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In search of well-crafted amnesties: The emergence of a new jurisprudence on amnesty

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Abstract

The use of amnesties in transitional justice remains a contentious issue. The fight against impunity at the international level has left little room for the application of amnesties for international crimes and human rights abuses. Nevertheless, amnesty measures continue to be applied in many jurisdictions and the permissibility of conditional amnesties enacted as part of wider processes of reconciliation remains under debate. This paper argues that the judicial discussion of amnesties under international law has followed dynamics of path dependence, where initial decisions adopted in very specific contexts have strongly determined the subsequent treatment of amnesties in completely different situations. The influence of early decisions rejecting blanket amnesties in the aftermath of autocratic regimes in Latin America pulled domestic and international courts towards a general rejection of amnesties. However, in more recent years, transitional justice ideas have influenced the trajectory of the discussion on amnesties, opening courts to the permissibility of conditional and negotiated amnesties accompanied by alternative mechanisms of accountability. Mapping the judicial dialogue on amnesties, this paper shows a cautious shift in the approach to conditional amnesties. This is significant because international courts have mostly engaged with the most problematic amnesties, leaving some uncertainty around the way conditional amnesties enacted as part of complex transitional frameworks will be evaluated. Reading a significant number of decisions from different jurisdictions, this essay aims to shed some light on the way domestic courts have addressed the discussion of amnesties when they are part of wider efforts to bring peace, reconciliation, and democracy.

Keywords: accountability; amnesty; impunity; judicial dialogue; transitional justice

1. Introduction

The turn to individual criminal responsibility for human rights violations in international law has made the use of amnesty laws increasingly controversial.¹ Human rights lawyers and UN bodies tend to agree on a prohibition of amnesties for serious crimes under international law.² However,

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¹K. Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights', (2015) 100 *Cornell Law Review* 1069.

²See UNHCR, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), UN Doc. A/44/40 (10 March 1992), at Para. 15; B. Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws* (2002); L.N. Sadat, 'Exile, Amnesty and International Law', (2006)

mechanisms recently adopted in Colombia (2016), Côte d'Ivoire (2018), Nepal (2024), and Spain (2024) have put the question of amnesties back on the table.³ States continue to face a challenge in negotiating peace during ongoing conflicts, in closing judicial procedures at the end of transitional processes, and in providing legal certainty to the parties to a conflict. Louise Mallinder's Amnesty Law Database shows that, over the last two decades, amnesty measures covering international crimes have continued to be issued worldwide.⁴

Judicial and quasi-judicial human rights bodies have generally rejected the use of amnesties enacted as impunity measures.⁵ However, the jurisprudence on the legality of conditional and limited amnesties is scarce.⁶ Most of the literature on amnesties has highlighted the role of courts in restricting the use of amnesties.⁷ In more recent years, transitional justice (TJ) ideas have influenced the trajectory of the discussion on amnesties, leading courts to consider the permissibility of conditional, limited, and negotiated amnesties when they are accompanied by alternative mechanisms of accountability.⁸ This article discusses the most recent pronouncements of domestic and international tribunals to highlight a shift in the general approach to amnesties. Examining the reasoning of judicial and quasi-judicial decisions on the permissibility of amnesties in different regions, it identifies growing trends towards a more nuanced stance against amnesties.

The article argues that the judicial discussion of the permissibility of amnesties under international law has followed dynamics of path dependence, whereby initial decisions adopted in very specific contexts have strongly influenced the subsequent treatment of amnesties in completely different situations.⁹ The influence of early decisions rejecting blanket amnesties, adopted in the aftermath of autocratic regimes in Latin America, pulled domestic and international courts towards a general rejection of amnesties.¹⁰ However, recent judgments delivered by domestic courts as well as decisions from regional human rights bodies have opened the door to the

81 *Notre Dame Law Review* 955; F. Lessa and L. A. Payne (ed.), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (2012); H. Relva, 'Three Propositions for a Future Convention on Crimes Against Humanity', (2018) 16 *JICJ* 857.

³In Colombia, see Peace Accord Matrix, 'Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace & Build a Stable Lasting Peace signed on the 24 November 2016', available at peaceaccords.nd.edu/barometer/the-accord. In Côte d'Ivoire see Amnesty International, 'Côte d'Ivoire: No Amnesty for Serious Crimes of 2010-11 Crisis', 7 August 2018, available at www.amnesty.org/en/latest/news/2018/08/cote-ivoire-no-amnesty-for-serious-crimes-of-crisis/. In Nepal, see Parliament of Nepal, 'Bill for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act', 14 August 2024, available at hr.parliament.gov.np/uploads/attachments/sivk5xrr4n0vzm0v.pdf. In Spain, see Law 1/2024, Amnesty for the Institutional, Political and Social Normalisation in Catalonia, 10 June 2024, available at www.boe.es/buscar/act.php?id=BOE-A-2024-11776.

⁴L. Mallinder, 'Amnesties, Conflict and Peace Agreement – ACPA Dataset', PA-X Analytics: Peace and Transition Process Data, available at peaceagreements.org/amnesties. See also L. Mallinder, 'Amnesties and Transitional Justice', in C. Lawther and L. Moffett (ed.), *Research Handbook on Transitional Justice* (2023), 262; L. Mallinder, 'Atrocity, Accountability, and Amnesty in a "Post-Human Rights World"?' (2017) 18 *Transitional Justice Institute Research Paper* 4.

⁵See *Barrios Altos v. Peru*, *infra* note 75; *Abdülsamet Yaman v. Turkey*, *infra* note 129; *Prosecutor v. Anto Furundžija*, *infra* note 163.

⁶L. Mallinder, 'Amnesty and International Law', *Oxford Bibliographies*, 25 October 2018, available at oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0172.xml.

⁷See A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (2009); see Engle, *supra* note 1.

⁸Here, the term TJ is used loosely to describe ideas of justice associated with periods of violence and political change. In the words of the UN, it refers to the 'processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation' (Secretary General of the UN, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616* (23 August 2004), at Para. 8). See also: R.G. Teitel, 'Transitional Justice Genealogy', (2003) 16 *Harvard Human Rights Journal* 69; C. Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"', (2009) 3 *International Journal of Transitional Justice* 5.

⁹See O.A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System', (2001) 28 *Iowa Law Review* 101, at 103.

¹⁰See *Barrios Altos v. Peru*, *infra* note 75; see *Almonacid Arellano v. Chile*, *infra* note 78; see *Consuelo et al. v. Argentina*, *infra* note 66; see *Mendoza et al. v. Uruguay*, *infra* note 66.

implementation of conditional and well-crafted amnesties in exceptional circumstances.¹¹ This article provides a comprehensive overview of the judicial treatment of amnesties, identifying the ways in which courts in different regions have considered the permissibility of amnesties when they are enacted as part of wider processes of TJ.

To develop this argument, the next section discusses the status of amnesties under international law. Analysing treaty and customary law, it identifies the ambiguities surrounding a general prohibition on amnesties. Section 3 argues that judicial and human rights bodies have shaped the emergence of a norm on amnesties. Such development is framed in wider trends, identified in the literature as a ‘justice cascade’ of domestic courts increasingly prosecuting international crimes and an ‘anti-impunity turn’ in the human rights movement.¹² Section 4 explains how the synergy between the Inter-American and UN systems in the rejection of amnesties in Latin America initiated a general repudiation of the use of amnesties. Section 5 argues that the vertical dialogue between human rights institutions and domestic courts in Latin America, facilitated by doctrines such as the conventionality control and the block of constitutionality, resulted in a regional trend that marked the path for a general prohibition of amnesties under international law. Section 6 argues that the decisions of the Inter-American Human Rights System have had a widespread influence in other regions and jurisdictions, establishing a horizontal dialogue in the treatment of amnesties. However, human rights regional bodies in Europe and Africa, and to a certain extent international criminal tribunals, have adopted a more nuanced approach against amnesties. Section 7 uncovers the ways in which domestic and international courts around the world have considered the permissibility of some amnesties. It identifies three lines of argument: first, the states’ discretion to adopt measures based on public interests in peace and democracy; second, the role of amnesties in TJ to deal with complex situations of conflict, and third, the relationship between amnesties and alternative mechanisms of justice to find a balance between conflicting interests in justice, peace, truth, and reconciliation.

The article concludes by showing that there have been three distinct periods in the judicial consideration of amnesties. First, an exploratory stage between the 1980s and the 1990s, during which some decisions upheld the use of amnesties, while others condemned them. A second period in the late 1990s and early 2000s, when judicial bodies start rejecting amnesties more decisively. More recently, despite a trend towards limiting the use of amnesties, some tribunals have taken into account the role of amnesties as a mechanism of TJ, hinting at the permissibility of limited and conditional amnesties accompanied by alternative mechanisms of accountability. The article ends with a reflection on the ambiguities around the permissibility of amnesties and the way in which complex mechanisms, such as the one implemented in Colombia, present an opportunity for international tribunals to engage in more depth with conditional and negotiated amnesties. Rather than conclusively claiming a prohibition or the permissibility of amnesty laws, this article aims to present an updated diagnosis of the current state of the judicial treatment of amnesties and its implications on contemporary debates in TJ, as an invitation for further doctrinal and empirical research.

2. The status of amnesties under international law

The view that international law prohibits amnesties for international crimes and other serious human rights violations has gained support in the last three decades.¹³ Soft law instruments have

¹¹See Concurring Opinion Judge García Sayán in *Massacres of El Mozote*, *infra* note 36; see *Marguš v. Croatia*, *infra* note 143; see *Kwoyelo v. Uganda*, *infra* note 156.

¹²In this section, I draw on the work of Kathryn Sikkink and Karen Engle. See K. Sikkink, *The Justice Cascade – How Human Rights Prosecutions Are Changing World Politics* (2011); see Engle, *supra* note 1.

¹³See M. Pensky, ‘Amnesty on Trial: Impunity, Accountability, and the Norms of International Law’, (2008) 1 *Ethics & Global Politics* 1; G. Meintjes and J.E. Mendez, ‘Reconciling Amnesties with Universal Jurisdiction’, (2000) 2 *International Law FORUM Du Droit International* 76.

asserted the incompatibility of amnesty measures with international law and UN policy.¹⁴ However, no treaty dealing with human rights law, humanitarian law, or international criminal law explicitly proscribes the application of amnesties.¹⁵ In this context, the discussion on the prohibition of amnesties under international law has been mostly grounded on the interpretation of non-amnesty-specific treaty obligations and in the crystallization of norms under customary international law. Despite the lack of reference to amnesties, the corpus of human rights and humanitarian treaty law includes general obligations to investigate, prosecute, and punish individuals for serious crimes.¹⁶ The corpus of human rights treaties reflects a principle of justice that requires criminal accountability for the most serious crimes.¹⁷ The general application of amnesties for crimes such as genocide, torture, war crimes in international conflicts, and enforced disappearance is incompatible with explicit obligations to prosecute individuals and constitutes a breach of international law.¹⁸ State parties to those treaties have an affirmative duty to prosecute such crimes, as they are considered serious violations of international law.¹⁹ Unlimited, unconditional, and self-amnesties enacted as mechanisms of impunity that preclude any form of accountability, are in contradiction with the letter and spirit of those commitments.

The picture is somewhat different regarding the use of conditional and limited amnesties adopted as part of genuine attempts to achieve peace and reconciliation.²⁰ The Belfast Guidelines on Amnesty and Accountability, for instance, distinguish between legitimate and illegitimate amnesties.²¹ The application of unconditional or illegitimate amnesties adopted as mechanisms of impunity to preclude judicial investigations and protect individuals responsible for gross crimes would breach such treaty provisions when there are no other policies or mechanisms to redress such violations.²² However, conditional and limited amnesties, articulated alongside alternative mechanisms of accountability, allow states to implement different strategies to offer justice and accountability while guaranteeing peace, truth, and reconciliation.²³

The fact that states have not included an explicit clause banning the use of amnesties also warrants caution in the interpretation of a general prohibition on amnesties. States debated the inclusion of specific clauses on amnesty during the negotiation of treaties such as the International Convention for the Protection of All Persons from Enforced Disappearance. Nevertheless, a prohibition on amnesty included in initial drafts was later removed.²⁴ Unlike the restriction on the application of statutes of limitations contained in treaties such as the Rome Statute, states have refrained from including a general ban on amnesties.²⁵ This suggests that some states may not

¹⁴See Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States: Amnesties, UN Doc. HR/PUB/09/1 (2009), at 44.

¹⁵See M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (2009), at 32; D. Orentlicher, 'Immunities and Amnesties', in L.N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (2011), 202 at 218.

¹⁶See Arts. 4, 5, and 6 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; Arts. 49, 50, and 51 of the 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Arts. 2, 4, 5, and 7 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Arts. 3, 6, and 11 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

¹⁷M. Freeman and M. Pensky, 'The Amnesty Controversy in International Law', in Lessa and Payne, *supra* note 2, 42 at 46.

¹⁸M. Scharf, 'From the eXile Files: An Essay on Trading Justice', (2006) 63 *Washington and Lee Law Review* 339, at 351; see Seibert-Fohr, *supra* note 7, at 186.

¹⁹C.P. Trumbull IV, 'Giving Amnesties a Second Chance', (2007) 25 *Berkeley Journal of International Law* 283, at 290.

²⁰See Freeman, *supra* note 15, at 41.

²¹Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (2013), Guideline 4, The Role of Amnesties.

²²*Ibid.*

²³*Ibid.*, Guideline 5, Linking Amnesty with Accountability. See also L. Mallinder and K. McEvoy, 'Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies', (2011) 6 *Contemporary Social Science* 107.

²⁴See J. Close, *Amnesty, Serious Crimes and International Law: Global Perspectives in Theory and Practice* (2019), at 138.

²⁵See Art. 29 of the 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3 (2002).

regard their obligation to prosecute as categorically incompatible with their prerogative to adopt conditional and limited amnesties for international crimes in exceptional situations.²⁶

Customary international law is also regularly invoked as a source of the prohibition of amnesties under international law.²⁷ This is particularly important in relation to crimes against humanity and war crimes committed in non-international conflicts because there is no treaty directly addressing the obligations of states regarding the prevention, investigation, and prosecution of those crimes.²⁸ Much of the discussion around customary international law has been around the Second Additional Protocol to the Geneva Conventions (APII).²⁹ Article 6(5) of the APII includes a clause encouraging states, at the end of hostilities, to grant the broadest possible amnesty to persons who have participated in the armed conflict. This article has been considered a tool of TJ and pacification.³⁰ During the drafting phase, states made clear that such provision was merely a recommendation, and several delegations stressed that the power to grant amnesties falls exclusively within the discretionary powers of the domestic authorities.³¹ This clause was relied upon by some courts in the 1990s to uphold amnesties adopted at the end of non-international conflicts in El Salvador, South Africa, Chile, and Colombia.³²

The International Committee of the Red Cross (ICRC), however, suggested a narrow reading of such a clause under customary international law, that excludes the application of amnesties for war crimes.³³ To support this interpretation, the ICRC referenced examples of state practice and the interpretation given by the delegation of the Soviet Union in the sense that such 'provision could not be construed to enable war criminals, or those guilty of crimes against humanity, to evade punishment'.³⁴ Therefore, human rights advocates have argued that such interpretation is also applicable by analogy, *mutatis mutandis*, to exclude crimes against humanity.³⁵ This interpretation advanced by the ICRC has been followed by human rights courts in cases regarding El Salvador and Croatia.³⁶ Such decisions have been interpreted as evidence of international courts and human rights bodies reaching an international agreement on the prohibition of amnesties for international crimes or serious human rights violations under international law.³⁷

The TJ literature is somewhat critical of this position. Louise Mallinder, for instance, has argued that the practice of domestic courts is not consistent enough for the crystallization of a rule on amnesties.³⁸ William Schabas argues that 'evidence . . . that the drafters of article 6(5) of Protocol II meant to exclude serious violations of international humanitarian law is actually very slender'.³⁹ Meanwhile, Josepha Close has criticized the lack of discussion of the *travaux préparatoires* and the

²⁶See Close, *supra* note 24, at 140.

²⁷See Relva, *supra* note 2, at 862.

²⁸See Scharf, *supra* note 18, at 360.

²⁹1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609.

³⁰Y. Sandoz et al., (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at 1402.

³¹For a full analysis of the negotiation history of the Art. 6 of the APII see Close, *supra* note 24, at 123–33; W. A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (2012), at 178–80.

³²See N. Roht-Arriaza and L. Gibson, 'The Developing Jurisprudence on Amnesty', (1998) 20 *Human Rights Quarterly* 843, at 864. For relevant decisions in El Salvador see note 109, *infra*; in South Africa, note 194, *infra*; in Chile, note 98, *infra*; in Colombia, note 203, *infra*.

³³ICRC, 'Rule 159: Amnesty', ICRC Customary IHL Database, available at ihl-databases.icrc.org/en/customary-ihl/v1/rule159 (emphasis added).

³⁴*Ibid.*

³⁵See Relva, *supra* note 2, at 865; J.E. Mendez, 'Foreword', in Lessa and Payne, *supra* note 2, xvii at xxii.

³⁶*Massacres of El Mozote and surrounding areas v. El Salvador*, Judgment of 25 October 2012, [2012] IACtHR (Ser. C) No. 252, at Para. 284; *Marguš v. Croatia*, Judgment of 13 November 2012, [2012] ECtHR, at Para. 220.

³⁷See Relva, *supra* note 2.

³⁸L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (2008), at Ch. 5. See more recently: Close, *supra* note 24, at Ch. 5.

³⁹See Schabas, *supra* note 31, at 178.

interventions of other delegations that manifested a more favourable position towards amnesties at the end of non-international conflicts in order to facilitate reconciliation.⁴⁰

More generally, TJ scholars have challenged the claim that a norm on the prohibition of amnesties has emerged under customary international law. Focusing on state practice, Mark Freeman has argued that '[a]mnesties are as prevalent today as at any time in modern history'.⁴¹ Tricia Olsen, Leigh Payne, and Andrew Reiter concluded that their Transitional Justice Data Base shows a persistence in the use of amnesties.⁴² In fact, the persistence of amnesties, despite the increase of criminal prosecutions, suggests that in many contexts they coexist.⁴³ Likewise, Mallinder's database shows that, despite many developments in human rights law and international criminal law, states continue to enact amnesties for human rights abuses around the globe.⁴⁴ Therefore, despite some evidence of *opinio juris*, the practice of states rejecting the applicability of amnesties for serious crimes has been far from general or consistent.⁴⁵

3. Judicial decisions shaping international law

The ambiguities surrounding the permissibility of amnesties under formal sources of international law have created significant room for judicial development. The growing number of prosecutions for human rights violations in domestic courts, the creation of international criminal tribunals, and the activation of the universal jurisdiction signalled a shift towards the importance of individual criminal accountability in redressing human rights abuses.⁴⁶

In the 1990s, domestic courts began to speak the language of international law. With the development of international criminal law institutions and the creation of a permanent International Criminal Court (ICC), the anti-impunity discourse took central stage at the international level, and states committed themselves to prosecuting human rights abuses. This empowered national courts to investigate international crimes. Examining seminal decisions of municipal courts in Latin American, African, and European countries, Naomi Roht-Arriaza and Lauren Gibson observed the growing importance of a discourse of accountability and the fight against impunity when assessing amnesty measures.⁴⁷ More recently, Roht-Arriaza concluded that states are facing a great challenge: negotiating peace in a world where amnesties are off the table.⁴⁸ Ellen Lutz and Kathryn Sikkink called that shift towards accountability the 'justice cascade'.⁴⁹ This meant 'a dramatic shift in the legitimacy of the norms of individual criminal accountability for human rights violations and an increase in actions (prosecutions) on behalf of those norms'.⁵⁰ Analysing the transnational justice networks that sparked the activation the universal jurisdiction in the US and Europe to prosecute authoritarian regimes in Latin America, scholars noted a ripple

⁴⁰See Close, *supra* note 24, at 131.

⁴¹See Freeman, *supra* note 15, at 4.

⁴²T. Olsen et al., *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (2010).

⁴³F. Lessa et al., 'Persistent or Eroding Impunity? The Divergent Effects of Legal Challenges to Amnesty for Past Human Rights Violations', (2014) 47 *Israel Law Review* 105, at 109.

⁴⁴L. Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment', in Lessa and Payne, *supra* note 2, 69 at 81. See also: Mallinder, 'Atrocity, Accountability, and Amnesty in a "Post-Human Rights World"?'', *supra* note 4, at 10; see Mallinder, 'Amnesties and Transitional Justice', *supra* note 4, at 276.

⁴⁵See Close, *supra* note 24, at 140, 179. See also Trumbull IV, *supra* note 19, at 291; see Schabas, *supra* note 31, at 188.

⁴⁶K. Sikkink, 'The Age of Accountability: The Global Rise of Individual Criminal Accountability', in Lessa and Payne, *supra* note 2, 19, at 19.

⁴⁷See Roht-Arriaza and Gibson, *supra* note 32.

⁴⁸N. Roht-Arriaza, 'After Amnesties are Gone: Latin American National Courts and the new Contours of the Fight Against Impunity', (2015) 37 *Human Rights Quarterly* 341, at 369.

⁴⁹E. Lutz and K. Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', (2001) 2 *Chicago Journal of International Law* 1.

⁵⁰See Sikkink, *supra* note 46, at 19.

effect leading to an increase in criminal investigations for human rights violations at a domestic level, and greater judicial acceptance of the principle of universal jurisdiction.⁵¹

At the international level, this was accompanied by an ‘anti-impunity turn’ in the human rights movement.⁵² Karen Engle observes that supporting human rights today means favouring criminal accountability for those individuals who have violated international human rights or humanitarian law, and opposing amnesty laws that might preclude such accountability.⁵³ Despite criticizing a strong anti-impunity focus, Engle and Pinto highlight how the decisions of human rights bodies have put the obligations to prosecute and punish individuals at the core of the victims’ right to an effective remedy for human right abuses.⁵⁴ International human rights law and international criminal law converge on the need for criminal punishment as a main form of redress. In the words of the former Secretary General of the UN Ban Ki-moon, the creation of institutions such as the ICC marked the beginning of a ‘new age of accountability’.⁵⁵

This anti-impunity discourse generated a remarkable reversal in the attitude of the international legal community towards national amnesties, framing them as one of the most egregious forms of impunity.⁵⁶ Criminal accountability arose as the main element in TJ, while alternative accountability mechanisms, like truth commissions, were viewed as complementary to trials.⁵⁷ This approach began to consider amnesties as a barrier to improvements in human rights and, in consequence, inappropriate for addressing past human rights abuses.⁵⁸ Amnesty laws were seen as a failure to deal with the past through trials and to end the cycle of human rights violations;⁵⁹ a ‘spoilers’ strategy to prevent human rights prosecutions;⁶⁰ and, ultimately, the ‘illegal social evil’ that perpetuates a culture of impunity.⁶¹

4. The initial rejection of amnesties by the Inter-American and UN human rights systems

This section looks closer at the early decisions of human rights bodies in Latin America that sparked the initial rejection of amnesties. The idea that human rights violations require criminal punishment under international law gained traction in the early 1990s. Examining situations with large-scale impunity, the Inter-American System developed a clear doctrine on how states need to react to serious human rights violations, and a stringent view on the form of accountability that is envisaged.⁶² The first case to make this move was *Velásquez Rodríguez v. Honduras* (1988), where

⁵¹See Lutz and Sikkink, *supra* note 49; N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2006). See decisions such as: *Caso contra Baltasar Garzón Real*, Tribunal Supremo de España – Sala de lo Penal, Sentencia No. 101/2012, Causa Especial No. 20048/2009 (27 February 2012); *Decisión de jurisdicción para investigar crímenes cometidos en Guatemala*, Tribunal Supremo de España, Sentencia No. 327/2003, Recurso de casación No. 803/2001 (25 February 2003); *Teófila Ochoa Lizarbe et al v. Telmo Ricardo Hurtado Hurtado*, District Court, Southern District of Florida, Case No. 07-21783-CIV-JORDAN (4 March 2008).

⁵²See Engle, *supra* note 1.

⁵³*Ibid.*, at 1070.

⁵⁴*Ibid.*, Pinto, ‘Awakening the Leviathan through Human Rights Law: How Human Rights Bodies Trigger the Application of Criminal Law’, (2018) 34 *Utrecht Journal of International and European Law* 161.

⁵⁵UN Secretary-General Ban Ki-moon, ‘The Age of Accountability’, 27 May 2010, available at www.un.org/sg/en/content/former-secretary-general/articles/2010-05-27/the-age-of-accountability.

⁵⁶See Pensky, *supra* note 13, at 7. See also L.J. Laplante, ‘Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes’, (2009) 49 *Virginia Journal of International Law* 915.

⁵⁷See Mallinder, ‘Atrocity, Accountability, and Amnesty in a “Post-Human Rights World”?’, *supra* note 4, at 7.

⁵⁸T. Olsen et al., ‘Conclusion: Amnesty in the Age of Accountability’, in Lessa and Payne, *supra* note 2, 336 at 337.

⁵⁹*Ibid.*, at 338.

⁶⁰H.J. Kim and K. Sikkink, ‘Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries’, (2010) 54 *International Studies Quarterly* 939, at 958.

⁶¹A. Gurmendi, ‘So, You Pardoned a War Criminal . . .’, *Opinio Juris*, 28 May 2019, available at opiniojuris.org/2019/05/28/so-you-pardoned-a-war-criminal/.

⁶²See Seibert-Fohr, *supra* note 7, at 51.

the Inter-American Court of Human Rights (IACtHR) interpreted the victims' right to an effective remedy, concluding that it includes states' obligations to investigate, prosecute, and ensure the effective punishment of human rights violators.⁶³ This approach signalled an anti-impunity stance, initiating a turn in the human rights movement towards retribution, with criminal accountability as a central pillar in redressing human rights violations and indispensable for achieving other values of truth, reconciliation, and non-recurrence.⁶⁴

Following decisions on amnesty were key in the shift towards the increasing demand for criminal prosecutions. Inter-American and UN human rights bodies examined impunity measures enacted in South America, developing a synergistic relationship that generally opposed amnesties.⁶⁵ Evaluating measures enacted in Argentina, Uruguay, Chile, Peru, and El Salvador, the Inter-American Commission on Human Rights (IACmHR) connected the duty to investigate human rights abuses with the victims' right to participate in judicial procedures as an effective remedy.⁶⁶ Particularly in the situations of Chile and Peru, the IACmHR expanded on the incompatibility of self-amnesties with the state's obligation to investigate and punish human rights violations. The overall conclusion was that the legal frameworks enacted created expectations of impunity that eroded public trust in the judicial system and the exercising of the victims' right to justice.⁶⁷

The position of UN monitoring bodies mirrored this. Despite some pronouncements supporting the use of amnesties in transitional processes in Haiti, Mozambique, Angola, and El Salvador, the UN radically changed its position during the 1990s when examining measures in the Southern Cone.⁶⁸ Both the Committee Against Torture (UNCAT) and the Human Rights Committee (UNHRC) expressed concern about amnesty measures contributing to an atmosphere of impunity in Argentina and Uruguay, that undermined the democratic order and risked further human rights violations.⁶⁹ Focusing on the prohibition of torture, the UNCAT stated that amnesties or other mechanisms that preclude the fair prosecution and punishment of perpetrators violate the principle of non-derogability.⁷⁰ The UNHRC expanded the prohibition of amnesties to include other violations like arbitrary killings and enforced disappearances, particularly when benefiting state agents.⁷¹ Since then, UN bodies have consistently rejected amnesty measures in other countries beyond the Americas. In fact, the UN has directed peace negotiators and staff not

⁶³*Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, [1988] IACtHR, (Ser. C) No. 4, at Para. 174. See also Seibert-Fohr, *supra* note 7, at 53; see Mallinder, *supra* note 38, at 270; see Engle, *supra* note 1, at 1080.

⁶⁴See of the Human Rights Courts' A. Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction', (2013) 107 *AJIL* 1; J. Carvajalino and M. Davidovic, 'Escaping or Reinforcing Hierarchies? Norm Relations in Transitional Justice', (2023) 25 *International Studies Review* viad022.

⁶⁵For a full analysis on the historical shift in the treatment of amnesties by the UN and Inter-American Human Rights Bodies see D. Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities', (1996) 59 *Law and Contemporary Problems* 197; see Mallinder, *supra* note 38; see Seibert-Fohr, *supra* note 7; see Engle, *supra* note 1.

⁶⁶See *Consuelo et al. v. Argentina*, Decision of 2 October 1992, IACmHR (Report 28/92) OEA/Ser.L/V/II.83; *Mendoza et al. v. Uruguay*, Decision of 2 October 1992, IACmHR (Report 29/92) OEA/Ser.L/V/II.83; and *Masacre Las Hojas v. El Salvador*, Decision of 24 September 1992, IACmHR (Report 26/92) OEA/Ser.L/V/II.83.

⁶⁷See *Garay Hermosilla et al. v. Chile*, Decision 15 October 1996, IACmHR (Report 36/96) OEA/Ser.L/V/II.95; *Alfonso René Chanfeau Orayce et al. v. Chile*, Decision of 7 April 1998, IACmHR (Report 25/98) OEA/Ser.L/V/II.98; *Hugo Bustios Saavedra v. Peru*, Decision of 16 October 1997, IACmHR (Report 38/97) OEA/Ser.L/V/II.98; *Estiles Ruíz Dávila v. Peru*, Decision of 19 February 1998, IACmHR (Report 41/97) OEA/Ser.L/V/II.98.

⁶⁸See R. Jeffery, 'Nepal's Comprehensive Peace Agreement: Human Rights, Compliance and Impunity a Decade On', (2017) 93 *International Affairs* 343; C. Stahn, 'United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?', (2002) 84 *IRRC* 191.

⁶⁹*OR, MM and MS v. Argentina*, Decision of 23 November 1989, UNCAT, UN Doc. CAT/C/WG/3/DR/1, 2, and 3/1988; *Hugo Rodríguez v. Uruguay*, Decision of 19 July 1994, UNHRC, UN Doc. CCPR/C/51/D/322/1988.

⁷⁰UNCAT, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2 (24 January 2008), at Para. 5.

⁷¹UNHRC, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13 (29 March 2004), at Para. 18.

to 'encourage or condone amnesties regarding war crimes, crimes against humanity, genocide or gross violations of human rights or foster amnesties that violate relevant treaty obligations of the parties'.⁷² Although the decisions of the IACmHR and UN bodies are not binding, reports on specific countries and other soft law declarations helped consolidate the idea of a prohibition of amnesties and the principle of individual criminal responsibility as fundamental to the redress of serious human rights abuses.

In 2001, the IACtHR fully engaged for the first time with the analysis of the permissibility of amnesties under the American Convention on Human Rights (ACHR).⁷³ For many, *Barrios Altos v. Peru* (2001) is the decision that started the crystallization of a prohibition of amnesty under international law.⁷⁴ Analysing the self-amnesty laws passed during the Fujimori regime, the IACtHR followed the Commission's interpretation and decided that the state had failed to comply with its obligations to provide judicial protection and access to justice under the ACHR.⁷⁵ Rather than ordering the state to repeal or annul the measures, the Court indicated that self-amnesty laws designed to avoid justice had lacked legal effect from the beginning.⁷⁶ In these circumstances, such decisions constitute a 'fictitious' or 'fraudulent' *res judicata*, allowing criminal investigations to be reopened and rendering the double jeopardy principle inapplicable.⁷⁷ Similar considerations were made in *Almonacid Arellano v. Chile* (2006), where the IACtHR studied the failure of the Chilean state to investigate and punish crimes committed during the military dictatorship of Augusto Pinochet.⁷⁸ The IACtHR considered that Chile granted 'a self-amnesty, since it was issued by the military regime to avoid judicial prosecution of its own crimes'.⁷⁹ The Court reinforced the rejection of amnesties in the Chilean case, arguing that amnesty laws are not permissible for crimes against humanity and that truth commissions are 'no substitute for the duty of the State to reach the truth through judicial proceedings'.⁸⁰

In the years that followed, the IACtHR strengthened its stance against amnesties. After focusing on blanket and self-amnesties in Chile and Peru, the Court expanded the prohibition to amnesties benefiting both state officials and guerrilla members in *Gomes Lund v. Brazil* (2010),⁸¹ amnesties ratified democratically through referendum in *Gelman v. Uruguay* (2011), and amnesties enacted as part of a negotiated peace agreement in *Massacres of El Mozote v. El Salvador* (2012).⁸² The focus of the court became the *ratio legis* of the measures, concluding that the prohibition of amnesty extended to all 'amnesties of serious human rights violations and is not limited to those which are denominated "self-amnesties"'.⁸³ More than the adoption process or the authority issuing the amnesty, the fundamental question was whether the objective of the measure was to leave serious human rights violations unpunished and unredressed.⁸⁴

Most recently, in *Herzog v. Brazil* (2018), the Court repeated that the prohibition of amnesty is not grounded upon procedural considerations, but in the consequence of leaving serious violations of international law committed by the military regime unpunished.⁸⁵ Additionally, in follow-up decisions to cases in Guatemala and El Salvador, the IACtHR had warned that legislative initiatives to grant general amnesties in those countries would be in direct violation of the ACHR

⁷²See Rule-of-Law Tools, *supra* note 14, at 44.

⁷³1969 American Convention on Human Rights, OAS Treaty Series No. 36 (1978).

⁷⁴See Laplante, *supra* note 56, at 919.

⁷⁵*Barrios Altos v. Peru*, Judgment of 14 March 2001, [2001] IACtHR, (Ser. C) No. 75, at Paras. 43 and 51.

⁷⁶*Ibid.*, at Para. 44.

⁷⁷*La Cantuta v. Peru*, Judgment of 29 November 2006, [2006] IACtHR, (Ser. C) No. 162, at Para. 153.

⁷⁸*Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006, [2006] IACtHR, (Ser. C) No. 154.

⁷⁹*Ibid.*, at Para. 120.

⁸⁰*Ibid.*, at Para. 150. See also *La Cantuta*, *supra* note 77, at Para. 224.

⁸¹*Gomes Lund et al. v. Brazil*, Judgment of 24 November 2010, [2010] IACtHR, (Ser. C) No. 219.

⁸²See *Massacres of El Mozote*, *supra* note 36, at Para. 284.

⁸³See *Gomes Lund*, *supra* note 81, at Para. 175.

⁸⁴See *Gelman v. Uruguay*, Judgment of 24 February 2011, [2011] IACtHR, (Ser. C) No. 221.

⁸⁵*Case of Herzog et al. v. Brazil*, Judgement of 15 March 2018, [2018] IACtHR, (Ser. C) No. 353, at Para. 175.

and the international obligations of both states.⁸⁶ Throughout these cases, which are the backbone of the case law on amnesty, the IACtHR has been consistent in rejecting amnesty measures.

5. The vertical dialogue on the prohibition on amnesties

The influence of the IACtHR's decisions in other courts has been substantial. On the one hand, they have empowered domestic courts in Latin America to revoke amnesty measures (vertical dialogue).⁸⁷ On the other hand, as shown in the following section, they have facilitated the work of other international and regional bodies that have used the decisions of the Inter-American System as evidence of an emerging consensus on the prohibition of amnesties (horizontal dialogue).⁸⁸

Domestic courts in Latin America engaged in an active dialogue with the Inter-American System, enhancing the reach of the decisions of the IACtHR and consolidating the judicial rejection of amnesties at a domestic level. The nature, or absence, of the transitional process in authoritarian regimes that implemented amnesties with the purpose of shielding people in power from justice, led courts in Latin America to become a counterforce in the protection of individual rights. Judges arose as protectors of the rule of law in periods of military dictatorships, autocratic regimes, and concentration of power.⁸⁹ Such a role was legitimized by the development of the conventionality control doctrine by the IACtHR, and the doctrine of the block of constitutionality incorporated into many countries of the region, which gives constitutional status to human rights treaties under domestic law.⁹⁰

5.1. Courts as protectors of the rule of law in authoritarian regimes

In the aftermath of authoritarian regimes in South America, courts strengthened their independence and deepened their protection of the separation of powers and the rule of law. Courts have found different ways to eschew the application of amnesty measures. Understanding themselves as autonomous actors in the international system, national courts interacted with judicial bodies beyond their borders, speaking a common language and engaging in a common enterprise.⁹¹

In Argentina and Uruguay, courts have been vocal about the terms of the amnesty violating the separation of powers. The Supreme Court in Argentina argued that, with the expedition of the Full Stop and Due Obedience Laws, the executive power assumed discretionary powers belonging to the legislative branch to enact amnesty laws, and limited the powers of the judicial branch to decide on the criminal responsibility of individuals, in a manner incompatible with the separation of powers.⁹² Similarly, the Supreme Court of Uruguay rendered the Expiry Law unconstitutional in 2009. It concluded that the law violated the separation of powers because the declaration of the prescription of a crime should be made by the judiciary on a case-by-case basis.⁹³ Besides, despite

⁸⁶*Members of the Village of Chichupac, Molina Theissen and other 12 cases v. Guatemala*, Order of 12 March 2019, [2019] IACtHR, Provisional Measures and Monitoring Compliance with Judgment; *Massacres of El Mozote and surrounding areas v. El Salvador*, Order of 3 September 2019, [2019] IACtHR, Provisional Measures and Monitoring Compliance with Judgment.

⁸⁷A-M. Slaughter, 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 99, at 106.

⁸⁸*Ibid.*, at 103.

⁸⁹See Roht-Arriaza and Gibson, *supra* note 32.

⁹⁰See further explanations of these doctrines in Sections 5.2 and 5.3.

⁹¹See Slaughter, *supra* note 87, at 136.

⁹²See *Caso contra Julio Héctor Simón y otros*, Corte Suprema de Justicia de la Nación, Fallo 328:2056 (14 June 2005); *Caso contra Santiago Omar Riveros (Caso Julio Lilo Mazzeo y otros)*, Corte Suprema de Justicia de la Nación, Fallo 330:3248 (13 July 2007).

⁹³*Sabalsagaray Curutchet, Blanca Stela – Excepción de inconstitucionalidad Ley 15.848*, Suprema Corte de Justicia de Uruguay, Sentencia No. 365 (19 October 2009), at 28. See also *Caso contra José Nino Gavazzo Pereira y Jose Ricardo Arab Fernández*, Suprema Corte de Justicia de Uruguay, Sentencia No. 1501/2006 (6 May 2011).

not being an amnesty itself, the law constituted a mechanism of impunity that restricted the access of victims to effective remedy, analogous to other amnesty laws applied in the region.⁹⁴

In Peru, the judiciary reacted quickly against the expedition of the general self-amnesty covering the crimes committed by military officials and civilians as part of Fujimori's 'war on terrorism'. In 1995, Judge Saquicury decided not to apply the amnesty law only a few months after their expedition, arguing that self-amnesties are incompatible with international and constitutional obligations to provide an effective remedy and to investigate and punish human rights violations.⁹⁵ In reaction, the regime passed a bill obliging courts to apply the amnesty laws. Despite the efforts of the judiciary, many domestic proceedings were terminated, including the investigations on the massacres of *Barrios Altos* and *La Cantuta*. These cases made their way up to the Inter-American System, and it was only after the intervention of the IACtHR that courts in Peru were fully empowered to revoke the amnesty.⁹⁶

In Chile the judiciary was more effective. In the aftermath of the military dictatorship, the Congress failed to achieve the necessary majorities to revoke the blanket amnesty enacted by Pinochet.⁹⁷ The amnesty was then challenged before the courts. Despite initially upholding the amnesty,⁹⁸ the Supreme Court changed its precedent in 1998 in a landmark case concerning the enforced disappearance of *Pedro Poblete Córdova* by intelligence officials.⁹⁹ Invoking the state's obligations under the Geneva Conventions to investigate and punish grave breaches of humanitarian law, the judges considered that the amnesty could not be applied in the abstract; the state first had to identify those responsible.¹⁰⁰ Besides, forced disappearance and illegal detention are continuous crimes that were not covered by the temporal scope of the amnesty.¹⁰¹ Consequently, the Chilean courts found avenues to avoid the application of the amnesty without invalidating the decree.¹⁰²

5.2. Conventionality control and the direct application of the IACtHR case law

After 2001, the decisions of the IACtHR had a direct impact in the decision-making of domestic courts.¹⁰³ Particularly in countries where the IACtHR decided on the incompatibility of the amnesty with the ACHR, national courts relied on those pronouncements to limit or revoke the legal effects of those measures. In countries like Chile and Brazil, despite the amnesty remaining valid, courts have referenced the case law of the IACtHR to limit the application of the measure in

⁹⁴See *Sabalsagaray Curutchet, Blanca Stela – Excepción de inconstitucionalidad Ley 15.848*, *ibid.*, at 48.

⁹⁵*Caso contra Santiago Martín Rivas y otros*, Juzgado Penal No. 16 de Lima (Perú), Juez Antonia Saquicury Sánchez (16 June 1995), at 2.

⁹⁶The Peruvian Congress has recently approved, in the first and second debate, a new general amnesty for crimes committed between 1980 and 2000. In response, the IACmHR exhorted the state to abstain from approving the amnesty and reminded them of their international obligations to comply with the decision of the IACtHR. See Inter-American Commission on Human Rights, 'CIDH exhorta al Perú a abstenerse de aprobar leyes que otorgan amnistías por graves violaciones a los derechos humanos' [IACHR Urges Peru to Refrain from Passing Laws Granting Amnesties for Serious Human Rights Violations], *Press Release*, 26 June 2025, available at www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2025/128.asp&utm_content=country-per&utm_term=class-mon.

⁹⁷See Roht-Arriaza and Gibson, *supra* note 32, at 248.

⁹⁸See *Caso contra Manuel Contreras*, Corte Suprema de Chile, Rol 553–78 (24 August 1990); *Caso contra Osvaldo Romo Mena*, Corte Suprema de Chile, Rol 5.566 (26 October 1995).

⁹⁹*Caso por la desaparición de Pedro Poblete Córdova por miembros de la Dirección de Inteligencia Nacional (DINA)*, Corte Suprema de Chile, Rol 469–98 (9 September 1998).

¹⁰⁰*Ibid.*, at Paras. 6–8.

¹⁰¹*Ibid.*, Para. 11.

¹⁰²See for instance *Caso contra Paulino Flores Rivas y otros (Caso Molco)*, Corte Suprema de Chile, Rol 559–2004 (13 December 2006).

¹⁰³C. Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights', (2011) 12 *German Law Journal* 1203, at 1225.

specific cases. In other countries, including Peru and El Salvador, the decisions of the Inter-American System have been instrumental to invalidate amnesty laws.

In the *Almonacid Arellano* case, the IACtHR developed the conventionality control doctrine.¹⁰⁴ Under this doctrine, domestic legislation that is incompatible with the ACHR lacks legal effects. The conventionality control doctrine requires that domestic courts disregard or even revoke domestic regulations that fail to comply with the ACHR and the Court's interpretation. This has two effects: it engages national courts in a decentralized control of the compatibility of domestic legislation with the ACHR, and it gives direct effect to judgments of the IACtHR that are authoritative interpretations of the ACHR. In the Chilean case, the IACtHR applauded the fact that domestic courts have not applied the self-amnesty in many cases since 1998, but added that the state has a general obligation to annul all legislation that is in violation of the ACHR.¹⁰⁵ Therefore, while condemning the Chilean state as a whole, the IACtHR empowered and obliged domestic courts to apply the ACHR directly.¹⁰⁶

The doctrine formalizes the idea of judicial dialogue between human rights bodies and domestic courts. Moreover, that dialogue became instrumental in the general rejection of amnesty laws in the region. In Peru, the decisions of the IACtHR had a significant influence in the cases against Santiago Martín Rivas for his responsibility in the Barrios Altos and La Cantuta massacres, which ultimately led to the revocation of the Peruvian self-amnesty.¹⁰⁷ Similarly, the decision of the IACtHR in the *El Mozote* case led to the Salvadorean Supreme Court changing its precedent, after upholding the general amnesty in previous decisions in 1993 and 2000.¹⁰⁸ After leaving a wide margin of discretion for the state to enact the amnesty, the Supreme Court argued that amnesty laws, when used as mechanisms of TJ, can facilitate transition to peace but may also become obstacles to justice and reconciliation. Consequently, building upon the considerations of the IACtHR, the Salvadorean Supreme Court declared that the General Amnesty Law was unconstitutional because it provided for a blanket amnesty that violated the victims' rights to an effective remedy.¹⁰⁹

The decisions of the Inter-American System have also reached Brazil, but domestic courts there have upheld amnesty measures most decisively.¹¹⁰ In 2010, Brazil's Supreme Federal Tribunal upheld the amnesty enacted in 1979.¹¹¹ This decision was the object of analysis and repudiation by the IACtHR in the *Gomes Lund* and *Herzog* cases. Appealing to the conventionality control doctrine, the IACtHR called upon courts to apply the ACHR domestically. Following this, federal prosecutors in Brazil have tried to comply with the IACtHR, opening cases for crimes against humanity notwithstanding the amnesty.¹¹² Brazilian judges and courts, including the Supreme

¹⁰⁴See *Almonacid Arellano*, *supra* note 78, at Para. 124.

¹⁰⁵*Ibid.*, at Para. 121.

¹⁰⁶J. Contesse, 'The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine', (2018) 22 IJHR 1168, at 1170.

¹⁰⁷See *Recurso de Amparo por Santiago Enrique Martín Rivas – Barrios Altos*, Tribunal Constitucional de Perú, No. 4587-2004-AA/TC (29 November 2005); *Recurso de Amparo por Santiago Enrique Martín Rivas – La Cantuta*, Tribunal Constitucional de Perú, No. 679-2005-PA/TC (2 March 2007).

¹⁰⁸See *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 10-93 (20 May 1993), at 5; *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 24-97/21-98 (26 September 2000), at 18.

¹⁰⁹*Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 44-2013/145-2013 (13 July 2016), at 25, at 40.

¹¹⁰See Engle, *supra* note 1, at 1109.

¹¹¹*Arguição de Descumprimento de Preceito Fundamental 153 (Lei Anistia)*, Supremo Tribunal Federal do Brasil, ADPF 153 (28 April 2010).

¹¹²E.P. Neder-Meyer and F.B. Pasquot-Polido, 'Brazil in the Dock: The Inter-American Court of Human Rights Rulings Concerning the Dictatorship of 1964–1985', *Verfassungsblog*, 3 December 2018, available at <https://verfassungsblog.de/brazil-in-the-dock-the-inter-american-court-of-human-rights-rulings-concerning-the-dictatorship-of-1964-1985/>.

Federal Tribunal, have rejected those attempts.¹¹³ In a recent 2019 decision, the Federal Tribunal based in Rio de Janeiro decided to overrule the amnesty granted to Antônio Waneir Pinheiro Lima for crimes committed during the dictatorship at the torture centre known as the 'House of Death'. The Regional Tribunal applied the conventionality control doctrine and argued that the ACHR has direct application in Brazil.¹¹⁴ The tribunal considered that, even though the amnesty was prior to the ratification of the ACHR by Brazil, the state had failed to investigate the crimes and to provide an effective remedy to the victims in the years that followed.¹¹⁵

5.3. Block of constitutionality and the influence of the IACtHR in other Latin American countries

The doctrine of the constitutionality block in Latin American countries has complemented the conventionality control doctrine and reinforced the incorporation of international human rights standards into domestic constitutional frameworks. Jorge Contesse has called this a form of 'bottom-up conventionality control'.¹¹⁶ At the domestic level, national courts have relied on the block of constitutionality theory to directly apply international human rights law. Under this doctrine, human rights treaties are incorporated into the constitutional framework of the country. Therefore, international law is enforceable by domestic courts and can become a parameter for examining the constitutionality of other legal measures.¹¹⁷ In Argentina and Colombia, despite the IACtHR not having a decision on the legality of the amnesty measures enacted in those countries, courts have used the constitutionality block doctrine to apply the standards developed by the IACtHR in their judgments.¹¹⁸

The constitutionality block was invoked in the *Simón* case, where the Argentinean Supreme Court argued that congress has the discretion to grant amnesty under the Constitution, however, such faculty is limited by international treaties.¹¹⁹ Applying this doctrine, the Supreme Court evaluated the amnesty laws in light of the ACHR and the authoritative interpretation made by the IACtHR (in cases against Honduras and Peru) and the IACmHR (in its observations on Argentina).¹²⁰ It concluded that amnesty laws enacted to secure impunity, whether issued by the same government in the form of self-amnesty or by following administrations, are incompatible with international treaties.¹²¹ Following the IACtHR's approach in *Barrios Altos*, the Supreme Court concluded that the Argentinean amnesty laws were invalid and lacked legal effect.¹²² More recently, Argentinean courts have relied on the case law of the Inter-American System to uphold legislation derogating other impunity laws, and to limit the application of amnesties for crimes against humanity.¹²³

¹¹³See *Reclamação 18.686 Rio De Janeiro - Tutela de urgência Ricardo Agnese Fayad*, Supremo Tribunal Federal do Brasil, RCL 18.686/RJ (23 November 2018).

¹¹⁴*Ministério Público Federal v. Antônio Waneir Pinheiro Lima*, Apelação Criminal- Turma Espec. I - Penal do Brasil, Previdenciário e Propriedade Industrial, No. CNJ 0500068-73.2018.4.02.5106 (14 August 2019), at 13.

¹¹⁵*Ibid.*, at 31.

¹¹⁶See Contesse, *supra* note 106, at 1179.

¹¹⁷See M. Góngora Mera, 'La difusión del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del ius constitutionale commune latinoamericano' ['The Diffusion of the Constitutional Block Doctrine in the Latin American Jurisprudence and Its Potential for the Construction of a Latin American *Ius Constitutionale Commune*', translation by the author], in A. von Bogdandy et al (ed.), *Ius Constitutionale Commune en América Latina* (2014), 301.

¹¹⁸See Binder, *supra* note 103, at 1222.

¹¹⁹See *Julio Héctor Simón*, *supra* note 92, at Para. 16.

¹²⁰*Ibid.*, at Paras. 18–27.

¹²¹For a detailed analysis of the *Simón* case see: C.A. Bakker, 'A Full Stop to Amnesty in Argentina: the *Simón* case', (2005) 3 *JICJ* 1106.

¹²²See *Julio Héctor Simón*, *supra* note 92, at Para. 31.

¹²³See *Caso contra Marcos Levi y otros*, Corte Suprema de Justicia Argentina, CSJ 1874/2015/RH1 (18 September 2018); *Caso contra Rufino Batalla (Carlos Hidalgo Garzón)*, Corte Suprema de Justicia Argentina, FLP 91003389/2012/TO1/93/1/RH11 (4 December 2018).

In Colombia, the Constitutional Court examined the legal framework enacted for the demobilization of paramilitary groups.¹²⁴ The Court concluded that this was not a law on amnesty because it did not release individuals from criminal liability, but provided for alternative reduced prison sentences.¹²⁵ Nevertheless, invoking the block of constitutionality that gives international human rights treaties constitutional hierarchy under Article 93 of the Colombian Constitution, the Court reviewed the standards of justice set by the ACHR. Referencing cases from the IACtHR against Peru and Guatemala, among others, the Constitutional Court concluded that amnesty laws for international crimes are incompatible with human rights standards in that they fail to provide effective remedies.¹²⁶ This was also acknowledged by the Colombian Supreme Court which, in the *Segovia Massacre* case, highlighted that amnesties cannot be granted for international crimes with the purpose of shielding someone from justice.¹²⁷

Thus, the dialogue between the Inter-American System and domestic courts in Latin America created a symbiotic rejection of amnesties enacted in the aftermath of authoritarian regimes in the continent. This was facilitated by doctrines such as the conventionality control and the block of constitutionality, which empowered national tribunals to apply directly the ACHR and the decisions of the IACtHR at the domestic level. This regional trend marked the path for a general rejection of amnesties as mechanisms of impunity, with tribunals in other parts of the world reading closely the reasoning of the IACtHR and establishing a horizontal dialogue across regions and legal regimes.

6. The horizontal dialogue on the prohibition on amnesties

Despite the initial leadership of the IACtHR, in the last decade the European Court and the African Commission have also discussed the permissibility of amnesties. A horizontal dialogue has flourished, with human rights bodies and international criminal tribunals looking at each other's decisions. The position of the Inter-American System and the UN bodies against amnesties has strongly influenced the decision-making of international tribunals in other regions. However, there are regional differences that reflect some fragmentation in the debate and a range of approaches that bring some nuance to the debate around the permissibility of amnesty laws.

6.1. Amnesties at the European System of human rights

The European System has faced fewer cases dealing with amnesties than its counterparts in Latin America. The first decisions of the European bodies discussed the permissibility of amnesties only tangentially, focusing on the standards set by the European Convention on Human Rights (ECHR).¹²⁸ In *Abdülşamet Yaman v. Turkey* (2004) the European Court of Human Rights (ECtHR) examined the case of a victim of arbitrary detention, torture, and degrading treatment by state agents who later benefited from laws that limited liability.¹²⁹ The Court considered that this violated Article 3 of the ECHR and created a climate of impunity. Without examining the compatibility of amnesties with international law more generally, the ECtHR formulated a broad rule rejecting the use of amnesty and other mechanisms that limit liability for crimes involving

¹²⁴ *Constitucionalidad de la Ley de Justicia y Paz (Ley 975/05)*, Corte Constitucional de Colombia, C-370/06 (18 May 2006).

¹²⁵ *Ibid.*, at 220.

¹²⁶ *Ibid.*, at 242–61.

¹²⁷ *Caso contra César Pérez García - Masacre de Segovia*, Corte Suprema de Justicia de Colombia – Sala Penal, No. 33.118 (13 May 2010).

¹²⁸ 1950 European Convention on Human Rights, ETS No. 005.

¹²⁹ *Abdülşamet Yaman v. Turkey*, Judgment of 2 November 2004, [2004] ECtHR.

torture or ill-treatment by state officials.¹³⁰ This clause has been profusely referenced and reproduced in several other cases against Turkey and other states.¹³¹

The overall position of the European System against amnesties is not as strong as the previous paragraph might suggest. In decisions that have examined amnesty measures in more depth, the position of the European System has been more lenient than that of the Inter-American System. The European System has brought some nuance to the debate on amnesties, avoiding an outright rejection of all forms of amnesties, and framing the question of permissibility of amnesties as part of a more general debate about states' discretion and public interests.¹³² It has engaged in a balancing act that accounts for the obligation of states to investigate and punish human rights abuses, but also takes into consideration the legitimate interests of states in resolving internal conflicts.¹³³ For instance, in *Laurence Dujardin v. France* (1991) the then European Commission of Human Rights (ECmHR) argued that states have discretion to deal with situations of violence.¹³⁴ Thus, the amnesty measure was justified as an exceptional measure designed to resolve conflicts, as long as 'a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law'.¹³⁵

Dealing with international crimes more directly, ECtHR has, in recent decisions, considered the position of Inter-American and UN bodies restricting the application of amnesties under international law. The ECtHR identified a growing consensus rejecting amnesties for international crimes, but it has maintained a more flexible approach that leaves some room for considerations of public interest in peace and reconciliation. In *Ould Dah v. France* (2009)¹³⁶ the ECtHR examined the activation of the universal jurisdiction by French courts against Captain Ely Ould Dah, a Mauritanian national, despite the amnesty law enacted in 1993 by Mauritania. Explicitly agreeing with the position of UN bodies, the ECtHR argued that 'an amnesty is generally incompatible with the duty incumbent on the States to investigate [torture]'.¹³⁷ The obligation to prosecute crimes of torture, the Court added, 'should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law'.¹³⁸ In *Marguš v. Croatia* (2012) the ECtHR built upon its own precedent, concluding that the obligation to prosecute torture could be extended to intentional killings and international crimes, including crimes against humanity, war crimes and genocide.¹³⁹ Therefore, the Court extended the prohibition of amnesty under international law, noting that 'there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by Governments'.¹⁴⁰

With these decisions the ECtHR moved closer to the position of the Inter-American System. Diverting from a general prohibition of amnesties, however, the ECtHR addressed the possibility of a tension between the need to prosecute criminals and a country's determination to promote reconciliation in society.¹⁴¹ European states still have ample discretion to enact amnesties when they pursue a legitimate interest.¹⁴² In 2014 the *Marguš v. Croatia* case was reconsidered by the

¹³⁰*Ibid.*, at Para. 55.

¹³¹See, among others: *Okkali v. Turkey*, Judgment of 17 October 2006, [2006] ECtHR, at Para. 76; *Ali and Ayşe Duran v. Turkey*, Judgment of 8 April 2008, [2008] ECtHR, at Para. 69; *Yerli v. Turkey*, Judgment of 8 July 2014, [2014] ECtHR, at Para. 61; *Mocanu and others v. Romania*, Judgment of 17 September 2014, [2014] ECtHR, at Para. 326.

¹³²See J.P. Perez-Leon-Acevedo, 'The Control of the Inter-American Court of Human Rights over Amnesty Laws and Other Exemption Measures: Legitimacy Assessment', (2020) 33 *LJIL* 667.

¹³³See Seibert-Fohr, *supra* note 7, at 151.

¹³⁴*Laurence Dujardin and others v. France*, Decision of 2 September 1991, ECmHR, Application No. 16734/90.

¹³⁵*Ibid.*, at Para. 244.

¹³⁶*Ould Dah v. France*, Judgment of 17 March 2009, [2009] ECtHR.

¹³⁷*Ibid.*, at 17.

¹³⁸*Ibid.*

¹³⁹See *Marguš*, *supra* note 36, at Paras. 73–4.

¹⁴⁰*Ibid.*, at Para. 74.

¹⁴¹See *Ould Dah*, *supra* note 136.

¹⁴²*Tarbuk v. Croatia*, Judgment of 11 December 2012, [2012] ECtHR, at Para. 50.

Grand Chamber, which again emphasized the need to consider the state's legitimate interest in peace and reconciliation when evaluating amnesty laws.¹⁴³ Looking extensively at the IACtHR's case law, the ECtHR concluded that there is a growing tendency in international law to regard amnesties for war crimes and crimes against humanity as unacceptable.¹⁴⁴ However, in the same paragraph, the ECtHR nuanced this position again by acknowledging that this was not a difficult case because the state failed to implement other TJ mechanisms for reconciliation.¹⁴⁵ As in the *Ould Dah* case, the fact that Croatia nor Mauritania accompanied the amnesty legislation with other mechanisms of accountability seems to have affected the Court's decision-making.¹⁴⁶

The ECtHR has shown more openness than other human rights bodies to the permissibility of conditional amnesties in specific contexts. As noted by William Schabas, adopting a relatively flexible position where rights are balanced against other legitimate objectives rather than treated as absolutes.¹⁴⁷ Despite rejecting blanket amnesties for international crimes, the ECtHR seems to suggest that some amnesties could be possible where there is a reconciliation process.¹⁴⁸ However, there is still uncertainty in relation to how it would deal with amnesties during genuine TJ processes.¹⁴⁹ The ECtHR has left some room for amnesties to be upheld on a case-by-case basis when they pursue a legitimate interest of the state in peace and reconciliation.¹⁵⁰

6.2. Amnesties at the African System on human and peoples' rights

The African System has examined the permissibility of amnesties in four cases. In dialogue with both the Inter-American and the European systems, the African Commission on Human and Peoples' Rights (ACmHPR) has adopted a position that combines a strong rejection of blanket and unconditional amnesties, while also pointing to the lack of guidance for the application of amnesties when pursuing peace and reconciliation in transitional contexts. In a decision on admissibility in *Malawi African Association and others v. Mauritania* (2000), the ACmHPR considered that the implementation of an amnesty law in 1993 rendered all internal remedies obsolete.¹⁵¹ Pointing at the fact that the amnesty law was adopted with the aim of stopping the redress of state-sponsored human rights abuses, the ACmHPR concluded that the law may have effect within Mauritanian national territory, but it cannot shield the country from fulfilling its international obligations.¹⁵²

Later in separate decisions, the ACmHPR analysed amnesty laws enacted in Zimbabwe and Ivory Coast. In both cases, the African Commission referenced the decisions of the IACtHR, the ECtHR, and the UNHRC, concluding that 'there has been consistent international jurisprudence suggesting that the adoption of amnesties leading to impunity for serious human rights has become a rule of customary international law'.¹⁵³ Placing emphasis on amnesty laws that grant 'total and complete immunity from prosecution' and 'foreclose access to any remedy' without implementing alternative mechanisms of justice, the ACmHPR concluded that both amnesties

¹⁴³*Marguš v. Croatia*, Judgment of 27 May 2014, [2014] ECtHR.

¹⁴⁴*Ibid.*, at Paras. 138–9.

¹⁴⁵*Ibid.*, at Para. 139.

¹⁴⁶*Ibid.*; see *Ould Dah*, *supra* note 136.

¹⁴⁷W.A. Schabas, 'Synergy or Fragmentation?: International Criminal Law and the European Convention on Human Rights', (2011) 9 *JICJ* 609, at 619–22.

¹⁴⁸See *Marguš*, *supra* note 143, at Para. 139.

¹⁴⁹M. Jackson, 'Amnesties in Strasbourg', (2018) 38 *OJLS* 451, at 463.

¹⁵⁰See Close, *supra* note 24, at 206.

¹⁵¹*Malawi African Association and others v. Mauritania*, Decision of 11 May 2000, ACmHPR, Communication No. 54/91, at Para. 85. Same situation of violence that originated the *Ould Dah* case before the ECtHR, *supra* note 136.

¹⁵²See *Malawi African Association and others*, *ibid.*, at Para. 83.

¹⁵³*Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Decision of 25 May 2006, ACmHPR, Communication No. 245/2002, at Para. 201; *Mouvement Ivoirien des Droits Humains (MIDH) v. Côte d'Ivoire*, Decision of 29 July 2008, ACmHPR, Communication No. 246/2002, at Para. 91.

were incompatible with the African Charter.¹⁵⁴ In the eyes of the Commission, these amnesties prevented victims from seeking redress and encouraged impunity. However, it added that the violation materialized because the state failed to put in place 'alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy'.¹⁵⁵ Thus, echoing the position of the ECtHR, the African Commission hinted at a different approach to amnesties when these are accompanied by alternative mechanisms of accountability.

In its most recent decision on amnesty, the ACmHPR examined the petition elevated by Thomas Kwoyelo, who challenged his exclusion from the application of the Amnesty Act of 2000 in Uganda, despite being granted to thousands of other Lord's Resistance Army fighters.¹⁵⁶ Given the nature of the petition, the ACmHPR focused on the violation of the right to equal protection before the law. The African Commission concluded that Kwoyelo fulfilled the requirements in the Amnesty Act and that the state failed to provide a reasonable justification for the differential treatment.¹⁵⁷ In *obiter dictum* considerations, headed as such at the end of the decision, the ACmHPR acknowledged the 'lack of clear guidance . . . when states resort to the use of amnesty as necessary means for pursuing the objectives of achieving peace and justice in times of transition from violence to peace'.¹⁵⁸ The Commission differentiated between blanket and conditional amnesties. Referencing the position of the IACtHR regarding blanket amnesties in Peru, the ACmHPR stressed that 'blanket or unconditional amnesties that prevent investigations . . . are not consistent with the provisions of the African Charter' and 'would be a flagrant violation of international law'.¹⁵⁹ However, the Commission also considered the possibility of states enacting well-crafted conditional amnesties at the end of conflict, as long as they constitute 'justifiable and proportional limitations acceptable under international law'.¹⁶⁰

The position of the African Commission has been more cautious and nuanced than that of the Inter-American system. Very much like the ECtHR, the ACmHPR seems to be opening the door to the possibility of conditional amnesties, in exceptional circumstances, when they have a legitimate interest in peace and reconciliation, and when they are complemented with alternative mechanisms of justice. Nevertheless, these considerations have been based on hypothetical situations. Neither the ACmHPR nor the ECtHR has upheld a conditional amnesty as legal under international law, leaving a sense of uncertainty around the permissibility of conditional amnesties.

6.3. Amnesties and international criminal tribunals

Judicial interactions have also facilitated dialogue on amnesties between different legal regimes, with international, ad hoc and hybrid criminal tribunals examining the standards set by human rights bodies. International criminal courts have been mainly concerned with the opposability of domestic amnesties to their jurisdiction. Regardless of whether an amnesty is valid, there is also the question of whether they can prevent international or hybrid tribunals (constituted under international law) or domestic courts (exercising universal jurisdiction) from prosecuting those crimes.¹⁶¹ The general consensus is that amnesties do not bar the jurisdiction of international

¹⁵⁴See *Zimbabwe Human Rights NGO Forum*, *ibid.*, at Para. 215; see *Mouvement Ivoirien des Droits Humains*, *ibid.*, at Para. 98.

¹⁵⁵*Ibid.*

¹⁵⁶*Thomas Kwoyelo v. Uganda*, Decision of 17 October 2018, ACmHPR, Communication No. 431/12.

¹⁵⁷*Ibid.*, at Paras. 181, 195.

¹⁵⁸*Ibid.*, at Para. 284.

¹⁵⁹*Ibid.*, at Para. 293.

¹⁶⁰*Ibid.*, at Para. 291.

¹⁶¹See *Trumbull IV*, *supra* note 19, 287.

criminal courts nor restrict the exercise of universal jurisdiction by foreign domestic courts.¹⁶² The validity of an amnesty under municipal law does not have effect, at the international level, in preventing the jurisdiction of other courts from investigating and prosecuting international crimes.

There is more uncertainty around the crystallization of a norm prohibiting amnesties as such. Interestingly, some international criminal courts have taken a stance on the general compatibility of amnesties with international law. However, the tribunals are still divided on whether such a prohibition has crystallized. The International Criminal Tribunal for the former Yugoslavia (ICTY), for instance, echoed the UN position on a general prohibition of amnesties for torture and other inhuman treatment.¹⁶³ The ICTY argued that the prohibition of torture is a peremptory norm of *jus cogens* and non-derogable, making null and void *ab initio* amnesty laws condoning torture or absolving its perpetrators.¹⁶⁴ The decisions of the Special Court for Sierra Leone (SCSL) have been more ambivalent. Initially the SCSL argued that there is not yet a general obligation for states to refrain from amnesty laws and that a prohibition of amnesties for international crimes under international law has not yet crystallized.¹⁶⁵ However, only a few months later, the SCSL adopted a stronger stance against amnesties. Referencing the position of the ICTY, the SCSL suggested that the prohibition of amnesty had already crystallized for crimes whose prohibition had the status of *jus cogens*.¹⁶⁶

The Extraordinary Chambers in the Courts of Cambodia (ECCC) examined the status of amnesty in more depth when they faced a challenge to their jurisdiction based on an amnesty law and a series of royal decrees in favour of Ieng Sary.¹⁶⁷ The ECCC considered that ‘state practice regards blanket amnesties for serious international crimes to be in breach of international norms’.¹⁶⁸ However, state practice is insufficiently uniform to establish an absolute prohibition of amnesties, therefore, they need to be evaluated on a case-by-case basis, assessing the implementation of alternative mechanisms of accountability.¹⁶⁹ In the Cambodian case, the ECCC highlighted that the amnesty might have contributed to combatants reintegrating into society and restoring peace in the country, having been instrumental as a negotiation tool in ending the conflict. However, the Cambodian amnesty was closer to a blanket amnesty, following the Chilean example, than to a conditional amnesty, as in South Africa.¹⁷⁰ The amnesty failed to impose conditions for its application or to provide for other forms of accountability or alternative truth or reconciliation mechanisms. Consequently, the ECCC excluded crimes of genocide, torture, and grave breaches of the Geneva Conventions from the scope of the amnesty.¹⁷¹

The International Criminal Court (ICC) tackled the debate on amnesties for the first time in 2019. In *Prosecutor v. Saif Al-Islam Gaddafi*, the Pre-Trial Chamber of the ICC considered the opposability of a domestic amnesty to its jurisdiction, and more generally, the status of amnesties under international law.¹⁷² The Pre-Trial Chamber dismissed the argument of opposability and,

¹⁶²See *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case Nos. SCSL-2004-15-AR72 and SCSL-2004-16-AR72, A.Ch., 13 March 2004, at Para. 220; *Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’, ICC-01/11-01/11-662, P.T. Ch. I. 5 April 2019, at Para. 61.

¹⁶³See also *Prosecutor v. Anto Furundžija*, Judgement, Case No. IT-95-17/1-T, T. Ch., 10 December 1998, at Paras. 155–6.

¹⁶⁴*Ibid.*, at Para. 155.

¹⁶⁵See *Morris Kallon and Brima Bazzy Kamara*, *supra* note 162, at Para. 82.

¹⁶⁶*Prosecutor v. Augustine Gbao*, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Case No. SCSL-2004-15-AR72(E), A.Ch. 25 May 2004, at Paras. 9–10.

¹⁶⁷*Prosecutor v. Ieng Sary*, Decision on Ieng Sary’s Rule 89 Preliminary Objections (Ne Bis In Idem and Amnesty and Pardon), Case No. 002/19-09-2007/ECCC/TC, 3 November 2011.

¹⁶⁸*Ibid.*, at Paras. 46, 49.

¹⁶⁹*Ibid.*, at Para. 53.

¹⁷⁰R.C. Slye, ‘A Limited Amnesty? Insights from Cambodia’, in Lessa and Payne, *supra* note 2, 291 at 301.

¹⁷¹See *Ieng Sary*, *supra* note 167, at Paras. 54–5.

¹⁷²See *Saif Al-Islam Gaddafi*, *supra* note 162.

with an eye on the decisions of human rights bodies, concluded that there is a growing universal tendency to regard grave and systematic human rights violations as not subject to amnesties or pardons under international law.¹⁷³ This authoritative reading of the status of amnesties was quickly backtracked by the Appeals Chamber. Despite agreeing with the decisions of the Pre-Trial Chamber, the Appeals Chamber considered that it was not necessary to expand on the compatibility of amnesties with international law.¹⁷⁴ However, it added that, ‘international law is still in the developmental stage on the question of acceptability of amnesties’.¹⁷⁵ Contrary to the Pre-Trial Chamber which concluded that the question on amnesties was settled, the Appeals Chamber cautiously avoided the question altogether. In doing so, the ICC suggested that there remains some debate around the crystallization of such a norm. This conclusion added to the ambiguities around the contours of a norm on amnesties under international law, but it also made clear that the ICC does not consider a prohibition of amnesties crystallized in the way that other international criminal tribunals have asserted in the past.

7. Courts bringing nuance to the discussion

The characteristics of the measures applied in Latin America have strongly influenced the overall discussion on amnesties. Enacted as mechanisms of impunity in the aftermath of authoritarian regimes, the judicial reaction to some of the most problematic amnesties triggered an anti-impunity turn in the human rights movement, which started seeing criminal prosecutions not only as a component of the right to an effective remedy, but even the main form of redress. As shown, most courts and human rights bodies have been highly critical of amnesty measures. However, most amnesties under examination have been self-amnesties, blanket amnesties, or general amnesties with a broad scope.¹⁷⁶ Conditional amnesties such as those enacted in South Africa or, more recently, in Colombia have come under less judicial scrutiny at an international level. The lack of examination of conditional amnesties added to the recent decisions of the ECtHR, the ACmHPR, the IACtHR and the ICC reflects some uncertainty about the current status of conditional amnesties under international law. This section explores some of the considerations taken into account by judicial bodies in the evaluation of conditional amnesties that provide for alternative mechanisms of accountability. By framing the examination of amnesties in wider analysis of TJ mechanisms, some courts are breaking away from the accountability-versus-impunity dichotomy and are opening the door for the permissibility of conditional, negotiated, and limited amnesties.

7.1. Public interests and the states’ discretion to enact amnesties

Amnesties are political tools used to negotiate peace and facilitate transition to democracy.¹⁷⁷ Thus, some courts have highlighted the need to frame the analysis of amnesty laws in relation to the states’ public and legitimate interests to find peace and reconciliation. This has not only been highlighted by the ECtHR, but it has also been the approach of domestic courts in European countries. Notwithstanding the activation of the universal jurisdiction to investigate and prosecute crimes in the Southern Cone despite domestic amnesties,¹⁷⁸ European courts have been more

¹⁷³*Ibid.*, at para. 61.

¹⁷⁴*Prosecutor v. Saif Al-Islam Gaddafi*, Judgment on the Appeal of Mr Saif Al-Islam Gaddafi against the Decision of Pre-Trial Chamber I Entitled ‘Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute”’ of 5 April 2019, ICC-01/11-01/11-695, A.Ch, 9 March 2020, at Para. 87.

¹⁷⁵*Ibid.*, at Para. 96.

¹⁷⁶See Mallinder, *supra* note 6; see Seibert-Fohr, *supra* note 7, at 218.

¹⁷⁷Freeman, *supra* note 15, at 183.

¹⁷⁸See *Caso contra Leopoldo Fortunato Galtieri*, Audiencia Nacional Española – Juzgado No. 5, (25 March 1997); *Caso contra Augusto Pinochet*, Audiencia Nacional Española, Sala de lo Penal – Pleno, Sumario 1/98 (5 November 1998).

lenient in the examination of their own domestic amnesty laws. The Supreme Tribunal of Spain, for instance, upheld the 1977 amnesty, arguing that the ‘forget and forgive’ model adopted by Spain had been effective and legitimate.¹⁷⁹ Referencing similar cases in Germany and South Africa, the Supreme Tribunal highlighted the importance of the amnesty in the transition to democracy. The Tribunal concluded that granting amnesty was a state discretion, approved democratically through the constitutional debate and political consensus that took place after the death of Franco.¹⁸⁰

Similarly, the Portuguese Constitutional Court upheld the constitutionality of the amnesty granted for politically motivated crimes committed between 1976 and 1991.¹⁸¹ The judges argued that the amnesty was a political measure and that the state had autonomy and discretionary powers to grant. Democracy, political stability, and social peace are means for the consolidation of the rule of law, thereby giving the state legitimacy to enact exceptional measures such as amnesty.¹⁸² Along the same lines, the Constitutional Court of Montenegro has argued that amnesty laws could be considered legitimate if ‘a balance is maintained between the legitimate interests of the State and the interests of individual members of the public’.¹⁸³ Analogous considerations were made by the Constitutional Court of North Macedonia. Accepting the terms of the amnesty that excluded crimes under the jurisdiction of the ICTY, the court argued that the legislative assembly has discretion to grant amnesty and to determine its content and scope.¹⁸⁴ The amnesty was justified by the public interest of the state in a peaceful transition.¹⁸⁵

Generally, domestic courts in Europe have accepted more than other tribunals the discretionary powers of the state to enact amnesties. However, there are also examples of courts in other regions granting some discretion to states. Considerations about the public interest in democracy were discussed in the decision of the Brazilian Supreme Federal Tribunal that validated the 1979 amnesty.¹⁸⁶ Despite arguments concerning its incompatibility with the new constitution of 1988, the Tribunal argued that the amnesty should be interpreted in its own context, in light of the process of democratization and reconciliation that took place in Brazil.¹⁸⁷ Early decisions in El Salvador adopted a similar approach. In 1993, the Constitutional Chamber of the Supreme Court upheld the general amnesty, arguing that the state had discretionary powers to enact amnesties as a mechanism of public interest.¹⁸⁸ Pursuant to Article 6(5) of APII to the Geneva Conventions, the Court argued that the state was authorized to enact amnesties at the end of hostilities in order to put an end to situations of violence.¹⁸⁹ Later, in 2000, the Salvadorean Supreme Court upheld the constitutionality of the amnesty again, but considered that the Constitution imposed some restrictions on the scope of amnesties. For instance, limiting the possibility of self-amnesty under Article 244 of the Constitution and amnesty for crimes that affect fundamental rights in which the criminal prosecution is an essential part of the reparation process.¹⁹⁰ Despite putting

¹⁷⁹*Caso contra Baltasar Garzón Real*, Tribunal Supremo de España – Sala de lo Penal, Sentencia No. 101/2012 (27 February 2012).

¹⁸⁰*Ibid.*, at 20.

¹⁸¹*Case No. 444/97*, Portuguese Constitutional Court, No. 784/96 (25 June 1997); *Case No. 510/98*, Portuguese Constitutional Court, No. 299/96 (14 July 1998).

¹⁸²See *Case 444/97*, *ibid.*, at 11, 13.

¹⁸³*Constitutionality of the Law on Amnesty of Persons Sentenced for Criminal Offences*, Montenegrin Constitutional Court, No. 13/13, 17/13 and 19/13 (24 July 2015), at Para. 7(1).

¹⁸⁴*Case U.no.169/2002*, North Macedonian Constitutional Court, No. 70/1992 (19 February 2003), at Para. 6. See also *Case U.no.19/2016*, North Macedonian Constitutional Court, No. 12/2009 (16 March 2016), at 7.

¹⁸⁵See *Case U.no.169/2002*, *ibid.*, at Para. 7.

¹⁸⁶See *Arguição de Descumprimento de Preceito Fundamental 153*, *supra* note 111.

¹⁸⁷*Ibid.*, at Para. 39.

¹⁸⁸See *Revisión de constitucionalidad* (1993), *supra* note 108, at 5.

¹⁸⁹*Ibid.*, at 9.

¹⁹⁰See *Revisión de constitucionalidad* (2000), *supra* note 108, at 31–4.

constitutional limits to the scope of amnesties, the Court reinforced the discretionary powers of the legislature to grant amnesty in exceptional circumstances.¹⁹¹

7.2. Amnesties and transitional justice

Some domestic courts in the Global South have framed the question of the permissibility of amnesties within a broader discussion of the role of amnesty measures in TJ. More cautious in the characterizing amnesties as impunity, these tribunals have considered the legality of some amnesties when they are enacted alongside other mechanisms of accountability, to facilitate peaceful transitions and put an end to non-international conflicts.

South Africa's constitutional history, for instance, is entrenched in a TJ process. After the end of the apartheid system in the early 1990s, the Promotion of National Unity and Reconciliation Act created the Truth and Reconciliation Commission. The Commission was at the heart of the transitional process in South Africa, with the mandate of 'establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights' and 'facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act'.¹⁹² This was taken into account by the South African Constitutional Court in its seminal *Azapo* case. Reviewing the constitutionality of the amnesty, the Court argued that the measure was part of the reconstruction and reconciliation process that facilitated the transition in South Africa and engendered the new Constitution.¹⁹³ Relying on Article 6(5) of the APII, the Court drew on the conditional nature of the South African amnesty. The Constitutional Court differentiated it from blanket amnesties and concluded that it had an important function in the process of peace reconstruction and transition to democracy.¹⁹⁴ The amnesty, concluded the Court, was constitutional as an instrument of reconciliation and the Parliament had discretionary powers to design such a mechanism according to the Constitution.¹⁹⁵ This approach has been reinforced in more recent decisions. For instance, in the *Du Toit* case, the Constitutional Court added that 'the ultimate aim of the truth and reconciliation process justifies the severe limitation on rights that it causes. This was an extraordinary time and extraordinary measures had to be taken'.¹⁹⁶ The amnesty was seen as a compromise and a reciprocal process in which the victims were able to hear the truth, accepting that no criminal sanction would be forthcoming; while perpetrators had to make a full disclosure and come face to face with the victim, in order to avoid prosecution.¹⁹⁷

In Uganda, before the case *Kwoyelo* reached the ACmHPR, the Constitutional Court argued that Parliament had constitutional discretion to enact an amnesty with the goal of bringing the rebellion to an end and finding peace.¹⁹⁸ Differentiating the Amnesty Act from blanket and self-amnesty, the Ugandan Constitutional Court concluded that the law was valid because it had similar conditions to the South African amnesty.¹⁹⁹ This was affirmed by the Ugandan Supreme Court which, despite denying amnesty to *Kwoyelo*, upheld the amnesty.²⁰⁰ Putting some limits to

¹⁹¹*Ibid.*, at 24, 33.

¹⁹²Promotion of National Unity and Reconciliation Act, President of South Africa, Act No. 34 of 1995 (26 July 1995), Art. 3.

¹⁹³*The Azanian Peoples' Organization (AZAPO) and others v. The President of South Africa and others*, South African Constitutional Court, CCT 17/96 (25 July 1996), at Para. 19.

¹⁹⁴*Ibid.*, at Para. 32.

¹⁹⁵*Ibid.*, at Para. 50.

¹⁹⁶*Wybrand Andreas Lodewicus Du Toit v. Minister for Safety and Security and others*, South African Constitutional Court, Case No. CCT91/08[2009]ZACC22 (18 August 2009) at Para. 27.

¹⁹⁷*Ibid.*, at Para. 28.

¹⁹⁸*Thomas Kwoyelo alias Latoni v. Uganda*, Ugandan Constitutional Court, No. 36/11 (22 September 2011), at 14.

¹⁹⁹*Ibid.*, at 15–16.

²⁰⁰See *Uganda v. Thomas Kwoyelo*, Ugandan Supreme Court, Constitutional Appeal No. 1/2012 (8 April 2015). In a recent decision, *Kwoyelo* was convicted for war crimes and crimes against humanity. See *Prosecutor v. Thomas Kwoyelo alias Latoni*, Ugandan High Court (International Crimes Division), HCT-00-ICD-CR-SC-0002 OF 2010 (13 August 2024).

the scope of the amnesty and excluding grave breaches of the Geneva Conventions, the Supreme Court concluded that, as long as the Amnesty Act is not interpreted as a blanket amnesty for all crimes, it 'is not inconsistent with the Constitution nor with Uganda's international obligations'.²⁰¹

Amnesties are also at the core of the constitutional history of Colombia. The Constitution of 1991 emerged from a constitutional assembly formed by representatives of traditional political parties and demobilized guerrilla groups. For this, the Government granted amnesty to members of guerrilla groups that agreed to demobilize. Subsequently, the Colombian Constitutional Court gave Congress broad discretion to enact amnesty laws for political offences and other related ordinary crimes.²⁰² However, much like the Salvadorean courts, while asserting the discretionary powers of the state to grant amnesty, the Colombian Court argued that amnesties cannot be unlimited and should respect constitutional and international standards.²⁰³ The Court drew a prohibition on blanket amnesty, self-amnesty and any other mechanism enacted with the purpose of limiting the victims' right to access effective remedies.²⁰⁴ Nevertheless, it considered that amnesty laws may have an important role as mechanisms of TJ. The Constitutional Court suggested that amnesties implemented with other mechanisms of accountability and enacted as part of a legitimate effort to bring peace and reconciliation, may be interpreted as a genuine effort to bring justice to victims.²⁰⁵ Thus, while the Colombian Court has echoed the position of the IACtHR, it has left some room for amnesties enacted to consolidate a peace process. In TJ it is necessary to consider different constitutional rights that may clash; neither the right to justice nor the right to peace is absolute, neither overrules the other, so a balance needs to be struck.²⁰⁶

Asian states have also resorted to amnesties to negotiate peace agreements, leading domestic courts in countries like Indonesia and Nepal to assess the permissibility of amnesty measures in transitional justice.²⁰⁷ Examining the constitutionality of the law No. 27 concerning the Commission for Truth and Reconciliation (CTR), the Indonesian Constitutional Court argued that the law erred by making compensation and reparation for victims contingent upon the application of amnesty.²⁰⁸ Conditional amnesty measures shall not limit the rights of the victims to obtain reparations.²⁰⁹ The Court concluded that granting amnesties for serious human rights violations was not only incompatible with the constitution, but also impractical in terms of guaranteeing the rights of the victims to reparation, truth recovery and participation in TJ.²¹⁰ Controversially, the Indonesian Court quashed the entire law, thereby not only stopping the enactment of the amnesty but also blocking the establishment of the CTR.²¹¹ Nonetheless, the Court added that truth commissions are an alternative mechanism of accountability that have been 'accepted by international practice'.²¹² Consequently, the Court considered that better-designed transitional mechanisms, including amnesty, could be implemented in the future.²¹³

²⁰¹See *Uganda v. Thomas Kwoyelo*, *ibid.*, at 65.

²⁰²*Constitucionalidad del Protocolo Adicional II a los Convenios de Ginebra*, Corte Constitucional de Colombia, C-225/95 (18 May 1995), at Para. 43.

²⁰³See *Constitucionalidad del artículo 127 del Decreto 100 de 1980 – Código Penal*, Corte Constitucional de Colombia, C-456/97 (September 23, 1997); *Constitucionalidad del artículo 13 de la Ley 733/02*, Corte Constitucional de Colombia, C-695/02 (28 August 2002).

²⁰⁴*Constitucionalidad del Estatuto de Roma*, Corte Constitucional de Colombia, C-578/02 (30 July 2002), at 101.

²⁰⁵*Ibid.*, at 103.

²⁰⁶See C-370/06, *supra* note 124, at 292.

²⁰⁷See R. Jeffery, *Negotiating Peace: Amnesties, Justice and Human Rights* (2021).

²⁰⁸*Decision on the Petition for Judicial Review on Law of the Republic of Indonesia Number 27 Year 2004 concerning Commission for the Truth and Reconciliation*, Constitutional Court of Indonesia, No. 006/PUU-IV/2006 (7 December 2006).

²⁰⁹*Ibid.*, at 27.

²¹⁰*Ibid.*, at 29–30.

²¹¹P. Burgess, 'De Facto Amnesty? The Example of Post-Soeharto Indonesia', in Lessa and Payne, *supra* note 2, 263 at 282–3.

²¹²See *Judicial Review on Law of the Republic of Indonesia Number 27*, *supra* note 208, at 26.

²¹³*Ibid.*, at 32.

The Nepali model tried to emulate the South African approach, but the reality of its implementation has shown the difficulty of agreeing to abstract mechanisms without defining the ‘nitty-gritty’ of how they should operate.²¹⁴ The Ordinance No. 2069/2012 granted broad amnesty as part of the peace agreement signed between the Communist Party of Nepal (Maoist) and the Government. Examining the terms of the amnesty, the Nepali Court argued that they were too vague and criticized the lack of complementary mechanisms of accountability.²¹⁵ For these reasons, the Court ordered the modification of the ordinance to make it consistent with international humanitarian law and principles of TJ.²¹⁶ One year later, however, the case was brought before the Supreme Court of Nepal again because the amnesty law was passed in disregard of the order of mandamus issued by the Court.²¹⁷ Referencing decisions from the IACtHR, the Nepali Court placed emphasis on the international obligation to investigate and punish serious violations of human rights.²¹⁸ The Court stressed the importance of balancing the prosecution of serious crimes with the creation of an environment for reconciliation through the implementation of mechanisms for truth seeking, reparations and non-recurrence.²¹⁹ The lack of political will to implement real mechanisms of accountability have rendered the decision ineffective with impunity achieved by other means.²²⁰ New legislation has been passed in 2024, correcting some of the shortcomings highlighted by the Supreme Court. Surprisingly, this law has been read as a welcomed development by UN institutions, even with the inclusion of amnesties, although not for serious human rights violations.²²¹

7.3. Designing amnesties as a balancing act

The stringent position of the Inter-American System against amnesties has responded to specific contexts. Interestingly, the decisions of the IACtHR have generally avoided deciding in ongoing peace processes.²²² However, with an eye to the peace negotiations taking place in Colombia at the time, the majority of the IACtHR signalled the possibility of amnesties as a negotiation tool in a concurring opinion in *El Mozote* case. The opinion written by Judge García Sayán acknowledged that during TJ, obligations to investigate, prosecute, and punish gross human rights violations, might clash with objectives of national reconciliation and a negotiated solution to non-international armed conflicts.²²³ Developing upon the *ratio legis* approach to the permissibility of amnesties, the opinion draws a line between amnesties enacted during authoritarian regimes in order to shield people in power from justice (see Section 4), and amnesties that result from genuine peace negotiations with a legitimate interest in peace and reconciliation.²²⁴

The opinion developed upon the early concurring opinions of judge García Ramírez in cases against Peru, differentiating blanket and self-amnesty from conditional amnesties negotiated in

²¹⁴See Jeffery, *supra* note 68, at 356.

²¹⁵*Madhav Kumar Basnet and others v. Government of Nepal*, Supreme Court of Nepal– Special Bench, Writ petition No. 069-WS-0057 and 069-WS-0058 (2 January 2014), at 24–6.

²¹⁶*Ibid.*, at 26, 32.

²¹⁷*Suman Adhikari and others (Victims of the armed conflict) v. Government of Nepal*, Supreme Court of Nepal – Special Bench, Order 069-WS-0057 (26 February 2015).

²¹⁸*Ibid.*, at 55, 63.

²¹⁹*Ibid.*, at 45.

²²⁰See Jeffery, *supra* note 68, at 363.

²²¹Office of the High Commissioner for Human Rights, ‘Nepal: Türk Welcomes Adoption of Transitional Justice Law, Calls for Victim-Centred Implementation’, *UN Press Releases*, 22 August 2024, available at www.ohchr.org/en/press-releases/2024/08/nepal-turk-welcomes-adoption-transitional-justice-law-calls-victim-centred.

²²²W. Sandholtz and M.R. Padilla, ‘Law and Politics in the Inter-American System: The Amnesty Cases’, (2020) 8 *Journal of Law and Courts* 151.

²²³Concurring Opinion of Judge García Sayán in *Massacres of El Mozote*, *supra* note 36, at Para. 20.

²²⁴*Ibid.*, at Para. 38.

the context of transitional processes to democracy.²²⁵ Seeking peace, justice, and reconciliation requires the combination of several components, both judicial and non-judicial, in order to find the balance between conflicting interests.²²⁶ The victims' rights to truth, justice, and reparation are interdependent. Thus, the concurring opinion proposes a new approach within the Inter-American System, which diverges from a total focus on criminal sanctions.²²⁷ The use of amnesties is framed as a balancing act, where 'States must weigh the effect of criminal justice both on the rights of the victims and on the need to end the conflict'.²²⁸ Amnesty laws that strike a complex and delicate balance between fighting impunity and promoting national reconciliation might be admissible under international law. However, those permissible trade-offs remain unclear.²²⁹

This pronouncement allowed Colombia to negotiate a peace agreement to end more than 50 years of conflict. The agreement combines the application of amnesties with selection and prioritization strategies for the prosecution of international crimes, with complementary extrajudicial mechanisms to guarantee peace, truth, and reconciliation.²³⁰ The Colombian Constitutional Court built upon this reasoning, arguing that humanitarian law permits certain amnesties at the end of conflict.²³¹ However, they are restricted in three ways: (i) prohibition of self-amnesty (unless they are part of a negotiated peace agreement, as in the Colombian case); (ii) prohibition of general amnesties, because they cannot include international crimes; and (iii) prohibition of unconditional amnesties, because there is a minimum requirement to contribute to reconciliation and the fulfilment of the victims' rights.²³²

The decision of the ACmHPR in *Kwoyelo* established a similar standard under which amnesties should comply with procedural and substantive conditions. Amnesties should not affect disproportionately the victims' right to an effective remedy, including the right to know the truth and obtaining reparations. Moreover, amnesties should be formulated with the participation of affected communities.²³³ While self-amnesties, blanket amnesties, and unconditional amnesties are prohibited under international law, conditional amnesties that facilitate reconciliation might be accepted as long as they do not include gross human rights violations and guarantee alternative mechanisms of accountability and access to justice for victims.²³⁴ In the words of the ACmHPR, '[t]hey should also facilitate a measure of reconciliation with perpetrators acknowledging responsibility and victims getting a hearing about and receiving acknowledgment for the violations they suffered'.²³⁵

8. Conclusions

This article has identified a shift in the way that courts are assessing the permissibility of amnesties. Tracing the trajectory of the judicial discussion of amnesties, it is possible to identify three phases that reflect a change in the way courts have been examining amnesties. Between the 1980s and the 1990s, there was an exploratory stage during which the position of courts and human rights bodies regarding the use of amnesty was not entirely clear. Some judicial decisions

²²⁵*Ibid.*, at Para. 7. See also Concurring Opinion of Judge García Ramírez in *Castillo Páez v. Peru*, Judgment of 27 November 1998, [1998] IACtHR (Ser. C) No. 43, at Para. 9.

²²⁶Concurring Opinion of Judge García Sayán in *Massacres of El Mozote*, *supra* note 36, at Para. 22.

²²⁷*Ibid.*, at Para. 23.

²²⁸*Ibid.*, at Para. 27.

²²⁹C. Bell, 'The "New Law" of Transitional Justice', in K. Ambos et al., (ed.), *Building a Future on Peace and Justice* (2009), 105 at 111.

²³⁰See *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, *supra* note 3.

²³¹*Constitucionalidad de la Ley 1820 de Amnistía*, Corte Constitucional de Colombia, C-007/18 (1 March 2018), at Para. 138.

²³²*Ibid.*, at Para. 163.

²³³See *Thomas Kwoyelo v. Uganda*, *supra* note 156, at Para. 293.

²³⁴See C-007/18, *supra* note 231, at Para. 395.

²³⁵See *Thomas Kwoyelo v. Uganda*, *supra* note 156, at Para. 293.

were still accepting amnesties as a necessary measure to overcome situations of violence (see, for instance, early decisions in El Salvador, Guatemala, Portugal, and South Africa). Meanwhile, at the international level, Inter-American and UN bodies started calling upon countries like Argentina, Uruguay, Chile, and Peru to annul self-amnesty measures and conduct criminal trials in the aftermath of authoritarian regimes. In the early 2000s, with the creation of international criminal institutions and the anti-impunity turn in the human rights movement, there emerged a trend towards a strict prohibition of amnesties with the development of the case law of the IACtHR at its centre. Domestic and international bodies began to place criminal accountability at the core of any TJ process, and the early critique of blanket and self-amnesties expanded to a more general prohibition of any kind of amnesties. Vertical and horizontal judicial dialogues led to the expansion of a rejection of amnesty laws in other regions. More recently, there has been an increasing number of decisions including considerations about the role of amnesties in TJ. Since the 2010s, while continuing with the rejection of problematic amnesties, international bodies have hinted at the permissibility of legitimate amnesties that, when accompanied by alternative mechanisms of accountability, may contribute to wider efforts of peace and reconciliation. While limiting the use of amnesties for international crimes and serious violations of human rights, courts have continued highlighting the role of amnesties as an exceptional mechanism of TJ in countries like Colombia, Uganda, Nepal, El Salvador, and Indonesia.

Most decisions, however, have mainly focused on prohibiting amnesty measures enacted as impunity mechanisms to shield human rights abusers from justice. The international jurisprudence on the legality of conditional and limited amnesties that require perpetrators to participate in broader processes to guarantee peace, truth, accountability, and reparations is still scarce.²³⁶ Conditional amnesties such as the ones enacted in South Africa or, more recently, in Colombia have not been subjected to international scrutiny yet. The lack of examination of these types of amnesty added to the recent decisions of international bodies, casting doubt on the absolute prohibition of amnesties, reflect some uncertainty around the status of conditional amnesties under international law. International tribunals seem to be moving towards accepting the possibility of well-crafted amnesties, but such move has not materialized.

Navigating that uncertainty is going to be difficult for judicial bodies in the future. This article has identified three ways in which domestic and international courts have approached complex amnesties and nuanced their position. Firstly, by considering the tensions between amnesties and the public interests of the state in putting an end to violence and re-establishing democracy. European institutions have particularly expanded on the discretionary powers of states to deal with domestic situations of violence and the room for manoeuvre that should be left to states when enacting TJ mechanisms. A second line of argument has placed conditional amnesties in wider contexts of TJ, where they may contribute to promote other values like truth recovery, reconciliation, reparations, and non-repetition. The South African case continues to be a relevant example for other domestic tribunals in the Global South that see amnesties as a tool of TJ. Despite putting limits on the scope of amnesties, courts in Africa and Asia continue exploring the possibility of conditional amnesties when accompanied by alternative mechanisms of accountability. A third consideration has been the role of conditional amnesties in mediating between conflicting interests and values, so the impunity v. accountability debate becomes a question about finding the right balance between justice, peace, and reconciliation. Especially during peace negotiations, the IACtHR and Colombian courts have identified the need for a practical approach to find a balance between conflicting values and principles of justice. Therefore, they have acknowledged that limited and conditional amnesties may have a role in negotiating peace and making transitional processes possible and effective, although the shape and form that amnesties can take as result of peace negotiations is unclear.

²³⁶See Mallinder, *supra* note 6; see Seibert-Fohr, *supra* note 7, at 218.

This analysis presents a more complex and comprehensive picture of the way in which amnesties have been examined by judicial and human rights bodies. However, the uncertainty regarding how courts will treat conditional amnesties in genuine transitional peace processes remains. States still face challenges concerning the legal certainty of peace processes that involve amnesties, for instance in the negotiation of peace agreements with active armed forces, in the closure of criminal procedures, and the reintegration of former combatants. Rather than thinking about amnesties in terms of ‘permissibility versus prohibition’, the ambiguities identified in this article call for the development of a framework to assess in what circumstances amnesties can become a mechanism to negotiate peace and to find an adequate balance between principles of justice, truth, reconciliation, and non-repetition. This means framing the discussion on amnesties in a wider understanding of accountability that is not limited to criminal prosecutions and that challenges the centrality of criminal justice as the main pillar in TJ.²³⁷ That way, the question about amnesties becomes less about whether they are prohibited or permitted, but rather whether specific measures effectively contribute to the implementation of accountability mechanisms, truth recovery efforts, reconciliation initiatives, reparation measures, and democratic processes.

²³⁷See Mallinder and McEvoy, *supra* note 23 see Carvajalino and Davidovic, *supra* note 64.