Reconciling Amnesties with Universal Jurisdiction

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I. Introduction

Human rights bodies already have held that domestic amnesty laws may violate a state’s international human rights obligations. Nevertheless, since these laws often continue to be applied domestically, a novel legal situation arises when an amnesty beneficiary like General Augusto Pinochet steps outside of a domestic haven into the ambit of universal jurisdiction. What deference does the international community owe in such cases to the domestic arrangements made by the state in reckoning with the serious human rights violations and international crimes of its recent past?

For many years, the answer may well have been: “complete and absolute deference.” Although international human rights law places limits on what states can do to their citizens, those restrictions generally were thought to operate to prevent present and perhaps future abuses. How a newly democratic government treated past human rights abuses and crimes was considered a matter largely within its own discretion. When that treatment included some forms of clemency and oblivion (invariably justified as being for the sake of national reconciliation), this was thought to be well within the attributes of sovereignty and of little concern to the international community.

Amnesty laws obtained a bad name, however, when they became shameful tools for perpetuating the impunity enjoyed by violators of human rights, rather than opportunities for reconciliation among warring parties. Typically, these laws not only prevented victims or their families from seeking justice, they also denied them the possibility of learning the truth about the circumstances in which they were victimized. In addition, by granting impunity to the former dictators and their...
accomplices, these laws often allowed them to retain positions from which they continued to influence the policies of the new regimes.

For political, moral and legal reasons, however, some newly democratic governments attempted to settle these accounts rather than leave them as permanent wounds in the fabric of society. In their attempts to restore justice, they were helped by principles embodied in the international law of human rights. But the reverse also has happened; international human rights law itself has been enriched by the practices and experiences of the various approaches that were attempted in dealing with the demands of truth and justice. As a result, it is now widely, perhaps universally, accepted that the abuses of the recent past require some affirmative responses on the part of the state in which they occurred. Moreover, these duties must be carried out regardless of whether the abuses were committed by the present or a former government.

While it is clear that no government is free to completely ignore its past, it is equally apparent that the approaches which governments thus far have adopted run the full gamut from complete impunity on the one hand to full truth and justice on the other. In virtually all cases, some element of clemency (for certain perpetrators or for certain deeds) is included in the balance of considerations. Although most efforts thus far have not met international expectations, it is unfair to color with the same degree of opprobrium a state that has made a good faith effort to confront its past, but yet has not imprisoned all perpetrators, as a state that simply has buried its past.

This point is well illustrated by the case of South Africa, as described below, where a more discerning evaluation is needed to assess the adequacy of the level of accountability that state has achieved. For in its efforts to comply with expectations of the international community, this case represents not only a rejection of broadly drawn amnesties, but also a suggestion that the criteria for granting amnesties

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