

## Research Brief: Country case studies on the use of pardons

International Center for Transitional Justice (ICTJ)

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### a. Case Study: Argentina<sup>1</sup>

In March 1976, General Jorge Rafael Videla and members of the Argentine military overthrew the government of President Isabel Martinez de Peron; seven years of dictatorship by the military junta followed.<sup>2</sup> This “Dirty War,” as it is often termed, was marked by thousands of disappearances<sup>3</sup> and the repression of liberals, leftists, and others, as well as arbitrary arrests, torture, and other serious violations of human rights.<sup>4</sup> In 1983, the military dictatorship ended, and civilian rule returned to the country under the Presidency of Raul Alfonsin, who immediately began to investigate the crimes committed during the dictatorship.<sup>5</sup> Trials of leaders of the former junta and of senior guerilla leaders commenced, and five top commanders were convicted in 1985.<sup>6</sup> Another initiative aimed at bringing democracy back to Argentina was the founding of the National Commission on the Disappearance of Persons (CONADEP) by the Alfonsin administration; this was a truth and historical clarification commission that investigated the crimes committed during the “Dirty War” and subsequently published a world-renowned report entitled *Nunca Más*.<sup>7</sup> However, pressure and obstruction from the military led to the adoption of the *Punto Final* (“Full Stop”) law in 1986 and the *Obediencia Debida* (“Due Obedience”) law in 1987,<sup>8</sup> which constituted a break in the democratic recovery impetus of the country.

The December 1986 Full Stop law provided that prosecutors had a deadline of sixty days, beginning from the date of the implementation of the law, to bring a case against members of the military already accused of crimes committed under the military

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<sup>1</sup> This case study is drawn, in large part, from THOMAS UNGER AND OTHERS, WITH GERALDINE DE VRIES, THE SCOPE OF POSSIBLE AMNESTIES UNDER INTERNATIONAL LAW (AUGUST 2008) (internal ICTJ document on file with the authors). Juan Mendez made substantial revisions to this section.

<sup>2</sup> OnWar.com, Armed Conflict Events Data, Argentina’s “Dirty War” 1976-1983, *Dictionary of Wars*, p. 31, available at <http://www.onwar.com/aced/nation/all/argentina/fargentina1976.htm>

<sup>3</sup> Timeline: Argentina, A Chronology of Key Events, BBC News, April 1, 2008, available at [http://news.bbc.co.uk/1/hi/world/americas/country\\_profiles/1196005.stm](http://news.bbc.co.uk/1/hi/world/americas/country_profiles/1196005.stm)

<sup>4</sup> See OnWar.com, Armed Conflict Events Data, Argentina’s “Dirty War” 1976-1983, *supra* note X.

<sup>5</sup> *Id.*

<sup>6</sup> Filippini, L. G. “Argentina”, Chapter 3, in *Victims Unsilenced, The Inter-American Human Rights System and Transitional Justice in Latin America*, July 2007, Due Process of Law Foundation, 2007, pg.83, available at <http://www.dplf.org/uploads/1190403828.pdf>

<sup>7</sup> *Id.* at 83. CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 7-73, 78-81 (1996).

<sup>8</sup> *Id.* at 83.

dictatorship before December 10, 1983.<sup>9</sup> After the sixty-day deadline, such a case became inadmissible.<sup>10</sup>

The adoption of the Full Stop law did not entail a complete cessation of the trials; in fact, it prompted a veritable race to the courthouse, and hundreds of new cases were opened in the 2-month period following enactment. For that reason, the military continued to voice its discontent, and 1987 saw an uprising by young officers.<sup>11</sup> As a result, the Due Obedience law, adopted in June 1987, set down the irrebuttable presumption that all officers, non-commissioned officers and enlisted men from the military or from security, police, or penitentiary forces, except for those who commanded large areas of the country, had acted under the assumption that the orders they received were legal, (qualified as “due obedience”); due to this presumption, such persons could not be prosecuted for acts committed during the military dictatorship.<sup>12</sup> Further, Article 1 of the law stated that “in such cases, it shall by right be considered that the abovementioned persons acted under coercion and subordination to superior authorities, and obeyed orders without having the faculty or possibility of inspection, opposition, or resistance to these orders in their opportunity and legitimacy.”<sup>13</sup>

The Full Stop law excluded cases brought against theft of children and falsification of their identity papers and birth certificates,<sup>14</sup> as did the Due Obedience law; the latter also precluded rape of children.<sup>15</sup> In 1987, the Supreme Court held that the Due Obedience Law conformed to the Constitution of Argentina.<sup>16</sup>

Due to ongoing discontent from the military, President Menem issued pardons to imprisoned members of the military in January 1991, including for General Videla, who had been convicted in 1985.<sup>17</sup> The combination of this pardon and the Full Stop and Due Obedience laws had a three-dimensional result. No new case could be filed against

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<sup>9</sup> Translated from the *ley de Punto Final*, Art.1, (Law No. 23,492), available at <http://www.isdc.ch/d2wfiles/document/4165/4017/0/LEY23492%20Punto%20final%20Argentina.htm>. Explained in “In-Depth: Justice for a Lawless World? Rights and reconciliation in a new era of international law”, “Global: Argentina: Justice, impunity and the ‘dirty war’”, by Oliver Balch for IRIN (Integrated Regional Information Networks), available at <http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59484>

<sup>10</sup> Balch, O. For IRIN, *supra*. note X.

<sup>11</sup> “Argentina, Reluctant Partner, The Argentine Government’s Failure to back Trials of Human Rights Violators”, “Summary and Recommendations”, Human Rights Watch Report, Vol.13, Issue 5(B), Dec.2001, available at <http://www.hrw.org/reports/2001/argentina/argen1201-01.htm>

<sup>12</sup> Translated from the *ley de Obediencia Debida*, Art.1, (Law No. 23,521), available at <http://www.isdc.ch/d2wfiles/document/4166/4017/0/LEY23521%20Obediencia%20debidam>

<sup>13</sup> *Id.*

<sup>14</sup> Translated from the *ley de Punto Final*, Art.5, *supra* note X.

<sup>15</sup> Translated from the *ley de Obediencia Debida*, Art. 2, *supra* note X.

<sup>16</sup> “Argentina: Amnesty Laws Struck Down, Supreme Court’s Long-Awaited Ruling Allows Prosecution of ‘Dirty War’ Crimes”, Press Release, Human Rights Watch, Human Rights News, Buenos Aires (June 14, 2005), available at <http://www.hrw.org/english/docs/2005/06/14/argent11119.htm>

<sup>17</sup> See OnWar.com, Armed Conflict Events Data, Argentina’s “Dirty War” 1976-1983, *supra* note X.

person suspected of crimes committed during the “Dirty War,”<sup>18</sup> except for the excluded crimes indicated above;<sup>19</sup> all persons but former top commanders were protected from prosecution, and former officers, who could not benefit from the Due Obedience law and who had been tried and convicted, had been issued pardons.<sup>20</sup> An estimated 1,180 persons accused of human rights violations during the military dictatorship benefited from these measures.<sup>21</sup>

National human rights organizations led strong campaigning against impunity which contributed to repeal of the Full Stop and Due Obedience Laws in 1998; however, previous judicial decisions interpreting these laws could not be challenged since the 1998 repeal lacked retroactive effect.<sup>22</sup> In his landmark decision of March 2001, Argentine federal judge Gabriel Cavallo declared that the Full Stop and Due obedience laws violated the Argentinean Constitution, because international treaty obligations took precedence over domestic laws, and these laws were null and void. This decision was upheld in November 2001 by the Federal Court of Appeal of Buenos Aires.<sup>23</sup> In August 2003, the Argentinean Congress passed a law annulling the two amnesty laws.<sup>24</sup> Two years later, the Supreme Court affirmed the 2001 decision of the Federal Court of Appeal of Buenos Aires and declared the two earlier laws unconstitutional<sup>25</sup> because the crimes of torture, murder and disappearance committed during the “dirty war” constitute crimes against humanity, which the State is obliged to investigate, prosecute, and punish. With the legislative and judicial decisions, prosecutions for crimes committed during the military dictatorship could be lodged against those who formerly had benefited from the two amnesty laws.<sup>26</sup> Subsequently the Supreme Court ruled that a presidential pardon for similar crimes also was unconstitutional for the same reasons, and, therefore, could not be a bar to reopening investigations and eventual prosecution of the beneficiary.<sup>27</sup>

Argentina has undergone significant transformation regarding accountability for human rights violations, which took place during the “Dirty War.” Civil society rejected the blanket amnesty and pardons justified to maintain the fragile civilian rule, and legal developments insisted upon justice for victims, including holding perpetrators accountable. Currently, there are around 1000 cases reopened, with up to 300 members of the security forces awaiting trial. To date there are about 30 convictions. Argentina’s

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<sup>18</sup> See “Argentina, Reluctant Partner, The Argentine Government’s Failure to back Trials of Human Rights Violators,” “Summary and Recommendations,” Human Rights Watch Report, *supra* note X.

<sup>19</sup> See Press Release, Human Rights Watch, *supra* note X.

<sup>20</sup> See “Argentina, Reluctant Partner, The Argentine Government’s Failure to back Trials of Human Rights Violators,” “Summary and Recommendations,” Human Rights Watch Report, *supra* note X.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Translated from: “*Argentine: Il faut annuler les lois prévoyant l’amnistie pour les auteurs de violations des droits humains*”, Amnesty International press release, July 13, 2003, available at <http://www.amnestyinternational.be/doc/article2272.html>

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<sup>25</sup> See “Argentina: Amnesty Laws Struck Down, Supreme Court’s Long-Awaited Ruling Allows Prosecution of ‘Dirty War’ Crimes”, Human Rights news, Human Rights Watch, *supra* note X.

<sup>26</sup> See “Argentina, Reluctant Partner, The Argentine Government’s Failure to back Trials of Human Rights Violators”, “Summary and Recommendations”, Human Rights Watch Report, *supra* note X.

<sup>27</sup> Rivesos case, 10057.

experience provides an interesting example for other countries debating the constitutionality of and continued perpetuation of amnesty laws for crimes against humanity, as well as for pardons for the same offenses.

## b. Case Study: Chile

In 1973, the military, led by General Augusto Pinochet, overthrew the democratically elected government of Salvador Allende. Pinochet instituted a harsh police state<sup>28</sup> that strictly censored the press, purged the public administration and education, and committed widespread detentions, torture and executions, including of persons in other countries.<sup>29</sup> At the end of Pinochet's seventeen-year rule in 1990, his regime had executed or disappeared more than 3,200 people; thousands more had been detained and tortured or forced into exile.<sup>30</sup> He also had embezzled millions of dollars.<sup>31</sup>

In 1978, Pinochet issued a general amnesty. The amnesty covered "anyone who had committed a criminal act between September 11, 1973 and March 10, 1978" and included accomplices and those involved in cover-ups of the crimes.<sup>32</sup> The amnesty foreclosed individual accountability.<sup>33</sup> Even after being voted out of office, Pinochet continued as Chief of the Army and Senator for life.<sup>34</sup>

The political parties' participation in the election implied acceptance of both the 1978 amnesty law and the 1980 Pinochet-engineered constitution, but because participation in the election was the only way to remove Pinochet from power, the parties elected to field candidates. As the legislature and judiciary were still mostly loyal to Pinochet, there was little the new president could do about the amnesty law, thus limiting his ability to address the issue of human rights.<sup>35</sup>

Nevertheless, the desire for an accounting of the past was not to be extinguished. In 1990, the National Commission of Truth and Reconciliation was established "to compile a report of human rights abuses during the military regime and assess their effects on the citizenry."

Then, in 1998, in an action that would set precedent in international law,<sup>36</sup> Spanish Judge Baltasar Garzón, charged Pinochet criminally.<sup>37</sup> Spain issued an

<sup>28</sup> Roseann M. Latore, *Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes*, 25 B.C. INT'L & COMP/ REV. 419, 421 (2002).

<sup>29</sup> Latore, *supra* note X, at 423 (citations omitted).

<sup>30</sup> Magambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China and Beyond*, 35 GA. INT'L & COMP. L. 495, 502 (2007)(citations omitted).

<sup>31</sup> Jouet, *supra* note X, at 502 (citation omitted).

<sup>32</sup> MARK ENSALACO, CHILE UNDER PINOCHET, RECOVERING THE TRUTH 129 (2000).

<sup>33</sup> Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 199 (2002).

<sup>34</sup> Latore, *supra*. note X at x.

<sup>35</sup> Latore, *supra* note X, at 423 (citations omitted).

<sup>36</sup> Latore, *supra* note X, at 441 (citation omitted). See also Magambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China and Beyond*, 35 GA. INT'L & COMP. L. 495, 502 (2007); NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT, TRANSITIONAL JUSTICE IN THE

international arrest warrant and requested Pinochet's extradition from the United Kingdom, where Pinochet was convalescing at the time. After a protracted legal battle, English officials ultimately determined that Pinochet's ill health prevented his extradition to Spain.<sup>38</sup> Pinochet returned to Chile.<sup>39</sup>

Once Pinochet was returned to Chile, however, the Chilean Supreme Court in 2000 stripped him of his immunity from prosecution, which he held as "lifetime senator."<sup>40</sup> The 1978 self-amnesty also was partially withdrawn, "allowing for arrest of dozens of former military officers for disappearances and kidnappings, based on the evolving doctrine that 'force disappearance kidnapping is an ongoing crime not subject to statutes of limitations.'" <sup>41</sup> Given that the crime of enforced disappearance continues until proof of the direct victim's death, the Supreme Court found that the 1978 amnesty decree, which covers crimes committed between 1973 and 1978, did not apply to this crime.<sup>42</sup> As to Pinochet, a 2001 ruling determined that Pinochet was too ill to stand trial for his crimes; this ruling was challenged and later reversed.<sup>43</sup> In 2006, the Supreme Court upheld a lower court's decision stripping Pinochet of his immunity. By affirming the lower court's decision, the Supreme Court paved the way for him to be tried for the murders of two body guards of Salvador Allende.<sup>44</sup> Pinochet was placed under house arrest five times after his return to Chile, but he died before being tried for his responsibility for those or many other abuses. However, dozens of his military cohorts have faced and are facing continued legal actions in Chile and elsewhere.<sup>45</sup>

### c. Case Study: El Salvador

Throughout the 1980s, the Salvadoran Security Forces carried out a calculated program of state repression of the civilian population, including a clear pattern and

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AGE OF HUMAN RIGHTS, *passim* (2005) (describing the international efforts that led to the Spanish courts decision and the continuing advocacy in UK and elsewhere and in Chile on Pinochet's return to ensure accountability).

<sup>37</sup> NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT, TRANSITIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS, *passim* (2005) (describing the international efforts that led to the Spanish court's decision to issue the initial and amended indictments).

<sup>38</sup> THE PINOCHET CASE, A LEGAL AND CONSTITUTIONAL ANALYSIS (DIANA WOODHOUSE, ED., 2000); ROHT-ARRIAZA, *supra* note X, at 1-66.

<sup>39</sup> ROHT-ARRIAZA, *supra* note X, at 67-69. Roht-Arriaza describes the continual pressure of civil society to bring about prosecutions in Chile and internationally. *Id.*, at 67-96, 208-224.

<sup>40</sup> Latore, *supra* note X, at 444 (citation omitted).

<sup>41</sup> Latore, *supra* note X, at 444 (2002)(citations omitted).

<sup>42</sup> *Juan Contreras Sepúlveda y otros (crimen) casacion fondo y forma*. Corte Suprema, 517/2004. Resolución 22267.

<sup>43</sup> Latore, *supra* note X, at 444 (2002)(citations omitted). Monte Reel and J.Y.Smith, *A Chilean Dictator's Dark Legacy*, WASH. POST, December 11, 2006, A01.

<sup>44</sup> ICTJ amicus brief citing Eduardo Gallardo, *Chilean Court Pinochet's Loss of Immunity*, Associated Press, July 17, 2006.

<sup>45</sup> Roht-Arriaza, *supra* note X., *passim*.

practice of arbitrary detention, torture and widespread extrajudicial killings.<sup>46</sup> Despite the sweeping nature of the human rights abuses, impunity was rampant.<sup>47</sup>

On January 1, 1992, the government and the Salvadoran guerrilla forces (the Frente Farabundo Marti para la Liberacion Nacional (FMLN)) signed Peace Accords sponsored by the United Nations.<sup>48</sup> These Peace Accords, however, did not signal the end of political violence for a variety of reasons, including the failure to purge and transform the security forces and to implement other aspects of the agreement.<sup>49</sup>

The 1992 peace agreements established a truth commission “composed of international figures, to investigate the war's worst acts of violence and recommend reforms.”<sup>50</sup>

The Commission focused on a small number of cases involving the most notorious and representative crimes. The Commission published a report which named over forty military officers and eleven FMLN members responsible for human rights abuses and detailed the previously unknown facts of several cases of massacres and extrajudicial killings. It also recommended sanctions for the perpetrators, such as being banned from public office for a minimum of ten years, or from the police forces for life. However, due to the judiciary's history of involvement with the executive and legislative branches and its contributions to rampant impunity, the Commission suggested that prosecutions could be counterproductive and unlikely to achieve fair results.<sup>51</sup>

As a result of and directly after the release of the Commission's report, the government passed a far-reaching amnesty law<sup>52</sup> that removed civil and criminal responsibility for political crimes committed by the government and the FMLN. Furthermore, the law contained a broad definition of political crimes, “including crimes against the public peace, crimes against the activities of the courts, and crimes committed ‘on the occasion of or as a consequence of the armed conflict, without regard to political condition, militancy, affiliation, or ideology.’”<sup>53</sup> Amnesty was not required by or part of the Peace Agreement.

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<sup>46</sup> REPORT OF THE COMMISSION ON THE TRUTH FOR EL SALVADOR, FROM MADNESS TO HOPE, THE 12-YEAR WAR IN EL SALVADOR, 26-44(1993) (hereinafter “Truth Commission Report.”)

<sup>47</sup> *Id.* at p. 173. MAGGIE POPKIN, PEACE WITHOUT JUSTICE, OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR, 108 (2000).

<sup>48</sup> These are referred to as the Chapultepec Agreement.

<sup>49</sup> With impunity still in effect, visible human rights violations continued in El Salvador throughout the early 1990s. These human rights abuses were condemned by the U.N. Secretary General, the United States, and the United Nations Observer Mission in El Salvador, which concluded that the persistence of summary executions, torture, and illegal detentions threatened the peace agreements.

<sup>50</sup> TRUTH COMMISSION REPORT *supra* note X, at pp. 5 (members); 18-26 (mandate). *See also*, Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20 HUM. RTS. Q. 843, 850 (1998)[citation omitted].

<sup>51</sup> Roht-Arriaza & Gibson, *supra* note X, at 850 (citations omitted).

<sup>52</sup> Republic of El Salvador Law on General Amnesty for the Consolidation of Peace, Legislative Decree No. 486, March 20, 1993.

<sup>53</sup> Roht-Arriaza & Gibson, *supra* note X, at 850 (citation omitted).

The Salvadoran Constitutional Court, reviewing the amnesty, found it constitutional.<sup>54</sup> Several decisions subsequently applied the amnesty law,<sup>55</sup> including the *Guevara Portillo Case* that involved the deaths of American soldiers traveling in a helicopter who were shot down by the FLMN.<sup>56</sup> In that case, the Criminal Chamber of the Salvadoran Supreme Court justified its ruling that the Salvadoran amnesty was valid under international law based, in part, on a likely misinterpretation of Protocol II to the Geneva Conventions, Article. 6(5).<sup>57</sup> The Court “emphasized that amnesty was necessary in order for reconstruction to take place after years of a bloody civil war. It also stressed the fact that the amnesty was part of negotiated peace accords.”<sup>58</sup>

Despite upholding the blanket amnesty in 1996, the Salvadoran Supreme Court issued a decision in 2000 that qualified its approval of the law.<sup>59</sup> The Court allowed each investigative judge to determine whether the amnesty law’s application in a particular case would violate El Salvador’s treaty obligations or interfere with remedying fundamental rights violations; if that occurred, then the amnesty law ostensibly could not be applied. Thus, if a fundamental right was at stake, the amnesty law could not be interposed as a barrier.<sup>60</sup> However, in El Salvador, the public prosecutor determines whether cases involve fundamental rights and, in the past eight years, has not found a case that he believes falls within that determination. Thus, a *de facto* situation of impunity continues in El Salvador.<sup>61</sup>

#### d. Case Study: Peru

The Peruvian case provides an illuminating example of how President Alberto Fujimori utilized his power, and mobilized a majority in Congress, to pass a 1995 general amnesty, forestall judicial review of the law, and avoid prosecutions of high-level military and political figures for serious human rights violations. Five years later, wracked by a corruption scandal, Fujimori was forced from office early in his third term and fled to Japan.<sup>62</sup> The following year, the Inter-American Court of Human Rights ruled that the Fujimori-era amnesty laws violated Peru’s obligations under the American Convention and cleared the way once again to pursue justice for serious human rights abuses in Peru.

<sup>54</sup> Roht-Arriaza & Gibson, *supra* note X, at 851 (referencing *El Salvador: Supreme Court of Justice Decision on the Amnesty Law, Proceedings No. 10-93 (May 20, 1993)*, 3 TRANSITIONAL JUSTICE 549, 555 (1995)).

<sup>55</sup> Roht-Arriaza & Gibson, *supra* note X, at 851.

<sup>56</sup> Guevara Portillo Case, Sala de lo Penal de la Corte Suprema de Justicia, San Salvador (Aug. 16, 1995).

<sup>57</sup> Roht-Arriaza & Gibson, *supra* note X, at 864.

<sup>58</sup> Roht-Arriaza & Gibson, *supra* note X, at 864, *citing* Guevara Portillo Case, Sala de lo Penal de la Corte Suprema de Justicia, San Salvador (Aug. 16, 1995) at 11.

<sup>59</sup> Cases 24-97 and 21-98, Constitutional Chamber, Sup. Ct. Sept. 26, 2000.

<sup>60</sup> *Id.*

<sup>61</sup> Chavez et. al. v. Carranza, Case No. 06-6234, brief of *amici curiae* in support of affirmance (6<sup>th</sup> Cir. brief filed 5/14/08), at 15.

<sup>62</sup> “Peru”, “Human Rights Developments”, World Report 2002, Human Rights Watch, available at <http://www.hrw.org/wr2k2/americas9.html>

The internal conflict in Peru, which lasted two decades, started in May 1980, when members of a guerrilla group, the Shining Path (*Sendero Luminoso*), burned ballot boxes just before the first democratic elections were to take place after twelve years of military rule.<sup>63</sup> The Shining Path launched a campaign of terror against the Peruvian state and against those it suspected of pro-government sympathies.<sup>64</sup> In response, the Peruvian government engaged in repression and human rights violations on a scale that eventually led a Truth and Reconciliation Commission to conclude that “...at some places and moments in the conflict, the behavior of members of the armed forces not only involved some individual excesses by officers or soldiers, but also entailed generalized and/or systematic practices of human rights violations that constitute crimes against humanity as well as transgressions of the norms of International Humanitarian Law.”<sup>65</sup>

Although after 1992 when the leader of Shining Path was captured, the conflict was in decline, the TRC found that “...in the last years of the Fujimori government, the internal armed conflict was manipulated with the goal of keeping the regime in power. This plunged the country into a new economic crisis and into the abyss of corruption, moral decay, weakening of the social and institutional fabric, and a profound lack of confidence in the public sphere. All of these characteristics constitute, at least in part, consequences of the authoritarian way in which the conflict was resolved, and make up one of the most shameful moments in the history of the Republic.”<sup>66</sup>

Fujimori took office following elections in 1990, but in 1992 he “dissolved the Congress, destroyed the independence of the judicial branch, suspended the Constitution, and assumed dictatorial powers” through what has been called a “self coup.”<sup>67</sup> That same year, Peruvian Army General Rodolfo Robles Espinoza denounced the existence of the *Grupo Colina* a death squad organized within the National Intelligence Service. The courts started to investigate the involvement of a presidential adviser and the commander of the army, as well as other high-ranking officials in killings and detentions attributed by

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<sup>63</sup> Villaran de la Puente, S. Chapter 4 “Peru”, in *Victims Unsilenced, The Inter-American Human Rights System and Transitional Justice in Latin America*, July 2007, Due Process of Law Foundation, 2007, p.96, available at <http://www.dplf.org/uploads/1190403828.pdf>

<sup>64</sup> “Profile: Peru’s Shining Path”, BBC News, Nov. 5, 2004, available at <http://news.bbc.co.uk/1/hi/world/americas/3985659.stm>. The Shining Path, a Maoist movement trying to establish a communist state in Peru, had its inception in the 1970s. *Id.*

<sup>65</sup> Truth and Reconciliation Commission, Final Report (2003), Volume VIII, General Conclusions, ¶ 55.

<sup>66</sup> *Id.* ¶ 104.

<sup>67</sup> Human Rights Watch, World Report, 1993, <http://www.hrw.org/reports/1993/WR93/Amw.htm>, accessed September 23, 2008. See also, OEA/Ser.L/V/II.83, Doc. 31, March 12, 1993, Report on the Situation of Human Rights in Peru, ¶ 43: “...an ad hoc Meeting of Ministers of Foreign Affairs... resolved ‘to appeal for the immediate reestablishment of democratic institutional order in Peru, for an end to all actions that impair the observance of human rights, and for abstention from the adoption of any new measures that will further aggravate the situation.’ The ad hoc Meeting also decided to send to Peru a mission of foreign ministers, accompanied by the Secretary General, to promote ‘immediate measures to bring about a dialogue among the Peruvian authorities and the political forces represented in the legislature, with the participation of other democratic sectors, for the purpose of establishing the necessary conditions and securing the commitment of the parties concerned to reinstate the democratic institutional order, with full respect for the separation of powers, human rights and the rule of law.’” Eventually, Fujimori agreed to hold congressional elections in November 1992, and a new Constitution was promulgated in December 1993.



Robles Espinoza to this death squad. Among the cases being investigated was the *Barrios Altos* massacre, the November 1991 assassinations of fifteen victims by masked, armed men in cars with police lights and sirens.<sup>68</sup>

In April 1995 the judicial investigation was formally opened.<sup>69</sup> Then in what the Inter-American Commission later described as “unexpectedly, early in the morning” of June 14, 1995, the Peruvian Congress promulgated the Amnesty Law, Law N° 26,479<sup>70</sup> with no congressional debate.<sup>71</sup> According to one source, the government had dictated the language of the amnesty law to the Congress.<sup>72</sup>

Under the terms of Law 26,479,<sup>73</sup> Article 1, “General amnesty is hereby granted to Military, Police or Civilian personnel, whatever their corresponding military or police situation or other duties, who are accused, investigated, indicted, placed on trial or convicted of common and military crimes under regular or military jurisdiction, for all acts derived from or originating on the occasion of or as a consequence of the armed struggle against terrorism and which may have been committed individually or by a group from May 1980 until the date of the promulgation of the present Law.” Article 6 sought to close any loopholes, providing that, “The acts or crimes covered in the present amnesty, as well as the definitive dismissals and absolutions, are not open to investigation, inquiry or summary proceeding; all judicial cases, whether in proceedings or under execution of a sentence, remaining definitively closed.”<sup>74</sup>

When a judge decided that the law was unconstitutional and continued investigating the *Barrios Altos* massacre, the Attorney General appealed, and a hearing was pending when the Fujimori government passed a second law to shut down judicial review. Law No. 26492<sup>75</sup> provided in its Article 1 that, “It shall be understood that the amnesty granted by Law No. 26479, ... does not constitute interference in the exercise of the judicial function nor does it undermine the State’s duty to respect and ensure the full observance of human rights, ...” Article 2 further clarified that “. . . said amnesty, as a right of pardon whose grant corresponds exclusively to Congress, in accordance with the provisions of clause 6 of Article 102 of the Constitution, is not subject to judicial review.” Offering its own broad interpretation of the amnesty law, this decree stated that, “Article 1 of Law No. 26479 shall be interpreted in the sense that the general amnesty granted is a binding obligation... and extends to all acts derived from or originating on

<sup>68</sup> See discussion *supra* Annex I and text accompanying notes x-y.

<sup>69</sup> See Villaran de la Puente, S. Chapter 4 “Peru, *supra* note X at 115.

<sup>70</sup> See Inter American Commission of Human Rights, Annual Report 1996, OEA/Ser.L/V/II.95 Doc. 7 rev., 14 March 1997. [Note: this report mistakenly refers to June 16 as the date of congressional action on the bill.] The speed with which the law was promulgated was notable: Congress passed the law on the 14<sup>th</sup>, the President signed it into law the same day, and it was published the following day, thus coming into legal effect on June 16, 1995.

<sup>71</sup> Villaran de la Puente, S. Chapter 4 “Peru,” *supra* note x, at 115.

<sup>72</sup> *Id.*

<sup>73</sup> Promulgated by the Executive Power on June 14, 1995, and published in the Official Reporter *El Peruano* on June 15, 1995.

<sup>74</sup> Unofficial translation by Lisa Magarrell, ICTJ.

<sup>75</sup> Promulgated by the Executive Power on June 30, 1995 and published in *El Peruano* on July 2, 1995.

the occasion or as a consequence of the fight against terrorism, whether committed by an individual or a group, between May 1980 and 14 June 1995.”<sup>76</sup>

Following the second amnesty law, the Peruvian courts closed the *Barrios Altos* prosecution. Human rights defenders in Peru turned to the Inter-American Commission on Human Rights (IACHR) and filed a complaint on behalf of various family members and victims.<sup>77</sup> In 1999, Peru rejected an offer by the IACHR to broker a friendly settlement, and an initial report was issued by the IACHR.<sup>78</sup> Peru defended the amnesty as an exceptional measure necessary to combat terrorism; the following day the IACHR decided to submit the case to the Inter-American Court of Human Rights. Two months later, the Peruvian government notified the Court that it was withdrawing its recognition of the Court’s jurisdiction, effective immediately. The court rejected this action.

Fujimori’s departure from office and the installation of a transitional government led to Peru’s renewed recognition of the Inter-American Court in January 2001. In February, Peru’s new representatives admitted responsibility in the *Barrios Altos* case and advised they would seek a friendly settlement. The Court convened a public hearing to air the parties’ positions on the Government’s proposal. The March 14, 2001 hearing, recounted in the Court’s ruling of the same date, led to its decision that the State’s admissions effectively put an end to the controversy.<sup>79</sup> The State likewise violated the Convention by passing amnesty laws that impeded the family members and surviving victims from pursuing judicial guarantees and protections.<sup>80</sup> The Court declared the two amnesty laws to be incompatible with the American Convention and lacking legal effect. The Court concludes that the laws “...may not continue to obstruct the investigation [of the massacre] on the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.”<sup>81</sup>

In its dispositive paragraph, the Court ruled that “the State of Peru should investigate the facts to determine the identity of those responsible for the human rights violations referred to in this judgment, and also publish the results of this investigation and punish those responsible.”<sup>82</sup> While, as of this writing, laws 26479 and 6492 have not been repealed, the courts do not give them effect. The *Barrios Altos* case was reopened, and nineteen members of the Armed Forces and former Presidential adviser Vladimiro Montesinos were charged with belonging to the *Grupo Colina* and participating in this crime. Later, other crimes

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<sup>76</sup> This section ensured that all cases of any kind would stay closed. *Id.*

<sup>77</sup> See discussion *supra*. Accompanying notes x-y.

<sup>78</sup> Inter-Am. Comm. H.R., Rep. No. 28/00.

<sup>79</sup> *Chumbipuma Aguirre Et Al v. Peru (Barrios Altos Case)*, Inter-Am.Ct. H.R., Judgment March 14, 2001. Ser. C No. 75.

<sup>80</sup> The Court decided it was not necessary to address the Commission’s argument that the State also violated the right to the truth (alleged under Art. 13.1, which recognizes the right to seek and receive information), as it considered this aspect to be subsumed within the Article 8 and 25 grounds on which the case had been accepted. *Id.*

<sup>81</sup> *Id.* ¶ 44.

<sup>82</sup> *Id.* ¶ 51.5.

attributed to the group were added to the charges, which have been consolidated.<sup>83</sup> Former President Alberto Fujimori also is being tried in connection with the *Barrios Altos* case, with a ruling expected in late 2008.<sup>84</sup>

#### e. Case Study: South Africa<sup>85</sup>

The system of apartheid in South Africa, which involved the enactment of legal structure of forced segregation of those of African, Asian, and mixed descent,<sup>86</sup> was institutionalized in 1948 under the National Party, South Africa's nationalist government.<sup>87</sup> The apartheid system was opposed by a number of groups, through demonstrations, strikes, non-violence, sabotage, and an armed opposition movement. The apartheid government reacted with swift and violent suppression.<sup>88</sup> Finally, due to mass demonstrations and increasing international advocacy and pressure, Nelson Mandela, the most significant leader of the anti-apartheid African National Congress (ANC), was released from prison,<sup>89</sup> and the ANC was no longer banned.<sup>90</sup>

In May 1994, Nelson Mandela was elected South Africa's first black President in its free, democratic and fully participatory elections.<sup>91</sup> In April of that year, an interim Constitution had already been adopted for the purpose of "the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution".<sup>92</sup> Under its Chapter 16 on "National Unity and Reconciliation," the interim Constitution provides that "[i]n order to

<sup>83</sup> Ronald Gamarra, "Human rights, justice and democratic transition: Institutional Review," in Lisa Magarrell and Leonardo Filippini, Eds, *The Legacy of Truth: Criminal Justice in the Peruvian Transition*, published by the International Center for Transitional Justice and the Instituto de Democracia y Derechos Humanos (Lima, 2006), available in English translation at <http://www.ictj.org/static/Americas/Peru/LegacyofTruth.eng.pdf>.

<sup>84</sup> See, <http://www.juicioysancionafujimori.org/baltos.htm>, accessed September 23, 2008.

<sup>85</sup> This case study is drawn, in large part, from THOMAS UNGER AND OTHERS, WITH GERALDINE DE VRIES, *THE SCOPE OF POSSIBLE AMNESTIES UNDER INTERNATIONAL LAW (AUGUST 2008)* (internal ICTJ document on file with the authors).

<sup>86</sup> "Human Rights: Historical Images of Apartheid in South Africa", introductory paragraph, United Nations multimedia, photos, at <http://www.un.org/av/photo/subjects/apartheid.htm>

<sup>87</sup> These laws, for example, prohibited mixed marriages, forced physical separation between communities and segregation in all public buildings, facilities, transport, and other, and forced black people to carry a special identification booklet with them at all times. "Apartheid Legislation in South Africa", About.com: African History, at <http://africanhistory.about.com/library/bl/blsalaws.htm>

<sup>88</sup> A. J. Robinson, Jr. "Apartheid, social and political policy of racial segregation and discrimination enforced by white minority governments in South Africa from 1948 to 1994," Africa, Featured Selections, *Africana, The Encyclopedia of the African and African American Experience*, at <http://www.africanaencyclopedia.com/apartheid/apartheid.html>

<sup>89</sup> See "Human Rights: Historical Images of Apartheid in South Africa," introductory paragraph, United Nations multimedia, photos, *supra* note x.

<sup>90</sup> "The context of the call for a general amnesty in South Africa," *Accounting for the Past: The lessons for South Africa from Latin America*, Human Rights Watch report, Vol.44, Issue 11, 23 October 1992, at <http://www.hrw.org/reports/1992/southafrica/2.htm>

<sup>91</sup> See "Human Rights: Historical Images of Apartheid in South Africa", introductory paragraph, United Nations multimedia, photos, *supra* note X

<sup>92</sup> *South Africa – Interim Constitution*, Preamble, 27 April 1994, at [http://www.servat.unibe.ch/icl/sf10000\\_.html](http://www.servat.unibe.ch/icl/sf10000_.html)

advance [...] reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past.”<sup>93</sup> It goes on to declare that “[t]o this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 Oct. 1990 and before 6 Dec. 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.”<sup>94</sup>

Accordingly, in July 1995, citing the above provisions of the interim Constitution, the Parliament of the Republic of South Africa passed the Promotion of National Unity and Reconciliation Act (PNUR), aiming “to provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from March 1, 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations.”<sup>95</sup> The Act establishes a Truth and Reconciliation Commission (TRC)<sup>96</sup> which, “to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past,”<sup>97</sup> shall, aside from “establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights” committed during the apartheid, and providing reparation and rehabilitation to victims,<sup>98</sup> “[facilitate] the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act.”<sup>99</sup> Any person granted amnesty within this framework, thereafter, could not be prosecuted or be the object of a civil claim for the amnestied act.<sup>100</sup>

A Committee on Amnesty of the TRC was created to address all aspects of the amnesty.<sup>101</sup> Moreover, under this system, “[a]ny person who wishe[d] to apply for amnesty in respect of any act, omission or offence on the grounds that it is an act associated with a political objective,” had to submit an application to the TRC.<sup>102</sup> This process fundamentally differed from the concept of a blanket amnesty. Especially innovative and contrasting with the Latin American models of amnesty laws<sup>103</sup> was the integration of the system for amnesty as one of the pillars of a truth and reconciliation process.<sup>104</sup>

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<sup>93</sup> *Id.* Chapter 16.

<sup>94</sup> *Id.*

<sup>95</sup> Promotion of National Unity and Reconciliation Act, 1995, No.34 of 1995, Preamble, at <http://www.doj.gov.za/trc/legal/act9534.htm>

<sup>96</sup> *Id.* at art. 2(1).

<sup>97</sup> *Id.* at art. 3(1).

<sup>98</sup> *Id.* at arts. (1)(a) & (1)(b).

<sup>99</sup> *Id.* at art. 3(1)(b).

<sup>100</sup> *Id.* at art. 20(7)(a).

<sup>101</sup> *Id.* at art. 3(3)(b).

<sup>102</sup> *Id.* at art. 18(1).

<sup>103</sup> See additional case study discussions in this Annex.

<sup>104</sup> A. Du Bois-Pedain, Excerpt of the Introduction of *Transitional Amnesty in South Africa*, Cambridge University Press, p.6, at [http://assets.cambridge.org/97805218/78296/excerpt/9780521878296\\_excerpt.pdf](http://assets.cambridge.org/97805218/78296/excerpt/9780521878296_excerpt.pdf).

More than 7,000 perpetrators of crimes applied for amnesty under the PNUR Act.<sup>105</sup> By 1998, when the TRC had completed its work, except for ongoing amnesty investigations, the TRC had rejected more than 4,500 of these applications while it had granted around 125 amnesties.<sup>106</sup> Soon after, when the TRC issued its report and in accordance with the legal framework of the amnesty process, the government of South Africa again asserted, as it had done at the beginning of the process, that those who had not applied for amnesty would be prosecuted.<sup>107</sup> Despite this promise and the transfer from the TRC of more than 800 cases for further investigation and possible prosecution to the National Prosecuting Authority (which, in 2004, had established a special unit for this purpose), a notable lack of political will resulted in the absence of such prosecutions, except for one or two isolated cases which sparked controversy.<sup>108</sup> In May 2002, thirty-three prisoners were “granted a presidential pardon for their role in the South African freedom struggle;” a number of those prisoners had applied for amnesty under the TRC system but been rejected.<sup>109</sup>

In June 2005, after prosecutions were suspended, guidelines for post-TRC prosecutions were adopted which enable the National Director of Prosecutions to grant indemnities from prosecution if the person charged fully discloses all facts relating to the charges and accepts to cooperate in any investigation and prosecution.<sup>110</sup> The December 2005 amendments to the National Prosecution Authority Act's (NPA) prosecution policy provide for an effective indemnity against prosecution in relation to politically motivated offenders, if they comply with certain factors. The primary factors in the exercise of prosecutorial discretion are the same as those applicable to the TRC process (i.e., truth, a political motive, and proportionality between the motive and the crime) but other factors are also relevant, including the following:<sup>111</sup>

- "The degree of co-operation on the part of the alleged offender";
- "The personal circumstances of the alleged offender", including "the alleged offender's sensitivity to the need for restitution... the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation... renunciation of violence and willingness to abide by the Constitution on the part of the alleged

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Du Bois-Pedain cites the following in her footnotes: “Minow (1998: 57) writes: ‘It turns the promise of amnesty, wrested from political necessity, into a mechanism for advancing the truth-finding process.’”

<sup>105</sup> “Background and Introduction”, Traces of Truth – Documents relating to the South African Truth and Reconciliation Commission, University of the Witwatersrand, at <http://truth.wvl.wits.ac.za/about.php>

<sup>106</sup> “TRC: The facts,” BBC NEWS, October 30, 1998, at <http://news.bbc.co.uk/1/hi/world/africa/142369.stm>

<sup>107</sup> “TRC Category - 5.Aftermath”, Traces of Truth – Documents relating to the South African Truth and Reconciliation Commission, University of the Witwatersrand, at [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=5](http://truth.wvl.wits.ac.za/cat_descr.php?cat=5)

<sup>108</sup> *Id.*

<sup>109</sup> Joanna Ross. “SA amnesty raises storm,” BBC NEWS, May 19, 2002, at <http://news.bbc.co.uk/1/hi/world/africa/1997262.stm>.

<sup>110</sup> See “TRC Category - 5.Aftermath”, Traces of Truth – Documents relating to the South African Truth and Reconciliation Commission, *supra* note 143.

<sup>111</sup> Press Release, International Center for Transitional Justice, Challenge Claims Amended Prosecution Policy Infringes Constitutional Rights (July 19, 2007), available at <http://www.ictj.org/en/news/press/release/1272.html> (last viewed Sept. 24, 2008).

offender; and the degree of indoctrination to which the alleged offender was subjected;" and

- "The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society."<sup>112</sup>

These amendments to the NPA policy are currently being challenged in court. The applicants in this case allege that the amended policy infringes the constitutional rights of the victims to dignity, life, freedom and security of the person and equal protection before the law. They allege that amended policy also infringes South Africa's international law obligations arising from the ICCPR and the CAT. The applicants also allege that the amended policy violates the rule of law by allowing for impunity from prosecution of those guilty of serious human rights abuses in an insufficiently transparent process. Few of the safeguards present in the TRC process are present in the amended policy. The challenge argues that, despite what the amended policy says, clearly, it allows for a re-run of the TRC process, with three key differences in the negative: (1) unlike the TRC, the application process will not happen in the public eye. The provisions for some form of publicity in the amended policy do not go far enough. The general public has an interest in knowing the details of the crimes of the past; (2) unlike the TRC, victims seemingly will not be entitled to present evidence of their own or oppose the grant of indemnity; and (3) unlike the TRC, the decisions will be of an administrative nature, made by the NDPP, a member of the executive. TRC amnesty decisions were made by a specially constituted judicial body.<sup>113</sup>

In addition, a 'Presidential pardons process for political offences ("Special Dispensation on the Presidential Pardoning Process relating to Certain Offenders") is currently ongoing in south Africa. The preamble to its Terms of Reference notes that if legal mechanisms created during the South African transition, such as the amnesty provisions of the PNUR Act of 1995 were still available, they would have been employed to deal with persons who have been convicted and sentenced for politically motivated offences. Since such mechanisms are no longer available and given that the President enjoys the constitutional power to grant pardons, he intends to exercise such power because of the absence of amnesty laws.

President Mbeki established a Presidential Reference Group, comprised of representatives of political parties and led by a former deputy police minister during the apartheid regime. More than 2000 applications are pending before it, many arising from

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<sup>112</sup> *Id.*

<sup>113</sup> The applicants further allege that the adoption of the policy is in breach of the Promotion of Administrative Justice Act, 2000 on various grounds. The alleged breaches include: (1) the amended policy was adopted without sufficient public consultation; (2) the procedure for making decisions under the amended policy is not sufficiently transparent; and (3) while the goals of "nation-building" and "reconciliation" are clearly to be supported, these values are neither possible nor durable if they are sought at the expense of the rule of law, fulfillment of international law obligations and effective access to justice by those victimized. Legally, such considerations are not rationally related to the purpose of the prosecution policy and are not legally relevant in the proper exercise of prosecutors' powers, namely the effective prosecution of crime without fear, favor or prejudice.

the political conflicts in KwaZulu Natal.<sup>114</sup> It already has recommended sixteen pardons to the President. The President is likely to accept these recommendations in issuing pardons. The pardons process is due to conclude in late 2008.

A full assessment of the process of trading “truth for amnesty” indicates that “the truth for amnesty formula of the South African approach was innovative, and it has been credited with assisting that country through its successful transition. The proposal of the conditional amnesty was instrumental in getting the conflicting parties to participate in a negotiated transition. This was the real value of the concept. However, the amnesty process itself was plagued with problems and shortcomings.”<sup>115</sup> The amnesty process failed if it “is to be assessed on whether it was able to incentivize or persuade perpetrators (particularly senior level perpetrators and commanders) to come forward and speak the full truth”<sup>116</sup> In South Africa, only the truth-seeking function received consistent emphasis. “The compact struck with victims” was contingent on perpetrators who were denied amnesty or those who never applied for amnesty facing investigation and prosecution; this did not occur.<sup>117</sup>

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<sup>114</sup> See, e.g., Boyd Webb, *Apartheid police chief in new bid for pardon*, CAPE TIMES, August 26, 2008.

<sup>115</sup> Comments on the Truth, Justice and Reconciliation Commission Bill, 2008 (ICTJ), June 10, 2008, ¶ 28.

<sup>116</sup> *Id.* ¶¶. 30 -30.1.

<sup>117</sup> *Id.* ¶¶. 31 -31.1.