

# Juggling Rights, Juggling Politics: Amnesty Laws and the Inter-American Court

Wayne Sandholtz  
John A. McCone Professor of International Relations  
School of International Relations  
University of Southern California  
Los Angeles, CA 90089-0043

[wayne.sandholtz@usc.edu](mailto:wayne.sandholtz@usc.edu) (corresponding author)

Mariana Rangel Padilla  
School of International Relations  
University of Southern California  
Los Angeles, CA 90089-0043

[rangelpa@usc.edu](mailto:rangelpa@usc.edu)

## Abstract

In a series of decisions starting in 2001, the Inter-American Court of Human Rights (IACtHR) has ruled that amnesty laws that create impunity for serious violations of human rights violate the American Convention on Human Rights and other treaties. In doing so, the IACtHR has placed itself at the forefront of international law jurisprudence on amnesties. In addition, the IACtHR has, in some of its decisions, taken the extraordinary step of nullifying national amnesty laws. We argue that the IACtHR's amnesty jurisprudence can be understood as the work of a trustee court. We offer a set of hypotheses regarding judicial decision-making in trustee courts. The hypotheses refer to the timing of decisions, the scope of decisions (narrow versus expansive), and the degree to which decisions follow a court's existing jurisprudence. Finally, we explore the hypotheses in short analyses of seven of the Inter-American Court's key amnesty decisions. The historical record is broadly consistent our argument (1) that both the Commission and the Court act on the basis of their commitment to expanding the reach of human rights law in the Americas, and (2) that they can adjust the timing and scope of their decisions in light of domestic contexts in the respondent states and their prior jurisprudence.

## Law, Politics, and Amnesties in the Inter-American System of Human Rights

In a series of decisions starting in 2001, the Inter-American Court of Human Rights (IACtHR) has ruled that amnesty laws that create impunity for serious violations of human rights violate the American Convention on Human Rights and other treaties. These judgments are noteworthy for several reasons. First, the IACtHR has placed itself at the forefront of international law jurisprudence on amnesties. No other international tribunal has addressed amnesties as often or as decisively as has the Inter-American Court. Second, the IACtHR has, in some of its decisions, taken the extraordinary step of nullifying national amnesty laws, declaring that they lack legal effect. The European Court of Human Rights is widely viewed as the most influential international court in the world, yet it does not have the authority to overrule national laws. Third, in overruling national amnesty laws, the IACtHR has challenged domestic legislation enacted as part of politically sensitive, sometimes fragile, transitions from authoritarian rule or peace settlements concluding brutal civil wars.

One strand of scholarship regards international courts as agents carrying out the preferences of member-state principals (Carrubba, Gabel, & Hankla, 2008; Garrett, Kelemen, & Schulz, 1998). But the Inter-American Court's amnesty decisions are difficult to reconcile with the depiction of international courts as faithful agents. The states that have ratified the American Convention on Human Rights (ACHR) did not include in the treaty a prohibition on amnesties. In addition, it is difficult to imagine that the states parties to the treaty would, by unanimity or even qualified majority, grant to the Inter-American Court the authority to nullify domestic legislation.

An alternative perspective sees some international courts not as faithful agents but as trustees. Trustee courts are created not to carry out the immediate wishes of the states that chartered them, but rather to safeguard the norms and purposes of a treaty regime. Such courts are trustees of the treaty regimes themselves and are charged with the duty of serving the "overarching objectives of the regime" (Stone Sweet & Brunell, 2013, p. 62).

The most commonly mentioned exemplars include the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR), the World Trade Organization Appellate Body (WTO-AB), and the International Court of Justice (ICJ) (Alter, 2008; Stone Sweet & Brunell, 2013).

We argue that the IACtHR's amnesty jurisprudence can be understood as the work of a trustee court. In the following sections we define trustee courts and measure the Inter-American Court against that definition. We then offer a set of hypotheses regarding judicial decision-making in trustee courts. The hypotheses refer to the timing of decisions, the scope of decisions (narrow versus expansive), and the degree to which decisions follow a court's existing jurisprudence. Finally, we explore the hypotheses in short analyses of seven of the Court's amnesty decisions. The analysis supports our broad argument that the Inter-American Court is a trustee court that takes into account both the domestic politico-legal context in a respondent state and its own prior jurisprudence.

## **Trustee courts**

Trustee courts exercise authority by delegation, but it is "fiduciary" not "agency" delegation (Majone, 2001). Agency delegation entails doing what the principals would do, by applying rules created by the principals to regulate third parties – citizens and companies, for instance. Fiduciary delegation means taking rules agreed by the principals and applying them to the principals themselves, even against their wishes at the moment.

Put differently, delegation to an agent is fundamentally about reducing "decision-making costs" for the principals, whereas trustee (fiduciary) delegation is essentially about enhancing the credibility of policy commitments made by the principals. States (and other kinds of principals) set up agency delegation in order to govern those who are subject to the principals' authority. States create trustees in order to govern themselves. "A trustee, then, possesses legal authority to govern the principals in light of priorities -- legal commitments -- to which the latter have agreed" (Stone Sweet & Keller, 2008, p. 9). Trustee courts are particularly appropriate in human rights, a domain in which states

commit not to exchange mutual benefits but to constrain their own behavior (to refrain from abuses). In human rights, traditional inter-state enforcement mechanisms like reciprocity and retaliation are virtually meaningless, as states can hardly threaten to violate the Convention against Torture (for example) in response to another state's violations. In other words, the commitment problems connected with safeguarding basic rights are particularly acute, and states have established international trustee courts to help deal with that challenge (Stone Sweet & Keller, 2008, p. 9).

Finally, the term "trustee" implies that the trustee acts on behalf of a third party beneficiary (Alter, 2008, pp. 39-41). For a trustee court, the beneficiaries are the holders of treaty-protected rights, that is, the people living within the court's jurisdiction. When states violate their international human rights commitments, people – not other states – are the victims. Trustee courts exist to permit individual persons to vindicate their rights against states that have compromised them.

### **The Inter-American Court as a trustee court**

This section discusses the essential attributes of trustee courts in general and evaluates the Inter-American Court in terms of those characteristics. The Inter-American Court of Human Rights is part of a system that also includes the Inter-American Commission on Human Rights. The Commission is the body that receives individual petitions. Once it has determined that a petition meets the requirements, the Commission gathers information and requests a response from the state accused of violating Convention rights. The Commission can then broker a friendly settlement between the petitioner and respondent state, publish a report with its findings, and, if the state response is inadequate, refer the case to the Inter-American Court. Once it has received an application from the Commission, the Court reaches a decision on the merits of the claim and publishes its decision. At the conclusion of its proceedings, the Court can find a state responsible for violations and require compensation and other remedies (Pasqualucci, 2003, pp. 6-7). If the Commission and the Court constitute a trustee system, they should exhibit the key features of such arrangements.

## 1. Institutional independence

Agency delegation implies the need for principals to monitor and control the agents, but fiduciary delegation requires the opposite – that the trustee be independent of the principals (Majone, 2001, p. 103). The trustee must enjoy independence from the principals because its job is to apply rules to the conduct of the principals (the states) themselves. Institutional independence depends on the procedures for appointing and removing judges; the length of judges' terms; salaries; funding for court operations; control over operational rules; and the difficulty with which political bodies can alter the court's powers or jurisdiction. Both the Commission and the Court enjoy considerable institutional independence.

With respect to appointments, the multilateral nature of the appointment process for judges on international courts means that international judges are probably more insulated from appointment or confirmation politics than are domestic judges (Alter, 2006, p. 46). This holds true for the seven members of the Inter-American Commission. The OAS General Assembly elects Commissioners by secret ballot; a candidate must receive both the largest number of votes and an absolute majority of the member state votes to be elected. Terms on the Commission are for four years, with the possibility of election to a second term. The OAS General Assembly can remove a Commissioner by a two-thirds majority vote, but only if at least five members of the Commission first vote that there is cause. The independence of members of the Commission is also safeguarded by the American Convention and the Commission's Statute, which confer on Commissioners the same immunities as those enjoyed by diplomats under international law. In addition, Commissioners cannot be held liable for decisions or opinions issued as part of their official functions (Davidson, 1997, pp. 101 - 103).

The seven judges are elected to six-year terms on the Court, renewable once, by the states parties to the American Convention. Any state party may nominate candidates, whose states of nationality must be members of the OAS but need not be parties to the American Convention nor have accepted the Inter-American Court's jurisdiction. All of the judges but the President of the Court serve on a part-time basis, as the Court sits in session for a few weeks, several times each year (Pasqualucci, 2003, pp. 10-11). Because the judges serve part-time, they do not depend on Court salaries. Judges are paid an honorarium

during the time they are present for sittings of the Court, though they are not compensated for the time they spend studying cases and preparing for sessions (Pasqualucci, 2003, p. 23).

With respect to funding, both the Commission and the Court are in a paradoxical situation. The Organization of American States does not adequately fund either body, but contributions from other sources allow them to carry out their duties. In other words, the independence of neither is compromised by dependence on limited OAS funding. For instance, in 2013, the funds received by the Commission totaled \$11,100,700, of which 44 percent came from the OAS. The balance came from individual states (some OAS members but also eight European countries and the EU) and various organizations, including Save the Children (Sweden), UNAIDS, UNICEF, and UNHCR (Inter-American Commission on Human Rights, 2013). The Court's total 2013 budget was \$4,509,323, of which 59 percent came from the OAS. Donors contributed the balance, including various foundations, international organizations, and states (both regional and European) (Inter-American Court of Human Rights, 2014). In short, the modest financial resources of the Commission and the Court do not compromise their independence vis-à-vis their political principals, the member states of the OAS. To exert political pressure on the Commission and Court through their budgets, a majority of the OAS members would have to agree to do so and, even then, the OAS supplies only about half of the two budgets.

Perhaps most important, supranational courts are more independent the more difficult it is for the member states to rein them in (Alter & Helfer, 2010, p. 567). States can constrain an international court by controlling its operational rules and by constricting its overall powers. At the operational level, both the Court and the Commission are authorized by the Convention to create and to modify their own Rules of Procedure (Arts. 39, 60). This power enhances the independence of the two bodies, as the states parties could only gain control over the rules of procedure by amending the Convention (Burgorgue-Larsen & Úbeda de Torres, 2011, p. 36). Similarly, the states parties to the American Convention would find it exceedingly difficult to curtail the authority or the jurisdiction of the Commission and the Court. The Commission could only see its powers reduced through amendment of the OAS Charter, which requires a two-thirds vote of the states, and amendment of the American Convention on Human Rights, which also requires ratification

by two-thirds of the States Parties (*Charter of the Organization of American States*, Arts. 140, 142; *American Convention on Human Rights*, Art. 76). To reduce the powers of the Court, the states parties would likewise have to muster a two-thirds majority to ratify amendments to the Convention.

## 2. Compulsory jurisdiction

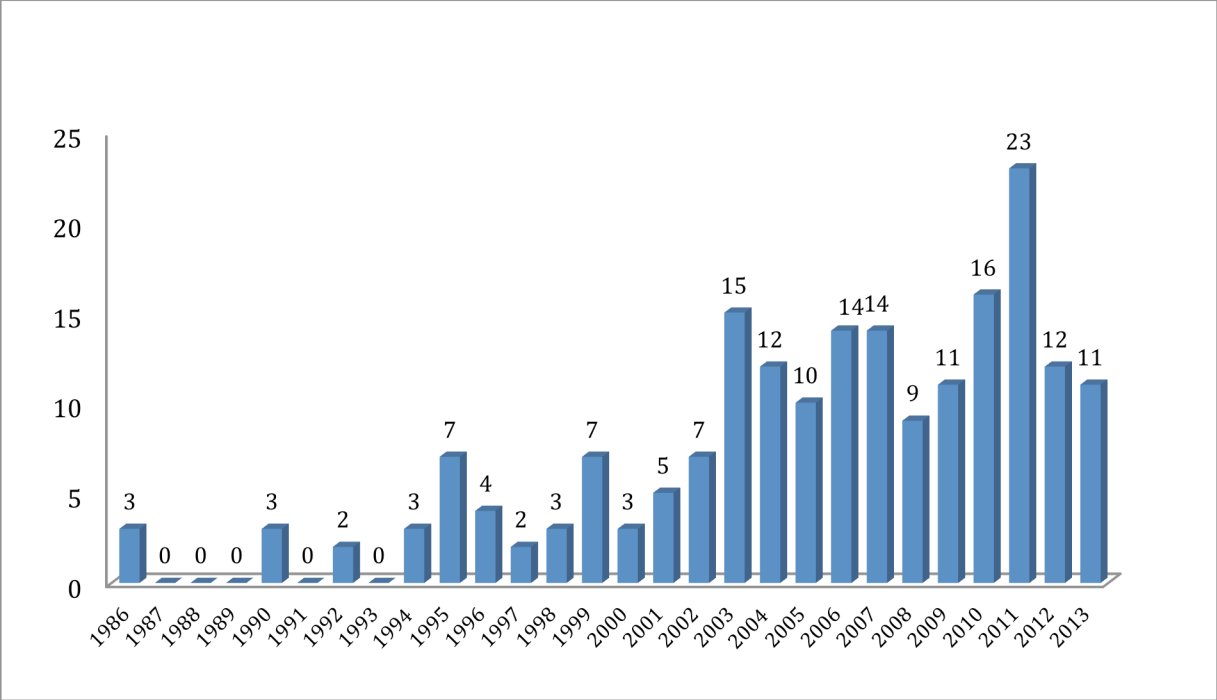
An international court cannot function as a trustee if states can opt out of the court's jurisdiction. Compulsory jurisdiction, then, is a key feature of trustee courts (Stone Sweet & Brunell, 2013, p. 62). Put differently, if states are able to prevent cases from going before the court, then the court will not perform its role of holding member states to their commitments. Only states that ratify the ACHR can accept the jurisdiction of the Inter-American Court. Currently, 23 countries are states parties to the Convention (two additional states, Trinidad and Tobago and Venezuela, have denounced the Convention). Of those 23, 18 have filed with the Secretary General of the OAS their acceptance of the binding jurisdiction of the Court, pursuant to Art. 62 of the American Convention. Other states accept the Court's jurisdiction in specific cases.

Perhaps most importantly, compulsory jurisdiction makes it more likely that a court will receive the regular caseload that is essential to its effectiveness (Alter & Helfer, 2010, p. 567; Helfer & Slaughter, 1997; Stone Sweet & Keller, 2008, p. 8). Without a regular stream of cases, a court cannot develop the jurisprudence that would (1) fill in the gaps in regime norms and (2) allow states to develop stable expectations about how those norms are likely to be interpreted and applied in future disputes. Indeed, one of the signal achievements of the world's most successful trustee court, the European Court of Human Rights (ECtHR), is precisely that it has developed "precedent-based rationales" (jurisprudence) to guide the arguments of claimants and states, to provide rationales for its decisions, and to encourage state compliance with those decisions (Stone Sweet & Keller, 2008, p. 14).

The IACtHR has received a steady, if modest, flow of cases; see table 1. The number of cases referred to the Court rose after 2001. Prior to that year, the Commission had discretion as to whether or not it would send a case to the Court. The Commission's Rules of Procedure were amended in May 2001 so as to reduce that discretion and specify

criteria for referral of cases. The new rules require a case to be submitted to the Court when: (1) the state in question has accepted the jurisdiction of the Court; (2) the state has not implemented the recommendations of the Commission’s report; and (3) an absolute

Figure 1: Cases submitted to the IACtHR, by year



Source: Inter-American Court of Human Rights. 2013. *Annual Report 2013*. p. 25. Available at [http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng\\_2013.pdf](http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2013.pdf).

majority of the seven Commission members does not offer a reasoned objection to referral (Burgorgue-Larsen & Úbeda de Torres, 2011, pp. 36-37). The flow of cases has by now allowed the IACtHR to develop a substantial jurisprudence across a broad spectrum of topics (Burgorgue-Larsen & Úbeda de Torres, 2011).

### 3. Judicial supremacy

The decisions of a trustee court must be authoritative. That is, the trustee court must have the last word on interpretation of the relevant instruments and its decisions must be virtually immune to being overridden by the member states. “By definition, a trustee court possesses final authority to determine the scope and content of the law, and the principals have reduced means of overruling judicial determinations that they may find



objectionable” (Stone Sweet and Keller 2008, 9). The Statute of the Court states that it is “an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights” (Art. 1). Article 67 of the American Convention further stipulates that “[t]he judgment of the Court shall be final and not subject to appeal.” Finally, the Court has affirmed in its jurisprudence that it is “the ultimate interpreter of the American Convention” (*Almonacid-Arellano v. Chile*, Judgment, 26 September 2006, para. 124).

### **Judicial decision-making in trustee courts**

Research on domestic courts offers a set of arguments on how judges decide cases, arguments that can be adapted to international courts. Two main strands of theory have emerged, both offering an alternative to the baseline “legal decision-making” model. The legal model is the traditional account of judging, in which judges seek to resolve disputes according to the written law and case law. Reasoning by analogy, judges determine which legal rule best fits the set of facts before them, and apply that rule to resolve the dispute. The attitudinal model (Segal & Spaeth, 2002) argues against the naïve legal model and contends that judges decide according to their political or ideological preferences. In this account, judges will cite law and precedent selectively in order to reinforce decisions that they have made on underlying ideological grounds. The strategic model (Epstein & Knight, 1998) holds that judges add to the attitudinal approach the constraints imposed on them by other institutional actors, including other courts, the executive, the legislature, and public opinion (Vanberg, 2000). Judges acting strategically will try to carry out their political preferences in their rulings, but they also recognize that they depend on the other branches to comply with, implement, and enforce judicial decisions. In addition, judges prefer to avoid provoking legislatures and executives into overriding judicial decisions or curtailing the powers or jurisdiction of the courts. As a result, judges will act strategically, confining their decisions to the policy space delimited by the preferences of the legislature and the executive. These are somewhat simplified versions of the theories of judicial decision-making, but they are sufficient to orient the discussion of decision-making in international trustee courts.

For the Inter-American System, we assume that both Commissioners and IACtHR judges will generally prefer to apply the American Convention expansively, that is, in the way that allows the greatest scope for Convention rights and freedoms. Commissioners and judges will tend to favor interpretations that extend rights protections to additional situations and categories of persons. In other words, the original formulation of the attitudinal model, based on a left-right (liberal-conservative) ideological spectrum, does not apply straightforwardly to the Inter-American System and other human rights tribunals. Judges and Commissioners will generally share a pro-rights commitment and will see their primary duty as promoting respect for the regime's rights and freedoms by state actors. The professional background of both commissioners and judges suggests that they are oriented toward fulfilling and expanding Convention rights. All of the current (May 2014) Commissioners have prior professional human rights experience, in NGOs, academia, legal practice, or government service. Six of the seven IACtHR judges have professional human rights experience, and the seventh has high-level experience in constitutional law.<sup>1</sup>

The strategic model has direct implications for the Inter-American System. Though Commissioners and judges will generally prefer to interpret and apply the Convention expansively, they do have to take into account the interests and preferences of the member state governments and other domestic actors. The issue is not that the member states are likely collectively to reverse Court decisions or restrict Commission's and the Court's powers or jurisdiction. As explained above, the obstacles to collective member state action to curtail the authority of the Commission or the Court are virtually insurmountable. The Commission and the Court have an incentive to consider the likely reactions of governments and other domestic actors for two reasons. First, states that are dissatisfied with the Court's decisions can withdraw from the Court's jurisdiction. In fact, states can denounce the American Convention altogether. Only two states have withdrawn, and only one of the withdrawals was motivated by displeasure with the Court. Trinidad and Tobago did so in 1998 in order to retain and carry out the death penalty. Venezuela withdrew from the Convention in 2012, criticizing the Commission and the Court for their decisions with

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<sup>1</sup> See the biographies at <http://www.oas.org/en/iachr/mandate/composition.asp> and <http://www.corteidh.or.cr/index.php/en/about-us/composicion>.

respect to cases arising out of a coup attempt against President Hugo Chávez in April 2002 and a broad work stoppage of December 2003 (Venezuela (Bolivarian Republic of), 2012). A large number of withdrawals would clearly undermine the Court (and the entire Inter-American System), but it is difficult to imagine circumstances in which either (a) a large number of states withdraw in reaction to separate rulings against them, or (b) a large number of states is sufficiently incensed by a ruling against other states that they all withdraw.

Second, as the strategic model suggests, the Commission and the Court depend on other actors to implement their recommendations (the Commission) and rulings (the Court). Some degree of non-compliance with Court decisions is inevitable, but constant and pervasive non-compliance would erode the Court's legitimacy and effectiveness. The Commission (which requests rulings from the Court) and the Court will therefore take into account domestic factors that would affect the likelihood of compliance in the respondent state. Research on international courts suggests that the Commission and Court would consider the following domestic factors:

1. Favorable domestic political conjuncture

The Commission and the Court will take into account the nature of the government in the state that is involved in a case. The reasoning is straightforward: governments that have been implicated in systematic, widespread abuses are hardly likely to accept and comply with an unfavorable Court ruling. In order to be effective, supranational courts must be aware of political "boundaries" (Helfer & Slaughter, 1997). The Commission and Court will therefore take into account, (1) the composition of the regime in power and then, depending on the nature of the regime, (2) the gravity and extensiveness of the alleged violations. The latter consideration can magnify the importance of the first, as explained below.

(a) *Composition of the regime*: Do the governing parties or party factions whose actions or policies are being challenged remain in power? If the parties or factions that were responsible for the actions or policies that violated Convention rights are no longer in control of the government, the Commission and the Council are more likely to issue decisions against that state. For instance, if the government that granted itself an "auto-

amnesty” remains in power, a Court decision invalidating the amnesty law would likely have little effect. Once that government has left the scene, the Commission and Court are more likely to issue decisions against that state. If the groups responsible for the violations retain political power, two additional considerations become relevant. The next two considerations have conditional effects, depending on the nature of the regime in power.

(b) *The nature of the violations*: Some violations will be seen as more grievous than others, with grievousness dependent on both the specific rights involved and the number of victims. We posit that there is an implicit hierarchy of human rights abuses. Violations of physical integrity rights (torture, arbitrary detention, disappearance, and extrajudicial killing) are widely seen as the most serious, followed by other civil rights (freedoms of expression, assembly, religion, and so on), political rights, and economic, social and cultural rights. Violations with large numbers of victims are more grievous than those with smaller numbers. The most serious violations, then, are those involving physical integrity rights with large numbers of victims. The more serious the violations: (1) the less likely the Court is to rule against the state *if the groups responsible for the violations remain in power*, and (2) the more likely the Court is to rule against the state *if the groups responsible are out of power*.

Figure 2: Decision-making in the Inter-American System

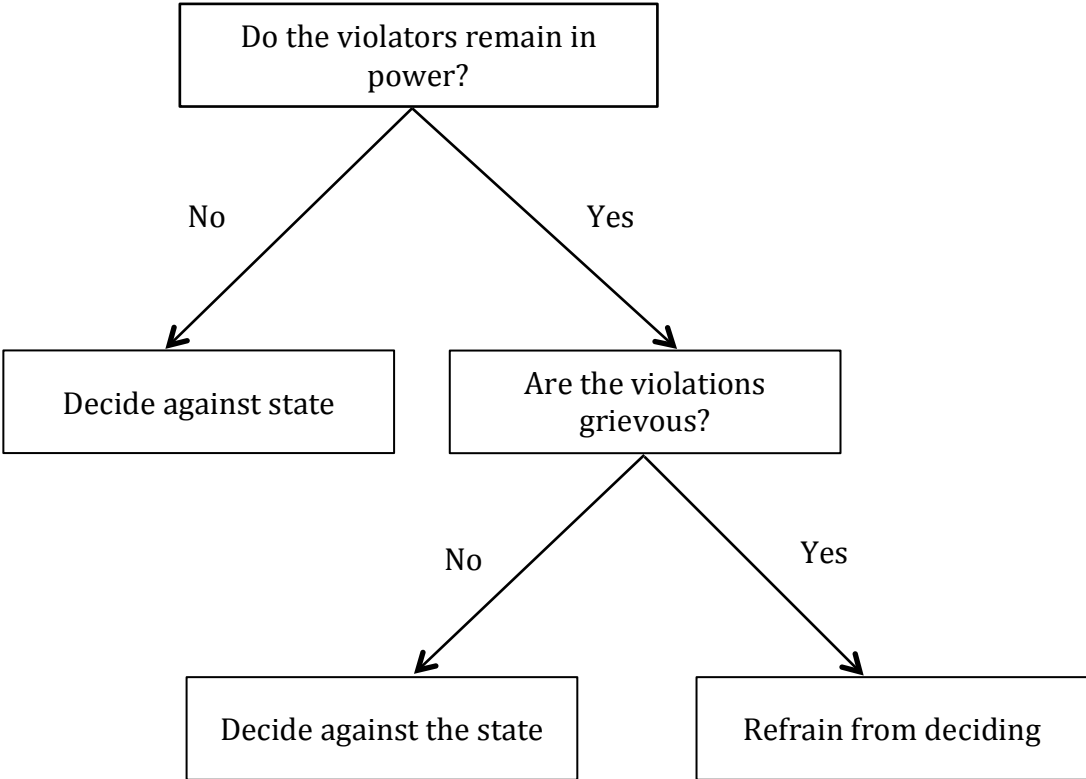


Figure 1 depicts the key decisions facing the Commission and Court, assuming that the facts of the alleged violations have been established (that is, the violations occurred). Two examples from Chile illustrate the process. In *Almonacid Arellano*, the violators were no longer in power, so the Court ruled against Chile even though the violations were indeed grievous (extrajudicial killing) and the victims numerous (Mr. Almonacid Arellano was one of hundreds). In *The Last Temptation of Christ* case, the alleged violators of the right of expression remained in power, but the violation was not grievous as we defined it (not involving physical integrity rights with many victims). The Court, accordingly, ruled against Chile.

2. Supportive domestic constituencies

At a minimum, supranational courts will be more effective when their judges cultivate an awareness of their audiences and constituencies (Helfer & Slaughter, 1997),

especially those within the country affected by a ruling. As Cavallaro and Brewer put it, “supranational tribunals” like the IACtHR “are likely to be most effective” when their activities support the efforts of local actors -- civil society groups, human rights activists and organizations, media actors, pro-human rights government actors (Cavallaro & Brewer, 2008, p. 770). Alter and Helfer similarly argue that international courts are “more likely to be expansionist where substate and societal interlocutors—government officials, national judiciaries, advocacy networks, administrative agencies, or the public more generally—encourage IC lawmaking and facilitate compliance with IC rulings” (Alter & Helfer, 2010, p. 565). In the amnesty cases specifically, the IACtHR’s activist jurisprudence against amnesties must “be appreciated against the background of the generally favorable political climate in Latin America, which turned against impunity in the 1990s.” Binder notes that the Court’s decisions on amnesty laws aligned with the efforts of national courts, legislatures, and civil society to end impunity and were welcomed by public opinion and news media (Binder, 2012, p. 1227). As the analysis below will show, that was true for some countries but not others.

### **Amnesties and judicial decision-making in the Inter-American System**

We have argued that the IACtHR is a trustee court that will generally seek to apply the American Convention as expansively as possible. The Commission is likewise a trustee body because all individual petitions reach the Court through the Commission, which also reaches decisions on the petitions, makes recommendations for remediation, and, when it submits an application to the Court, requests specific findings. We assume that the underlying preferences of the Commission and the Court are to rule expansively, that is, to decide cases in ways that will extend the reach of inter-American human rights law. Ruling expansively can mean expanding the list of substantive rights, the contexts in which they must be protected, and the kinds of actions that constitute violations. At the same time, the Commission and the Court must act strategically vis-à-vis the member states, both because states retain the ability to withdraw from the Convention and because the Court relies on domestic actors to comply with and implement its decisions. The Commission and the Court, in other words, constantly face decisions about how assertively to act.

We propose that the Commission and the Court calibrate the assertiveness of their actions along two dimensions – timing and scope – and in light of their own jurisprudence.

### 1. Timing

Timing refers to how quickly the two institutions decide cases brought before them. The most assertive decision is one that follows quickly after receipt of a petition, regardless of the political context in the respondent state and the strength of domestic constituencies (activists, NGOs, the media, the public). At the other end of the spectrum, the Commission and the Court act less assertively when they delay issuing a decision. The Commission, for example, might wait years before filing an application at the Court, waiting for a more favorable domestic context in the respondent state.

Though the option of waiting is available to both the Commission and the Court, we suggest that it is more likely to be exercised by the Commission. First, the Commission process differs from that of the Court, in that the Commission first seeks to reach a “friendly” resolution of the dispute. Ideally, when the Commission finds that a state has violated a Convention right, the state will agree to halt the abuse, compensate the victim(s) appropriately, and institute measures to prevent further violations. If the Commission and the state party reach such an agreement, the case is concluded. In other words, the Commission process will naturally lead in many cases to an extended period of exchanges and negotiations. For the Commission, a friendly resolution is the best outcome, so it will often allow time for such an outcome to develop. But the Commission may also allow the timeframe to expand for more strategic reasons. The Commission will prefer a Court decision that has the best chance of being implemented by the state party. In some cases, therefore, the Commission will have an incentive to wait until the domestic context in the respondent state (political power and societal groups) is favorable, before submitting an application to the Court. The upshot is that the Court is likely to receive cases in which the Commission has already waited for a favorable domestic context, and therefore the Court will have no strategic incentive to wait. On the contrary: the Court will be motivated to act quickly, while the domestic context is favorable.

### 2. Scope

The Commission and the Court have discretion over whether a decision will be narrow in scope or broad (expansive). A narrow decision resolves the case, finding that specific actions violated (or did not violate) a Convention right, without claiming to judge the national law or policy behind the specific actions. An expansive decision is broader in scope: it both rules on the specific actions in the case and determines whether the national law or policy that motivated those actions itself violates the Convention. In a (hypothetical) case of forced disappearance, for example, the Court could rule narrowly that state agents violated the victim's Convention rights. The Court could rule more expansively that, in addition, the state's failure to investigate the disappearance constituted a further violation of Convention rights. The Court could rule yet more expansively that not only did the disappearance and the failure to investigate violate the Convention, but that a national amnesty law preventing the prosecution of those responsible also violated the Convention and was invalid. The latter outcome – in which the Court nullifies a national law – represents the outcome in which a court's assertiveness is at its maximum. The most influential trustee court in the world – the ECtHR – does have the authority to override national laws. Yet the Inter-American Court, in some of its amnesty decisions, has asserted precisely that competence.

With respect to amnesty laws specifically, the Commission and the Court are likely to take into account the origins of the amnesty. Self-amnesties, granted to itself by the regime that committed the abuses, are likely to be seen as less legitimate and less connected to important national policies than are amnesties that are implemented as part of a negotiated or “pacted” transition.

### 3. Precedent

A crucial element of judicial decision-making in any trustee court, including the Inter-American System, is the development of jurisprudence. A decision, in principle, applies only to a specific dispute and only to the parties to that case. But judicial bodies everywhere face powerful incentives to be consistent, that is, to decide like cases alike. A court's legitimacy depends in part on that consistency, in the absence of which the court can appear arbitrary or biased. In fact, as Stone Sweet and Keller argue, no court can have an influence on its legal and political context without (among other characteristics) a



“minimally robust conception of precedent” (Stone Sweet & Keller, 2008, p. 8). The ECtHR, for instance, “relies on precedent-based rationales” in order to guide the arguments of claimants and states, to provide rationales for its rulings, and to encourage state compliance with decisions (Stone Sweet & Keller, 2008, p. 14). Thus, though past decisions do not establish binding precedent, once the Commission and the Court have established a legal norm or principle, they are likely to apply it in subsequent cases, absent compelling reasons that would distinguish a case from its predecessors. Once the Court has announced a legal norm in one case, it is likely to apply that norm in later similar cases.<sup>2</sup> In other words, the Court’s decisions create a ratchet effect.

The foregoing arguments lead to a set of propositions regarding decisions in cases in which the Commission and the Court have the chance to rule on national amnesty laws:

*Proposition 1 (timing):* The Commission is likely to submit an application to the Court after the end of the crisis that produced the human rights violations, meaning either a political transition from authoritarian rule or the conclusion of a civil war.

*Proposition 2 (timing):* The Commission is more likely to submit an application to the Court if the domestic political context is favorable to prosecuting past rights abuses. That context is more favorable when:

- (a) the parties or factions connected to the rights-violating regime have been weakened in the post-transition period.
- (b) supportive societal groups (activists, NGOs, media) have gained in strength.
- (c) a transitional justice process (truth commission, trials) has begun.

*Proposition 3 (scope):* The Commission and the Court are more likely to rule narrowly on an amnesty question when the amnesty law was part of a negotiated transition (including

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<sup>2</sup> For clarification, of course the roles and authorities of the Commission and the Court differ. The Commission’s reports on cases are not legally binding. Still, when the Commission issues a report on a petition, it reaches a conclusion regarding the claims and offers a rationale for that conclusion. Once the Commission has advanced a normative claim and supportive rationale, it is unlikely to retreat from it, otherwise it risks losing credibility. The Court’s decisions are binding for the dispute in question and the parties to it. To avoid losing credibility, the Court has an incentive to rule consistently with the norms and legal reasoning that it has announced in an earlier decision.

agreements ending civil wars). Conversely, both bodies are more likely to rule expansively on immunity laws created by the rights-violating regime itself (self-amnesties).

*Proposition 4 (precedent):* Decisions in amnesty cases are shaped by the norms announced in previous decisions, meaning that each decision will be at least as expansive as preceding ones, in the absence of distinguishing facts.

### **The Commission, the Court, and the amnesty cases**

In this section, we compare our propositions to the empirical record through a qualitative examination of seven judgments, out of a set of 15 potentially relevant cases. We have selected only one decision per country, with the exception of El Salvador, for which we included two (*Serrano-Cruz Sisters* and *El Mozote Massacre*). The two Salvadoran cases permit a comparison of outcomes before and after significant shifts in the domestic context. We exclude *Moiwana Village v. Suriname* because it is not clear that Suriname's amnesty law was actually a factor in the case (Antkowiak, 2007, pp. 280-282). Each of the brief case studies below is structured to correspond to our propositions, with a section on the timing of the referral to the Court, a section on the scope of the Court's decision, and (where relevant) a section on the relationship of the current decision with the Court's prior jurisprudence. In order to assess the scope of the Court's decisions, we devised a three-fold categorization system:

1. *Specific*: the decision states that the amnesty law must not be an obstacle to the investigation and prosecution of those responsible for the violations in the present case.
2. *Broad*: the decision states that the amnesty law must not be an obstacle to the investigation and prosecution of those responsible for violations in the present case or in any other cases.
3. *Expansive*: the decision nullifies the amnesty law itself.

Figure 2 presents the seven cases in timeline form, which makes more visible the timing of Commission and Court actions in relation to domestic transitions and political changes. In particular, note that in every case the Commission's application to the Court came after the domestic political transition and in every case but one (*Serrano-Cruz*) it came after a left-leaning or opposition party had come into power ("Alternance" in figure 3).

### 1. *Barrios Altos v. Peru*

#### (a) Timing

The Inter-American court's first decision on a state's amnesty law came in *Barrios Altos v. Peru*, a case involving the massacre of 15 persons by a Peruvian Army death squad in November 1991. The massacre occurred during the Peruvian government's brutal campaign against the insurgent groups, Shining Path and the Tupac Amaru Revolutionary Movement. The government employed arbitrary detention and extrajudicial killings; took over the judiciary; conducted trials by anonymous ("faceless") judges; prosecuted civilians in military courts; and curbed the mass media (Villarán de la Puente, 2007). In this context, the families of the victims of the Barrios Altos massacre were unable to obtain justice through domestic judicial means. President Alberto Fujimori had reinstalled himself in power through the "self-coup" of April 1992 and a pair of 1995 amnesty laws had terminated all judicial proceedings against anyone implicated in human rights violations between 1980 and 1995.

Figure 3: Amnesty case timelines



Figure 3: Amnesty case timelines (continued)

IACtHR case title	Country	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Barrios Altos	Peru	[Authoritarian rule]		Alt / App	Ct Dec	[Truth commission years]										
Serrano Cruz	El Salvador		Pet				App		Ct Dec				Alt			
Almonacid	Chile		Pet				[Truth commission years]		App	Ct Dec						
Las Dos Erres	Guatemala	[Truth commission years]									Alt	App	Ct Dec			
Gomes Lund	Brazil	[Truth commission years]							Alt				App	Ct Dec		[Truth commission years]
Gelman	Uruguay			[Truth commission years]					Alt	Pet			Ref2	App		Ct Dec
El Mozote	El Salvador												Alt	App		Ct Dec
		[Authoritarian rule]	Authoritarian rule		Amn =	Amnesty law enacted			App =	Commission app.						
		[Civil war years]	Civil war years		Alternance =	Opposition/left party comes to power			Ct Dec =	Court decision						
		[Truth commission years]	Truth commission years		Pet =	Petition filed at Commission			Ref =	Referendum						

The *Barrios Altos* petition was filed at the Commission on 30 June 1995 by the Coordinadora Nacional de Derechos Humanos (National Human Rights Coordinator), an umbrella organization that provided legal defense to victims of human rights violations. In the first years after the filing of the petition, the domestic political context in Peru was unfavorable to the Commission's activities. The public supported Fujimori because, despite his authoritarianism, he had managed to stabilize the economy and cripple the insurgent groups. On 7 January 1999 the Commission proposed a friendly settlement but Peru asked the Commission to declare the case inadmissible because domestic remedies had not been exhausted (*Barrios Altos* Judgment, March 2001). In July 1999 Fujimori attempted to withdraw Peru from the jurisdiction of the IACtHR, but both the Commission and the Court rejected this move (Mosquera, 2012).

However, by then Fujimori's regime had eroded. Since his 1995 reelection with 60 percent of the vote, Fujimori's public approval rating declined steadily to between 30 and 40 percent by 1999 (Levitsky, 1999). Fujimori ran for a constitutionally prohibited third term and to assure victory in the May 2000 election resorted to fraud, triggering broad domestic and international condemnation. During this period, as Fujimori's position weakened, the Commission submitted the *Barrios Altos* case to the Court (8 June 2000).

#### (b) Scope of the decision

In November 2000, in the wake of a corruption scandal involving a high official in the National Intelligence Service, Fujimori resigned and left the country. Following Fujimori's departure, a transition government reinstated judicial officers that had been removed during the Fujimori regime. Peru affirmed its acceptance of the jurisdiction of the IACtHR in January 2001 and acknowledged the state's responsibility for human rights violations committed during the Fujimori regime (Burt, 2009). In this context the Court issued an expansive judgment in *Barrios Altos*. The Court not only declared that the amnesty provisions enacted in Peru under Fujimori were "incompatible with the American Convention" but also that they lacked "legal effect" (*Barrios Altos*, Judgment, 14 March 2001, para. 51). In other words, the IACtHR took the extraordinary step – for an international court – of nullifying a piece of domestic legislation.

In short, the Commission submitted the *Barrios Altos* case to the Court before the transition that saw Fujimori leave power and before the emergence of a more favorable domestic political environment. However, Fujimori's position at the time of the Commission's application was weak and getting weaker. The *Barrios Altos* case is therefore partially consistent with the timing propositions. The Court's expansive ruling is consistent with the scope hypothesis because it was issued after Fujimori's departure and after Peru had reaffirmed its acceptance of the Court's jurisdiction.

## 2. *Serrano-Cruz Sisters v. El Salvador*

From 1980 until 1992 El Salvador experienced a civil war between the Marxist-Leninist guerrilla group, the Farabundo Martí National Liberation Front (FMLN), and the government of El Salvador. The United Nations sponsored peace negotiations that led to the January 1992 agreement ending the war. A Commission on the Truth for El Salvador was created as part of the accords, along with a separate Ad Hoc Commission to vet the upper echelons of the armed forces and determine their role in past human rights violations. The Truth Commission concluded that 85 percent of the human rights violations during the civil war were committed by state agents and their paramilitary allies (Cuéllar Martínez, 2007, p. 43; Schifter & Schwartz, 2012).

Conservative post-war governments complied with the Ad Hoc Commission's orders to transfer or purge officers implicated in abuses (Schifter and Shwartz 2012), but the Truth Commission report was not widely disseminated and President Alfredo Cristiani publicly dismissed it in his official response in March 1993, declaring that the country must "erase, eliminate, and forget the past in its entirety." He called for a "general and absolute amnesty, to turn that painful page of our history and seek a better future for our country" (quoted in Cuéllar Martínez 2007, 43). Within days, President Cristiani pushed through the sweeping General Amnesty for Peace Consolidation (Legislative Decree No. 486). The new law overrode the earlier and more limited National Reconciliation Law of 1992 as it did not exclude human rights violations from the amnesty. The idea of a general amnesty was broadly accepted by the public and subsequent conservative governments did not waiver in their support for impunity.

### (a) Timing

The *Serrano Cruz Sisters Case* was filed at the IACHR in 1999 but was not sent to the Court until 2003. During the four years that passed between the Commission reception of the *Serrano-Cruz Sisters Case* and its submission to the Court, the political context was not favorable to accountability. ARENA, the conservative party that had been the main promoter of the amnesty law, held power from 1989 until 2009. Throughout those twenty years successive ARENA governments insisted, in their responses to Commission investigations, that it was impossible to repeal the amnesty laws because they represented the “cornerstone” of the peace accords and were needed to strengthen democracy (Canton, 2007, p. 173). Moreover, “the *borron y cuenta nueva* (clean slate) was not only supported wholeheartedly by ARENA but also underwritten by the FMLN” (Collins, 2010, p. 170). More broadly, “[i]n contrast to the elites of other countries, many members of [the] Salvadoran elites view the amnesty as something positive, and still more consider it necessary” (Popkin & Bhuta, 1999, p. 8).

The judicial arena appeared equally unpromising for accountability. With few exceptions, the courts were unwilling to challenge the executive’s position. The Supreme Court of Justice upheld the amnesty law in two occasions, in 1993 and 2000. However, there were some hopeful signs. Non-governmental human rights organizations in El Salvador pursued the investigation and prosecution of the perpetrators of human rights violations (Canton, 2007, p. 175). For instance in March 2000, the Human Rights Institute of Central American University (IDHUCA) filed a complaint before the attorney general of the Republic requesting the prosecution of several Salvadoran military officers, including the minister of defense and president of the Republic at the time when the violations occurred. The NGOs invoked the IACtHR decisions regarding the incompatibility of amnesty laws with the American Convention of Human Rights, to which El Salvador was party. Also, in its 2000 ruling on the amnesty law, the Supreme Court left room for a case-by-case consideration of application of the amnesty law, when fundamental rights were at issue (Roht-Arriaza, 2012, p. 15). And the same court held in 2003 that it was up to trial court judges to decide if the amnesty applied in a particular case. But, compared to other countries undergoing transitions, there was little scope for the IACHR and the IACtHR to view the domestic context in El Salvador as favorable to accountability.



### (b) Scope of the decision

In *Serrano-Cruz v. El Salvador* the IACtHR affirmed its temporal jurisdiction by not asserting competence over the crimes themselves, which occurred before El Salvador had accepted the Court's contentious jurisdiction. When it joined the Court in 1995, El Salvador stipulated that the Court would not have jurisdiction over events that occurred prior to that date. The Court therefore ruled on those violations that were continuing after 1995, namely, denial of the right to truth and justice. This principle would be important in subsequent cases.

The Court found that the State had not applied the amnesty law in this case but that it could be a potential obstacle to justice. Therefore the scope of its ruling was specific, and preemptive. The Court ordered El Salvador, "in compliance with its obligation to investigate the reported facts, to identify and punish those responsible and to conduct a genuine search for the victims, to eliminate all the obstacles and mechanisms de facto and de jure that hinder compliance with these obligations *in this case*" (*Serrano-Cruz*, Judgment, 1 March 2005, para. 180; emphasis added).

In sum, the Commission and the Court would have to wait for a more robust case and a more favorable scenario to confront directly the amnesty law in El Salvador.

### (c) Jurisprudence

The Court invoked to its own jurisprudence on various key points, though not to invalidate El Salvador's amnesty law. The *Barrios Altos v. Peru* case was only mentioned once, in reference to the right to the truth. The Court did not apply the jurisprudence enunciated in *Barrios Altos* to invalidate El Salvador's amnesty law, quite possibly because the law was part of a peace settlement negotiated under U.N. auspices to end the civil war. The Court could therefore distinguish *Serrano-Cruz Sisters* from *Barrios Altos* because the former was a negotiated transition whereas the law in Peru was a self-amnesty.

## 3. *Almonacid-Arellano v. Chile*

### (a) Timing

In *Almonacid-Arellano*, the Commission and the Court took their key steps after favorable conditions emerged in Chile. Pinochet stepped down in 1989 and a

democratically elected government took office in 1990. Between 1990 and 1998, a Truth and Reconciliation Commission published its report (the 1991 Rettig Report) and a significant judicial overhaul, which included the replacement of a substantial proportion of sitting Supreme Court judges, had taken place under President Eduardo Frei (1994 – 1998). Still, when the Commission received the *Almonacid-Arellano* petition in September 1998, Pinochet remained as head of the army and the amnesty for human rights violations (Decree Law 2.191) of 19 April 1978 still seemed politically untouchable. In fact, it was not until 2005 that the Commission submitted an application to the Court in the *Almonacid-Arellano* case. During the interval from 1998 to 2005, crucial shifts occurred in Chile.

A key impetus to change was Pinochet's arrest in London in September 1998 pursuant to a Spanish request that he be extradited to Spain to stand trial for torture committed during the dictatorship. The *Almonacid-Arellano* petition was filed at the IACHR just days before the Spanish government requested Pinochet's extradition. A plausible interpretation is that the Commission waited to see how the extradition case would unfold and what the reaction would be in Chile.

The Pinochet extradition case gave additional impetus to domestic efforts in Chile to challenge impunity. On June 5, 2000 the Santiago Court of Appeal voted to strip Pinochet of his senatorial immunity. In early January 2001, Pinochet was formally charged with kidnapping and murder but a few months later was declared medically unfit to stand trial and in 2002 the Supreme Court suspended proceedings permanently. But other human rights prosecutions started to move forward in 2003 and 2004 and "blanket amnesty seemed to be definitely on the retreat" (Collins, 2010, p. 92). The Supreme Court of Appeal in 2004 upheld convictions for disappearances, ruling that the amnesty law could not apply to that crime (Collins 2010, 93). The executive branch was also more active in human rights. President Ricardo Lagos set up the National Commission on Political Prisoners and Torture, which published the Valech Report in 2004. The army commander in chief, Juan Emilio Cheyre, in November 2004 issued an official acknowledgement of human rights violations on the part of the army (Collins 2010, 94).

It was during this period of rapid shifts in Chile that the Commission acted on the *Almonacid-Arellano* petition, finding it admissible in October 2002. The case stemmed from the murder of Luis Alberto Almonacid-Arellano in September 1973. The crime had

occurred before Chile accepted the jurisdiction of the Inter-American Court in August 1990, so the case focused not on the murder itself, but directly on the application of Chile's amnesty law. The government of Chile resisted acting on the Commission's recommendations to investigate and prosecute those responsible for the execution, to grant reparations to the next of kin, and to adapt domestic laws so as to invalidate the Amnesty Law Decree Law. Therefore the Commission filed the case at the Inter-American Court in July 2005.

#### (b) Scope of the decision

The Court issued its decision in *Almonacid-Arellano* in September 2006. Rejecting Chile's preliminary objection to the Court's temporal jurisdiction, the Court ruled that Chile's violation of Article 2 of the American Convention started not when the amnesty law went into effect in 1978 but rather when Chile "bound itself to adapt its domestic legislation to the provisions of the Convention," that is, upon Chile's ratification of the Convention. The ruling on Chile's amnesty law was broad, that is, it covered more than the specific case but did not void the amnesty law. The court ruled that "[t]he State must ensure that Decree Law No. 2.191 does not continue to hinder further investigation into the extra-legal execution of Mr. Almonacid-Arellano as well as the identification and, if applicable, punishment of those responsible, as set forth in paragraphs 145 to 157 herein." Then the court extended the scope of its ruling to all similar cases: "The State must ensure that Decree Law No. 2.191 does not continue to hinder the investigation, prosecution, and, if applicable, punishment of those responsible *for similar violations in Chile*" (Judgment of September 26, 2006, para. 171; emphasis added).

#### (c) Precedent

Having already ruled Peru's amnesty law violated the American Convention, the Court could retreat from that norm only at the cost of inconsistency. The Court therefore had a strong incentive to find that Chile's amnesty law also violated the Convention. Throughout the *Almonacid-Arellano* judgment the Court referred to its amnesty jurisprudence in *Barrios Altos v. Peru*. The key part of the *Almonacid-Arellano* ruling invokes the prior judgment: "In the *Case of Barrios Altos* the Court has already stated that: all amnesty 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, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law” (*Almonacid-Arellano*, Judgment, 26 September 2006, para. 112).

#### 4. *Las Dos Erres v. Guatemala*

##### (a) Timing

The Guatemalan amnesty – like El Salvador’s – was implemented under peace negotiations led by the United Nations, whereas the Peruvian and Chilean laws were self-amnesties, enacted by the abusive regimes themselves. The Guatemalan cases are consistent with the argument that the Commission generally waits to act – in amnesty cases at least – until relatively favorable conditions exist in the involved country. In this study we focus on one of the Guatemalan amnesty cases, *Las Dos Erres Massacre v. Guatemala*.<sup>3</sup> The Commission received the petition in 1996 but did not submit it to the Court until 2008.

Guatemala began to change gradually after the 1996 peace accords that ended a 36-year brutal civil war (Mersky & Roht-Arriaza, 2007, p. 7). The peace agreement included an amnesty law, the Law of National Reconciliation (LNR). In 1997 the Commission for Historical Clarification (CHC) was formed under the guidance of the United Nations to report on human rights abuses that occurred during the civil war; it published a final report in 1999. But the government dismissed the recommendations of the CHC and the president published a paid add in the newspapers stating that the report’s “historical interpretation around the internal armed conflict was a contribution to a task that was just beginning and which was highly controversial” (Simón, 2003, p. 190). Civil society support for accountability was also weaker in Guatemala than it had been in, for example, Argentina or Chile. In June 1996 a group called *Alianza contra la Impunidad* formed around the goal of opposing a general amnesty (Simon 2003). But broad public support was lacking. Repression during the civil war had been so severe that “it eliminated or silenced the human rights movement” (Sikkink, 2011, p. 81).

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<sup>3</sup> The other three amnesty cases involving Guatemala are *Myrna Mack Chang v. Guatemala* (2003), *Plan de Sanchez* (2004), and *Nicolle Carpio v. Guatemala* (2004).

At the Commission, the State and the representatives of the victims of the 1982 massacre at Las Does Erres reached a friendly settlement in April 2000 whereby the State recognized its international responsibility and committed to make reparations to the victims (*Las Dos Erres*, Judgment, 24 November 2009, para. 1). A judicial procedure to decide the applicability of the Law of National Reconciliation began the following June; the activities of the Commission were paused as it waited for the domestic resolution of this case. The domestic proceedings stalled in February 2003 and three years later, in February 2006, the representatives of the victims expressed their desire to discontinue the friendly settlement process and the Commission resumed its investigation (*Las Dos Erres Massacre*, Judgment, 24 November 2009, para. 2).

By 2007, the Guatemalan government stance towards the IACHR had evolved: “The most significant change since then [the 1990s] has been the growing if uneven tendency during the past three governments . . . to begin to accept responsibility for the ‘historical’ cases involving violations that occurred during the armed conflict. [T]he government has also agreed to settle a large number of cases pending before the Commission through amicable settlements, by accepting state responsibility and making reparations” (Mersky & Roht-Arriaza, 2007, p. 10).

Guatemalan courts also started some prosecutions against human rights violators in the years prior to the filing of the *Las Dos Erres Massacre* case at the IACtHR in 2008. The first time that members of the military high command were affected by an action against them occurred in November 2006 when a local trial court in Guatemala, pursuant to an extradition request from Spain, ordered the arrest of the country’s ex-President Oscar Mejia Victores along with ex-Defense Minister Anibal Guevara, ex-Police Chief German Chupina, and head of the Secret Police Pedro Arredondo. However, the defendants were freed in December 2007 after Guatemala’s Constitutional Court decided that it would not honor Spanish arrest warrants and extradition requests (Roht-Arriaza, 2008). Military officers were subject to judicial proceedings in a pair of other cases (those of Bishop Juan Gerardi and Myrna Mack). The Mack case resulted in the convictions of three officers (Roht-Arriaza 2008). Another relevant initiative was the creation of the International Commission Against Impunity, sponsored by the U.N. This organization was set up in

August 2007 to increase Guatemalan investigative and prosecutorial capacity and to fight organized crime.

Finally, Alvaro Colom of the Social Democratic Party won the presidential election in 2007. His victory represented a chance of breaking with the long-running rule of conservative parties. Though his regime was weakened by a serious scandal (Isaacs, 2010), the opposition had finally achieved power in Guatemala, and in July 2008 the Commission decided to take the *Las Dos Erres Massacre* case to the Court.

#### (b) Scope of the decision

The Court's decision in November 2009 came after its expansive amnesty ruling in the *Barrios Altos* case and its broad *Almonacid-Arellano* decision. But in *Las Dos Erres*, the Court's ruling was specific. One first objection encountered by the Court in the *Las Dos Erres* was the *ratione temporis* argument by which the Guatemalan state argued that part of the alleged violations of the rights occurred prior to the recognition of the Court's contentious jurisdiction on March 9, 1987. Having faced a similar objection in *Serrano-Cruz Sisters* and in *Almonacid-Arellano*, the Court determined that the killings themselves were effectively outside the Court's competence. However, some of the violations claimed by the victims and their representatives were not based on the facts of the massacre themselves, but on the denial of justice to the victims and their families, after Guatemala had accepted the Court's jurisdiction (*Las Dos Erres Massacre*, Judgment, 24 November 2009, para. 47).

Regarding the possible application of the Amnesty Law (Law of National Reconciliation) by the Guatemalan government the Court quoted *Barrios Altos*, declaring, "[T]he Court reiterates its constant jurisprudence on the incompatibility of figures such as extinguishment and amnesty in cases of serious human rights violations" (*Las Dos Erres Massacre*, Judgment, 24 November 2009, para. 129). The Court then ruled "that the eventual application of the amnesty provisions of the LRN in this case would violate the obligations derived from the American Convention. Thus the State has the duty to continue the criminal proceeding without major delays, and include the multiple crimes generated in the events of the massacre for their proper investigation, prosecution and eventual punishment of those responsible for those acts" (*Las Dos Erres Massacre*, Judgment, 24 November 2009, para. 131). The Court also cited *Almonacid-Arellano* in support of the

victims' right to the truth and to justice and the state's concomitant obligation to investigate and prosecute abuses (*Las Dos Erres Massacre*, Judgment, 24 November 2009, para. 151, 232).

Interestingly, in this case, the amnesty law had not yet been applied; but the domestic investigation and prosecution had been delayed due to the amnesty law process. The Court reiterated the incompatibility of amnesty laws with the American Convention, though the decision in *Las Dos Erres* was specific: the Court ordered Guatemala not to allow the amnesty law to hinder the investigation of the massacre and the prosecution of those responsible.

### (c) Jurisprudence

Why did the Court decline to rule directly on Guatemala's amnesty law, given the jurisprudence already established in *Barrios Altos*? First, the amnesty law had not actually been applied to the *Las Dos Erres Case*. Second, the Court was aware that, unlike in the Peruvian and Chilean cases, the Guatemalan amnesty was part of a U.N.-sponsored pacification process after a civil war. The Court may have been reluctant to tackle head-on a part of the U.N.'s work in Guatemala. Finally, the political context in Guatemala was less favorable to an expansive ruling. Guatemala's political institutions were still fragile and the military retained substantial power throughout the period. In fact, Guatemala (and El Salvador), "have not fully consolidated democratic civil control and the armed forces have not abandoned their political influence, nor have they fully been converted into an administrative instrument at the service of the existing government" (Pérez & Martínez, 2013, p. 182).

#### 5. *Gomes Lund v. Brazil*

The authoritarian regime in Brazil spanned from 1964 to 1985. During that time, "Brazil's national security state carried out widespread repression that included brutality, torture, murder, and disappearances" (Huggins, 2000, p. 59). The armed forces negotiated the transition to democracy with the opposition and extracted prerogatives that included an amnesty law (Law No. 6,683) fully designed by the last military administration of General Joao Batista Figueiredo in 1979. The amnesty law remained unaltered through

November 2010 when the Inter-American Court of Human Rights ruled against it in the *Gomes Lund v. Brazil* case.

(a) Timing

The *Gomes-Lund v. Brazil* petition was filed at the IACHR on 7 August 1995 by the Center for Justice and International Law (CEJIL) and Human Rights Watch/Americas, in the name of disappeared persons in the context of the *Guerrilha do Araguaia* and their next of kin. The Commission ruled the case admissible in March 2001, but it was still very early in the development of amnesty law jurisprudence in the Inter-American System. In fact, the Court issued its decision in *Barrios Altos v. Peru* the same month that the Commission ruled the *Gomes Lund* case admissible.

At the domestic level, Brazil was characterized by a lack of accountability and very low levels of interest on the part of both politicians and the public in the prosecution of human rights crimes committed under the dictatorship. As Panizza and Barahona (1998) note, “In comparison with other countries of the Southern Cone, however, the issue [of prosecuting human rights violations] was not as central to the politics of opposition to authoritarian rule and of transition to democracy. Among other reasons this was because state-sponsored repression affected only a relatively small sector of the population and gained less public visibility and because the worst violations had been committed 15 years before the transition to democracy” (25). Furthermore, the amnesty law in Brazil “was supported by civil society because it was originally intended to pardon crimes of resistance committed by the politically persecuted who had been banished, exiled, and imprisoned” (Abrão & Torelly, 2012, pp. 153-154; Mezarobba, 2010, p. 10).

Unfortunately, the law turned into a blanket amnesty for those who were responsible for human rights violations: “although of great significance in the country’s democratization process, Law No. 6,683 was drafted under the government’s own terms, proving to be more effective for the members of the apparatus of repression than for the victims of political persecution . . . it ultimately acquired a sense of pragmatic conciliation, capable of contributing to the transition to democratic rule” (Mezarobba, 2006, pp. 146-147, quoted in Mezarobba 2010). In addition, the Brazilian Constitution of 1988 contained some reparation measures for victims of the military regime (the “Transitional



Constitutional Act" included in Art. 8). Amidst this climate of indifference a Truth Commission was established in 1995 under President Fernando H. Cardoso, who had been a political exile. The Truth Commission led to additional reparations, including compensation to family members of 59 alleged victims in *Gomes Lund* (*Gomes Lund v. Brazil*, Judgment, 24 November 2010). In 2002 a second Amnesty Commission (Law No. 10559/2002) was created to offer reparations – and a state apology of sorts – to those affected by acts of exception, torture, arbitrary arrests, dismissals and transfers for political reasons, kidnapping, forced hiding and exile, banishment, student purges and illegal monitoring (Abrao and Torelly 2012).

The election to the presidency of Luiz Inacio Lula Da Silva, who had been a victim of the dictatorship, and more generally the installation of the PT (Workers Party) in power in 2003 raised some hopes for transitional justice. Nonetheless, the efforts of this administration were “lukewarm at best” (Engstrom, 2014, p. 8). Lula's government (2003-2010) pursued a range of symbolic reparation mechanisms in the form of publications and official apologies but no trials were held.

In sum, all the measures implemented by the Brazilian State were focused on reparations carried out by the executive and legislative powers, rather than on the prosecution of crimes by the judicial system (Abrão & Torelly, 2012, p. 164; Mezarobba, 2010, p. 17). In the second half of 2008, the Brazilian Bar Association filed a motion with the Federal Supreme Court, questioning the validity of amnesty for agents of the State who had committed human rights violations during the dictatorship (Abrao and Torelly 2012, 165). By a 7 – 2 vote, the justices ruled that “the judicial branch was not in a position to review the political agreement that had produced the amnesty. . . . The decision was harshly criticized by human rights organizations both inside and outside Brazil” (Mezarobba, 2010, p. 18). Under these conditions, the Commission issued its report in *Gomes Lund* in October 2008. Despite two extensions, Brazil failed to comply with the Commission's recommendations, and the IACHR submitted the case to the Court in March 2009. *Gomes Lund* is therefore a case in which the referral did take place after the democratic transition and after the election of a left-leaning government, though the domestic context was not strongly supportive of accountability.

### (b) Scope

The IACtHR ruled expansively, tackling the amnesty law itself and not just its application to the present case. The Court declared unanimously that “[t]he provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention, *lack legal effect*, and cannot continue as obstacles for the investigation of the facts of the present case, neither for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other serious violations of human rights enshrined in the American Convention which occurred in Brazil” (*Gomes-Lund v. Brazil*, Judgment, 24 November 2010, para. 325; emphasis added).

### (c) Jurisprudence

In its application in *Gomes-Lund v. Brazil*, the Commission noted that this was “an important opportunity for the Court to consolidate the Inter-American jurisprudence on amnesty laws in relation to enforced disappearances and extrajudicial executions” (*Gomes-Lund v. Brazil*, Judgment, 24 November 2010, para. 1). In fact, by then the IACtHR had considered and ruled on eleven cases involving amnesty laws. In *Barrios Altos v. Peru* (2001) and *Almonacid-Arellano v. Chile* (2006), which were most similar with the *Gomes Lund* because they involved self-amnesties amidst a democratization process, the ruling had been expansive (*Barrios*) or broad (*Almonacid*). In *Gomes-Lund*, the decision was once again expansive. Perhaps the Court had concluded that because Brazil had enjoyed a long period of democratic consolidation, an expansive ruling ran no risk of provoking an anti-democratic backlash.

#### 6. *Gelman v. Uruguay*

The *Gelman v. Uruguay* case was the first in which the IACtHR ruled expansively in a case that did not involve a self-amnesty. The Uruguayan amnesty law (the “Expiry Law”) was subject to a democratic process by which a majority of the population chose to uphold it on two occasions, first in a referendum held in 1989 and two decades later through a plebiscite in 2009. The Uruguayan amnesty law differs from the Central American ones because those were created in peace negotiations that concluded a civil war.

### (a) Timing

The IACHR acted rather promptly after receiving the petition in *Gelman v. Uruguay* in 2006, in part, perhaps, because it faced a relatively favorable domestic context. By 2006, Uruguay was already a stable democracy. Since the mid-1990s, civilian authorities were in control of the military and after the 1989 referendum on the Expiry Law, the military made no explicit or implicit threats or demands on the democratic political system.<sup>4</sup> More important, the party that had enacted the amnesty law and that had been in power since the transition (the *Partido Colorado*) lost the 2004 elections and was replaced by the opposition coalition, *Frente Amplio*, which won again in 2009. Still, the accountability movement in Uruguay developed rather late. The Colorado governments from 1985 to 2005 “sponsored policies of silence and oblivion . . . calling for forgetting past divisions” (Lessa, 2012, p. 130). It was not until 2000 that the Commission for Peace was created by President Jorge Battle for the purpose of receiving, analyzing, classifying, and compiling information on the enforced disappearances that had occurred during the military regime. The Commission published its final report on 10 April 2003 and the President adopted it as “the official version of the facts regarding the detainees and disappeared persons during the de facto regime” (*Gelman v. Uruguay*, Judgment, 24 February 2011, para. 155).

In 2005, the opposition party *Frente Amplio* assumed power and changed the official stance towards past human rights violations and the amnesty law. President Tabaré Vázquez declared in his inaugural speech that the enforced disappearance cases submitted for consideration to the Executive Branch would not be covered by the Expiry Law. Vázquez also pledged to begin excavating military grounds in order to determine the fate of citizens who were detained and disappeared during the military dictatorship. Through a Presidential Order of 23 June 2005, he informed the Judicial Branch that the *Gelman* case was excluded from the Expiry Law and in 2008 the case was re-opened. When the IACtHR examined the case it was still pending in Uruguay’s Second Criminal Court. The IACHR received the petition in *Gelman v. Uruguay* on 8 May 2006 and issued its Report on the

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<sup>4</sup> Linz and Stepan note that the military in Uruguay certainly had fewer prerogatives than it had in Chile, Argentina or Brazil (Linz & Stepan, 1996, p. 158).

Merits on 18 July 2008. Still, the Commission waited two years before submitting the case to the Court, possibly because it was aware of crucial domestic events.

Uruguayan courts were beginning to confront the Expiry Law. It was during this interval that former dictator Jose María Bordaberry was condemned to thirty years in prison for orchestrating two political murders and nine disappearances and attacking the constitution, a verdict unprecedented in Latin America (Lessa 2012). On 19 October 2009, the Supreme Court of Justice, in the case of *Sabalsagaray Curuchet Blanca Stela*, declared key portions of the amnesty law unconstitutional and ruled it inapplicable to the case at hand. A year later, the Supreme Court of Justice issued another ruling reiterating the unconstitutionality of the Expiry Law (*Gelman v. Uruguay*, Judgment, 24 February 2011, para. 150). And in February 2011 the Supreme Court declared the amnesty law void for twenty-five additional cases (Buriano, 2011, p. 24).

But it was also during this period, in October 2009, that the Expiry Law was subjected to a second plebiscite in Uruguay. The first time, in 1989, 57 percent of those voting agreed to let the amnesty stand.<sup>5</sup> In the 2009 vote, under fully democratic conditions, the proposed amendment that would have nullified the Expiry Law earned only 47.7 percent of the votes. After the plebiscite to revoke amnesty failed, the Commission remitted the case to the IACtHR on 21 January 2010.

#### (b) Scope of the decision

The IACtHR weighed Uruguay's democratic approval of the amnesty law but concluded, "The fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law" (*Gelman v. Uruguay*, Judgment, 24 February 2011, para. 238). It then ruled that the State had not complied with its obligation to adapt domestic law to the

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<sup>5</sup> Linz and Stepan (1996) argue that public opinion polls revealed that the voters had supported the amnesty more to avoid a crisis than because they believed it was just (155). Sikkink (2011) also notes that "many Uruguayans were afraid, given the posture of the military during the referendum campaign, that if the law were overturned, it would lead to another military coup and the Easter coup attempt in Argentina in 1987 heightened fears" (80).

American Convention on Human Rights and to the Inter-American Convention on Forced Disappearance of Persons.

Additionally, the Court responded to Uruguay's democratic approval of the Expiry Law by underscoring that the incompatibility of amnesty laws was "not limited to those which are denominated, 'self-amnesties,'" and that, regardless of "the adoption process and the authority which issued the Amnesty Law," the central issue was the law's effect: "to leave unpunished serious violations committed in international law" (*Gelman v. Uruguay*, Judgment, 24 February 2011, para. 229).

The Court's ruling was maximally expansive: "Given its express incompatibility with the American Convention, the provisions of the Expiry Law that impede the investigation and punishment of serious violations of human rights *have no legal effect* and, therefore, cannot continue to obstruct the investigation of the facts of this case and the identification and punishment of those responsible, nor can they have the same or similar impact on other cases of serious violations of human rights enshrined in the American Convention that may have occurred in Uruguay" (*Gelman v. Uruguay*, Judgment, 24 February 2011, para. 232; emphasis added).

### (c) Jurisprudence

The Court grounded its decision in *Gelman v. Uruguay* in its previous jurisprudence: "this Court has ruled on the non-compatibility of amnesties with the American Convention in cases of serious human rights violations related to Peru (*Barrios Altos* and *La Cantuta*), Chile (*Almonacid Arellano et al.*), and Brazil (*Gomes Lund et al.*)." The IACtHR also cited the Commission's conclusion, in cases from Argentina, Chile, El Salvador, Haití, Perú, and Uruguay, that amnesty laws also contradicted international law (*Gelman v. Uruguay*, Judgment, 24 February 2011, para. 196, 197). The Court cited *Almonacid-Arellano* and *Gomes Lund* in support of its argument that the democratic origins or approval of an amnesty law were less important than its effect in creating impunity (*Gelman v. Uruguay*, Judgment, 24 February 2011, p. 81, fn. 289). And in declaring the Expiry Law without legal effect, the Court cited again its decisions in *Barrios Altos v. Peru*, *La Cantuta v. Peru*, and *Gomes Lund v. Brazil* (*Gelman v. Uruguay*, Judgment, 24 February 2011, p. 82, fn. 292). In

short, the Court built on its own jurisprudence and nullified a national amnesty law, this time one that had been twice democratically endorsed.

### 7. *El Mozote v. El Salvador*

The *El Mozote v. El Salvador* petition was received by the Commission in 1990, yet the case was declared admissible only in 2006. After El Salvador failed to supply the information requested by the Commission, the Commission submitted the case to the Court on 8 March 2011 – after the election of the first non-rightist government since the end of the civil war.

#### (a) Timing

The case of *El Mozote v. El Salvador* was pushed by the Commission once favorable domestic conditions were in place. In March 2003 the opposition party, FMLN, became the largest single party in the National Assembly. Some of the party leaders took a critical stance against the amnesty laws (Collins 2010, 171). The victory of the FMLN candidate Mauricio Funes in the presidential election of 2009 marked a turning point in El Salvador's government stance towards human rights violations. During the ceremony to commemorate the eighteenth anniversary of the signature of the Peace Accords in El Salvador, President Funes acknowledged and accepted the facts related to the Massacre of El Mozote as reported by the Inter-American Commission. The State acknowledged its obligation to clarify the facts and to prosecute those responsible. It also recognized that it had to adapt its domestic laws (*El Mozote v. El Salvador*, Judgment, 25 October 2012, para.19).

Perhaps the Funes government strategically chose to let the Commission and the Court rule, given that it did not reply to the Commission's 2010 Report on the Merits. This inaction allowed the case to be automatically referred to the Court. Then, after the Court received the case in March 2011 and requested a State response, El Salvador acknowledged and accepted the facts alleged in the application presented by the Commission and indicated that it waived the possibility of filing preliminary objections. Similarly, the State did not offer deponents or expert witnesses (*Massacre El Mozote v. El Salvador*, Judgment, 25 October 2012, para. 11). Finally, on 16 January 2012 the President gave a speech in El Mozote in which he acknowledged the numerous acts of brutality and human rights

violations committed and apologized on behalf of the State of El Salvador. The repeal of the amnesty laws seemed a possibility for the first time. The Court issued its decision in *El Mozote* the following October.

(b) Scope of the decision

With the opposition in power and the military subordinated to civilian authority, domestic conditions were now more favorable than they had been with *Serrano-Cruz Sisters* for the rejection of El Salvador's amnesty laws (Pérez & Martínez, 2013, p. 191). The IACtHR ruled broadly on the amnesty law. In the two previous amnesty law cases against El Salvador (*Serrano-Cruz Sisters* and *Contreras et al.*), the Commission and the Court noted that the amnesty law had not been applied, so the Court was not competent to rule on its legality. However in *El Mozote*, domestic courts had resorted to the amnesty law to dismiss the case. The IACtHR therefore ruled directly on the legality of the amnesty:

“Consequently, for purposes of this case, the Court reiterates the inadmissibility of ‘amnesty provisions, provisions on prescription, and the establishment of exclusions of responsibility that seek to prevent the investigation and punishment of those responsible for grave human rights violations such as torture, summary, extrajudicial or arbitrary execution, and forced disappearance, all of which are prohibited because they violate non-derogable rights recognized by international human rights law’” (*El Mozote v. El Salvador*, Judgment, 25 October 2012, para. 283). The Court went on to order that “the State must ensure that the Law of General Amnesty for the Consolidation of the Peace *never again* represents an obstacle to the investigation of the facts that are the subject matter of this case or to the identification, prosecution and eventual punishment of those responsible for them *and for other similar grave human rights violations* that took place during the armed conflict in El Salvador” (*Massacre El Mozote v. El Salvador*, Judgment, 25 October 2012, para. 403; emphasis added).

Whereas in *Serrano-Cruz Sisters* the Court had issued a ruling specific to that case, without confronting the amnesty law itself, in *El Mozote* the Court produced a broad decision, as it had done in *Almonacid*, forbidding the application of the amnesty law to any future cases but not invalidating the law itself. In doing so, the IACtHR also took into account that El Salvador's amnesty law differed from those of other countries in that it

related “to acts committed in the context of an internal armed conflict” (*Massacre El Mozote v. El Salvador*, Judgment, 25 October 2012, para. 284, 285).

### (c) Jurisprudence

The ruling in *Massacre El Mozote v. El Salvador* in 2012 came on heels two expansive amnesty decisions, in *Gomes Lund v. Brazil* and *Gelman v. Uruguay*. The Court cited those two judgments as well as its decision in *Barrios Altos*, in reaffirming “the incompatibility of amnesty laws in relation to grave human rights violations with international law and the international obligations of States” (*El Mozote v. El Salvador*, Judgment, 25 October 2012, para. 283 and footnotes). The recent expansive jurisprudence may well have pushed the Court to rule more broadly in *El Mozote* than it had in other cases involving amnesties enacted as part of civil war peace settlements. The broad decision in *El Mozote* thus represented a jurisprudential advance on the decisions in both *Serrano-Cruz Sisters* and the more recent *Las Dos Erres*, both of which had been specific to the instant case. The ruling in *El Mozote* may also have been broader in part because the Court had recently eliminated some of the grounds by which it could have ruled specifically. In particular, after *Gelman*, public acceptance of an amnesty law (which existed in El Salvador sociologically, albeit not through formal democratic mechanisms) could no longer be seen as shielding the amnesty from broader judicial scrutiny.

### **Conclusion**

Trustee courts, like the Inter-American Court of Human Rights, serve not the immediate preferences of member-state principals but rather the norms and purposes of the underlying regime. We began with the assumption that the Inter-American Commission and the Inter-American Court both see their fundamental mission as expanding the fulfillment of human rights in the Americas. But we also argued that the Commission and the Court – like other courts – takes into account their political environment, both to maintain their own legitimacy and to enhance the likelihood of broad acceptance of their judgments. Specifically, we proposed that, though their preference would always be to rule as expansively as possible in support of human rights, the Commission and the Court can



modulate the timing of their actions and the scope of their decisions in light of the domestic context in respondent states. With national amnesty laws, the two sets of considerations come immediately into contact, if not collision: actors in the Inter-American System will be inclined to uphold rights by nullifying amnesty laws, but such laws are always entangled in tenuous domestic political conflicts and compromises.

The analysis of seven key amnesty cases broadly confirms our propositions. We briefly summarize the main findings.

*Proposition 1 (timing):* In two cases, the Commission received a petition while the crisis that produced the rights violations was still underway; in the other cases, the petition arrived after the transition. In *Barrios Altos*, the petition arrived at the Commission while Fujimori was still in power. In *El Mozote*, the petition arrived before the conclusion of El Salvador's civil war. In *Barrios Altos*, the Commission submitted the case as Fujimori's position in Peru eroded, just five months before he left power. In *El Mozote* (Guatemala), the Commission submitted the case to the Court well after the crisis had ended.

*Proposition 2 (timing):* We also suggested that the Commission is more likely to submit a case to the Court if the domestic political context is favorable to prosecuting past rights abuses. The most directly measureable indicators of a favorable domestic context are the alternance of parties in power (the parties connected to the rights-abusing regimes have been replaced in power by opposition parties or coalitions) and the presence of transitional justice mechanisms. In six of the seven cases, transitional justice processes had taken place before the Commission submitted the application to the Court; in the seventh (*Barrios Altos*) the Commission's application went to the Court just months before transitional justice mechanisms started in Peru. In five of the cases, the Commission's application came after alternance in power. In *Barrios Altos*, the application was submitted shortly before Fujimori left power. In *Serrano-Cruz*, the fact that the application went to the Court before alternance had taken place may help explain why the Court ruled quite narrowly on the amnesty law.

*Proposition 3 (scope):* We argued that the Court would rule more expansively against self-amnesties and less expansively on amnesties that were part of negotiated transitions, which imply more sensitive domestic political contexts. The case studies generally support this contention. The Court ruled expansively in two of the three self-

amnesty cases (Peru and Brazil). In the third (Chile), the Court ruled broadly, holding that the amnesty could not inhibit investigation and prosecution in the instant case or in any other cases. In three of the four cases involving negotiated amnesties (El Salvador's two cases and Guatemala's one), the Court exercised restraint, ruling specifically in two (*Serrano-Cruz* and *Las Dos Erres*) and broadly in one (*El Mozote*). The Court ruled expansively with respect to Uruguay's democratically-ratified amnesty law, but by then democracy in Uruguay was well consolidated and opposition parties had won three consecutive elections.

*Proposition 4 (precedent):* We argued that all courts are motivated to rule consistently, meaning that like cases should be decided alike. We also proposed that the Court's decisions would exhibit a ratchet effect, that is, that the more often the Court ruled expansively, the more likely subsequent decisions would also be expansive. This proposition was broadly supported within both sets of like cases. Among the three self-amnesties, the Court ruled expansively in the first and third (*Barrios Altos* and *Gomes Lund*), with a broad decision in between (*Almonacid-Arellano*). Though the Chilean case did not follow the expansive precedent of *Barrios Altos*, the Court never retreated to the most narrow option. In the four cases of negotiated amnesties, two further sub-categories emerge: the civil war cases and Uruguay's democratic amnesty. The Court's jurisprudence was consistent and ratcheting in the civil war cases, moving from specific decisions in *Serrano-Cruz* and *Las Dos Erres* to a broad decision in *El Mozote*. In *Gelman*, the Court followed the precedents established by the self-amnesties and ruled expansively. Table 1 summarizes these findings.

Table 1: Summary of findings

Case	Year	Type of amnesty	Prop. 1: case sent to Court post-transition (petition received during crisis)?	Prop. 2(a): case sent to Court after alternance?	Prop. 2(b): case sent to Court after transitional justice mechanisms?	Prop. 3: narrower ruling for amnesty in negotiated transition, expansive for self-amnesty?	Prop. 4(a), self-amnesties: decision at least as expansive as previous similar case?	Prop. 4(b), negotiated: decision at least as expansive as previous similar case?
<i>Barrios Altos</i> (Peru)	2001	Self-amnesty	No	Simultaneous	Simultaneous	Yes	Expansive	n/a
<i>Serrano-Cruz Sisters</i> (El Salvador)	2005	Negotiated - civil war	n/a	No	Yes	Yes	n/a	Specific (civil war)
<i>Almonacid</i> (Chile)	2006	Self-amnesty	n/a	Yes	Yes	Intermediate	Broad	n/a
<i>Las Dos Erres Massacre</i> (Guatemala)	2009	Negotiated - civil war	n/a	Yes	Yes	Yes	n/a	Specific (civil war)
<i>Gomes Lund</i> (Brazil)	2010	Self-amnesty	n/a	Yes	Yes	Yes	Expansive	n/a
<i>Gelman</i> (Uruguay)	2011	Negotiated - democratic	n/a	Yes	Yes	No	n/a	Expansive (democratic)
<i>El Mozote</i> (El Salvador)	2012	Negotiated - civil war	Yes	Yes	Yes	Yes	n/a	Broad (civil war)

To be clear: we have *not* argued that the Commission and the Court explicitly or consciously make decisions on the basis of politics rather than law. Rather, we have argued: (1) that both the Commission and the Court act on the basis of their commitment to expanding the reach of human rights law in the Americas, and (2) that they can adjust the timing and scope of their decisions in light of domestic contexts in the respondent states. We do not claim that the Commissioners and the judges of the Court in fact made decisions on the basis of the considerations examined in this study. We claim only that, whatever the decision-making processes in the two institutions, the historical record is broadly consistent with our arguments. Our study thus illustrates how much more we need to learn about judicial decision-making in the Inter-American System – and in other international tribunals – and indicates some paths for future investigation.

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