



ARE AMNESTIES STILL AN OPTION? A NON-POLICY BASED CRITIQUE OF THE INTER-AMERICAN APPROACH



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Are Amnesties still An Option? A Non-Policy Based Critique of the Inter-American Approach

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Abstract: Between 2010 and 2012 the Inter-American Court of Human Rights upheld three decisions that evaluated the legitimacy of amnesties under the American Convention on Human Rights by discussing a set of concepts. These concepts have a longstanding tradition, rooted in the precedent of the Inter-American Commission and Court on this issue. The present paper aims to investigate the legal profiles delineated by those institutions to challenge the validity of amnesty laws. In order to do this, it goes back to all the cases in which the question of amnesty legitimacy has been discussed. All the reasoning can be grouped into three major concepts: the legitimacy of the democratic process responsible for the amnesty; the seriousness of the crimes committed and/or the violated rights; and the incompatibility of the amnesty with the Convention. However, two issues emerge: the first is that the effective weight of these factors, and their place in the overall reasoning, are not clearly organized and defined; the second is that the seminal cases decided by the Court were discussed in the unusual circumstances of agreement between the parties and the court. The latest cases that dealt with amnesties in an organic way have seen an impoverishment of the legal reasoning that challenges amnesty laws, reducing it to a strict reading of the Convention. This choice of the Court can be criticized on several grounds, in particular: for not taking into account the possible conformity of an amnesty to the Convention as a necessary step for the full enjoyment of human rights; for having originated in a distorted concept of the nature and goals of law.

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I. An overview

The recent unrest in Lybia and Syria, and the challenge of moving on in both situations – where, in one case, the government still clings to power, while in the other, a power vacuum and fragmentation into tribal systems has followed the fall of the former dictator – reopen a question that has appeared to be closed over the last decade, at least as concerns international lawyers: the possibility to enact amnesties, even in contexts of massive violations of human rights.¹ It has been

¹ The problem of the legitimacy and validity of amnesty laws in international law has been the object of thoughtful reflection in the last 15 years. The bibliography on the topic is wide; of particular use have been the works of MAHNOUSH H. ARSANJANI, *The International Criminal Court and National Amnesty Laws*, *Am. Soc'y Int'l L. Proc.*, 1999, 93, p. 65 ff.; BEN CHIGARA, *Amnesty in International Law*, Pearson, Edinburgh, 2002; ANDREAS O'SHEA, *Amnesty for crime in international law and practice*, Kluwer Law International, The Hague – London – New York, 2002; RONALD C. SLYE, *The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 *Va. J. Int'l L.* 173 (2002); ERIN DALY, JEREMY SARKIN, DESMOND TUTU, *Reconciliation in Divided Societies: Finding Common Ground*, University of Pennsylvania Press, Philadelphia, 2006; HELÈNE RUIZ FABRI, GABRIELE DELLA MORTE, ELISABETH LAMBERT-ABDELGAWAD, KATHIA MARTIN-CHENUT (sous la direction de), *La clémence saisie par le droit. Amnistie, prescription et grâce en droit international et comparé*, Société de législation comparée, Paris, 2007; EDEL HUGHES, WILLIAM A. SCHABAS, RAMESH THAKUR, *Atrocities and international accountability. Beyond transitional justice*, UN

addressed in two different ways. Arguments built on legal deduction are now denying this possibility, while a more political approach still considers it an option, in which individual rights and the collective need for peace and reconciliation are put into dialogue, leading to a middle point between a pure legitimacy and a pure illegitimacy of amnesties.² These pages will consider the legal arguments, leaving aside the political dilemma; in order to do so, the paper considers a very specific system, the Inter-American (including both the Commission and the Court), which has been the leader in establishing legal categories striking down the legitimacy of amnesties.³ Their position

University Press, New York, 2007; MICHELANGELA SCALABRINO, *Per non dimenticare. Violazioni dei diritti umani e leggi di amnistia in America latina*, Vita e Pensiero, Milano, 2008; MARK FREEMAN, *Necessary evils: amnesties and the search for justice*, Cambridge University Press, Cambridge (UK)-New York, 2009; MAHMOUD CHERIF BASSIOUNI (ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-conflict Justice*, 2 Vols, Intersentia, Antwerp – Oxford – Portland, 2010; MARIA ROSARIA MAURO, *Leggi di amnistia e punizione dei crimini internazionali*, in *Rivista Diritto Internazionale*, 93, 2010, p. 343; GABRIELE DELLA MORTE, *Le amnistie nel diritto internazionale*, CEDAM, Padova, 2011; CHRISTINA BINDER, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, in *German Law Journal*, 12, 2011, p. 1203 ff.; KIERAN MCEVOY, LOUISE MALLINDER, *Amnesties in Transition : Punishment, Restoration, and the Governance of Mercy*, in *Journal of Law and Society*, 39, 2012, pp. 410-440.

² See for example RAMA MANI, *Does Power Trump Morality? Reconciliation or Transitional Justice?*, in HUGHES ET AL., *Atrocities cit., above* at fn. 1, p. 23 ff.; MAURO, *Leggi cit., above* at fn. 1, p. 344; see also the position of the Brazilian Government in *Guerrilha do Araguaia*, cit. *above* at fn. 4, para. 130.

³ The condemnation of amnesties by the Inter-American Commission and Court opened a reflection now followed by the Strasbourg Court, see for example *Yeter v. Turkey*, 13 January 2009,

was developed in cases dealing with amnesty laws passed in the late twentieth century, during the decades of social strife that divided the Latin American continent, including most recently, in November 2010 and March 2011, two decisions that declared the invalidity of amnesty laws approved in Brazil and in Uruguay, and a decision in October 2012 that took a different approach (see sect. 8).⁴

The paper will chronicle a quarter century of cases, individuating the legal categories developed thereby (sections 4 and 5) in order to understand whether it is true that no amnesty can truly be compatible with the American Convention and, more generally, with any established legal system. Two issues will emerge: the first is that certain disputes have been decided in the context of highly unusual consensus among the litigants, which influenced the development of all the subsequent cases (sect. 6). The second is that the whole journey taken by the Commission and the Court seems unsatisfactory (sect. 9 and 10).⁵ The set of concepts against amnesties that appeared since the earliest cases decided by the Commission became increasingly poor over time, in favor of a strict

ECtHR, Appl. No. 33750/03, para. 70.

⁴ *Gomes-Lund et Al. (Guerrilha do Araguaia) v. Brazil* (Preliminary Objections, Merits, Reparations, and Costs), 24 November 2010, Series C, No. 219; *Gelman v. Uruguay* (Merits, Reparations, and Costs), 24 February 2011, Series C, No. 221; *The Massacre of El Mozote and Nearby Places v. El Salvador* (Merits, Reparations, and Costs), 25 October 2012, Series C, No. 252. All the decisions of the Inter-American Court of Human Rights (IACtHR) mentioned in the article are available at www.corteidh.or.cr; the cases decided by the European Court of Human Rights (ECtHR), are available at www.echr.coe.int; those decided by the African Commission of Human Rights, at www.achpr.org (last visit to these websites and to the others in the present article on 21 April 2012).

⁵ See *below* sects 6, 9, and 10.

reading of the American Convention on Human Rights (American Convention, Convention),⁶ including its prescriptions (in particular of Arts 1, 2, 8 and 25). However, this interpretation of the Convention does not seem necessary, and it is not the only one possible; other, superior interpretations of the Convention are possible, and explain in a better way both the problem at stake and the entire enterprise and analysis developed in the past.

The conclusion is that there has been an increasingly serious misunderstanding of the purpose of the whole enterprise of dissecting amnesties. This misunderstanding originated within certain key decisions that, while they marked a fundamental step in the establishment of peaceful society, wherein human rights are effectively protected, also generated a contagious – and not always convincing – conviction that now prevents a holistic understanding of the potential value of amnesties in dealing with massive social crisis.

2. *On amnesties*

2.1 *On amnesties in general*

There is not a consolidated legal definition of *amnesty* in international law. Different traditions, like the Common and Civil Law, have different penal systems with different approaches to the duty to prosecute (mandatory or not) and to the need to move beyond critical moments for the criminal system (a war, prison overpopulation, civil strife, etc.). Separate Countries adopt separate expressions and concepts (*grace, pardon, forgiveness, amnesty, reduction of punishment, etc.*) to handle this need.⁷ Following the most used terminology among international law scholars and

⁶ Signed at *San José*, Costa Rica, 22 November 1969, entered into force 18 July 1978, OAS Treaty Series No. 36, available at <http://www.unhcr.org/refworld/docid/3ae6b36510.html>.

⁷ FREEMAN, *Necessary evils* cit., above at fn. 1, pp. 12-19, DELLA MORTE, above at fn. 1, pp. 39-119. PIETRO POMANTI, *I provvedimenti di clemenza. Amnistia, indulto e grazia*, Giuffrè, Milano, 2008.

decisions, here *amnesty* will be defined very broadly to incorporate all these possible institutions of erasing or diminishing punishments, under any name.⁸

The reasons that push a political community not to prosecute certain persons that violate a law – as in fiscal amnesties – or that commit serious violent crimes – as in the amnesties approved in Italy after the internal strife at the end of World War II – have been studied under different perspectives: historical, philosophical, political and juridical.⁹

From a historical point of view, acts of forgiveness by religious and political authorities have been in use since antiquity until the present day.¹⁰ Considering law, the issues arising from an

⁸ FREEMAN, *Necessary evils* cit., *above* at fn. 1, p. 13, defines *amnesty* as any “extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law”.

⁹ The literature on the field is abundant: among the studies that have been most useful for this work, even if belonging to branches of knowledge different from international law, are: MARTA SORDI (ed.), *Responsabilità, perdono e vendetta nel mondo antico*, Vita e Pensiero, Milano, 1998; DESMOND TUTU, *No Future without Forgiveness*, Doubleday, New York, 1999; LOUISE MALLINDER, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Hart Publishing, Oxford-Portland, 2008; POMANTI, *I provvedimenti* cit., *above* at fn. 7; DANIEL PHILPOTT, *Just and Unjust Peace: An Ethic of Political Reconciliation*, Oxford, OUP, 2012. On Italian amnesties, passed during the second half of the XX Century, see MIMMO FRANZINELLI, *L'amnistia Togliatti. 22 giugno 1946*, Mondadori, Milano, 2006.

¹⁰ Several essays on the Greek and Roman conceptions of forgiveness can be read in SORDI, *Responsabilità* cit., *above* at fn. 9; SCIPIONE FABBRINI, *Il diritto d'amnistia e la competenza parlamentare*, Osvaldo Paggi, Pitigliano, 1900, has a large section dedicated to analyzing amnesty and pardon during the Greek and Roman periods, pp. 37-44, showing how especially Roman law

amnesty have been discussed at length both in criminal law and in philosophy of law.¹¹ The legal questions raised by the approval of an amnesty have recently attracted attention from both legal scholarship and international decisions. These studies emerged beginning with the so-called *fight against impunity* movement promoted by the UN,¹² and during the recent tormented decades in the history of Latin America,¹³ and is still continuing in the field of *transitional justice*.¹⁴

recognized several personal and collective institutions of pardon; at pages 44-80 the author carries out an historical overview of amnesties until the eighteenth century. For a study on the concept of forgiveness and reconciliation in the Jewish, Christian, and Muslim tradition, see PHILPOTT, *Just* cit., *above* at fn. 9, chapters 9-11.

¹¹ The conceptual problems concerning amnesties are not new to law; see the question already as disputed among the Romans, in FABBRINI, *Il diritto* cit., *above* at fn. 10, pp. 40-43.

¹² The expression “fight against impunity” can be read in many UN documents since the nineteen-nineties. A summary of the origin of this movement can be read in the *Introduction* of the final Report of Mr. JOINET *The Administration of Justice and the Human Rights of Detainees. Question of the impunity of perpetrators of human rights violations (civil and political)*, 2 October 1997, Doc. E/CN.4/Sub.2/1997/20/Rev.1 available at <http://www.unhcr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.sub.2.1997.20.Rev.1.En>.

¹³ The preliminary report of the Special Rapporteur Louis Joinet, at the Commission on Human Rights of the ECOSOC, *Study on Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights, Preliminary Report, 21 June 1985*, doc. E./CN.4/Sub.2/1985/16, was completely dedicated to evaluate the positive effect of amnesties.

¹⁴ On the history of the studies on *transitional justice* see P. ARTHUR, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, in *Human Rights Quarterly*, 31, 2009, pp. 321-367; KORA ANDRIEU, *Transitional Justice: A New Discipline in Human Rights*, at <http://www.massviolence.org/Transitional-Justice-A-New-Discipline-in-Human->

International law has traditionally recognized the validity of amnesty laws.¹⁵ More recently, they have been challenged under three prongs of attack. The first focuses on the relationship between a national amnesty and general international law, the second looks at the relationship of amnesties and international criminal law, and the third deals with the systems of protection of human rights. This paper will deal exclusively with the third; however, in order to better understand it, it is necessary to look quickly at the other two that developed at the same time, and are often evoked by the Court.

Rights; see also the critical reflections on this movement by SAMUEL MOYN, *The Last Utopia*.

Human Rights in History, The Belknap Press of Harvard University Press, Cambridge (Ma) and London.

¹⁵ See Arts I and II of the Edict of Nantes of 1598; Art. 2 of the Treaty of Osnabruck of 24 October 1648; Art. 3 of the Treaty of Neijmegen, of 1678; Art. 2 of the Treaty of Utrecht of 1713; Art. 2 of the Treaty of Aix-la-Chapelle, 1748; Art. 2 of the Treaty of Paris, 1763; these dispositions contain all the expression 'perpetual oblivion', cf. DELLA MORTE, *L'amnistia* cit., above at fn. 1, p. 16 ff. Early comments on the amnesties in the peace treaties were elaborated by EMERICH DE VATTEL, *The Law of Nations*, Johnson & Co., Philadelphia, 1866, p. 439; GEORG FRIEDRICH VON MARTENS, *Précis du Droit des gens moderne de l'Europe*, 3^a ed., Gottingue, 1821, pp. 573-575, para. 333; ALPHONSE RIVIER, *Principes du droit des Gens*, Vol. II, Rousseau, Paris, 1896, pp. 455-457. More recent cases (from the World War II) are commented on by FAUSTIN Z. NTOUBANDI, *Amnesty for crimes against humanity under international law*, Martinus Nijhoff, Leiden, 2007, pp. 15-21; MALLINDER, *Amnesty* cit., above at fn. 9, pp. xxiii-xxxiii; ID., *Amnesties*, in BASSIOUNI, *The Pursuit* cit., above at fn. 1, Vol. 1, pp. 900-922, and p. 820 ff. Still in 1985 Louis Joinet as special rapporteur of the *Study on amnesty laws and their role in the safeguard and promotion of human rights*, above at fn. 13, was talking in a positive way about amnesties.

2.2 *General international law and amnesties*

Under the first prong two questions emerge. The first is if according international law the State has a right, if not a duty, to enact an amnesty law at the end of a civil strife or an international war; or alternatively, if such a right falls within the domestic jurisdiction of the state. The second is if, on the contrary, the state has certain international duties that force it to *not* enact an amnesty.

The practice of States to approve amnesty laws for every kind of crime is very rich, and regards both the far past, and more recent times.¹⁶ This practice, often sustained and endorsed by international institutions, like the UN or the OAS, reveals a right of the state to approve amnesties. Suriname, in the *Moiwana* case, sustained precisely this argument to defend the validity of its amnesty law:

“[T]he ‘Amnesty Act 1989’ is not contrary to international law, given the fact that a number of States have granted a similar amnesty, ‘with the cooperation of the Organization of American States and the Organization of African Unity’”.¹⁷

The right of states to approve amnesty laws derives also from Art. 6 of II Protocol on 1977, additional to the Geneva Convention of 1977 (Additional Protocol II), which says:

“1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

...

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are

¹⁶ See references in MALLINDER, *Amnesties* cit., *above* at fn. 15.

¹⁷ *Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs), 15 June 2005, Series C, No. 124, para. 138.o). That amnesty law explicitly excludes from its range of application crimes against humanity, se para. 138.p) e q).

interned or detained”.¹⁸

Legal scholars have speculated about the precise content of this article,¹⁹ because its meaning changes according to the weight given to the text,²⁰ to the *travaux préparatoires*,²¹ to the

¹⁸ Signed 8 June 1977 in Geneva, entered into force 7 December 1978.

¹⁹ See for example MALLINDER, *Amnesties* cit., *above* at fn. 15, pp. 807-812.

²⁰ A literal interpretation *grosso modo* says that states have a duty to grant an amnesty to those involved in a civil conflict in order to obtain the widest reconciliation; from the wording alone it cannot be determined whether or not the authors of crimes against humanity should be included.

²¹ The *travaux préparatoires* could clarify the scope of the disposition as including crimes against humanity, given an explicit declaration by the Soviet Union in support of this, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977*, Vol. 9, Berne, 1978, p. 319 (this is just one state, but one of the two big powers at the time). Against this interpretation see D. MOMTAZ in RUIZ FABRI ET AL., *La Clémence* cit., *above* at fn. 1, p. 182, and also JEAN-MARIE HENCKAERTS, LOUISE DOSWALD-BECK (eds), *International Humanitarian Customary Law*, Vol. I, CUP, Cambridge (UK)-New York, 2005, p. 692; JELENA PEJIC, *Accountability for international crimes: From conjuncture to reality*, in *International Review of the Red Cross*, 84, 2002, pp. 28–31, refers to the letters sent from the legal office of the ICRC to the Prosecutor of the ICTY, on the 24 November 1995, and to the Department of Law of the University of California, 15 April 1997. In particular, in the letter written by then head of the legal office of the Red Cross, Toni Pfanner, to Prof. Cassel (and mentioned in D. CASSEL, *Lessons from Americas: Guidelines for International Response to Amnesties for Atrocities*, in *Law and Contemporary Problems*, 59, 1996, p. 218), he says: “The travaux préparatoires of Art. 6(5) indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of the hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having

subsequent practice,²² and to the purpose of the treaty²³ (all elements envisaged in the Vienna Convention on the Law of Treaties). Moreover, today the general convergence in opposing the most

violated international humanitarian law”.

²² Many states enacted amnesty laws after the ratification of the Additional Protocol II: for example, Uruguay ratified the Additional Protocol II on the 13 December 1985 and enacted an amnesty in 1986. Peru ratified it on the 14 July 1989, and passed an amnesty in June 1995. Uganda ratified it in March 1991, and enacted an amnesty in 2000. Colombia ratified it on the 14 August 1989, and in 2005 voted in an amnesty law. El Salvador ratified the Protocol in 1978, and approved an amnesty in 1993. Algeria ratified it in 1989, and in 2006 passed an amnesty, after a civil strife that cost 200,000 victims. Congo ratified the Protocol on the 10 November 1983 and in 2005 voted an amnesty; Senegal ratified it in 1985, and in 1993 approved an amnesty.

Certain decisions by national courts explicitly interpreted this article as evidence of the existence of states’ right to pass amnesties under Article 6(5): *Santos Guevara Portillo, Criminal Chamber of the Supreme Court of Justice of Salvador, 16 August 1995, Punto IV*, at <http://www.jurisprudencia.gob.sv/exploiiis/.%5Cindice.asp?nBD=1&nDoc=22080&nItem=22082&nModo=1>; *AZAPO and Others v. South Africa, Constitutional Court of South Africa, 25 July 1996, Case CCT 17/96, para. 28-32*, at <http://www.justice.gov.za/trc/legal/azapo.htm>; *Romo Mena, Supreme Court of Chile, 26 October 1996, Case No. 5.566, para. 12*, at http://www.haguejusticeportal.net/Docs/NLP/Chile/RomoMena_CorteSuprema_26-10-1995.pdf.

²³ The purpose of the Additional Protocol II and of the four Geneva Conventions is not to prevent an effective protection of human rights, but rather to enforce them, see PHILIPPE X., in RUIZ FABRIET AL., *La Clemence* cit., above at fn. 1, p. 180, ELIZABETH G. SALMON, *Reflections on International Humanitarian Law and Transitional Justice: Lessons to Be Learnt from the Latin American Experience*, in *International Review of the Red Cross*, 88, 2006, p. 327 ss.

serious crimes²⁴ and the emergence of the principle *aut dedere aut iudicare*²⁵ lead to an evolutive interpretation of this disposition so that it cannot be applied to the most serious violations.²⁶ This evolutive interpretation of Art. 6.5 was endorsed by the Inter-American Court, that clearly stated that such a rule cannot be extended to amnesties applying to war crimes.²⁷

Second, this evolution emerges also in several acts of the United Nations that forbid amnesties, or limit their effects. This practice is composed by non-binding acts of two different kinds: on the one hand the reports of many working groups and committees of the United Nations,²⁸ of the

²⁴ This duty is contained in several international treaties, see Arts I and IV of the Convention on the Crime of Genocide, the four Geneva Convention of 1949, Art. 7 of the UN Convention against Torture, Arts 3 and 11 of the International Convention for the Protection of All Persons from Enforced Disappearance, in many agreements against terrorism and in the 1930 Convention against Forced Labour. References and comments to those conventions can be seen in FREEMAN, *Necessary cit.*, *above* at fn. 1, pp. 38-43.

²⁵ On the incompatibility of amnesty laws with the principle *aut dedere aut iudicare* see FAUSTIN Z. NTOUBANDI, *Amnesty for crimes against humanity under international law*, Martinus Nijhoff, Leiden, 2007, pp. 114-120.

²⁶ YASMIN NAQVI, *Amnesty for War Crimes: Defining the Limits of International Recognition*, in *International Review of the Red Cross*, 85, 2003, p. 583 ff., and DELLA MORTE, *L'ammnistia cit.*, *above* at fn. 1, p. 124 ss., propose a systemic and teleological interpretation of Art. 6.5, excluding its application to war crimes; the interpretation of this rule in the context of duties under other conventions (listed *above* at fn. 24) points in the same direction.

²⁷ *Gelman*, *above* at fn. 4, paras 210-211.

²⁸ In addition to the Report of Joinet, *cit. above* at fn. 12, and to the further references therein contained, see Res. 1998/53 of the Commission on Human Rights, *Impunity*, of 17 April 1998, 52nd Session; and *Updated Set of Principles for the Protection and Promotion of Human Rights Through*

Secretary General,²⁹ of the General Assembly³⁰ and of the Security Council;³¹ on the other, the reports adopted by the UN Committee on Human Rights.³²

2.3 *Special regimes*

The second prong is linked to the first one; it has been recently developed through the activities of supra-national criminal courts and tribunals. It regards the incompatibility of amnesties with the personal duties deriving from international criminal responsibility. This issue has emerged in the context of the International Criminal Court: its Statute and Rules, in fact, do not envisage any specific rule for amnesties,³³ while other regulations of supra-national criminal tribunals, such as

Action to Combat Impunity (2005), Sec. Cons. Res., 2006/1674.

²⁹ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary General to the Security Council, 23 August 2004*, Doc. S/2004/616, pp. 10-11.

³⁰ Gen. Ass. Res. 47/133, 18 December 1992.

³¹ *Declaration of the President of the Security Council, 5828^o Meeting, Situation in the Democratic Republic of Congo, 30 January 2008*: “The Council commends the Government for ordering a ceasefire in accordance with the statements of commitment. In the framework of the fight against impunity, while noting the Government’s pledge to seek parliamentary approval of an amnesty law covering acts of war and insurrection, the Council welcomes the exclusion of genocide, war crimes or crimes against humanity from the scope of this amnesty”, UN Doc. S/PRST/2008/2.

³² Established in the International Pact on Civil and Political Rights, that already in 1977 expressed some perplexity concerning the Zairian amnesty, cf. *Daniel Monguya Mbenge v. Zaire*, Communication No. 16/1977, UN Doc. CCPR /C/OP/2.

³³ DARRYL ROBINSON, *Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court*, in *Eur. J. Int’l L.*, 14, 2003, pp. 481-505. On the case of the Lord

those established for Sierra Leone, Kampuchea and Lebanon, envision certain dispositions explicitly dedicated to exclude or limit the effects of amnesty laws.³⁴

Resistance Army before the ICC see PAYAM AKHAVAN, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, in *Am. J. Int'l L.*, 99, 2005, p. 403 ff.; KASAJA PHILLIP APUULI, *The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda*, in *Crim. L. F.*, 15, 2004, p. 391 ff.; CARSTEN STAHN, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, in *J. Int'l Cr. Justice*, 3, 2005, p. 695 ff.; ABIGAIL MOY, *The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity*, in *Harv. Hum. Rts J.*, 19, 2006, pp. 267–273; MANISULI SSENYOYO, *The international Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?*, in *Neth. Int'l L. Rev.*, 54, 2007, p. 51 ss. The statute and the rules of the ICC do not envisage any disposition dedicated to amnesties. Also during the preparatory works there was no real debate on the issue.

³⁴ Art. IX of the *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, Lomé, 7 July 1999, granted forgiveness to the rebels, included to their leader, Sankoh. However, Art. 10 of the *Statute of the Special Court for Sierra Leone* says that “An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution”. The problem was addressed during the trial against Taylor, and the Special Court, *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, Appeals Chamber of the Special Court for Sierra Leone*; see the comments of ANTONIO CASSESE, *The Special Court and International Law. The Decision Concerning the Lomé Agreement Amnesty*, in *J. Int'l Criminal Justice*, 2004, 2, pp. 1130-1140, and SIMON M. MEISENBERG, *Legality of Amnesties in International Humanitarian Law. The Lomé Amnesty Decision of the Special Court of Sierra Leone*, 86 *Int'l Rev.*

The third prong also deals with special regimes, and regards the compatibility of amnesty laws with the specific obligations enshrined in regional human rights treaties. There are decisions in this vein from the African Commission on Human and People's Rights³⁵ and of the European Court of Human Rights.³⁶ However, it is under the jurisdictions of the Inter-American Court and

Red Cross 837 (2004). Art. 11 of the *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Signed at Phnom Penh, 6 June 2003* (available at <http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf>) also envisages that amnesties are not a valid bar to the prosecution; see also other Cambodian dispositions and a UN GA Resolution commented by RONALD C. SLYE, *The Cambodian Amnesties: Beneficiaires and the Temporal Reach of Amnesties for Gross Violation of Human Rights*, in *Wis. Int'l L. J.*, 21, 2004, p. 100 ff. lastly see Art. 16 of the *Agreement between the United Nations and the Lebanese Republic of the establishment of a Special Tribunal for Lebanon*, annex to CoS Res. 1757 of 2007, 5685^o Meeting, 30 May 2007, and Arts 6 and 30 of the Statute of the Special Tribunal of Lebanon, annexed to the same Resolution.

³⁵ *Malawi African Association and Others v. Mauritania*, 11 May 2000, Communication No. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, para. 83; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 21 May 2006, Communication No. 245/02, paras 211 and 215; *Mouvement Ivoirien des Droits Humains (MIDH) v. Ivory Coast*, 29 July 2008, Communication 246/2002, paras 89-98.

³⁶ Instead of highlighting the incompatibility of the amnesty laws with the European Convention on Human Rights, the Strasbourg Court sustained the duty to prosecute violations of *ius cogens* norms, cf. *Abdülsamet v. Turkey*, 2 November 2004, Appl. No. 32446/6, para. 55; *Yeter v. Turkey*, 13 January 2009, Appl. No. 33750/03, para. 70; *Ould Dah v. France (Admissibility)*, Appl. No. 13113/03, 17 March 2009.

Commission that the problem is historically emerged with more strength and clarity.

The three prongs have had reciprocal influence; they are closely correlated because the reflection on impunity and general international law historically originated in the discussions on the Latin American situation, and more recently international criminal law has been affected by this evolution of general international law. The next pages will focus exclusively on the Inter-American system; accordingly, the responsibility of the *State*, and not of *persons*, is at stake. In particular, the focus will be on the *concepts* elaborated by those institutions in grounding their final decisions, and on the *interpretation* of the Convention given by the Commission and by the Court.

3. *The origin of the issue in the Inter-American system of protection of human rights*

The 1985-86 Annual Report of the Inter-American Commission captures within a few pages all the contradictory elements that the approval of an amnesty law provokes. In that Report the Commission welcomed the adoption of an amnesty in Paraguay that allowed many political criminals to come back from exile abroad:

“As to the right to residence and movement, the Commission duly recorded its satisfaction over the amnesty granted in 1983, which permitted political exiles to return to Paraguay”.³⁷

In the very same chapter, however, the Court described the situation in Guatemala, noting:

“The new amnesty decree, geared to create a climate of social peace and to avoid difficulties to the new administration’s actions ... also introduces a new juridical principle which, in the opinion of the Commission, could hinder and render inefficient the actions taken by the judicial entity in charge of investigating and, if such is the case,

³⁷ *Annual Report of the Inter-American Commission on Human Rights 1985-86*, 26 September 1986, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, Chapter IV, *Situations of Human Rights in Several Countries – Paraguay*, at <http://www.cidh.oas.org/annualrep/85.86eng/chap.4b.htm>.

sanctioning, the authors of subversive and anti-subversive terrorist acts which took place in Guatemala during recent years, and the most serious legacy of which is the large number of persons abducted, illegally detained, tortured, assassinated and disappeared”.³⁸

The same contradictions are present in other reports adopted subsequently: in the Annual Report of 1986-87 the Commission welcomed the peace agreement between El Salvador, Guatemala, and Honduras, that granted a cease-fire and forgiveness for those that had actively participated in rebel forces:

“The Commission feels it is most important to describe also the recent events in Central America, which are designed to overcome some of the most immediate causes of the restrictions on the exercise of human rights in the region”.³⁹

On the contrary, in a part of the same Annual Report dedicated to the situation in Chile, the Commission complained about the impossibility of investigating the disappearance of ten persons

³⁸ *Annual Report of the Inter-American Commission on Human Rights 1985-86, 26 September 1986, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, Chapter IV, Situations of Human Rights in Several Countries – Guatemala*, at <http://www.cidh.oas.org/annualrep/85.86eng/chap4.a.htm>.

³⁹ *Annual Report of the Inter-American Commission on Human Rights 1986-1987, OEA/Ser.L/V/II.71, Doc. 9 rev. 1, 22 settembre 1987, Cap. IV - Status of Human Rights in Several Countries - Human Rights and Peace. The Esquipulas II Agreement*, at the website <http://www.cidh.org/annualrep/86.87eng/chap.4.htm>. Then goes on by saying: “The simultaneous adoption of the measures called for in the Esquipulas II Presidential Agreement within 90 days of its signature—dialogue with the unarmed opposition, amnesty for armed rebels, cease fire, cessation of outside assistance to armed groups, lifting of the states of emergency and the consequent restoration of civil and political liberties—constitutes an event to which the Commission accords the greatest significance and importance”.

after their arrest. The Commission especially stigmatized the introduction in Chile of extraordinary powers for the Government,⁴⁰ and cursorily mentioned the impossibility to open a trial on that case because of the approval of the amnesty decree.⁴¹

4. Contentious cases decided by the Commission

Before starting the analysis of the cases there are three premises that must be kept in mind in order to understand the reasoning of the Commission (presented in this sect.), and of the Court (*below*, sect. 5). The facts of almost all the cases that will be analyzed deal with a double violation of the Convention, regarding *i*) illegal deeds by the state or para-state forces of which *ii*) any investigation has been rendered impossible because of an amnesty. In (almost) all the cases *iii*) amnesty laws were signed by the very same authorities that soiled their hands with crimes.

4.1 The first cases. El Salvador, Argentina, Uruguay: from the condemnation of crimes to the condemnation of amnesties

The first three contentious cases on amnesty laws decided by the Commission (on Argentina, El Salvador and Uruguay) are from 1992. These cases provided the first approaches to this issue in the Inter-American system. Although similar, they have some differences: with El Salvador the

⁴⁰ Cf. *Transitory Disposition* No. 24 of the Chilean Constitution, that allowed extraordinary powers to the government in case of emergency, LAUTARO RIOS ALVAREZ, *La disposicion 24^a transitoria ante el estado de derecho*, in *Revista chilena de derecho*, 10, 1983, p. 781 ff.

⁴¹ *Annual Report of the Inter-American Commission on Human Rights 1986-1987*, OEA/Ser.L/V/II.71, Doc. 9 rev. 1, 22 September 1987, Chapter IV: *Chile – Right to a Fair Trial*, at <http://www.cidh.org/annualrep/86.87eng/chap.4.htm>. See also the *Annual report* of 1992 on the amnesty passed by El Salvador and on the works of its Truth Commission, at <http://www.cidh.oas.org/annualrep/92eng/chap.4a.html>.

Commission stigmatized the approval of an amnesty law in the body of the decision, but in the conclusions it focused only on the criminal deeds by the forces of the state, without making any determination about the validity or invalidity of amnesty laws.⁴² Accordingly, the Commission did not find *in abstracto* the incompatibility of amnesty laws or self-amnesties with the Convention, nor did it request the abolition of those laws.⁴³ Instead, it simply did not take the amnesty under consideration in order to decide the concrete dispute.

On the contrary, in the other two reports (voted on the very same day, 2 October 1992, one on the Argentinian amnesty law, and the other on the Uruguayan *Ley de Caducidad*),⁴⁴ the Commission adopted a different strategy. In these reports the incompatibility of amnesty laws with the Convention, and in particular with Arts. 1, 8, and 25 of the Convention, was evaluated *in abstracto*.⁴⁵ The Commission concluded the Report on Uruguay by saying:

⁴² In the *Las Hojas Massacre* decision the Commission attributed to El Salvador the responsibility of the massacre in Las Hojas, with the violation of the Arts 4 (right to life), 5 (right to security and personal integrity), 8 (due process) and 25 (access to justice) of the Convention (it briefly touched also Art. 1), and requested an impartial investigation of the facts, and the payment of right reparations to the victims' next of kin, cf. *Las Hojas Massacre*, Report No. 26/92 (El Salvador), Case 10.287, 24 September 1992.

⁴³ Although within the conclusion 5.c), and the order to remedy “the consequences of the situation which has arisen from the violation of the above-mentioned rights” can include such a request.

⁴⁴ *Mendoza et. Al.*, Report No. 29/92 (Uruguay), Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, 2 October 1992, p. 154. See similarly Report No. 28/92 (Argentina), Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311, 2 October 1992.

⁴⁵ Report No. 29/92 (Uruguay), paras 8-11, and Report No. 28/92 (Argentina), paras 29-41, both *above* at fn. 44.

“[...] that Law 15,848 of December 22, 1986, is incompatible with Article XVIII (Right to a Fair Trial) of the American Declaration of the Rights and Duties of Man, and Articles 1, 8 and 25 of the American Convention on Human Rights”.⁴⁶

The Commission, taking the position of the Court in the Honduran cases *Velásquez-Rodríguez* and *Godínez-Cruz* of 1988 and 1989 (although in those decisions amnesty laws were not at stake),⁴⁷ gave a decisive role to Art. 1.1 of the Convention,⁴⁸ and contrary to the previous Salvadoran case, asserted the radical incompatibility of amnesties with the duties envisioned in the Convention.

4.2 The Chilean cases

The Commission dealt again with amnesties in two cases involving Chile, decided on 15 October 1996. As in the previous ones, these cases regarded brutal deeds in violation of the Convention, and the enactment of a decree of amnesty for those belonging to the police. However, this time both the Petitioners and the Commission concentrated their attention almost entirely on the illegitimacy on the amnesty decree.⁴⁹

⁴⁶ *Ivi*, Conclusion 1.

⁴⁷ *Velásquez-Rodríguez v. Honduras* (merits), 29 July 1988, Series C, No. 4, para. 169: “According to Article 1 (1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention”; analogously in the subsequent decision *Godínez-Cruz v. Honduras* (merits), 20 January 1989, Series C, No. 5, para. 178.

⁴⁸ “When it enacted this law, Uruguay ceased to comply fully with the obligation stipulated in Article 1.1 and violated the petitioners’ rights upheld in the Convention”, Report No. 29/92 (Uruguay), *above* at fn. 44, para. 51.

⁴⁹ Report No. 34/96 (Chile), Cases 11.228, 11.229, 11.231 and 11.182, 15 October 1996. *Garay*

The two reports have some points in common, and some elements of difference. Both reflect the vocabulary adopted in those years by Joinet and Guissé in their works on impunity at the UN,⁵⁰ and stress the close link between *amnesties* and *impunity*.⁵¹ Both then establish the incompatibility of amnesties with the American Convention on Human Rights, finding that the setting up of a truth commission and the awarding of reparations for the victims⁵² are not sufficient to comply with Arts 1.1, 2, 8.1, and 25 of the Convention.⁵³

However, the decisions are different on other points, and highlight certain concepts and terms that will henceforth often be used by the Commission and the Court. First of all, the two reports deal with *self-proclaimed amnesties*, or *self-amnesties*: while in Report No. 34/96 the Commission only mentions them,⁵⁴ in Report No. 36/96 it describes the concept much more deeply,⁵⁵ concluding by saying:

“The violation of the right to justice, and the consequent impunity that is created in the present case, constitutes a chain of acts that began, as it has been established, when the military government issued, in its own favor and that of its agents who committed

Hermosilla et al. v. Chile, Report No. 36/96 (Chile), Case 10.843, 15 October 1996.

⁵⁰ *Preliminary report on the impunity of perpetrators of human rights violations* (Mr. El Hadji Guissé and Mr. Louis Joinet), August 1994, Doc. E/CN.4/Sub.2/1994/11 and Corr.1; the references to the Final Report are *above* at fn. 12.

⁵¹ Report No. 34/96, cit. *above* at fn. 49, para. 52.

⁵² Report No. 34/96, paras 55-57, and Report 36/96, paras 52, 56-7, both cit. *above* at fn. 49.

⁵³ Report No. 34/96, paras 44-45; Report No. 36/96, paras 44-45, both cit. *above* at fn. 49.

⁵⁴ The concept of *self-proclaimed amnesty* is placed beside to the concept of *government established through a coup self-absolving*, cf. Report No. 34/96, cit. *above* at fn. 49, paras 43, 49 ff., and 89.

⁵⁵ *Ivi*, paras 49-59.

violations of human rights, a series of rules designed to form a complete legal bulwark of impunity, beginning formally in the year 1978 with the military government's Decree-Law No. 2191 on self-amnesty".⁵⁶

Second, one of the two reports deals extensively with the question of the *legitimacy* of a government established through a coup and the laws it subsequently passes.⁵⁷

Third, in Report No. 36/96, the Commission introduced a criterion to evaluate the compatibility of an amnesty provision with the duties deriving from Art. 2 of the Convention: the *seriousness of the crimes* covered by the amnesty:

"In examining this matter [Art. 2], it is important to consider *the nature and severity of the alleged crimes* that were covered by the amnesty decree. The military government that ruled the country from 11 September 1973 until 11 March 1990 conducted a systematic policy of repression that resulted in thousands of victims of 'disappearances', summary or illegal executions and torture".⁵⁸

The Chilean amnesty was again at the center of the reports *Alfonso René Chanfeau Orayce*, of 1998⁵⁹ and *Lincoleo*, of February 2001.⁶⁰ The first report, *René Chanfeau Orayce*, is characterized by two contributions: a long analysis dedicated to evaluating the *legitimacy* of an amnesty enacted by a military government for those who belong to the public force;⁶¹ and the formulation of the

⁵⁶ *Ivi*, para. 59.

⁵⁷ *Ivi*, para. 25 ff.; see also the concurring opinion of Commissioner Fappiano (para. 2 ss.).

⁵⁸ Report No. 36/96, para. 46, emphasis added, cit. *above* at fn. 49.

⁵⁹ *Alfonso René Chanfeau Orayce et Al.*, Report No. 25/98 (Chile), Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675, 11.705, 13 April 1998.

⁶⁰ *Catalan Lincoleo*, Report No. 61/01 (Chile), Case No. 11.771, 16 April 2001.

⁶¹ Report No. 25/98, cit. *above* at fn. 59, para. 17-31.

right to truth, as an expression of the combination of the Arts 1.1, 8, 25, and 13 (with a declaration of the insufficiency of the works of the Truth Commission established by the Chilean Government to satisfy it).⁶² The report on the *Lincoleo* case is not much different: the Commission never defined the amnesty law as *self-amnesty*, and it reaffirmed that the works of the Truth Commission were not sufficient to comply with the Chilean international obligations. Both the cases dealt especially with the compatibility of an amnesty with the duties envisioned by the American Convention,⁶³ especially in case of *serious violations of human rights*, or of violations of *fundamental rights*.⁶⁴

Notwithstanding the fact that the very same amnesty decree was challenged in these four cases, the Commission delineated different reasoning according to the decision, sometimes piling them into a *climax* of legitimization of its final decision, and sometimes lingering over certain arguments more than others as if they were key concepts for the final decision. In all the four cases the Commission ended by requesting the modification of the Chilean legislation.⁶⁵

⁶² *Ivi*, paras 85-97.

⁶³ And in particular with Arts 1.1 and 2 (Report No. 25/98, cit. *above* at fn. 59, paras 32-37, and 66-84), and with Arts 1, 2, 8, and 25 (*ivi*, para. 45, as well as paras 54-59 on the violation of procedural guarantees, and paras 60-65 on the violation of judicial protection). Report No. 61/01, cit. *above* at fn. 60, paras 79 and 81, on the state obligation to conduct a criminal investigation; para. 51 on the right to justice as fundamental (the Report does not comment on the fact that Arts 8 and 25 can, on the contrary, be derogated under Art. 27 of the Convention).

⁶⁴ On the issue of the seriousness of the forgiven crimes, Report No. 25/98, cit. *above* at fn. 59, paras 38-40, with references also to the notion of “crimes against humanity”. Report No. 61/01, *above* at fn. 60, respectively at paras 49 and 51.

⁶⁵ The first two reports recommended that Chile modify its national legislation, cf. Report No. 34/96, para. 111, and Report No. 36/96, para. 111, both cit. *above* at fn. 49; in Report No. 25/98, cit. *above* at fn. 59, the Commission recommended the abrogation of the amnesty decree of 1978. In

4.3 *The Romero case and a strongly prescriptive interpretation of Art. 2*

Notwithstanding the fact that amnesties have also been dealt with in other cases,⁶⁶ the last one worthy of attention in this overview is the 2000 report *Romero*.⁶⁷ The Inter-American Commission considered at length the facts of the case – the circumstances of the murder of a Catholic Bishop, Oscar Romero, killed during the celebration of a mass by para-agents of the state – and the irregularities in the investigation of the murder.⁶⁸ Only in the second part did the Commission

the Report No. 61/01, cit. *above* at fn. 60, *Conclusion 2*, the Commission requested that Chile *adapt* its legislation in such a way as to deprive the amnesty of any effect.

⁶⁶ Cf. the two Reports against Peru, *Hector Perez Salazar*, Report No. 43/97 (Peru), Case No. 10.562, 19 February 1998, and *La Cantuta*, Report 42/99 (Peru), Case 11.045, 11 marzo 1999. The analysis on the legitimacy of amnesty laws in the Inter-American system is less refined than in the previous Chilean cases. However, both the reports condemned the states for the approval of an amnesty. A decision of the Inter-American Court held in the same period of time, *Castillo-Páez v. Peru* (Merits), 3 November 1997, Series C, No. 34, paras 85-90, did not explicitly condemn the Peruvian amnesty; however, at paras 85-86 and 90 can be read an implicit prohibition of amnesties, as well as an embryonic formulation of the “right to truth”.

⁶⁷ *Monsignor Romero y Galdámez*, Report 37/00 (El Salvador), Case 11.481, 13 April 2000.

⁶⁸ *Ivi*, paras 80-122, using what established by the Salvadorian Truth Commission. In this case the complainants were contesting the validity of the amnesty law, as well as the violation of art. 4, *right to life*, for the assassination of a bishop, Romero, killed during a mass by the Salvadorian police, *ivi*, paras 10-19. One of the most problematic question of the case was that El Salvador in the peace agreement of 16 January 1992 had established under the auspices of the UN an independent truth Commission to investigate on the facts occurred during the civil war. The amnesty law was passed on the 20th March 1993, just 5 days after the final report of the

consider the legitimacy of the amnesty decree: it made broad references to the Report of Joinet on *impunity* published in 1997,⁶⁹ then lingered on the *right to truth* through the interpretation of Arts 1.1, 8.1, 13, and 25,⁷⁰ and then, following a trend started by the Court in the *Castillo Petruzzi* decision,⁷¹ moved away from a generic interpretation of Art. 2 previously adopted, endorsing (similarly to what it had already done in respect to Art. 1.1) a strong interpretation of that provision:

“The general duty of Article 2 of the American Convention on Human Rights implies the adoption of measures along two lines: First, suppressing laws and practices of any nature that entail violation of the guarantees provided for in the Convention; and second, adopting laws and developing practices leading to the effective observance of

Commission. and the Supreme Court of El Salvador on the 20th May 1993 declared inadmissible the motion of unconstitutionality of that law, *ivi*, paras 17, 22, 55.

⁶⁹ *Ivi*, paras 123-135.

⁷⁰ As in *Lincoleo*, Report No. 61/01, cit. *above* at fn. 60. In *Romero* the Commission stressed that the approval of an amnesty frustrates the right to truth, and not even the establishment of an independent, international truth commission can satisfy it, see *ivi*, para. 142 ff., especially paras. 149-151: “...the IACHR concludes that the application of the General Amnesty Law in the instant case eliminated the possibility of undertaking judicial investigations aimed at determining the responsibility of all those involved. In addition, that decision violated the right of the victim’s relatives and of society at large to know the truth about the events in question”; see also para. 157: “...the State has failed in its duty to diligently and effectively investigate the violations alleged, and in its duty to try and punish those responsible through an impartial and objective process, as required by the American Convention. All this affected the integrity of the judicial process and entailed a manipulation of justice, with an evident abuse of power”, at para. 151.

⁷¹ *Castillo Petruzzi et Al. v. Peru*, 30 May 1999, Series C, No. 52, para. 207.

such guarantees”.⁷²

In short, for the Commission the presence of a *general obligation* to modify the national legislation in order to implement the Convention implies that every amnesty, irrespective of the way it has been approved, or by the subjects involved in its elaboration, is incompatible with the Convention.

4.4 Conclusions regarding the Commission between 1985 and 2000: the appearance of an articulated vocabulary

The picture of amnesties in Latin America seen through the lens of the Inter-American Commission is thoroughly articulated. The Annual Reports of the eighties took an ambivalent approach: amnesties allowed political activists protected abroad to safely reenter their countries (as in Paraguay); they allowed countries to reconcile after war and enjoy an environment in which human rights had greater respect (cf. *Presidential Agreement Esquipulas II*); but at the same time they prevented States from effectively protecting human rights (as in Guatemala and Chile).⁷³

Since 1992, on the contrary, as a result of the UN politics of “fight against impunity”, the contentious cases of the Commission show a straight line against amnesties. The most interesting data emerging from these cases is the wide (and not always coherent) range of terms and concepts used to determine the illegality of amnesties, and their incompatibility with the Convention.

Self-amnesty. Certain reports focus on the genetic moment of an amnesty law and condemn *self-amnesties*, that is amnesties for state agents passed by the same government responsible for the crimes.⁷⁴ Not every report employs this concept: for example certain reports against Chile mention

⁷² Report No. 37/00 (*Romero*), cit. *above* at fn. 67, para. 138.

⁷³ Cf. *above* at sect. 3 for further references.

⁷⁴ Report 36/96, cit. *above* at fn. 49, as well as *Hector Perez Salazar*, Report No. 43/97 (Peru), Case 10.562, 19 February 1997.

it, while others, in dealing with the very same amnesty, do not. The function of this reasoning is to make a distinction between, on the one hand, laws that are the expression of the real reconciliation of a society, and, on the other hand, the ploys designed by a government to grant impunity to itself for outrageous crimes.

Legitimacy. On one occasion the Commission tested the validity of an amnesty law by dealing extensively with the *democratic legitimacy* of the procedure that brought about its approval.⁷⁵ The function of this reasoning is analogous to that on self-amnesties.

Serious crimes. In other cases, as in Report No. 36/96 (Chile), the Commission stressed the importance of punishing the authors of the most serious violations of human rights, giving a decisive importance to the way certain crimes were committed, or to the importance of the rights violated.⁷⁶

A strongly prescriptive interpretation of the Convention obligations. All the reports on establishing the invalidity of amnesties refer to the incompatibility between amnesty laws and the Convention, especially to Arts 1, 2, 8 and 25. Certain reports do not give much importance (or give none at all) to the concepts of *self-amnesty*, the *legitimacy of the approval*, or the *seriousness of the crimes*, but instead rely exclusively on this argument. In particular, since the first two reports against Argentina and Uruguay decided on the 2nd October 1992 (*above* at sect. 4.1) a strongly prescriptive interpretation of two general provisions emerged, first of Art. 1.1 and then, in particular in the *Romero* case, of Art. 2. Accordingly, every amnesty, because it prevents those entitled to a right envisioned in the Convention (in particular, the access to a court and a fair trial), is a breach of the Convention.⁷⁷

⁷⁵ Report No. 25/98 (Chile), cit. *above* at fn. 59, paras 17-31.

⁷⁶ See for example Report No. 36/96, cit. *above* at fn. 49, para. 46.

⁷⁷ Cf. Report 29/92, cit. *above* at fn. 44, para. 51, and the Report 37/00 (*Romero*), cit. *above* at fn. 67, para. 126.

All these concepts and arguments are not always defined with precision, and the relationship between them, and their relevance to the invalidity of an amnesty, are not always clear. It is not clear, in fact, how much weight the Commission gives to whether an amnesty has been self-proclaimed, or whether the process of adoption of an amnesty has also involved elements of the society apart from the perpetrators of the crimes, or whether the forgiven crimes were not minor. In conclusion, it seems that when the Commission proclaims the incompatibility of amnesties with the Convention, it has preferred not to organize coherent arguments around a core of criteria for evaluating the validity of amnesties; instead it has presented several coordinated arguments, one beside the other, giving solid ground to a politically problematic final decision.

There are three further points that deserve attention.

Irrelevance of the effects of an amnesty. In no case, not even as a cursory note, did the Commission mention or discuss the social impact, the effective reconciliation that derived from an amnesty.

The emergence of the right to (judicial) truth. Reports No. 34 and 36 of 1996 in an implicit way, and Reports No. 25/98 and 37/00 (*Romero*) explicitly, established the existence of the *right to truth* under the Convention under the Articles 1.1, 8.1, 13, and 25 (respectively the rights to information, access to courts, and fair trial).⁷⁸ This right requires the possibility to obtain the truth through judicial activity: according to the Commission, the ascertainment of the facts and the calculation of the reparations made by a truth commission outside a court does not comply with the obligations set by the Convention. Therefore, what emerges is not a generic *right to truth*, but a *right to judicial*

⁷⁸ On the historical development of the right to truth see JO M. PASQUALUCCI, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. Int'l L. J. 321 (1994); DERMOT GROOME, *The Right to Truth in the Fight against Impunity*, 29 Berkeley J. Int'l L. 178 (2011).

truth.⁷⁹

Lastly, it is relevant to note the *judicial policy* adopted by the Court. In all the cases the respondent state was both responsible for the crimes, and for the adoption of the amnesty; however, in very few cases the Commission dealt directly with the violations committed by state agents.⁸⁰ The vast majority of the cases dealt only with amnesty laws (that is, with the obstacle that prevents local judges from investigating the state's crimes), leaving the further task of establishing fair reparations to local judges, once the legal obstacle that prevented them from doing so has been removed. This approach, dealing with the single obstacle instead of the many possible complaints, is effective given the exceptional character of the Inter-American jurisdiction.

5. *The work of the Court*

5.1 *A first serious blow to the legitimacy of amnesties: Barrios Altos v. Peru, in a dusty cloud*

⁷⁹ *Contra* see LAUREL E. FLETCHER, HARLEY M. WEINSTEIN, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, in *Human Rights Quarterly*, 24, 2002, p. 589: “the truth is something that trials can acknowledge, but not something that legal processes are needed to discover”. On the problem of the relationship between law, history and the approach to the past, the following are very insightful: ELAZAR BARKAN, *Legal settlements as a Form of Cultural Politics: A Moral and Historical Framework for the Right to Reparation*, in GEORGE ULRICH, LOUISE KRABBE BOSERUP (eds), *Human Rights in Development Yearbook 2001. Reparations: Redressing Past Wrongs*, Kluwer Law International, The Hague/London/New York, 2003, p. 405 ss., and PETER R. BAEHR, *How to Come to Terms with the Past*, in HUGHES ET AL., *Atrocities* cit. above at fn. 1, p. 6 ss.; rightly Baher, *ivi*, p. 12, notices the strongly political idea not only of oblivion, but also of memory.

⁸⁰ *Las Hojas Massacre*, Report No. 26/92 (El Salvador), case 10.287, 24 September 1992; Report No. 28/92 (Argentina), Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, 2 October 1992.

of concepts

The question of the validity of amnesties emerged from the quiet studies of lawyers and social scientists to capture the public attention on 14 March 2001, when the Inter-American Court (that is of an organ that does not make recommendations, as the Commission, but whose decisions are binding for the state) circulated a decision on the massacre of *Barrios Altos*.⁸¹ The complainant (the Commission: cases before the Court are presented by the Commission) contested the violation by Peru of Arts 4 and 5 (*right to life and prohibition of inhuman treatments*), because of the massacre,⁸² and the violation of Arts 1.1, 2, 8, 13, and 25, because of the enactment of amnesty laws No. 26479 and 26492.⁸³ As far as the amnesties were concerned, the Court started (para. 41) declaring the inadmissibility of every amnesty law because they prevented the investigation of

⁸¹ *Barrios Altos v. Peru* (Merits), 14 March 2001, Series C, No. 75. See also the decision on its interpretation, *Barrios Altos v. Peru* (Interpretation), 3 September 2001, Series C, No. 83. On these cases the legal literature is broad; a handy reference is the entry *Barrios Altos* in the on-line *Max Planck Encyclopedia of International Law*, 2008, written by STEFANO BRUGNATELLI, and the bibliography there attached. On the Peruvian amnesties, and on the history of that country during the years precedents its approval seek VICTOR RODRÌGUEZ BRESCIA, *Regional Report*, in BASSIOUNI, *The Pursuit* cit. above at fn. 1, Vol. 2, p. 245 ss.

⁸² On 3 November 1991 six armed persons in two cars of the police with lights and sirens on, burst into a party in the district of Lima called *Barrios Altos*, shooting on 19 persons, and killing 15 of them; see the first part of the decision.

⁸³ Amnesty law No. 26479, “exonerated members of the army, police force and *also civilians* who had violated human rights or taken part in such violations from 1980 to 1995 from responsibility”, *Barrios Altos* (Merits), cit. above at fn. 81, p. 4, para. 2, let. *i*), emphasis added; Amnesty law No. 26492, aimed at stopping the reaction of the Peruvian judiciary against the amnesty law, *ivi*, p. 5, para. 2, let. *m*).

violations of *non-derogable* rights and the *most serious violations* of human rights:

“[A]ll amnesty provisions [...] are inadmissible, because they prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”.⁸⁴

In this quote the decision does not refer to the inadmissibility of the *Peruvian* amnesties, but to a general inadmissibility of any amnesty under the Convention: every amnesty is inadmissible because they violate *non-derogable rights recognized by international human rights law* (in order to make this point the Court evokes a general *corpus* of law, external to the Convention, which the Court recognizes and enforces).

In the next paragraph the Court used a formal argument, assessing that the *Peruvian* amnesties are contrary to the Convention:

“[A]mnesty laws adopted by Peru prevented the victims’ next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention; they violated the right to judicial protection embodied in Article 25 of the Convention; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the Convention, and [...] the obligation to adapt internal legislation that is embodied in Article 2 of the Convention”.⁸⁵

The Court here deals only with *Peruvian* amnesty laws; it does not specify here whether *every* amnesty is incompatible with Arts 1.1, 2, 8.1 and 25. The Court, however, clarifies immediately that is talking about amnesties in general: in subsequent paragraph, para. 43, it suggests that every

⁸⁴ *Barrios Altos* (merits), cit. *above* at fn. 81, para. 41.

⁸⁵ *Ivi*, para. 42; see in a similar way see paras 39 and 51.3 on the Arts 1.1 and 2.

amnesty is *per se* a violation of the Convention:

“The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention”.⁸⁶

So, the three paragraphs 41-43, read together, give the impression that amnesties are radically illegitimate: there are words of strong criticism (moral argument) beside words dedicated to explain the incompatibility of amnesties with the Convention (argument of particular positive law) and with general international law (systemic argument – but without a complete analysis of general positive international law).

What we see thus far is an already complex framework. However, the second part of para. 43 and para. 44 instead of clarifying these arguments, introduces new ones:

“States Parties to the Convention which adopt [...] self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation”.⁸⁷

Here the Court invoked the notion of *self-amnesty*,⁸⁸ then it mentioned three general concepts

⁸⁶ *Ivi*, para. 43.

⁸⁷ *Ivi*, para. 43.

⁸⁸ Although the concept of *self-amnesty* seems fundamental in this decision, the Court does not use many words to explain or define it. Peruvian amnesty applied to both the state agents and to the

(not used in the Convention) that overarch it, that is *justice, truth and reparation*. The Court finally concluded the section dedicated to amnesties by saying:

“Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated”.⁸⁹

As in the Reports of the Commission, rather than a clear conceptualization we see the will to give the widest possible legitimation to a decision that challenges an amnesty, with an analysis that sounds redundant.

The Court then mentioned the *right to truth*⁹⁰ and, in the *Conclusions*, with a unanimous vote, it

civilians; accordingly, every amnesty that includes state agents and that has been passed by the same government responsible for the violations of human rights can be considered *self-amnesty*, and thus is void. On the distinction between *amnesty* and *self-amnesty* see the observations of Judge Cançado Trindade (Concurrent Opinion, paras 4-11, on the incompatibility of self-amnesties and general international law), and of Judge Garcia-Ramirez (Concurrent Opinion, paras 9-10, and 15; see also paras 11-14 on the impossibility to forgive serious violations of human rights).

⁸⁹ *Barrios Altos* (Merits), cit. *above* at fn. 81, para. 44.

⁹⁰ “[T]he right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention”, *ivi*, para. 48. See also the concurrent opinion of Judge Ramirez: “The Court [...] founds the right to truth on the articles on due process and on the access to justice, and therefore equates the right to truth with the right to investigation and prosecution”. In

held that the Peruvian amnesty laws are *void*, therefore using a power to abrogate a law that has not been attributed to the Court.⁹¹

5.2 *Four years later, an intermezzo on “serious crimes”: Moiwana Community v. Suriname*

The second decision on amnesties handed down by the Court came out a few year after *Barrios Altos*, in 2005, in the *Moiwana Community v. Suriname case*.⁹² As in the previous case, the facts at the base of the case are two: first, an outrageous massacre committed by state agents against civilians, in the Moiwana village, in 1986: 39 members of the village were killed, their property was set on fire, and those who survived were displaced;⁹³ second, the approval of an amnesty law in 1992.⁹⁴

The amnesty contained a disposition that excluded crimes against humanity from its application,⁹⁵ but the massacre of 1986 was not considered a crime against humanity by national judges, and the state of Suriname did not proceed with the investigation and punishment of those responsible.⁹⁶ The Court, therefore, was facing a law that excluded serious crimes from its scope, but that in practical application was preventing their investigation. Although this point is not

a previous Report the Commission (Report 25/98, cit. *above* at fn. 59), the Commission derived the *right to truth* also from Art. 13.1.

⁹¹ *Barrios Altos* (Merits), cit. *above* at fn. 81, para. 51, *Conclusion 4*.

⁹² *Moiwana*, cit. *above* at fn. 17. Moiwana is a small village composed of descendants of those who were forcefully displaced from Africa during the slave trade, that moved within the internal eastern forests of Suriname, cf. *ivi*, paras 86.1-86.11.

⁹³ *Ivi*, para. 86.15.

⁹⁴ *Ivi*, paras 86.39-86.40.

⁹⁵ *Ivi*, paras 86.39-86.40.

⁹⁶ *Ivi*, para. 165.

irrelevant, the Court did not touch upon it and maintained a traditional approach to the problem: it referred first to Arts 1 and 2 in a way used also in other cases of the same period,⁹⁷ asserting the invalidity of every law that restricts the enjoyment of human rights guaranteed by the Convention, concluding that “no domestic law or regulation – including amnesty laws and statutes of limitation – may impede the State’s compliance with the Court’s orders to investigate and punish perpetrators of human rights violations”.⁹⁸

Afterwards, the Court detailed a more specific reasoning:

“amnesty laws, statutes of limitation and related provisions that hinder the investigation and punishment of serious human rights violations – such as those of the present case, summary, extra-legal or arbitrary executions – are inadmissible, as said violations contravene non-derogable rights recognized in international human rights law”.⁹⁹

Therefore, the Court evoked a general “international human rights law”, of which the Convention is the expression and specific concretization, establishing the invalidity of those amnesties that prevent the investigation of *serious human rights violations* and to enforce *non-derogable rights*.

Putting together the two parts of the decision: according to the criteria established in the first part

⁹⁷ Cf. *Gómez-Paquiyaury Brothers v. Peru* (Merits, Reparations and Costs), 8 July 2004, Series C, No. 110, para. 151; *Bulacio v. Argentina* (Merits, Reparations, and Costs), 18 September 2003, Series C, No. 100, paras 117 and 142; *Five Pensioners v. Peru* (Merits, Reparations, and Costs), 28 february 2003, Series C, No. 98, para. 164.

⁹⁸ *Moiwana*, cit. above at fn. 17, para. 167.

⁹⁹ *Moiwana*, cit. above at fn. 17, para. 206. On non-derogable human rights see already *Serrano-Cruz Sisters v. El Salvador* (Preliminary Objections), 23 November 2004, Series C, No. 118, para. 172; *Gómez-Paquiyaury*, cit. above at fn. 97, para. 148; *19 Merchants v. Colombia* (Merits, Reparations and Costs), 5 July 2004, Series C, No. 109, para. 175.

(no law can impede a state's investigation and punishment of perpetrators of human rights violations), the Suriname amnesty of 1992 should be void as incompatible with the Convention, in particular Arts 1 and 2. On the contrary, however, according to the criteria established in the second part (no amnesty can limit the investigation of *serious* human rights violations, like crimes against humanity), the Suriname amnesty should have been declared compatible with the general international law of human rights, and the Court should have contested only the mistaken interpretation of the law by the national judges.¹⁰⁰

5.3 A second blow against the validity of amnesties: Almonacid-Arellano v. Chile, with a reflection on crimes against humanity

The second major step against amnesties was taken by the Court in 2006, in the *Almonacid-Arellano* decision.¹⁰¹ While in the *Moiwana* decision the Court dealt with both the crimes committed by the state's agents and the amnesty law, in the *Almonacid-Arellano* decision of 2006 both the requests of the Commission and the findings of the Court were focused only on the legitimacy of amnesty decree 2.191 of 18 April 1978.¹⁰²

Compared to the previous decisions, here the Court's evaluation of the amnesty decree focused mainly on the definition of *crime against humanity*: the Court weighed whether the murder of Mr. Almonacid-Arellano was a crime against humanity. To do that the Court started by establishing that in 1973 (the year when the murder was committed) the definition of *crime against humanity* was

¹⁰⁰ *Moiwana*, cit. above at fn. 17, paras 143, 152, 163-167.

¹⁰¹ *Almonacid-Arellano et Al. v. Chile* (Preliminary objections, Merits, Reparations, and Costs), 26 September 2006, Series C, No. 154. On Chilean amnesties and on the history of the Country at the time of their approval see RODRÌGUEZ BRESCIA, cit. above at fn. 81, p. 203 ff.

¹⁰² *Almonacid-Arellano*, cit. above at fn. 101, para. 83. In *Barrios Altos* the Commission presented both the issues, while the Court answered only to the question of amnesties.

already crystalized¹⁰³ and that it included inhuman acts, such as a single murder committed in the context of general and systematic attacks against civilians.¹⁰⁴ The Court then moved on to consider the customary character of the prohibition of these crimes,¹⁰⁵ concluding that the “prohibition to commit crimes against humanity is a *ius cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law”.¹⁰⁶ The Court eventually established that already at that time, in the seventies, international law did not permit the enactment of an amnesty law encompassing crimes against humanity. Also in this case the Court located the reasoning on amnesties within general international law:

“According to the International Law *corpus iuris*, a crime against humanity is in itself a serious violation of human rights and affects mankind as a whole.”¹⁰⁷

Afterwards the Court held that crimes against humanity violate certain rights established in the Convention whose violation cannot go unpunished,¹⁰⁸ and that an amnesty cannot include them.¹⁰⁹

¹⁰³ *Ivi*, para. 93. This part occupies a central place in the Court’s reasoning, and covers many paragraphs. The Court takes into account the preamble of the Hague Convention on the *ius in bello* of 1907 (IV Convention), the declarations made by the Governments of France, United Kingdom, and Russia on 28 May 1915 to condemn the genocide of the Armenians, Art. 6.c) of the Charter of the Nürnberg Tribunal and Art. 5.c) of the Tokyo Tribunal Charter (*ivi*, paras 94-95).

¹⁰⁴ “A single illegal act as those mentioned above, committed within the described background, would suffice for a crime against humanity to arise”, *ivi*, para. 96, referring to the ICTY decision on the *Tadic* case.

¹⁰⁵ *Ivi*, paras 97 e 98; see also paras 100-104.

¹⁰⁶ *Ivi*, para. 99; see also para. 105.

¹⁰⁷ *Ivi*, para. 110.

¹⁰⁸ *Ivi*, para. 111. The Court relied on to para. 41 of *Barrios Altos*, by which every disposition of amnesty, prescription, or any other measures that prevent investigations and punishment of the

Lastly, the Court considered whether the Chilean amnesty was compatible with the general obligation to prosecute the authors of serious violations of human rights,¹¹⁰ and with the obligation envisioned at Art. 2 of the Convention.¹¹¹

The Court, notwithstanding a short mention of self-amnesties, a law “issued by the military regime to avoid judicial prosecution of its own crimes”,¹¹² did not deal at length either with that concept, or with the democratic legitimacy of the process of enactment of the law,¹¹³ going beyond the long discussions articulated by the Commission in the Chilean cases.¹¹⁴

authors of serious violations of human rights violates the Convention, *ivi*, para. 112.

¹⁰⁹ *Ivi*, para. 114: “[T]he States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty”.

¹¹⁰ *Ivi*, paras 115-116, 129, the Court clearly reaffirmed the presence of an obligation for every state to prosecute the authors of crimes against humanity: “...The crime committed against Mr. Almonacid-Arellano cannot be susceptible of amnesty pursuant to the basic rules of international law since it constitutes a crime against humanity. The State has violated its obligation to modify its domestic legislation in order to guarantee the rights embodied in the American Convention because it has enforced and still keeps in force Decree Law No. 2.191, which does not exclude crimes against humanity from the general amnesty it grants”.

¹¹¹ *Ivi*, paras 118-119.

¹¹² *Ivi*, para. 120.

¹¹³ *Ivi*, para. 120: “The fact that such provisions have been adopted pursuant to the domestic legislation or against it, is irrelevant for this purpose”.

¹¹⁴ *Ivi*, paras 122-123.

5.4 The Court between 2001 and 2006: the maintenance and the enrichment of an articulated terminology

These decisions of the Court represent a big step forward in the definition of the dialectic between states and international courts on impunity and effective implementation of human rights. However, they are of little help in clarifying the definitions, the function, and the logical connections between the concepts already used in the work of the Commission. The Court often used the same ideas as the Commission, so, taking the structure already adopted *above* at sect. 4.4, it is possible to go through certain notable concepts, and consider how they evolved.

Self-amnesty. In *Barrios Altos* the Court did not try to give a clear definition of this concept, and its effective function is not clear.¹¹⁵ Nor does the Court discuss this point in depth in the *Almonacid-Arellano* case: it gives a short definition – “[a law] issued by the military regime to avoid judicial prosecution of its own crimes”¹¹⁶ – very similar to what the Commission had already said in the Reports about Chile,¹¹⁷ but does not further clarify how such a concept is useful in assessing the validity of an amnesty. If we read the amnesty laws it emerges that for the Court a self-amnesty is not only an amnesty applicable *only* to the members of public authorities, but includes an amnesty applicable *also* to them. For example, the Peruvian amnesty law No. 26479 “exonerated members of the army, police force and *also civilians* who had violated human rights or taken part in such violations from 1980 to 1995 from responsibility”.¹¹⁸

Legitimacy. In none of the above commented cases did the Court refer to the analysis proposed by the Commission in the Chilean cases for the process of approval of the amnesty law, and the arguments against the relative strength of laws approved by a scarcely democratic military regime.

¹¹⁵ *Barrios Altos*, cit. *above* at fn. 81, para. 43.

¹¹⁶ *Ivi*, para. 120.

¹¹⁷ *Si v. above* sect. 4.2. In *Moiwana*, cit. *above* at fn. 17, this issue has not been treated.

¹¹⁸ *Barrios Altos* (Merits), cit. *above* at fn. 81, p. 4, para. 2, let. *i*), emphasis added.

Unexpectedly, the only place that addresses the importance of the concepts of *self-amnesties* and of the *legitimacy of the amnesty* is in a separate opinion, handed down by Judge Garcia-Ramirez, attached to a judgment against Peru that does not directly deal with amnesties, *Castillo-Páez*. In the opinion he explained:

“[A] distinction must be made between the so-called ‘self-amnesty laws’ promulgated by and for those in power, and amnesties that are the result of a peace process, with a democratic base and reasonable in scope, that preclude prosecution for acts or behaviors of members of rival factions but leave open the possibility of punishment for the kind of very egregious acts that no faction either approves or views as appropriate”.¹¹⁹

Serious crimes. The argument regarding the seriousness of the crimes at stake, and the impossibility for a state to grant an amnesty to the authors of serious crimes, has been the object of very deep analysis in the *Almonacid Arellano* judgment, in particular in the definition of a *crime against humanity* and in the reference to the *ius cogens*. However, in the *Moiwana* case, notwithstanding that the national legislation explicitly prohibited the applicability of the amnesty to the authors of crimes against humanity, the Court did not engage in an analysis of such an issue (an amnesty law that complies in the abstract while not in application), and instead declared the incompatibility of the amnesty law with the Convention.

General international law. Another argument adopted by the Court in these cases, overlapping in part with the previous point, is the contrariness of the amnesties to general international law. The idea is that the Court acknowledges a general evolution of international law that prescribes prosecution of the perpetrators of certain violations, and interprets the Convention in light of it. Therefore, to that purpose, *Barrios Altos* and *Moiwana* mention the “international human rights

¹¹⁹ Concurring Vote of Judge García-Ramirez, *Castillo-Páez v. Peru* (Reparations and Costs), 27 November 1998, Series C, No. 43, para. 9.

law,” and *Almonacid-Arellano* the “International Law *corpus iuris*”.¹²⁰

Strongly prescriptive interpretation of the obligations of the Convention. Naturally, together with the reasonings just described, all three decisions address the compatibility of amnesty laws with Articles 8.1 and 25 of the Convention, and with the general provisions at Articles 1.1 and 2. As for the Commission cases (see sect. 4.4), here too there is a clear impression that the previous arguments are redundant if compared to this last one, given the absolute, cogent interpretation of these Articles endorsed by the Court.

On the *right to (judicial) truth*, these decisions confirm the existence of such a right.¹²¹ In *Barrios Altos* the Court clearly stated that notwithstanding the works of the Truth Commission, Peru had violated the right to truth enshrined in the Arts 8 and 25 of the Convention. While in certain reports of the Commission this right was also established by reference to Art. 13.1 (“freedom to seek, receive, and impart information and ideas of all kinds”, that is, the right to information), in these decisions this is not the case: even more clearly than in the Commission’s reports what is at stake is the right to judicial truth, based on Arts. 8 and 25 (*right to a fair trial*, and *right to access to justice*):

“[T]he right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding

¹²⁰ On this issue see also the Concurring Opinion of Cançado Trindade attached to the *Barrios Altos* case, cit. *above* at fn.81.

¹²¹ Cf. also *Moiwana*, cit. *above* at fn. 17, para. 204 “[A]ll persons, including the family members of victims of serious human rights violations, have the right to the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations. This right to the truth, once recognized, constitutes an important means of reparation. Therefore, in the instant case, the right to the truth creates an expectation that the State must fulfill to the benefit of the victims”.

responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention”.¹²²

Annulment of the laws. Both in the *Barrios Altos* and in *Almonacid-Arellano* the Court, notwithstanding its lack of such a power,¹²³ held that “Decree Law No. 2.191 does not have any legal effects”.¹²⁴ In the *Moiwana* judgment, on the contrary, the Court just requested Suriname to “remove all obstacles, *de facto* and *de jure*, that perpetuate impunity” without stating that the amnesty was void.¹²⁵ Compared to the Commission’s reports, therefore, certain decisions of the Court used a power of abrogation that has not been attributed to it by the Convention.

Judicial policy adopted by the Court. As in the cases decided by the Commission, the Court too preferred to deal at length with the amnesty provisions rather than the other violations of the Convention related to the case. In the *Moiwana* case the Court also took into consideration the crimes committed by the state agents; however, in the *Barrios Altos* and *Almonacid-Arellano* cases

¹²² *Barrios Altos*, cit. *above* at fn. 81, para. 48. Judge García-Ramírez, in his Concurrent opinion, stressed that “The Court [...] founds the right to truth on the articles on due process and on the access to justice, and therefore equates the right to truth to the right to investigation and prosecution”. In the Report 25/98 (Chile), cit. *above* at fn. 59, the Commission derived the right to truth also from Art. 13.1. In *Moiwana*, in the section dedicated to the *reparations*, the Court mentioned the right to truth, without referring to any article of the Convention, *Moiwana*, cit. *above* at fn. 17, paras 204-5. On the insufficiency of the truth commission in satisfying the right to truth see *Almonacid*, cit. *above* at fn. 101, para. 82(26), and para. 83, in which very concisely the Court says that “The Amnesty Law affects the rights of the victims to get justice”.

¹²³ Cf. Art. 63.

¹²⁴ In this way *Barrios Altos*, cit. *above* at fn. 81, para. 44; see also *ivi*, para. 50.4, and *Almonacid-Arellano*, cit. *above* at fn. 101, para. 119.

¹²⁵ *Moiwana*, cit. *above* at fn. 17, para. 207.

the Court did not touch on other violations at all. The policy adopted by the Court in the Peruvian and Chilean cases can be seen as a consequence of the exceptional role of the Court, which is called upon to decide only a few cases each year. Yet if this seems a plausible explanation of *why* the Court struck down an amnesty law, it does not say much about the absence in certain cases of a decision on the violation of Arts 4 and 5. The next section will explore the reasons behind this approach taken by the Court.

6. *Some further reflections on the context of the proceedings*

6.1 *Little disputed disputes*

A striking feature of these cases is the attitude that the parties maintained during the proceedings. In *Barrios Altos* and in *Almonacid-Arellano*, Peru and Chile did not defend themselves before the Court, but admitted their responsibility, both for the criminal acts, and for the amnesty. While the first admission does not raise a serious issue – luckily they did not defend their crimes –, the second is more interesting – why they do not defend a law, something that is still in their premises, and that they can challenge by themselves?

In *Barrios Altos* Peru recognized the massacre and its responsibility for having violated Arts 4 and 5 of the Convention.¹²⁶ So, rightly, Peru admitted the past criminal deeds; but the Government took a second notable step. The State's agent, during the hearing, stated:

“The Government [of Peru] faces an extremely complex human rights agenda[; as part

¹²⁶ *Barrios Altos*, cit. above at fn. 81, paras 35, 38, 40, and 46. See also *l'Escrito mediante el cual el Agente y el Agente Alterno informaron que el Estado reconoce su responsabilidad internacional, 15 February 2001*: “El Estado peruano reconoce su responsabilidad internacional en el caso materia del presente proceso, por lo que iniciará un procedimiento de solución amistosa ante la Comisión Interamericana de Derechos Humanos, así como ante los peticionarios en este caso”, available at <http://www.corteidh.or.cr/docs/casos/barrios/reconoc.PDF>.

of this] re-establishing and normalizing its relations with the Honorable Inter-American Court of Human Rights has been and will be an essential priority...

...

[With regard to the] Barrios Altos case[, ...] substantial measures have been taken to ensure that criminal justice will make a prompt decision on this case. However, we are faced with an obstacle, ... we refer to the amnesty laws. The amnesty laws ... directly entailed a violation of the right of all victims to obtain not only justice but also truth...

...

...[T]he State reiterated its willingness to enter into direct discussions in order to reach an effective solution ... to attack the validity of the procedural obstacles that impede the investigation and punishment of those who are found responsible in the instant case; we refer, in particular, to the amnesty laws». ¹²⁷

In *Almonacid-Arellano* the Chilean state raised only two preliminary objections: the lack of *ratione temporis* competence of the Court, and the failure to exhaust the domestic remedies. ¹²⁸

Then, Chile recognized its own responsibility for the facts of the case, ¹²⁹ and did not defend its own amnesty decree. The words of Chilean Agent quoted in the sentence are abundantly clear:

“I want to make it clear, and I will repeat here that the Chilean State is not defending the Decree Law of Amnesty. On the contrary, we do not consider that the Decree Law of

¹²⁷ Statement reproduced in *Barrios Altos*, cit. *above* at fn. 81, at para. 35.

¹²⁸ *Almonacid-Arellano*, cit. *above* at fn. 101, para. 38. A critics on the Court’s approach to these objection can be read in FABIA FERNANDES CARVALHO VEÉOSO, ALBERTO DO AMARAL JÚNIOR, *The Inter-American System as New Grossraum? Assessing the Case Law of the Inter-American Court of Human Rights*, ESIL Conference Paper Series, I-1, p. 8 ff.

¹²⁹ *Almonacid-Arellano*, cit. *above* at fn. 101, para. 82.

Amnesty has any ethical or juridical value”.¹³⁰

And then, in another passage, interpreting the Court’s position even more strongly, Chile declared that “amnesty or self-amnesty laws are contrary to international human rights law”, and that “the case law of the higher courts of justice of Chile, traceable from 1998, has established several mechanisms to avoid the application of the Amnesty Decree Law, and so avoid its negative effects regarding the respect for human rights”, making then an explicit reference to *Barrios Altos*, and saying that Chile:

“endorses the opinion of the Inter-American Court, which establishes that as a matter of principle, it is desirable that no amnesty laws exist, but in case they do, they must not be an obstacle for the respect of human rights, as established by the Court in the Case of *Barrios Altos*”.¹³¹

In short, the two seminal cases on the issue of amnesties were discussed in a (highly unusual for a Court) situation of agreement between claimants, respondent state, and Court.

6.2 Why?

We could ask why the governments took such positions instead of engaging in the process of

¹³⁰ Reproduced in *Almonacid-Arellano*, cit. *above* at fn. 101, para. 92.

¹³¹ *Ivi*, para. 85. Chile maintained a critical position towards the amnesty decree also in previous proceedings before the Commission, cf. Report 34/96, *above* at fn. 49, paras 59-60, 80, 94-102; Report 36/96, cit. *above* at fn. 49, paras 60-61, 81, 95-103. The absence of a defensive line by Peru emerges also in *La Cantuta v. Peru* (Merits, Reparations, and Costs), 29 November 2006, Series C, No. 162, para. 169. See also *ivi*, para. 113: “It is worth mentioning that the State itself recognized in the instant case that ‘amnesty or self-amnesty laws are, in principle, contrary to the rules of international human rights law’”, quoting the *Final written arguments of the State (Record on the Merits of the Case, Volume III, f. 723)*.

abrogation of the law, and why, for its part, the Court did not dismiss the case for lack of a dispute.¹³²

The historical context was favorable to this unusual convergence. The distinct positions of the states can be explained by (and was made possible because of) the special historical moment in which the cases were discussed and decided: at the national level, both the Peruvian and Chilean societies were dealing with (and moving away from) their dramatic recent pasts;¹³³ while during the same decade states ceased to perceive supranational justice as an intrusion in domestic politics, and began to see it as a regular player in public life.¹³⁴

If we consider the possible reasons behind the positions taken by the states and the Court, there

¹³² This fact was explicitly acknowledged by the Court itself in *Almonacid-Arellano*, cit. *above* at fn. 101, para. 92: “the State has merely objected to the admissibility of the case ... and has pointed out that the Chilean courts of justice no longer enforce Decree Law No. 2.191. The Court points out that the State has not affirmed at any time that the said decree law does not violate the American Convention”.

¹³³ Peru was at the time joining again the Organization of American States after the dictatorship of Fujimori. During the dictatorship the Government was behind the crimes discussed in *Barrios Altos*, a massacre perpetrated by the para-legal *Grupo Colina* in contrasting internal terrorism, in particular against the politically oriented organization of *Sendero Luminoso*. The authoritarian government of Augusto Pinochet was already a long time gone when the Chilean amnesty was challenged before the Court; however a disagreement within the society and between the Government and the Supreme Court was still enduring on the validity and effects of the amnesty decree, cf. *Almonacid-Arellano*, cit. *above* at fn. 101, paras 82(11) – 82(23), e 82(25).

¹³⁴ On the importance of the historical moment in understanding these decisions see JAMES L. CAVALLARO, STEPHANIE E. BREWER, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, in *Am. J. Int'l L.*, 102, 2008, p. 82.

are no obvious conclusions. The parliaments, the national courts and the governments could have removed their laws, but they did not. The governments accepted that the debate on the validity of their amnesties would be moved from the open fora of their national institutions and their societies to the quiet of a courtroom. For good, maybe: no more factions, no more divisions, no partisan decisions by a majoritarian and contingent fraction of the parliament, no arbitrary intervention of this or that government (the government of Peru changed precisely in the years in which *Barrios Altos* was discussed): just an external and unified voice coming in from outside, and revealing the way forward with authority. Accordingly, the Court's choice not to dismiss could be read either as mistrust of the ability of national institutions to remain constant on the issue over time, where the Court preferred to close the cases without awaiting further action by them, or as a help to the governments to overcome internal conflict, reaffirming the law in a clear way, with a voice not involved in the internal partisanship. Under the latter scenario the government's intent comes in a moment in which it is possible to address the issue, and the Court takes advantage of it to reaffirm certain rights that are under other circumstances difficult to state.

But it could be also for bad: as the governments rely on the external intervention of a Court, the dialogue about and awareness of a decision are no longer part of the society; hence the duty and the burden of an uneasy but fundamental choice shared among people and institutions are shifted away. It is also possible, therefore, to see this dynamic as merely an occasion for the Court to take advantage of the situation to consecrate an idea, without making a clear assessment of what is the applicable law on amnesties, and therefore not contributing to the establishment of a truly democratic society.

One can pick one or the other explanation: only further inquiries conducted on different levels, mainly historical, political, and sociological, can reveal the reasons behind these choices of the governments and Court. Such a comprehensive analysis is not within the scope of the present paper. But, in conclusion, as we read the other decisions on the legitimacy of amnesties in international law, the bottom line is that *the two seminal cases were decided in an unusual situation of agreement*

among the three involved entities, claimant, respondent, and Court, on the core issue of the dispute.

6.3 *Why the presence of a dispute is important*

Leaving behind disquisitions on the roots and purpose of these “disputes little disputed”, in any case this attitude open to a situation that for the correct functioning of the American legal system can be *dangerous* in some ways.

The first danger regards the clarity of the law: the Court, free from the adversarial opposition between the parties, risks declaring a law without caring for the necessary precision. This is clear in the cases just described: there are lists of concepts that, being confused, weaken the decision instead of strengthening it.¹³⁵

The second danger concerns the respondent state, in the event that the Court takes the agreed-upon ground as a starting point to go further in an unpredictable way.

A third risk regards the other states belonging to the Inter-American jurisdiction. Other states by following the decisions of the Inter-American Court will import a finding without understanding the special conditions that provoked it. This dynamic of influence can take different legal forms. The first is the spontaneous cross-reference between courts. For example, the Supreme Court of Uruguay challenged the amnesty law of Uruguay on the basis of *Barrios Altos*, without any decision of the San José Court against Uruguay.¹³⁶ A second form is top-down, and is the so-called

¹³⁵ On the clarity of a decision as necessary element for its legitimacy see ARMIN VON BOGDANDI, INGO VENZKE, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in *German Law Journal*, 12, 2011, p. 986 ss.

¹³⁶ *De Nibia Sabalsagaray Curutchet, Supreme Court of Justice of Uruguay, Order, 19 October 2009*, No. 365/09, *Preamble paragraph III.2 and III.8*, and paras 6-15. Other Court, as in El Salvador, defended their amnesty, see *above* fn. 22, while the Constitutional Court of Columbia condemned only a certain kind of amnesties, see MALLINDER, *Amnesties* cit., *above* at fn. 15, pp.

control of conventionality, a legal technique recently introduced by the Court that echoes the *control of constitutionality* typical of certain constitutional systems; according to it, “the Judiciary must exercise a sort of ‘conventionality control’ between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights”.¹³⁷ This control must include not only the Convention, but also the interpretation given by the Court.¹³⁸ What the Supreme Court of Uruguay spontaneously did becomes mandatory now under this doctrine. A third form comes from the bottom up, through a domestic monist constitution that puts international law

838-9, and BINDER, *The Prohibition* cit., above at fn. 1, p. 1224. A coup in Honduras in 2010, with new elections and a subsequent amnesty raised the problem again, see OAS Country Report on Honduras, 2010, paras 106-110 (on amnesties), and 111-117 (on the right to truth), at <http://www.oas.org/en/iachr/defenders/reports/country.asp>.

¹³⁷ *Almonacid-Arellano*, cit. above at fn. 101, para. 124.

¹³⁸ “To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention”, *ivi*, para. 124; BINDER, *The Prohibition* cit. above, fn. 1, pp. 1212-1214; LAURENCE BURGORGUE-LARSEN, *La erradicacion de la impunidad: Claves para descifrar la politica jurisprudencial de la Corte Interamericana de Derechos Humanos*, Working Papers on European Law and Regional Integration, WP IDEIR, 9, 2011, p. 10 ff.. The *control of conventionality* has been explained again, in more details, in the case *Radilla-Pacheco v. Messico* (Preliminary objections, merits, reparations, and costs), Series C, No. 209, 23 November 2009, paras 339-340, with the comments of KARLOS CASTILLA, *El control de convencionalidad: un nuevo debate en México a partir de la sentencia del caso Radilla Pacheco*, in *Anuario Mexicano de Derecho Internacional*, Vol 9, 2011, pp. 593-624. This technique has been also mentioned in one of the latest cases on amnesties, cf. *Guerrilha de Araguaia*, cit. above at fn. 4, para. 177.

and the American Convention at the top of the system of the sources of law.¹³⁹ In such a case, the decisions of the Inter-American Court have a direct impact in the domestic sphere not for a free emulative spirit of the national court, nor in conformity with the control of conventionality, but because of a national provision. The clearest example of such a dynamic is the *Simón* case, decided by the Supreme Court of Argentina.¹⁴⁰ In this case international law and *Barrios Altos* decision were used as grounds to annul two amnesty laws¹⁴¹ approved in Argentina during the eighties.¹⁴²

All these dynamics entail that, for one reason or for another, the leading cases on amnesties – cases that were made possible by the attitude of the respondent states and by the very peculiar historical and political circumstances – have had a very wide impact on all of Latin America. If, in general, this deference to the Court is a positive practice that leads to the creation of an homogeneous legal space, the present instance runs the risk of diminishing states' freedom, as the *particular political choice* of one state reaches the others cloaked in the generalizing authority of a court's reasoning. Consider *Barrios Altos* and *Almonacid-Arellano*, where governments with specific political electoral mandates decided to deal with the past events of its own country in a

¹³⁹ See for example Art. 75 of the Argentinian Constitution of 1994.

¹⁴⁰ *Simón, Julio Héctor y otros*, Supreme Court of Argentina, Causa No. 17.768, 14 June 2005, at <http://www.dipublico.com.ar/juris/simon.pdf>. It should be noted that a federal court in Argentina already contested, on the same case, the validity of the amnesty, on the 6 March 2001, cf. DELLA MORTE, *L'ammnistia cit., above* at fn. 1, pp. 163-165; however, the Supreme Court relied extensively on *Barrios Altos*.

¹⁴¹ Law 23.492, *De punto final*, and 23.521, *De obediencia debida*, were approved on the 29 December 1986 and on the 9 June 1987, at the end of the so called *Guerra sucia*, dirty war, granting an amnesty to the military agents involved.

¹⁴² See CHRISTINE A. E. BAKKER, *A Full Stop to Amnesty in Argentina*, in *Journal of International Criminal Justice*, 3, 2005, pp. 1106-1120.

certain way, that is by removing an amnesty; accordingly, it did not defend the amnesty before the Court. As a result, the decision of the Court also has an impact on those states not parties to the case, the governments of which, under other political mandates, decide to deal with their pasts in a different way. As a result, in short, the political opinion (not the law) exercised by a government through the intermediary of the Court becomes compulsory also for the other states, even when those others decided to transition to democracy in a different (but maybe still effective) way.

7. *Second phase: consolidation of a jurisprudence*

After these first cases that gave the basic structure to the Inter-American jurisprudence on amnesties, the Commission and the Court came again to the question of amnesties without modifying the general pattern that had emerged in the previous decisions. It can be noted the concepts of self-amnesty and of nullity *ab initio* were not used anymore. They appear in separate opinions,¹⁴³ but they were not discussed by the majority.

The arguments on Art. 2, and on the seriousness of the crimes and/or the violated rights became

¹⁴³ *La Cantuta*, cit. above at fn. 131, *Separate opinion of Judge García-Ramírez*, para. 3: “To sum up, the Inter-American Court’s position on this issue upholds: a) the full force and effect of the obligations to respect rights and ensure their exercise, under Article 1 of the American Convention on Human Rights (ACHR), notwithstanding any domestic-law obstacles that might hinder due compliance with such obligations that the State has undertaken, acting in its sovereign capacity, upon becoming a party to the Convention; b) the resulting eradication of the impunity that such obstacles might allow in connection with particularly egregious crimes; and c) the State’s duty to adopt, at the domestic law level, such measures as may be required to enforce said duties and root out impunity, pursuant to the provisions of Article 2 of the ACHR”. See also the Concurring Opinion of Judge Cançado-Trindade, paras 23-27, and the comment, at paras 28-32, on the cases *Barrios-Altos* and *Almonacid-Arellano*.

the most decisive. In the case *La Cantuta v. Peru* the Court repeated more or less what it had already said in *Barrios Altos*,¹⁴⁴ and insisted at length on the contrariety of amnesties to Art. 2¹⁴⁵ and to *ius cogens*.¹⁴⁶ For the rest, even if the Commission requested the Court “to order the State ... to pass, as part of its domestic law, any and all such measures as may be required to effectively guarantee that Laws No. 26,479 and No. 26,492 will have no legal effects, as their provisions are in conflict with the American Convention”,¹⁴⁷ the Court only repeated that the Peruvian amnesties since *Barrios Altos* were not anymore existent.¹⁴⁸

In the case of the *Massacre of La Rochela* the Court took into consideration the seriousness of the crimes of which investigation was being prevented by the Colombian program of dismantling the paramilitary groups¹⁴⁹. The decree establishing the program envisioned at its Art. 21 that the amnesty (“perdono” in the Colombian law) could not apply to those that must be prosecuted under

¹⁴⁴ *La Cantuta*, cit. *ivi* at fn. 131, paras 152, 167.

¹⁴⁵ *Ivi*, para. 165 ff.

¹⁴⁶ *Ivi*, paras 157, 160, 225, 226.

¹⁴⁷ *Ivi*, para. 193.e).

¹⁴⁸ *Ivi*, paras 189 and 226.

¹⁴⁹ *La Rochela Massacre v. Colombia* (Merits, Reparations, and Costs), 11 May 2007, Series C, No. 163, para. 181: “On January 22, 2003, the Government adopted Decree 128 of 2003 in order to regulate the implementation of Law 418 of 1997. This decree established socio-economic and other benefits for those individuals who demobilized. Article 13 established ‘juridical benefits’ and stipulated that, ‘pursuant to the law, those who formed part of illegal armed organizations who demobilize will have the right to a pardon, conditional suspension of the execution of sentence, cessation of proceedings, preclusion of the investigation, or a writ of prohibition, according to the stage of the proceedings [...]’.”

the constitution of Colombia and international treaties.¹⁵⁰ The Court said:

“[I]t should be highlighted that the events described in the instant case (*infra* para. 106 to 120) are *particularly serious*, as they were designed to thwart the investigation and punishment of *gross violations of human rights*, and in which the execution of the judicial officers was committed in the *most inhuman manner*”.¹⁵¹

The decision gave certain guidelines to Colombia for the correct application of the amnesty law (a dismantling program),¹⁵² but in any case, as in *Moiwana*, the Court stressed the contrariety to the Convention of all the laws perpetuating impunity.¹⁵³

¹⁵⁰ From the amnesty were excluded “[t]hose that are being tried or have been convicted for crimes which, pursuant to the Constitution, the law, or the international treaties signed and ratified by Colombia, are not subject to this type of benefit”, Decree 128, 22 January 2003, on the application of the law 418 of 1997, as modified by the law 548 of 1999 and from law 782 of 2002, on the programs of reintegration in society, *ivi*, para. 181.

¹⁵¹ *Ivi*, para. 103 (internal fn. omitted; emphasis added).

¹⁵² “[T]he Court deems it important to indicate, based on its jurisprudence, some aspects of the principles, guarantees and duties that must accompany the application of the juridical framework of the demobilization process. Likewise, it is necessary to indicate that state agents and authorities are obligated to guarantee that internal norms and their application conform to the American Convention”, *ivi*, para. 192 (internal fn. omitted).

¹⁵³ *Ivi*, para. 294: “This Court has consistently found inadmissible all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility, because these provisions and measures are intended to prevent the investigation and punishment of those responsible for serious human rights violations, such as torture, extrajudicial, summary or arbitrary execution and forced disappearance. Such violations are prohibited because they violate non-derogable rights recognized by international human rights law” (internal fn. omitted).

For some years afterward the Commission and the Court did not address disputes centered on amnesties.¹⁵⁴ Any reference to amnesty laws was made as a prong (with prescriptions, for example) of a generic reference to the *fight against impunity*. This position can be found in several other decisions of the Court: *Las Dos Erres* (2009);¹⁵⁵ *Ibsen Cárdenas and Ibsen Peña* (2010);¹⁵⁶ *Cantoral-Huamaní and García-Santa Cruz* (2010);¹⁵⁷ *Manuel Cepeda Vargas* (2010).¹⁵⁸ The Commission, as petitioner in the *Tiu Tojín* case, raised the question of the legitimacy of the

¹⁵⁴ The Commission held a report on the Colombian amnesty also in 2006, *Pronunciamiento de la Comisión Interamericana de Derechos Humanos Sobre la aplicación y el Alcance de la Ley de Justicia y paz en la República de Colombia, 1 agosto 2006*, Doc. OEA/Ser/L/V/II.125, reperibile al sito <http://www.cidh.oas.org/pdf%20files/Pronunciamiento%20Ley%20de%20Justicia%20y%20Paz.pdf>.

¹⁵⁵ “*Las Dos Erres*” *Massacre v. Guatemala* (Preliminary Objections, Merits, Reparations, and Costs), 24 November 2009, paras 129-131, and 233.

¹⁵⁶ *Ibsen Cárdenas and Ibsen Peña v. Bolivia* (Merits, Reparations, and Costs), 1 September 2010. This case deals mainly on prescription; however, at para. 207, says: “...in certain circumstances, international law considers statutes of limitations to be inadmissible and inapplicable, as well as amnesty laws and the establishment of exemptions of responsibility, in order to maintain in force the punitive power of the State repetition, need to be repressed” (internal fn. omitted). See also para. 237.

¹⁵⁷ *Cantoral-Huamaní and García-Santa Cruz v. Peru* (Preliminary Objections, Merits, Reparations, and Costs), 10 July 2007, para. 190 and para. 9 of the operative part.

¹⁵⁸ *Manuel Cepeda Vargas v. Colombia* (Preliminary Objections, Merits, Reparations, and Costs), 26 May 2010, paras 215-216, with also references to the *right to truth*.

Guatemalan amnesty;¹⁵⁹ this law was not really pertinent to the facts discussed in the case,¹⁶⁰ and the Court answered with a very generic reference to the duty of the state under international law.¹⁶¹

8. *The latest cases: Guerrilha do Araguaia, Gelman, and The Massacres of El Mozote.*

8.1 *The three amnesties*

Ten years after the judgment on the *Barrios Altos* massacre, and 25 years after the first reports of the Commission on the validity of amnesties, the Court returned to this question in three decisions: *Guerrilha do Araguaia* in 2010,¹⁶² *Gelman* in 2011,¹⁶³ and *The Massacre of El Mozote* in 2012.¹⁶⁴

¹⁵⁹ *Tiu Tojín v. Guatemala* (Merits, Reparations, and Costs), 26 November 2008, para. 89.

¹⁶⁰ *Ivi*, para. 90.

¹⁶¹ “[W]e should reiterate to the State that the prohibition of the forced disappearance of persons and the related duty to investigate them and, if it were the case, punish those responsible has the nature of *ius cogens*. As such, the forced disappearance of persons cannot be considered a political crime or related to political crimes under any circumstance, to the effect of preventing the criminal persecution of this type of crimes or suppressing the effects of a conviction. Additionally, pursuant with the preamble of the Inter-American Convention on Forced Disappearance, the systematic practice of the forced disappearance of persons constitutes a crime against humanity and, as such, entails the consequences established in the applicable international law”, *ivi*, para. 91, internal fn. omitted.

¹⁶² *Guerrilha do Araguaia*, *cit. above* at fn. 4, in particular paras 126-182.

¹⁶³ *Gelman* *cit. above* at fn. 4, cf. in particular at para. 144-150, and 183-246. A short history of Uruguay after the World War II can be read in RODRÌGUEZ BRESCIA, *Regional cit., above* at fn. 81, p. 198 ff.; a syntethic resume on the whole social and institutional debate over Uruguay amnesties is in DELLA MORTE, *Le amnistie cit., above* at fn. 1, p. 50 ff., in MALLINDER, *Amnesties, cit. above* at fn. 15, pp. 846-849.

These cases are very important because they addressed the question of amnesties again, in depth and detail, showing the limits of the reasoning developed before that point, and rethinking the right to truth in a more convincing and reasonable fashion.

The three cases have some similarities but also some peculiar differences. The three amnesties were debated in society and among institutions in a much richer way than the Chilean and the Peruvian ones were.¹⁶⁵ The Brazilian amnesty was not a self-amnesty, both on account of the plurality of subjects involved in its approval, and on account of its many beneficiaries. With regard to the subjects involved, it was the result of a negotiation between opposite factions after years of political instability, as part of a process of social pacification; moreover, the Supreme Federal Tribunal affirmed that the amnesty was valid.¹⁶⁶ With regard to the effects, it was general, with application to all people, not only state agents like members of the military or the police, and explicitly excluded from its purview the authors of certain grave crimes.¹⁶⁷ In 2010 the Supreme

¹⁶⁴ *The Massacre of El Mozote*, cit. above at fn. 4, in particular paras 265-296.

¹⁶⁵ The two amnesties challenged by the Court were, in the Brazilian case, the Lei n° 6.683, promulgated on 28 August 1979, and, in the Uruguay case, the Ley 15.848, *de Caducidad de la Pretensión Punitiva del Estado*, promulgated on 22 December 1986. On the historical context in which the two amnesties were enacted see RODRÌGUEZ BRESCIA, *Regional* cit., above at fn. 81, p. 171 ff. and DELLA MORTE, *Le amnistie* cit., above at fn. 1, p. 50 ff.

¹⁶⁶ Decision of the 29 April 2010, see *Guerrilha do Araguaia*, cit. above at fn. 4, paras 43-44, 130, and 133.

¹⁶⁷ Art. 1: “É concedida anistia a todos quantos, no período compreendido entre 02 de setembro de 1961 e 15 de agosto de 1979, cometeram crimes políticos ou conexo com estes, crimes eleitorais, aos que tiveram seus direitos políticos suspensos e aos servidores da Administração Direta e Indireta, de fundações vinculadas ao poder público, aos Servidores dos Poderes Legislativo e Judiciário, aos Militares e aos dirigentes e representantes sindicais, punidos com fundamento em

Federal Tribunal of Brazil affirmed that the amnesty was valid.¹⁶⁸

On the contrary, the amnesty law of Uruguay was originally a self-amnesty. Art. 1 established that the “State relinquishes the exercise of penal actions with respect to crimes committed until March 1, 1985, by military and police officials either for political reasons or in fulfillment of their functions and in obeying orders from superiors during the de facto period”.¹⁶⁹ However, it was

Atos Institucionais e Complementares (vetado). ... § 2. Excetuam-se dos benefícios da anistia os que foram condenados pela prática de crimes de terrorismo, assalto, seqüestro e atentado pessoal”; in the translation into English of the Court, Art. 1: “Amnesty is granted to all whom, in the period between September 2, 1961, and August 15, 1979, committed political crimes or derived crimes to these, electoral crimes, to those who had their political rights suspended, and to direct or indirect public servants of the administration, of foundations that belong to the public power, to the public servants of the legislative and judicial powers, to the military, leaders, and union representatives, who were punished based on institutional and complementary acts. § 1 ... § 2 Those excluded from the benefit of this amnesty are persons who were convicted for the crimes of terrorism, assault, kidnapping, and personal attacks”.

¹⁶⁸ Decision of the 29 April 2010, see *Guerrilha do Araguaia*, cit. above at fn. 4, paras 43-44, 130, and 133.

¹⁶⁹ Cf. *Gelman* cit. above at fn. 4, para. 144. In the Spanish original it says: “Reconócese que, como consecuencia de la lógica de los hechos originados por el acuerdo celebrado entre partidos políticos y las Fuerzas Armadas en agosto de 1984 y a efecto de concluir la transición hacia la plena vigencia del orden constitucional, ha caducado el ejercicio de la pretensión punitiva del Estado respecto de los delitos cometidos hasta el 1º de marzo de 1985 por funcionarios militares y policiales, equiparados y asimilados por móviles políticos o en ocasión del cumplimiento de sus funciones y en ocasión de acciones ordenadas por los mandos que actuaron durante el período de facto”.

voted in and then affirmed by several governments, of different political inspiration, that came after the Sanguinetti government that enacted it; it was likewise maintained in 1988 by a decision of the highest authority of the Judiciary, the Supreme Court, albeit by a very thin majority (3-2), and by two referenda by the population in 1989 and in 2009.¹⁷⁰ In short, notwithstanding the fact that it was applicable only to State's agents for deeds carried out under the same Government that enacted the law, on several occasions other Governments, the judiciary, and the people of Uruguay endorsed this decision, thereby transforming the *self*-amnesty ("I, Government, forgive myself, the state's agents") into just an amnesty ("we, Citizens, forgive") though one limited in scope ("we forgive the state's agents, not everybody"). Only recently, in 2009, did the Supreme Court of Uruguay, by acknowledging the San José Court's trend, neutralize the amnesty law by nullifying some central articles;¹⁷¹ it then reaffirmed this decision one year later.¹⁷²

The amnesty of El Salvador (Legislative Decree No. 486, published on March 22, 1993) was a law that followed the work of the truth commission charged, in a difficult process of peace that involved also the United Nations, to close a decade of violence in Central America (see also *above* sect. 4.3).¹⁷³

The three governments defended the three laws in different ways before the Inter-American Court. None of the three states raised any objection to the crimes committed by public agents asserted by the petitioners;¹⁷⁴ however, Brazil very strongly defended the validity of its amnesty

¹⁷⁰ See DELLA MORTE, *Le amnistie* cit., *above* at fn. 1, p. 50 ff., and *Gelman* cit. *above* at fn. 4, para. 144 ff.

¹⁷¹ Case of *Sabalsagaray Curutchet Blanca Stela*, Supreme Court of Justice of Uruguay, 19 October 2009, Judgment No. 365, that abrogated Arts. 1, 3 and 4 of the amnesty.

¹⁷² Supreme Court of Justice of Uruguay, 29 October 2010, Judgment No. 1525.

¹⁷³ *The Massacre of El Mozote*, cit. *above* at fn. 4, para. 266 ff.

¹⁷⁴ Also in these cases the criminal deeds were committed by state officials, *Guerrilha do*

before the Court, while the Governments of Uruguay and El Salvador took a very surrendering position.¹⁷⁵

8.2 *The decisions*

The decisions in *Gelman* and in *Guerrilha do Araguaia* have a very similar structure. The Court in both cases recalled the duties of the states to investigate and punish serious human rights violations,¹⁷⁶ also because of the *cogens* nature of such an obligation.¹⁷⁷ Then it made a long restatement of the evolving legal approach to amnesties in the contemporary general international law, in criminal law, and the Inter-American system of protection of human rights.¹⁷⁸ In both cases the Court referred to its own case law, in particular to *Barrios Altos*, stressing that serious violations of human rights cannot be subject to amnesty,¹⁷⁹ and stressing the incompatibility of every amnesty disposition with the Arts 1.1, 2, 8.1, and 25 of the Convention.¹⁸⁰ Eventually both the cases strongly stressed the nullity of a law that prevents investigation of the most serious violations of human

Araguaia, cit. above at fn. 4, paras 116 and 118; *Gelman*, cit. above at fn. 4, para. 79 ff.; *The Massacre of El Mozote*, cit. above at fn. 4, paras 18-20, 73-121.

¹⁷⁵ *Gelman*, cit. above at fn. 4, paras 19-31, 142; *The Massacre of El Mozote*, cit. above at fn. 4, paras 18-20.

¹⁷⁶ *Guerrilha do Araguaia*, cit. above at fn. 4, paras 137-146; *Gelman*, cit. above at fn. 4, paras 183-194.

¹⁷⁷ *Guerrilha do Araguaia*, cit. above at fn. 4, para. 137; *Gelman*, cit. above at fn. 4, para. 183.

¹⁷⁸ *Guerrilha do Araguaia*, para. 147 ff.; *Gelman*, para. 195 ff., both cit. above at fn. 4.

¹⁷⁹ *Guerrilha do Araguaia*, paras 170-171; *Gelman*, paras 195 ff., 225-226, 232, both cit. above at fn. 4.

¹⁸⁰ *Guerrilha do Araguaia*, paras 140, 173; *Gelman*, paras 189-191, 227-230, and 246, both cit. above at fn. 4.

rights.¹⁸¹

Other concepts articulated in the past were dismissed. In the Brazilian case, *Guerrilha do Araguaia*, the Court *i*) did not take into account the above described social and institutional debates surrounding the amnesty, *ii*) explicitly denied the importance of the concept of self-amnesty,¹⁸² and *iii*) stated that in any case the amnesty is invalid because it prevents the investigation and prosecution of the authors of serious violations of human rights.¹⁸³

In the *Gelman* case the Court took similar positions, but stated them even more strongly. The Court was very clear in saying that the conformity of an amnesty law to the Convention does not depend at all on the subjects enacting it or on the width of the subjects that it covers (“The incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated ‘self-amnesties’ ...”),¹⁸⁴ nor does it depend on the democratic processes that led to its approval,¹⁸⁵ including the referenda:

“The fact that the Expiry Law [...] has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, [...] does not automatically or by

¹⁸¹ *Guerrilha do Araguaia*, para. 174; *Gelman*, para. 232, both cit. *above* at fn. 4. Similarly see. *Barrios Altos* (Merits), cit. *above* at fn. 81, para. 44; however, contrary to *Barrios Altos*, this statement is not repeated in the final part of the cases.

¹⁸² *Ivi*, para. 175.

¹⁸³ *Guerrilha do Araguaia*, cit. *above* at fn. 4, para. 177; see also the position of the respondent state, summarized at paras 130-133.

¹⁸⁴ *Gelman*, cit. *above* at fn. 4, para. 229.

¹⁸⁵ *Gelman*, cit. *above* at fn. 4, para. 239: “The bare existence of a democratic regime does not guarantee, per se, the permanent respect of International Law, including International Law of Human Rights... [P]articularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes a impassable limit to the rule of the majority”.

itself grant legitimacy under International Law”.¹⁸⁶

The key concepts that make an amnesty illegitimate, as summarized by the Court itself, are the fight against impunity, the access to truth, the fact that the amnesty blocks the prosecution of serious violations of human rights, its contrariety to the rule of law, and its non-conformity with the Convention:

“[A]mnesty laws are, in cases of serious violations of human rights, expressly incompatible with ... the provisions of Articles 1(1) and 2... [T]hey impede the investigation and punishment of those responsible for serious human rights violations and, consequently, impede access to victims and their families to the truth of what happened and to the corresponding reparation... This, in turn, favors impunity and arbitrariness and also seriously affects the rule of law, reason for which, in light of International Law, they have been declared to have no legal effect”.¹⁸⁷

In short, these decisions confirmed what was already implicit in the previous reports and decisions of the Commission and the Court. Moreover, after a few cases in which it did not take a position on the issue, the Court stated in both cases that the Brazilian and the Uruguayan amnesties lacked any legal effect.¹⁸⁸ On the contrary, in *The Massacre of El Mozote* decision the Court did not proclaim the *invalidity* of the amnesty law, but contested only its application to the serious crimes at stake (the murderer of almost a thousand persons).¹⁸⁹ In this last decision the Court just referred to the previous decisions to deem as consolidated the previous orientation of the Court on amnesty laws,¹⁹⁰ but concluded keeping the focus only on the compatibility of the amnesty decree with the

¹⁸⁶ *Ivi*, para. 238; see also paras 229 and 239.

¹⁸⁷ *Ivi*, para. 226.

¹⁸⁸ *Gelman*, cit. above at fn. 4, paras 229, 232, 244, 253, and the 11th point of the operative part.

¹⁸⁹ *Ivi*, paras 296 and 403, Order No. 4.

¹⁹⁰ *The Massacre of El Mozote*, cit. above at fn. 4, para. 283.

crimes of the case.¹⁹¹

In these three decisions, two further points are relevant. The first is that, for the first time the Court explicitly took a position on the issue of amnesties and reconciliation. In the *Gelman* case, by quoting a UN document, the Court pointed out that there is no demonstrated direct link between amnesties and reconciliation.¹⁹² Unfortunately, this point was not developed in the main reasoning and remained isolated and abstract, without a thoughtful reflection on the specific situation of Uruguay.

Second, as far as the *right to truth* is concerned, the decisions are different. In *Guerrilha do Araguaia* the Court lays out an interesting construction that more closely resembles certain cases of the Commission than the Court's other decisions on the right to truth (see *above* sect. 4.2): it refers to Art. 13.1 (*right of access to information*), highlighting people's right to be informed of what happened to their relatives,¹⁹³ and asserting that to prevent the interested persons from knowing this information is cruel and inhuman treatment.¹⁹⁴ For this reason, the Court requested the establishment of a truth commission to investigate the disappearance of the members of the group *Guerrilha do Araguaia*,¹⁹⁵ although stressing that the activities of a truth commission "do not substitute the obligation of the State to establish the truth and ensure the legal determination of individual responsibility by means of criminal legal procedure".¹⁹⁶ Therefore, this decision goes more towards a *right to be informed* about crimes perpetrated by the state, rather than a *right to*

¹⁹¹ *Ivi*, para. 284 ff.

¹⁹² *Gelman*, cit. *above* at fn. 4, para. 199. MALLINDER, *Amnesties* cit. *above* at fn. 15, p. 797, stresses the great methodological difficulty of addressing such a question.

¹⁹³ *Guerrilha do Araguaia*, cit. *above* at fn. 4, paras 183 ff., above all paras 196-202.

¹⁹⁴ *Ivi*, paras 239-240.

¹⁹⁵ *Ivi*, paras 294-297.

¹⁹⁶ *Ivi*, para. 297.

judicial truth. On the contrary, the *Gelman* case (and in part *The Massacre of El Mozote* case)¹⁹⁷ distanced itself from the Brazilian case, saying that “in certain circumstances” the right to know the truth derives from Art 13,¹⁹⁸ and insistently re-proposed the *right to truth-access to justice*, already seen in many decisions of the Court, based on Arts 8 and 25.¹⁹⁹

9. A conclusion on the Court’s jurisprudence and on the Interpretation of Article 2

9.1 Profiles of (il)legitimacy of amnesties according the San José Court

Taking as a whole the journey made by the Court, it is now possible to single out the profiles of illegitimacy and compatibility of amnesty laws with the American Convention. The Court started with the ideas previously conceptualized by the Commission; they have been described at length in sect. 5. In synthesis, in the first cases decided by the Court, *three* elements were highlighted as central: the first includes the concepts of *self-amnesty* and *democratic legitimacy*. The second regards the importance of the violated rights and the seriousness of the offenses: we see, depending to the case, references to *crimes against humanity*, *ius cogens*, *serious violations of (fundamental) human rights*, and *peremptory norms*. The third regards the obligations established in the Convention and in particular at Arts 1.1, 2, 8.1 and 25. These three ways of reasoning are used to identify the invalidity of an amnesty.

The decisions *Gelman* and *Guerrilla de Araguaia* rearranged the picture: only two elements, the second (seriousness of the violations) and the third (contrariety to the Convention), were considered important. The first one, on self-amnesty and democratic legitimacy, was explicitly excluded (see

¹⁹⁷ *The Massacre of El Mozote*, cit. above at fn. 4, paras 297-298.

¹⁹⁸ *Gelman*, cit. above at fn. 4, para. 243. However, the court followed the indication distilled in *Guerrilha do Araguaia* to pursue transparency towards the public, by asking that public access be given to all the relevant documents, *ivi*, para. 279 ff.

¹⁹⁹ *Gelman*, cit. above at fn. 4, paras 141(h), 186, 192, 199, 226-228, 243, 259.

above sect. 8.2). The other *two* elements remain relevant: one substantial, regarding the importance of the violated rights and on the seriousness of the offenses, and the other formal, regarding the obligations established in the Convention.²⁰⁰

Considering the *Moiwana* and *La Rochela* decisions, the picture becomes even less colorful. In *Almonacid-Arellano*, for example, the Court clearly said that “[i]nsofar as it was intended to grant amnesty to those responsible for crimes against humanity, [the amnesty decree] is incompatible with the American Convention”.²⁰¹ However, in two cases in which the Court considered two amnesty laws that specifically omitted crimes against humanity from their scope, the Court did not touch on this point. In the *Moiwana* and *La Rochela* decisions the Court did not make a distinction either in theory, in an *obiter dictum*, or in practice, in the operative part, between amnesties that apply to every kind of crime, and those that expressly exclude certain serious crimes from their scope of application.²⁰² By challenging the laws, the Court demonstrated that the seriousness of the crimes covered by an amnesty does not have a place in the Court’s actual reasoning on the legitimacy of amnesties. Only in the last decision on amnesty laws, *The Massacre of El Mozote*, this reasoning took a preeminent place.²⁰³ In fact, this is not simply a hypothetical problem: if the type of crimes forgiven is relevant, in *Moiwana* and *La Rochela* the *interpretation* and *application* of the amnesty laws by their states would have been challenged rather than the laws themselves.

In conclusion, taking together the whole set of the Court’s decisions, only *one* element emerges as decisive in evaluating the validity of an amnesty law, that is the incompatibility of any amnesty

²⁰⁰ Clear, in this sense, is *Gelman*, cit. *above* at fn. 4, paras 226-227.

²⁰¹ *Almonacid-Arellano*, cit. *above* at fn. 101.

²⁰² *La Rochela*, cit. *above* at fn. 149, para. 294. Vaguely in *Moiwana*, cit. *above* at fn. 17, para. 207, the Court ordered Suriname to “remove all obstacles, de facto and de jure, that perpetuate impunity”.

²⁰³ *The Massacre of El Mozote*, cit. *above* at fn. 4, paras 296 and 403, *Order No. 4*.

(even if it does not cover serious violations, even if it is not a self-amnesty) with the Arts 1.1, 2, 8.1, and 25 of the Convention.²⁰⁴ Articles 1.1 and 2 are clear in saying the a member state should enforce the rights in the Convention, modify legislation to grant them, and avoid any conduct or law that would deprive them of an effective impact on society. Articles 8.1 and 25 require a member state to grant access to courts and to grant fair trials. All the other lines of reasoning used in the case law were only invoked where they would lend strength to this conclusion, and not where they tended to support the validity of the amnesty. This is clear in *Guerrilha do Araguaia* and *Gelman*, in which a consideration of the concepts of *self-amnesty* and *democratic process of approval of an amnesty* would have resulted in a final declaration of validity of those laws; and in the *Moiwana* and *La Rochela* cases, in which applying the test of the seriousness of included crimes would have led to different outcomes. In short, according to the Court of San José consolidated case law, no amnesty law that prevents access to courts can be valid because any such amnesty would violate the American Convention; only in the last decision, *The Massacre of El Mozote*, the Court did not proclaim the invalidity of the amnesty law, but asked to not apply it to the facts of the case.

9.2 A different way of reading the Convention

This straightforward reasoning based on the Convention seems necessary, unavoidable, objective. However, this reading of the Convention is a matter of interpretive choice. Articles 1.1 and 2 are general rules, at the beginning of the Convention, that give guidance to interpret it. The

²⁰⁴ In the *Gelman* case, cit. *above* at fn. 4, this passage is clear at para. 229, when the Court undermines the importance of the concept of *self-amnesty*, but at the same time empties the question of the *seriousness* of the violated rights: “The incompatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect in what regards the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention.”

Court, instead, decided to treat them as strict rules, and to give them a strong prescriptive interpretation. It is this strict interpretation of those rules that gives rise to a stiff reading of the Convention and of the rights included therein, a reading that is ultimately unconvincing. Let take a look at the two provisions. Article 1.1, *Obligation to Respect Rights*, says that “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms”.

Article 2, *Domestic legal effects*, says:

“Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms”.

As general rules, they are at the beginning of the Convention, and are a valid help in understanding the content of the Convention: we have to ask ourselves, making an effort to identify with the people of that time, what can be the meaning of these general rules when we have to apply them during a time of conflict (internal or international). How should a government operate to “ensure to all persons subject to their jurisdiction the free and full exercise of those rights” (Art. 1.1)?

Governments that are called upon to restore a democratic order in the wreckage of social conflict, must, as prescribed by Art. 2, “adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms”. So there is a question: can the approval of an amnesty be qualified precisely as expression of Art. 2 of the Convention? Under the circumstances, an amnesty is a *legislative or other measure necessary to give effect to those rights or freedoms*. This is the important function of such an act – when properly understood, and not when used to grant immunity, and a set of tools for making this distinction is necessary.

Which tools? The reference to the *constitutional processes* provided for at Art. 2 would justify a

question that unfortunately the Court has dropped: the legitimacy of the enactment of a law and the question of self-amnesties. This test would allow a discrimination between amnesties enacted during an attempt of reconciliation and those resulted ultimately in just a shield from prosecution for state officials. A different interpretation of Art. 2 would not *per se* affirm the validity of every amnesty, but it would give room for a discussion of whether an amnesty is valid or not. The strict reading that the Court is giving to the Convention and to its general prescription is therefore not a logically necessary reasoning, but is matter of interpretation; it is a deliberate choice of the Court.

Not only did the Court choose *an* interpretation of the Convention, but it chose an interpretation that is *less convincing* than the one just proposed. The Court's interpretation in the *Guerilha do Araguaya* and *Gelman* cases does not fit the general character of the rules, does not fit the court's case law on the topic, and does not fit the international practice on amnesties. First, the interpretation of Art. 2 here proposed is more consistent with the general character and the open wording of the provision, allowing states to intervene in an active way when the conditions for the full enjoyment of human rights are no longer real (even without looking at the most extreme cases, like *Strife*, and taking the more basic and rhetorical example: is an amnesty passed to empty inhumanly crammed unlawful, or is it unlawful to pack people in inhuman conditions into the prisons?).

Second, it explains and gives full meaning to the concepts considered in facing these dilemmas since the beginning of this history of cases. The seriousness of the crimes involved, the effects of the amnesties, and the amnesties' democratic legitimacy are important indicia that must be taken into account in evaluating the legitimacy of an amnesty (although they are not decisive: in certain given cases it can be more important to find a political solution that ends a civil war, than it is to avoid any political compromise in order to open trials in an unsettled society).

Third, this interpretation of Art. 2 is also more open to face the dilemmas that amnesty laws all over the world try to solve – dilemmas originally taken into consideration by the Commission (see sect. 3.3), and later progressively ignored. The Court's unilateralism in facing these questions

emerges also from the way it refers to general international law, or to the *corpus iuris* of human rights. This systemic approach, that considers also what happens outside the Inter-American jurisdiction in interpreting the Convention, is not illegitimate,²⁰⁵ but the Court is very selective in doing it. It often refers to general international law, international human rights law, or international criminal law, to define concepts such as *crime against humanity* or *fundamental rights*. However, it has never seriously engaged in an analysis of the voluminous international practice on amnesties that would have tended to support their validity.²⁰⁶ A broader reading of Article 2 would also be better able to encompass this entire, international debate on the legitimacy of amnesties.

10. Conclusions

At the end of this long journey through 25 years of decisions on amnesties, of which the last 10 are characterized by decisions of the Inter-American Court, it is now time to draw the final conclusions. The Inter-American Commission and Court mark a point in favor of the respect for human rights, by showing that there is no law, not even an amnesty enacted in the name of national

²⁰⁵ The debates over the communication between different legal regimes has had a wide echo in recent legal scholarship (see, *inter multa*, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission (Finalized by M. Koskenniemi), 13 April 2006, UN Doc. A/CN.4/L.682) and only a very limited conception of *jurisdiction* would negate this possibility.

²⁰⁶ See, *above* at fn. 9, the work of MALLINDER, *Amnesty* cit., for further references. This practice shows that there are still amnesties for serious violations of human rights (an example can be the amnesty passed in Algeria), but also decisions that deemed amnesties that covered the most serious violations as invalid. In the *Moiwana* and *La Rochela* cases the Court had the opportunity to address this last question, but it did not, and it has still to be clarified.

reconciliation, that is outside the power of review of the Court.²⁰⁷ This is a great achievement, because it allowed those institutions to intervene against fake amnesties, and averted impunity.

Against a narrative that always saw in amnesties a valid tool to fix social problems, in a conceptual chain that can be represented by *i*) an ordered society is the ideal – *ii*) a social problem occurs and destroys the order – *iii*) an amnesty is a valid tool to re-settle it, the Commission and the Court introduced a fourth point, *iv*) the idea that it is possible to abuse this tool, and the need to detect and eliminate such abuses.

In order to find orientation on such a question, the Commission and the Court used a set of concepts. They can be roughly grouped into three arguments (sections 4.4 and 5.4): the first deals

²⁰⁷ Legal literature has stressed: the alternative between justice (intended as punishment) and peace (intended as compromise and reconciliation), *inter alia* see MAURO, *Leggi cit., above* at fn. 1, p. 344, addressing the trade-off between justice and peace; the complementarity between these two ideals, FREEMAN, *Necessary evils cit., above* at fn. 1, pp. 23-24); and the need, even in case of amnesties, of any form of responsibility, not necessarily penal, of the person, *International Guidelines on Post-Conflict Justice: The Chicago Principles*, Principle 1.8 (*Amnesty*): “States should ensure that amnesty policies are linked to specific mechanisms of accountability to discourage impunity and support the goals of post-conflict justice”, reproduced in BASSIOUNI, *cit. above* at fn. 1, Vol. I, pp. 49-50. The Office of the High Commissioner of the United Nations published an *Instruments of the rule of law in societies that have emerged from conflict. Amnesties*, HR/PUB/09/1, United Nations Publication, New York and Geneva, 2009, in which at p. V says: “[t]he amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict”.

with the legitimacy of an amnesty (*self-amnesty*; *democratic legitimacy*), the second with the seriousness of the crimes (however labeled), the third with the interpretation of the Convention. These concepts were ostensibly articulated in order to distinguish between legitimate and illegitimate amnesties; however, the whole spectrum of decisions shows a certain confusion since the beginning: rather than an organized sequence of tests, they provided a list of reasons piled up in favor of a final declaration against the validity of amnesties. This attitude can be explained by how hard was to challenge an amnesty at the beginning: they were at the time legitimate in domestic as well as in international law, and it was the intervention against them that was in need of strong justifications, even if not consistently organized.

Later, once the possibility to challenge fake amnesties had been consolidated, the Court had the occasion to give order to this pile of concepts, and clarify the effective weight of each of them in determining the legitimacy of an amnesty. But notwithstanding the fact that the Court was presented with ideal cases for addressing this issue, it missed the opportunity: for example, in *Moiwana* and in *La Rochela* cases, it did not draw any distinction between amnesties forgiving crimes against humanity and amnesties excluding them, and in the cases against Uruguay and Brazil the democratic processes surrounding the amnesty laws were explicitly deemed irrelevant. Only in the very recent *Massacre of El Mozote* decision of 2012 the Court took an approach that did not challenge an amnesty law, but only its applicability to the serious crimes at stake.

Ultimately, apart from this last decision, at the heart of its reasoning, the Court relies only on the formal argument of the contrariety of amnesties to the American Convention (sect. 9.1), but, as explained in section 9.2, this argument does not seem per se decisive: the interpretation given by the Court to the Convention, and to Art. 2 in particular, fails to understand the spirit of the Convention – that is the establishment of a society in which the enjoyment of human rights is effective – and is not compatible with the general character of the rule. Also, the unilateral approach of the Court in interpreting the Convention emerges from the fact that, in looking at international practice, it does not consider the whole body of international practice on amnesties.

This attitude reveals a certain conceit, and raises some concerns. This way of interpreting the Convention, taken together with the unilateral reference to international human rights law (sect. 9.2), and the great emphasis on the right to truth as a right to *judicial* truth (sect. 5.4 and 8.2), and not a “right to know what happened”, even from a truth commission, show a conceptual chain different from that of the past. The premise is that *i*) the ideal is an ordered society, that is *a coherent legal system administered by judges*, and *ii*) amnesties coming from the political sphere *are* the problem; they represent a *vulnus*, a black hole in such a coherence.²⁰⁸ *iii*) The solution, therefore, is the abrogation of amnesties.

There are many problems with this new chain. First, the premises are flawed. The notion that the ideal ordered society is a coherent legal system in which amnesties are problematic is questionable, and it is not clear why the truth should be only determinable by judges (the importance of the independence of historical studies and neutral truth commissions is undermined). However, even if we accept the premises of the chain, still we can observe that, compared to the previous chain, there is no point *iv*): the possible abuse of the remedy. This brings us to a legitimate question: does the possibility of abuse and failure exist also in this remedy: *reconciliation through international and*

²⁰⁸ Among many, MAX PENSKY: “Failure to punish is itself an injustice. The injustice of the criminal act is doubled by the injustice of the state authority in failing to fulfill its retributive duties”, *Amnesty on trial: impunity, accountability, and the norms of international law*, in *Ethics & Global Politics*, Vol. 1, No. 1-2, 2008, at <http://www.ethicsandglobalpolitics.net/index.php/egp/article/view/1816/1786#FN0027>. An even too harsh critic of that project of international justice is made by JEREMY RABKIN, *No Substitute for Sovereignty: Why International Criminal Justice Has a Bleak Future – And Deserves It*, in HUGHES ET AL. cit., *above* at fn. 1, pp. 98-130; a complete and fascinating general reflection of the reasons, the successes, the failures of the international criminal justice is narrated by MARK A. DRUMBL, *Atrocity, Punishment, and International Law*, New York, Cambridge University Press, 2007.

national courts? When what was at stake were not fake amnesties but amnesties truly entrenched in the life of a society, as in the last cases, *Guerrilha do Araguaia* and *Gelman* (sect. 8) the Court had the opportunity to step back and take advantage of the cases to show that those amnesties were valid for all the qualities they have. Instead, in the author's view, by wrongly interpreting the Convention and challenging the amnesty laws of Uruguay and Brazil, the Court stepped into point *iv*), the abuse of the remedy, an important step that sheds light on the basis and the aim of the Court's reasoning: not the establishment of a society in which human rights are enjoyed, but a coherent legal system. On the contrary, in the *Massacre of El Mozote*, the Court seems to acknowledge in part the importance of the amnesty laws passed after many years of civil war dividing the Salvadorian society, and did not proclaim their nullity.

Judge Cançado Trindade concludes his Concurring Opinion to the seminal *Barrios Altos* decision by saying:

“It is never to be forgotten that the State was originally conceived for the realization of the common good. The State exists for the human being, and not vice versa. No State can be considered to rest above the Law, whose norms have as ultimate addressees the human beings”²⁰⁹.

This, and not the coherence of a legal system, is the question at stake. But the way the Court handled amnesty laws in the *Gelman* and *Guerrilha do Araguaia* cases provokes a paraphrase of Cançado Trindade's opinion, with “international law” in place of “State”: “International law was originally conceived for the realization of the common good. International law exists for the human being, and not vice versa”. Consider the Lybia and Syria of today, rather than the South America of yesterday: what can international law offer to those peoples? A temporary amnesty for some leaders, that will expire in a few years? What about the responsibilities of difficult-to-identify but violent rebels? Will only identifiable state agents pay for these tragedies? Is the restoration of

²⁰⁹ Concurring Opinion of Judge Cançado-Trindade, *Barrios Altos*, cit. *above* at fn. 81, para. 26.

societies through an amnesty still an option recognized by legal systems? Amnesties are the attempt of the people, in extreme cases, to restore the order of a society and pursue the common good, even if it means compressing certain individual rights – and in certain cases even in situations in which massive crimes have been committed. The answer coming from international law cannot be that those attempts are vain, and that this kind of attempt is *per se* unlawful. It is now time to challenge the assumption that the goal of international law is a coherent legal system without the *black-hole* of forgiveness, and, as revealed in *Gelman* and *Guerrilha do Araguaia*, to understand that there is a point *iv*) in the new chain of reasoning – the possible abuse of intervention against amnesties. For us jurists, it is now time to move away from a standardized approach that enforces a very specific policy of reconciliation through courts, and, following the step started in *The Massacre of El Mozote* decision, to reopen the conceptualization of unlawful (and lawful) amnesties.