lives, also eschewed a blanket amnesty law in favor of a complex scheme of reduced sentences, reparation of victims and recovery of stolen assets.[82] Thus, the need for peace and reconciliation after conflict in no way can justify or excuse imposition of a blanket amnesty: many post-conflict countries have found acceptable alternatives.

Where states have tried to use the need for reconciliation to justify such amnesties, those arguments have not generally been successful before international

---

[79] See Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 261-64 (2d Cir. 2007).

[80] Commission on Historical Clarification, Guatemala: Memory of Silence (1999), available online in Spanish at http://shr.aaas.org/guatemala/ceh/mds/spanish/. Summary and recommendations in English at <http://shr.aaas.org/guatemala/ceh/report/english/conc2.html>

[81] Law of National Reconciliation, Decree 145/1996, 27 Dec. 1996.

[82] Justice and Peace Law, Law 975/2005, 27 June 2005.

bodies. Thus, in the Peruvian, Argentine and Chilean cases cited above,[83] the states all argued that an amnesty was necessary to consolidate democracy and achieve reconciliation after conflict. The Commission and Court found that, while these were laudable goals, they could be achieved without a blanket amnesty and that, indeed, such an amnesty was at odds with those goals.

CONCLUSION

El Salvador enacted a blanket amnesty law, immunizing human rights violators from prosecution, following an armed conflict within its borders. Although El Salvador now requests this Court to apply its amnesty law extra-territorially in order to absolve the Appellant of liability, international law cautions against such action.

International bodies responsible for analyzing Latin American states' compliance with their international law obligations have condemned El Salvador's amnesty, declared it to be illegal, and have ordered El Salvador to effectively investigate and prosecute human rights violators. Obligations under treaties to which the United States and El Salvador are both parties, effectively preclude permitting an amnesty such as El Salvador's from having lawful effect. Furthermore, international bodies strongly denounce blanket amnesties regardless of the seemingly good intentions of the enacting State. Finally, in accordance with

[83] See supra notes 62-64.

the international trend, a number of Latin American countries have nullified or limited their own amnesty laws. Under these circumstances, there is no reason why El Salvador's amnesty, whatever its domestic validity and reach, should trump U.S. determination to allow civil suits in its courts for grave human rights violations. Extending considerations of comity to the Appellant would contravene the international consensus relating to blanket amnesties and would set the United States apart from those dedicated to providing relief to victims of human rights violations.

Respectfully submitted,

Naomi Roht-Arriaza /mee

Naomi Roht-Arriaza
Professor of Law
University of California, Hastings College of the Law
200 McAllister St.
San Francisco, CA 94102
(415) 565-4629

Counsel for Amici International Law and International Human Rights Professors

Morgan Weibel
Erin Cipolla
Refugee and International Human Rights Law Clinic
University of California, Hastings College of the Law
200 McAllister St.
San Francisco, CA 94102

Law students on brief

CERTIFICATE OF COMPLIANCE

Pursuant to the 6th Cir.R.32(a)(7)(C), the undersigned certified this brief complies with the type-volume limitations of 6th Cir.R.32(a)(7)(B)

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 6TH Cir.R.32(a)(7)(B), THE BRIEF CONTAINS:

   6,812 words.

2. THE BRIEF HAS BEEN PREPARED:

   in proportionally spaced typeface using:

   Times New Roman, 14 font in Word 2007

3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE AN ELECTRONIC VERSION OF THE BRIEF AND/OR COPY OF THE WORK OR LINE PRINTOUT.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 6TH CIR.R.32(a)(7), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

Naomi Roht-Arriaza/mee

Naomi Roht-Arriaza
Professor of Law
University of California, Hastings College of the Law

CERTIFICATE OF SERVICE

I do hereby certify that I sent two copies of the foregoing Amici Curiae Brief on this 14 th day of May, 2008 via UPS, postage prepaid to the following:

David R. Esquivel
Stephen J. Jasper
BASS, BERRY & SIMS, PLC
315 Deaderick Street, Suite 2700
Nashville, Tennessee 37238-3001

Carolyn Patty Blum
CENTER FOR JUSTICE & ACCOUNTABILITY
291 West 12th Street
New York, NY 10014

Robert M. Fargarson, Esq.
FARGARSON & BROOKE
254 Court Avenue, Suite 300
Memphis, TN 38103

John C. Kiyonaga, Esq.
526 King St., Ste. 213
Alexandria, VA 22314

Beth Egbers
Becker Gallagher Legal Publishing