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The Inter-American Human Rights System's/ICCAL's Impact on Transitions to Democracy from the Perspective of Transitional Justice

By Christina Binder

1. Introduction

In Latin America, transitions to democracy have often involved an engagement with major human rights violations committed by former regimes (frequently military dictatorships).¹ The question of how to deal with past crimes is thus crucial for developing and consolidating new democratic norms and institutions in Latin American States. It is a test of practice for the Inter-American Human Rights System and, more particularly, the *Ius Constitutionale Commune en América Latina* (ICCAL).² The impact of the Inter-American Human Rights System (and of ICCAL) on transitions to democracy will indeed relate to its ability to deal with these violations at the domestic level and its corresponding support for domestic institutions. Still, what are parameters to measure this impact?

This chapter argues that the concept of Transitional Justice provides relevant parameters and will thus draw on the concept for guidance. According to the definition contained in a report by the UN Secretary-General, Transitional Justice is “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve

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² In this chapter, ICCAL refers to the transformative potential of the Inter-American Human Rights System, most importantly to the Inter-American Court of Human Rights (IACtHR), which has unfolded—as will be argued—as a set of regional constitutional laws based on human rights.

reconciliation.”³ Transitional Justice, therefore, concerns the question of how to deal with past human rights violations and is central to transitions toward a more peaceful, democratic society. It provides the parameters to measure both success and scale of democratic transitions as well as the impact of the Inter-American Human Rights System on these transitions.

Transitional Justice has three dimensions: retributive, restorative, and distributive. Retributive justice refers to forms of reparations that primarily aim to criminally prosecute perpetrators; restorative and distributive justice, however, put the victims at center stage and aim to make good the harm that occurred. Restorative justice does this by giving a voice to victims, by establishing the truth through an official historical record of what happened, by hearing confessions of guilt by perpetrators, and through institutional reforms. Distributive justice instead focuses on (monetary) compensation. As will be shown, all these components are of relevance in Latin America.

Since many Latin American States passed amnesty laws in the course of their transitions to democracy, the question of how to qualify these amnesties for past human rights violations arose. As will be shown, blanket amnesties run against the very idea of Transitional Justice. Amnesty laws were subject to a rich case law of the Inter-American Court of Human Rights (IACtHR) and were found to violate key provisions in the American Convention on Human Rights (ACHR).⁴ Accordingly, the IACtHR's case law on amnesties is of crucial importance for democratic transitions. More particularly, the Inter-American Human Rights System and the Inter-American Court have contributed to the realization of all three aspects of Transitional Justice when dealing with amnesty laws that contravene the ACHR.

2. Enabling Transitions to Democracy in Latin America: How to Deal with Past Human Rights Violations from the Perspective of Transitional Justice

In the course of democratic transitions, the question of amnesties proved a major concern in Latin America. Domestic amnesty laws in many countries, such as

³ UN Security Council, Report of the Secretary-General, “The rule of law and transitional justice in conflict and post-conflict societies,” August 23, 2004, UN Doc. S/2004/616, para. 8. See also Anja Seibert-Fohr, “Transitional Justice in Post-Conflict Situations,” in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of International Law* (Oxford University Press 2008), para. 1: “Transitional justice describes a field of international law which is concerned with the question how to confront a situation of past large-scale human rights violations and humanitarian abuses in a period of transition to peace and democracy.”

⁴ See *Barrios Altos v. Peru* [2001] IACtHR, Ser. C No. 75; *La Cantuta v. Peru* [2006] IACtHR, Ser. C No. 162; *Almonacid Arellano v. Chile* [2006] IACtHR, Ser. C No. 154; *Gelman v. Uruguay* [2011] IACtHR, Ser. C No. 221; *Case of the massacre of El Mozote and nearby places v. El Salvador* [2012] IACtHR, Ser. C No. 252; *Gomes Lund et al. v. Brazil* [2010] IACtHR, Ser. C No. 219.

Argentina, Chile, and Uruguay,⁵ de facto established impunity for past violations. In Peru, then President Alberto Fujimori passed a number of amnesty laws in 1995, shielding himself and other human rights perpetrators against prosecution for crimes committed in the context of their fight against left-wing guerrilla fighters in the early 1990s.⁶ Thus, the three dimensions of Transitional Justice—retributive, restorative, and distributive—were set aside at the domestic level. In Latin America, therefore, transitions to democracy often came “at a price”: it proved difficult for the nascent and still fragile democracies to struggle against impunity as many of the human rights perpetrators remained in influential positions.⁷ At the same time, the “quality” of the respective amnesty laws diverged significantly. In countries like Peru and Chile, quasi self-amnesties were passed by the former regimes. Similarly, in Argentina the previous regime exercised sufficient pressure in favor of the provision of amnesty laws.⁸ In other parts of the region, amnesties seemed to be the result of a national deliberation process. In Uruguay, for example, the amnesty deal was brokered between the political parties and the armed forces, subsequently passed by Parliament, and upheld twice by popular referenda in 1989 and 2009.^{9,10}

⁵ See, for instance, the notorious *Punto Final* and *Obediencia Debida* Acts in Argentina, which were passed in 1986 and 1987, respectively, and brought investigations on human rights violations committed by the military junta between 1976 and 1983 to a practical halt. See also the 1978 Chilean amnesty decree law (Decreto Ley No. 2191, April 19, 1978; *Diario Oficial* No. 30.042), which established the nonresponsibility for crimes committed between September 11, 1973 (the military coup by Pinochet) and March 10, 1978. For Uruguay, see the Law Nullifying the State’s Claim to Punish Certain Crimes/Limitations Act/Law of Expiry, Law No. 15848, December 22, 1986.

⁶ Law (Ley) No. 26479, “Conceden amnistía general a personal militar, política y civil para diversos casos,” June 14, 1995, published in *Normas Legales*, No. 229 (1995), 200; modified by Ley No. 26492 “Precisan interpretación y alcances de amnistía otorgada por La Ley No. 26479,” June 28, 1995, published in *Normas Legales*, No. 230, 1995, 8.

⁷ See, e.g., Argentina, where President Carlos Menem, in view of the danger of a new military coup, pardoned around thirty top junta leaders in 1989 who had been imprisoned for human rights abuses (Decree 1002/89). The Decree was recently declared unconstitutional by the Argentine Supreme Court; see *Mazzeo Julio Lilo y otros*, Judgment of July 13, 2007, in *Jurisprudencia Argentina* 2007-III-573).

⁸ *Ibid.*

⁹ The Expiry Law was approved on December 22, 1986, by the Uruguayan parliament, and according to Article 1: “It is recognized that, as a consequence of the logic of events stemming from the agreement between the political parties and the Armed Forces signed in August 1984, and in order to complete the transition to full constitutional order, 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.” See Wayne Sandholtz, unpublished paper, “Juggling Rights, Juggling Politics: Amnesty Laws and the Inter-American Court,” 33: “The *Gelman v Uruguay* case was the first in which the IACtHR ruled expansively in a case that did not involve a self-amnesty. The Uruguayan amnesty law (the ‘Expiry Law’) was subject to a democratic process by which a majority of the population chose to uphold it on two occasions, first in a referendum held in 1989 and two decades later through a plebiscite in 2009.”

¹⁰ Note that also the Supreme Court of Justice of Uruguay captioned orders “*Detta, Josefina; Menotti, Noris; Martínez, Federico; Musso Osiris; Buggell, Jorge s/ unconstitutionality of the Law 15.848. Arts. 1, 2, 3 and 4;*” Judgment No. 112/87, resolution of May 2, 1988, evidence, folios 2256 to 2318 upheld in a first judgment the constitutionality of the law. In a second judgment on October

While the procedural legitimacy of the various amnesty laws differs—with self-amnesties being the most problematic—the result is the same: impunity for major human rights violations in disregard of the different dimensions of Transitional Justice. A key issue when discussing the impact of the Inter-American System on democratic transitions, therefore, relates to the System's contribution to realizing the different dimensions of Transitional Justice at the domestic level and its support for national efforts in the fight against impunity. Indeed, the Inter-American System has eased transitions by pushing States to uphold certain minimum requirements. So what were the requirements set by the Inter-American Court's amnesty jurisprudence for the domestic level, and what was their impact?

The following layers can be distinguished: Firstly, there are substantive standards that focus on ending impunity for major human rights violations and the right of victims and their family members to truth, due process, and compensation. Secondly, there are supportive strategies and techniques of norm control that give a maximal effect to standards and jurisprudence at the domestic level, namely, the nullification of amnesty laws and the Inter-American Court's conventionality control. And thirdly, when discussing the impact of the ICCAL on democratic transitions, there are broader democratic considerations like strengthening domestic institutions, the separation of powers, and the rule of law; the independence and impartiality of domestic tribunals vis-à-vis the executive seems especially crucial in societies emerging from a violent and often authoritative past. These layers will be examined in turn to determine the impact of the Inter-American Human Rights System on democratic transitions.

3. Inter-American Human Rights Standards within a Multilevel Legal System of Law

A preliminary question relates to the position that the inter-American human rights standards occupy in the multilevel system of law present in Latin American States. Indeed, this position is a decisive factor in determining the potential impact of the inter-American standards on democratic transitions.

So how does the Inter-American System work, and what is its place in the internal order of States, as well as, more generally, in the multilevel system of law? With regards to the international level, the ACHR is a treaty binding on the States parties to it. The ACHR establishes international obligations and

19, 2009 the Supreme Court of Uruguay rendered Judgment No. 365 in the case of "Sabalsagaray Curuchet Blanca Stela," where it declared the unconstitutionality of Articles 1, 3, and 4 of the Law and resolved the inapplicability in the specific case at hand. See also *Gelman* (n. 4), paras. 145 et seq. Also, the impact of the ICCAL varies, as will be shown, depending, inter alia, on the different "qualities" of adoption of the amnesty laws.

sets human rights standards applicable to the domestic sphere.¹¹ A violation of these standards entails the international responsibility of the State in question in accordance with the International Law Commission's (ILC) Articles on State Responsibility.¹² However, even though the international responsibility of a State in breach of its obligations is at stake in such situations, there are no automatic consequences at the domestic level. Rather, the consequences at the domestic level depend on the legal and constitutional system of the respective State. A State's constitutional order determines the incorporation of international obligations—including, therefore, the ACHR—and is thus of importance for the ACHR's domestic effect. The ACHR has been given a high rank in the internal constitutional hierarchy of most Latin American States, commonly with a self-executing character attributed to the rights enshrined in the Convention.¹³ This considerably facilitates the reception of the ICCAL and the Inter-American Court's jurisprudence.¹⁴ Thus, the domestic impact of the ACHR—and the case law of the IACtHR in the interpretation of the ACHR—is considerable. As will be shown, this impact is also supported by the Inter-American Court's techniques of norm control: the nullification of amnesty laws and the conventionality control.

The constitutional setup in most Latin-American countries is thus primed to give a maximum effect to the ICCAL and its standards. It also supports the Inter-American Human Rights System's impact on democratic transitions.

4. Impact of the ICCAL/Inter-American Human Rights System on Transitions to Democracy

4.1. The Inter-American Court's Amnesty Jurisprudence: Standards and "Toolbox"

The amnesty jurisprudence of the inter-American human rights institutions has a considerable history, reaching back several decades. Already in the 1980s the

¹¹ The ACHR is a treaty that has to be complied with by the States party to it (Art. 26 Vienna Convention on the Law of treaties (VCLT); *pacta sunt servanda*; and Art. 27 VCLT).

¹² ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" [2001] 2 Yearbook of the International Law Commission (Part Two).

¹³ See Allan Brewer Carías, "La interrelación entre los Tribunales Constitucionales de América Latina, la Corte Interamericana de Derechos Humanos, y la Cuestión de la inejecutabilidad de sus decisiones en Venezuela" [2009] unpublished paper 6 et seq. and 13. This is of particular importance for the conventionality control explained later. In fact, norm control regarding the constitutionality of laws or decrees exercised by domestic judges often automatically includes a conventionality control, since the ACHR is incorporated with a constitutional rank. See, e.g., María Angélica Gelli, "El Liderazgo Institucional de la Corte Suprema y las Perplejidades del Caso 'Mazzeo,'" La Ley of 7 December 2007, Buenos Aires, 1.

¹⁴ See, e.g., *ibid.*

question of amnesty laws came up in the Inter-American System. In 1992, the Inter-American Commission stated that the Argentine and Uruguayan amnesty laws contradicted those States' human rights obligations.¹⁵ The Inter-American Court, asked by Argentina and Uruguay to render an advisory opinion on the Commission's competence to decide on the validity of domestic legislation, upheld the Commission's competence in this regard.¹⁶ Nevertheless, "the political climate in the relevant countries remained hostile to the [inter-American human rights] system's views on amnesty laws,"¹⁷ and no immediate reaction at the national level gave effect to the Court's findings. It was only with the Inter-American Court's landmark decision in the 2001 *Barrios Altos* case,¹⁸ and later with the 2006 *La Cantuta v. Peru*¹⁹ and *Almonacid v. Chile*²⁰ decisions, that the issue of amnesty legislation was brought back onto the regional human rights agenda.²¹ Since then the question of amnesties has been at stake in numerous cases brought before the Court.²²

In its amnesty jurisprudence, the Inter-American Court addressed all three dimensions of Transitional Justice: retributive, restorative, and distributive. It did so first by establishing substantive standards. For example, in the *Barrios Altos* case, the Inter-American Court found that impunity for human rights violations, which were recognized as *ius cogens* under international human rights law because of their seriousness, was inadmissible and those responsible ought to be punished.²³ Accordingly, the Court established that the 1995 Peruvian amnesty

¹⁵ See IACHR, Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311; IACHR, Report No. 28/92, OEA/Ser.L/V/II.83, Doc. 14, corr.1 (1992–93) (Argentina); IACHR, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Report No. 29/92, (Uruguay). See James Cavallaro and Stephanie Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court" [2008] 102 *American Journal of International Law* 768, 819 et seq.

¹⁶ IACtHR, "Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50, and 51 of the American Convention on Human Rights)," Advisory Opinion OC-13/93, July 16, 1993, Ser. A No. 13, paras. 30, 37, 57(1).

¹⁷ See Cavallaro and Brewer (n. 15), 820.

¹⁸ IACtHR, *Barrios Altos v. Peru* (n. 4).

¹⁹ IACtHR, *La Cantuta v. Peru* (n. 4).

²⁰ IACtHR, *Almonacid v. Chile* (n. 4).

²¹ The *Barrios Altos* and *La Cantuta* cases against Peru concerned massacres in 1991 and 1992 that were committed by the paramilitary death squad *La Colina* and ordered by then President Alberto Fujimori. Those responsible were shielded from prosecution by amnesty laws passed by the Fujimori government in 1995: Laws No. 26479 and 26492 (n. 6). See also the following cases concerning self-amnesties: IACtHR, *Castillo-Páez v. Peru* [1998] IACtHR Ser. C No. 43; *Loayza Tamayo v. Peru* [1998] IACtHR, Ser. C No. 60.

²² See IACtHR, *Barrios Altos v. Peru*, IACtHR, *La Cantuta v. Peru*, IACtHR, *Almonacid Arellano v. Chile*, IACtHR, *Gelman v. Uruguay*, IACtHR, *Case of the massacre of El Mozote and nearby places v. El Salvador*, IACtHR, *Gomes Lund et al. v. Brazil* (n. 4).

²³ IACtHR, *Barrios Altos v. Peru* (n. 4), para. 41: "This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."

laws violated the rights of the survivors and victims' families to be heard by a judge and to judicial protection, as established in Article 8.1 and Article 25 ACHR, respectively. The Court stated further that these amnesty laws impeded the investigation, capture, prosecution, and conviction of those responsible for the human rights violations in the *Barrios Altos* massacre, in contravention of Article 1.1 ACHR, and obstructed the clarification of the facts of the case. Finally, the Inter-American Court held that the respective laws contributed to the defenselessness of victims and the perpetuation of impunity and were thus "manifestly incompatible with the aims and spirit of the [American] Convention."²⁴ The Inter-American Court established in relation to the 2001 Peruvian amnesty laws that they lacked legal effects in internal Peruvian legislation.²⁵ The survivors and the next of kin of victims of massacres involving perpetrators who had not been prosecuted due to the effect of the amnesty laws implemented between 1995 and 2001 were to be indemnified monetarily and given adequate psychological support, and investigations and prosecutions holding responsible those who were accountable for the massacre had to proceed.

Similar findings were reached in *Almonacid v. Chile*, which concerned the extrajudicial killing of a professor—and a supporter of the Communist Party—in September 1973 by State police forces acting under the instructions of the Pinochet regime. The Inter-American Court found that the killing constituted a crime against humanity,²⁶ which as a non-derogable right under the ACHR could not remain unpunished.²⁷ The Court reasoned similarly to the *Barrios Altos* case: it established that the nonprosecution of those responsible in application of the 1978 amnesty decree law (*Decreto Ley*)²⁸ constituted a violation of Articles 8.1 and 25 together with Articles 1.1 and 2 of the ACHR.²⁹ The Court, as in *Barrios Altos*, stated that the respective decree law was devoid of legal effects.³⁰ What is more, the IACtHR ordered the indemnification and satisfaction of the victims, including the prosecution of those responsible, and the publication of the established facts in the *Diario Oficial* of Chile and in another widely circulated newspaper, as well as other measures. Furthermore, the Court found with effect *erga omnes* that the Chilean State was obliged to ensure that the respective amnesty decree law hindered neither the continued investigations on

²⁴ IACtHR, *Barrios Altos v. Peru* (n. 4), para. 43.

²⁵ The IACtHR extensively listed Peruvian measures and jurisprudence to reach this conclusion.

²⁶ See, e.g., IACtHR, *Almonacid v. Chile* (n. 4), para. 115.

²⁷ *Ibid.*, para. 111: "Los crímenes de lesa humanidad producen la violación de una serie de derechos inderogables reconocidos en la Convención Americana, que no pueden quedar impunes."

²⁸ Chilean Amnesty Decree Law No. 2.191 (n. 5).

²⁹ IACtHR, *Almonacid v. Chile* (n. 4) para. 2.

³⁰ *Ibid.*, para. 3. The fact that the amnesty laws had not been applied by Chilean courts in various cases since 1998 was not considered sufficient to comply with the requirements of Article 2 ACHR, as the implementing authorities could change their approach (*ibid.*, para. 121).

the extrajudicial execution of the victim and similar situations nor the identification and punishment of those responsible in that case and similar cases.³¹

In *Gelman v. Uruguay*,³² the Inter-American Court found Uruguay in violation of its obligations under the American Convention by letting crimes go unpunished through the country's amnesty law. While taking into consideration the democratic approval of the Uruguayan law, the Court ultimately considered this immaterial³³ and found that the law was lacking legal effects.³⁴ The Court stated that the democratic legitimacy of a law had no effect on its general compatibility with human rights law. Even in cases like the one before it, the conventionality control could not be spared and was therefore not only a task for judicial authorities but for every public authority.³⁵

In the above-mentioned cases, the Inter-American Court adopted a similar approach to domestic amnesty laws³⁶ that shield perpetrators of grave human rights violations from prosecution. Interestingly, the Court was less concerned about the method of adoption, that is, whether the respective law was an act of self-amnesty or an amnesty passed by a subsequent regime or national parliament transitioning toward democracy.³⁷ Rather, the Court based its decision on the amnesty laws' *ratio legis*: that they shield perpetrators of grave human rights violations from prosecution. In so doing, the Court explicitly referred to the *ius cogens* character (non-derogable nature) of the prohibition of torture and extrajudicial killings.³⁸ Consequently, the respective amnesty laws were found to violate the rights of survivors and the family members of victims to a fair trial and judicial protection;³⁹ the laws' very existence, according to the Court, constituted a violation of a State's obligation under the ACHR.⁴⁰ While not of immediate relevance for the Court's reasoning, the procedural legitimacy of the amnesty law's adoption, as will be shown, is important for the reception and effects of the Court's amnesty jurisprudence at the domestic level.⁴¹

³¹ *Ibid.*, paras. 5 and 6.

³² IACtHR, *Gelman v. Uruguay* (n. 4).

³³ *Ibid.*, para. 229, 238; see also Sandholtz, (n. 9), 35 *et seq.*

³⁴ IACtHR, *Gelman v. Uruguay* (n. 4) para. 232.

³⁵ *Ibid.*, para. 238.

³⁶ As mentioned, the criteria for the incompatibility of amnesty laws are most clearly established in *Almonacid v. Chile* (n. 4), para. 120: it is the *ratio legis*—i.e., to shield perpetrators of grave human rights violations from prosecution—rather than how the law was adopted—e.g., a self-amnesty—which is decisive.

³⁷ *Ibid.*, para. 120. The Inter-American Court seems to make a distinction as regards amnesty laws that are adopted to end an armed conflict. See IACtHR, *Massacre of El Mozote and nearby places v. El Salvador* (n. 4).

³⁸ See, e.g., IACtHR, *Barrios Altos v. Peru* (n. 4), para. 41; *Almonacid v. Chile* (n. 4), para. 111.

³⁹ ACHR, arts. 8.1 and 25.

⁴⁰ ACHR, arts. 1.1 and 2.

⁴¹ See section 4.2 *infra*.

With its jurisprudence, the Inter-American Court obliges States to give effect to the different dimensions of Transitional Justice, which are important for democratic transition processes of societies emerging from a violent past. Therefore, the retributive dimension of Transitional Justice is accomplished via the required criminal prosecution of perpetrators; the restorative dimension is accomplished by defending the right of victims to the truth and to a fair process, as well as the necessary psychological aid and help when instances of torture are involved; and the distributive dimension is realized by awarding monetary compensation to victims. The standards and human rights conditions set up by the Inter-American Court for domestic democratic transition processes are thus stringent and comprise all three dimensions of Transitional Justice.

What is more, the Inter-American Court has also developed especially two innovative types of norm control to facilitate the reception and increase the impact of its judgments at the domestic level: first, the nullification of unconventional amnesty laws and second, the conventionality control. As regards the former, the Inter-American Court in its amnesty jurisprudence—for example, *Barrios Altos*, *La Cantuta*, *Gelman*, and *Almonacid*—does not task domestic authorities with amending or repealing deficient legislation. Rather, the Court itself determines whether the respective amnesty laws are “without effect” *ab initio* as a result of contravening the ACHR.⁴² The wording chosen by the Inter-American Court—“lack legal effect,” *carecen efectos jurídicos*—demonstrates that the Court does not consider an additional national legal act—for example, a repeal of the amnesty law—necessary to give effect to its determination.⁴³ This is explicitly confirmed in the *voto razonado* of Judge García Ramírez in *La Cantuta*.⁴⁴ When stating that national laws “are without effect” when contravening the ACHR, the Inter-American Court attributes supranational force to its determinations and acts like a national constitutional court.⁴⁵ This direct norm control exercised by the

⁴² This was stated most clearly in *La Cantuta v. Peru* (n. 4), para. 187: “[D]ichas leyes no han podido generar efectos no los tienen en el presente ni podrán generarlos en el future.”

⁴³ While the Court’s findings in *La Cantuta* indicate that the Inter-American Court’s statement is declaratory and not constitutive, such an establishment would have been up to the competent institution at the domestic level (e.g., the constitutional court).

⁴⁴ See *voto razonado* by Judge Sergio García Ramírez, IACtHR, *La Cantuta v. Peru* (n. 4), paras. 4 and 5: “En suma, la ineficacia de esos mandamientos resulta inmediatamente—y sin necesidad de actos especiales que lo dispongan y que, en todo caso, se limitarían a declararlo—de su colisión con la Convención Americana.”

⁴⁵ See Néstor Sagüés, “El ‘Control de Convencionalidad’ en particular sobre las Constitucionales Nacionales,” *La Ley*, February 19, 2009, Buenos Aires, 3: “[E]n ciertos veredictos . . . la Corte Interamericana habría incluso nulificado normas nacionales, como leyes de amnistía, con efectos *erga omnes*, comportándose así como un verdadero Tribunal Constitucional nacional.” Note that, especially when establishing the nullity of amnesty laws and decrees, the Court refers explicitly to the particularly serious character of human rights violations the amnesty laws are providing impunity for: the respective human rights guarantees being recognized as non-derogable (*ius cogens*) in international human rights law. The IACtHR thus seems to introduce a certain hierarchy of norms. This is evidenced by the fact that with respect to other laws that violated the ACHR but did not provide

Inter-American Court maximizes the impact of its findings, since no additional national act is necessary to give effect to the Inter-American Court's judgments.

Likewise, the conventionality control (*control de convencionalidad*) increases the effects of the Inter-American Court's jurisprudence. Indeed, in *Almonacid v. Chile*, the Inter-American Court established for the first time that national courts were obliged not to apply national norms that were in violation of the ACHR and, what is more, of the ACHR in the interpretation given by the Inter-American Court (*control de convencionalidad*).⁴⁶ According to the IACtHR:

124. The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, 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. 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.⁴⁷

Such decentralized conventionality control tasks national courts not to apply (provisions of) laws that are in contravention of the ACHR.⁴⁸ This obligation applies to all States parties to the ACHR and without the necessity of a prior judgment by the Inter-American Court against the respective State. The

for amnesty in cases of serious human rights violations, the IACtHR tasked national authorities to modify/amend the respective laws. See *Fermín Ramírez v. Guatemala* [2005] IACtHR, Ser. C No. 126: the Court established that a provision of the Guatemalan penal legislation that contravened the ACHR should be amended in a reasonable time and not be applied as long as it was not amended. Likewise in *La Última Tentación de Cristo* (Case of *Olmedo Bustos y otros (La última Tentación de Cristo) v. Chile* [2001] IACtHR, Ser. C No. 73, para. 4: the Court asked Chile to amend a provision of its constitution as the preliminary censorship established there violated Article 13 (freedom of thought and expression) of the ACHR; the Court did not declare the latter norms "without effect" itself, and it seems that only in reliance on non-derogable rights, in cases concerning *ius cogens* norms violations, the Court resorts to the drastic sanction to nullify a law.

⁴⁶ Sagüés (n. 45); see also Juan Carlos Hitters, "Control de Constitucionalidad y Control de Convencionalidad. Comparación (Criterios fijados por la Corte Interamericana de Derechos Humanos)" [2009] 7 *Estudios Constitucionales*, <https://www.scielo.cl/scielo.php?pid=S0718-52002009000200005&script=sci_arttext> (accessed February 5, 2022).

⁴⁷ IACtHR, *Almonacid v. Chile* (n. 4), para. 124.

⁴⁸ In the interpretation of the IACtHR.

Inter-American Court bases the duty to exercise the conventionality control, *inter alia*, on Article 27 of the Vienna Convention on the Law of Treaties (VCLT), which holds that a State cannot justify noncompliance with a treaty with reference to internal law.⁴⁹ Put differently, the Inter-American Court asks domestic courts to exercise a conventionality control comparable to the constitutionality control in constitutional law. The standard of review is not only the ACHR but also “the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.”⁵⁰ The Inter-American Court thus tasks national judges to exercise their review with reference to its own case law. According to the Inter-American Court, national judges have to engage in such controls not only when requested by a party to the case but also “*ex officio*,”⁵¹ and abstain from applying it to the concrete case when an internal norm or law contravenes the ACHR.⁵² In situations where the national legislator has failed to amend the deficient law,⁵³ it is domestic courts and judges that have to give effect to the human rights guarantees in the ACHR. After being applied first in the 2006 *Almonacid* case, the doctrine was consolidated in subsequent jurisprudence, including *Trabajadores Cesados del Congreso (Aguado Alfaro y otros) v. Peru*,⁵⁴ and more recently in *Heliodoro Portugal v. Panama*.⁵⁵

In sum, both forms of norm control—the nullification of national laws and the conventionality control—enable an effective implementation of a State’s human rights obligations and give maximum effect to the ACHR. The Inter-American Court’s supranational determination that national laws, or decrees, are “without effect” bypasses the need for an additional national legal act.⁵⁶ The conventionality control especially has far reaching consequences for the inter-American human rights protection system, as it makes national judges guardians of the human rights guarantees enshrined in the ACHR⁵⁷ and thus provides for the latter’s effective implementation at a decentralized level. The conventionality

⁴⁹ IACtHR, *Almonacid v. Chile* (n. 4), para. 125.

⁵⁰ *Ibid.*, para. 124.

⁵¹ See also *Trabajadores Cesados del Congreso (Aguado Alfaro y otros) v. Peru* [2006] IACtHR, Ser. C No. 158, para. 128.

⁵² IACtHR, *Almonacid v. Chile* (n. 4), paras. 123–125: the effect of such control by national judges is *inter partes*, see Sagüés (n. 45), 2. The IACtHR has not pronounced itself on what happens when the respective national tribunal is competent to invalidate norms *erga omnes*. Still, according to Sagüés, it might do so.

⁵³ See, in this sense, IACtHR, *Almonacid v. Chile* (n. 4), para. 123.

⁵⁴ IACtHR, *Trabajadores Cesados del Congreso* (n. 51), para. 128.

⁵⁵ *Heliodoro Portugal v. Panamá* [2008] IACtHR, Ser. C No. 186, paras. 180–181. See also IACtHR, *La Cantuta v. Peru* (n. 4), para. 173; *Boyce y otros v. Barbados* [2007] IACtHR, Ser. C No. 169, para. 78.

⁵⁶ This facilitates the work of national institutions, especially when the nullification of amnesty laws may be met with domestic resistance (see *infra* section 4.2).

⁵⁷ The IACtHR seems to leave open whether such control might be exercised with respect to other human rights treaties; see IACtHR, *Almonacid v. Chile* (n. 4), para. 124: “[A]n international treaty, such as the American Convention.”

control in particular, if properly implemented, would counterbalance the limited number of cases brought before the IACtHR, as domestic judges are required to ensure the effectiveness of the guarantees contained in the ACHR at the national level. Such effectiveness seems crucial in the field of amnesties and, more broadly, in the Latin American context of democratic transitions and serious human rights violations. The “toolbox” of the IACtHR, therefore, is highly developed. What remains to be seen is the domestic reception and the impact of the Inter-American Human Rights System “on the ground.”

4.2. Domestic Reception of the IACtHR’s Amnesty Jurisprudence

To truly measure the IACtHR’s impact on democratic transitions, a domestic-oriented analysis seems warranted. As will be shown, the reception of the Court’s jurisprudence at the national level was generally positive, with the judiciary (domestic tribunals and judges) turning out to be the IACtHR’s best allies. It did not make a difference whether States were parties to a specific case or not, which illustrates the acceptance of the Court’s doctrine of conventionality control. What somehow mattered, conversely, was the method with which the respective amnesty law was adopted, namely, its procedural legitimacy—self-amnesty versus an amnesty passed by parliamentary approval—and the degree of societal consensus on which the amnesty was based. Peru, Chile, Argentina, and Uruguay will be discussed by way of example.

Peru fully complied with the Inter-American Court’s *Barrios Altos* decision, which concerned an act of self-amnesty passed by Alberto Fujimori. As the Peruvian national legal system does not provide for a “nullification of laws,” this was done on the basis of the incorporation of the ACHR into the domestic legal system⁵⁸ and national legal provisions, making it possible to give effect to international decisions.⁵⁹ According to the Peruvian Constitutional Court (*Tribunal Constitucional*),⁶⁰ the Inter-American Court’s interpretative authority

⁵⁸ Arts. 55–57 of the Peruvian Constitution. While the 1993 Peruvian Constitution does not provide for an incorporation of international (human rights) treaties at a certain rank in its legal hierarchy, Article 55 provides that international treaties are “part of national law”; its final provisions establish that constitutional rights and freedoms have to be interpreted in accordance with treaties on human rights ratified by Peru.

⁵⁹ See, e.g., La Ley No 27.775, “Regula el procedimiento de ejecución de Sentencias emitidas por Tribunales Supranacionales”; art. 115 Código Procesal Constitucional.

⁶⁰ The Peruvian Constitutional Court acts as the final interpreter of the constitution and may derogate, with *erga omnes* effects, unconstitutional legislation. In addition, normal judges may decide not to apply or enforce unconstitutional laws with effects *inter partes* (system of judicial diffuse norm control in combination with a concentrated control in a specialized extra court; see arts. 138, 201, 202, and 204 of the Peruvian Constitution). See also Sagüés, “Regional Report Latin America”

in accordance with Article 62.3 ACHR made the Court's interpretations binding upon all national authorities, including Peru's Constitutional Court. More particularly, the Peruvian Constitutional Court found that not only the resolute part of the judgments but also the Inter-American Court's reasoning had binding force.⁶¹ The Peruvian Constitutional Court accordingly followed the IACtHR's determination that the 1995 amnesty laws were devoid of legal effect.⁶² In short, the Inter-American Court's position on the nullity of amnesty laws contravening the ACHR was given effect in Peru.⁶³

The implementation of *Almonacid* in Chile was more indirect. At first, no direct effect was attributed to the Inter-American Court's judgments.⁶⁴ Furthermore, a bill promoted by the Chilean government to amend the Chilean criminal code so that serious human rights violations were not subject to amnesties or statutes of limitation, such as foreseen in the 1978 amnesty decree law, had not been passed as of April 2019.⁶⁵ Still, the 1978 amnesty decree law is not applied in practice as the Chilean Supreme Court has ruled consistently that the amnesty decreed by the military government was inapplicable to war crimes or crimes against humanity, and that these crimes were not subject to the statute of limitations.⁶⁶ The Chilean Supreme Court referred inter alia to the Inter-American Court's *Almonacid* decision—as well as to *Barrios Altos*—when establishing that domestic legal norms could not be used as obstacles for the prosecution of perpetrators of gross human rights violations.⁶⁷ Thus, national authorities complied with the Inter-American Court's findings, although on a case-by-case basis. Given that legislation to repeal the controversial 1978 amnesty decree law

[2009] VII. Konrad Adenauer Stiftung Conference on International Law: The Contribution of Constitutional Courts in Safeguarding Basic Rights, Democracy and Development, 10.

⁶¹ This even in cases where Peru was not a party to the dispute.

⁶² See Peruvian Constitutional Court, *Caso Santiago Martín Rivas*, November 29, 2005, Expediente No. 4587–2004, AA/TC, para. 63.

⁶³ See, e.g., the findings of the IACtHR in *La Cantuta v. Peru*, where the Court establishes that Peru had fully implemented the *Barrios Altos* Judgment: IACtHR, *La Cantuta v. Peru* (n. 4), para. 186.

⁶⁴ The 2005 reforms of the Chilean Constitution introduced a system of centralized norm control located at the Constitutional Court with a monopoly to control the constitutionality of legislation with *erga omnes* effects (art. 82 of the Chilean Constitution). Still, the Chilean Supreme Court is tasked to exercise the system of diffuse norm control until the end of its term of office (*Cuadragesimacuarta*, Chilean Constitution). Article 5 of the Chilean Constitution establishes the obligation to respect the fundamental rights of persons recognized in the Constitution and relevant international human rights treaties. Thus, international human rights treaties arguably have a constitutional rank.

⁶⁵ See the Office of the High Commissioner on Human Rights, "Committee on Enforced Disappearances Examines Report of Chile," Geneva April 10, 2019, <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24469&LangID=E>> (accessed February 5, 2022).

⁶⁶ See *Ibid.*

⁶⁷ Supreme Court of Chile, Criminal Chamber, *Molco Case* (No. 559–2004) of December 13, 2006, paras. 19–20. See also the IACtHR's findings in *Almonacid v. Chile* (n. 4), para. 121.

had not been passed, Chilean courts only chose in practice not to apply the 1978 amnesty decree law.

The case of Argentina demonstrates that, in States that are not party to a case, the reception of the Inter-American Court's judgments is generally good and the Court's impact on transitions to democracy are considerable, from a Transitional Justice perspective. The Inter-American Court's doctrine of *control de convencionalidad* was explicitly accepted by the Argentine Supreme Court.⁶⁸ For example, the Argentine Supreme Court relied extensively on the *Barrios Altos* decision of the Inter-American Court when stating that Argentina's amnesty laws (*Punto Final* and *Obediencia Debida*) were unconstitutional. The Argentine Supreme Court drew on the Inter-American Court's reasoning especially when finding that the Argentine amnesty laws had the same deficiencies as the Peruvian ones: being "self-amnesties," ad hoc, and intended to prevent the prosecution of grave human rights violations.⁶⁹ The impact of the Inter-American Court's jurisprudence thus seems considerable: domestic amnesty legislation is not applied to specific cases or declared unconstitutional among others in reliance on the criteria established in the judgments of the Inter-American Court.

In sum, the Inter-American Court's amnesty jurisprudence was met with acceptance in Peru, Chile, and in Argentina. In all three countries, the Court's case law seems to have supported transitions by alleviating domestic institutions. In Peru and Chile the nullification of amnesty laws through the Inter-American Court "facilitated" the work of Chilean and Peruvian domestic authorities insofar as it dispensed with the need for an additional national act. In Argentina, the Inter-American Court's amnesty jurisprudence provided standards and increased the legitimacy of the findings of Argentine tribunals by requiring them to engage in the *control de convencionalidad*. This support for democratic transitions seems especially important in cases where it is difficult—due to internal resistance—to formally amend or repeal the respective amnesty laws at the domestic level. It also points to the crucial role of domestic judges where the implementation of human rights obligations and transitions to democracy are concerned. Therewith, the domestic rule of law is strengthened through the case law of the IACtHR.

⁶⁸ See the Argentine Supreme Court cases *Mazzeo Julio Lilo y otros* (n. 7), para. 21; and *Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simon, Julio Hector y otros s/ privación ilegítima de la libertad, etc.*, June 14, 2005, the Argentine Supreme Court relied extensively on the *Barrios Altos* decision of the IACtHR when stating that Argentina's amnesty laws (*Punto Final* and *Obediencia Debida*) were unconstitutional. See the questioning of constitutionality control in Acosta by the Argentine Prosecutor General, Walter Carnota, "The Inter-American Court of Human Rights and 'Conventionality Control'" [2015] unpublished paper, 25 et seq. See also the Argentine Supreme Court in *Rodríguez Pereyra v. Ejército Nacional*, November 27, 2012.

⁶⁹ Argentine Supreme Court, *Rodríguez Pereyra v. Ejército Nacional* (n. 68), para. 24; see also *Mazzeo Julio Lilo y otros* (n. 7).

Tellingly, the reception of the Inter-American Court's case law at the domestic level is particularly good in cases where the amnesty laws at stake lack procedural legitimacy: when they are self-amnesties or were adopted under the pressure of the former regime, as was the case in Peru, Chile, and Argentina. The Court's jurisprudence is especially welcome in these instances. Conversely, the reception of the Inter-American Court's amnesty jurisprudence is more critical in countries where the amnesty is combined with a broad societal consensus, as was the case in Uruguay. Indeed, the reception of the *Gelman* case at the domestic level was controversial: the Uruguayan vote on a law doing away with the Expiry Law in October 2011 resulted in a 49–49 deadlock. Until 2019, Uruguay had not fully complied with the Inter-American Court's judgment in the *Gelman* case. There seemed to be a lack of effective prosecution from judicial bodies, a general unwillingness to recognize crimes as crimes against humanity, and a certain opposition to the conventionality control.⁷⁰ This indicates how influential the method with which an amnesty law is adopted at the domestic level can be in determining the reception of the Inter-American Court's case law. The Inter-American Court's authority is questioned to a further reaching extent in relation to amnesties that were adopted by parliament or backed by a broad societal consensus, as in Uruguay, and thus in a process with increased domestic procedural legitimacy.⁷¹ Conversely, it proved to be of minor relevance whether a particular State was party to a case: Peru, Chile, and Argentina complied equally well with the Court's judgments even though not all were party to a case and followed the interpretative guidance provided by the Inter-American Court.

5. Concluding Remarks

To deal with past human rights violations is a challenge for any society moving from a violent past to a hopefully more peaceful future. The success of these transitions will largely depend on a society's ability to address this past. This has proved true for many Latin American States. As was shown throughout this chapter, the Inter-American Court has accompanied domestic democratic transition processes remarkably well through its "amnesty jurisprudence," overruling the impunity extended to perpetrators of violations. The Court's transformative impact is thus considerable, as illustrated in Peru, Chile, and Argentina.

⁷⁰ Center for Justice and International Law, "Uruguay reconoció ante la Corte Interamericana de Derechos Humanos el incumplimiento de la sentencia del caso Gelman," September 19, 2019, <<https://www.cejil.org/es/uruguay-reconocio-corte-interamericana-derechos-humanos-incumplimiento-sentencia-del-caso-gelman>> (accessed February 5, 2022).

⁷¹ Another challenge may arise in relation to amnesties that are part of a peace process (as in Colombia).

Different dimensions, however, can be distinguished. First, the Inter-American Court has set up clear substantive standards, which guide democratic transitions at the domestic level and set limits on State action from a human rights perspective—especially in terms of the rights of victims. These standards cover the three dimensions of Transitional Justice—retributive, restorative, and distributive. Domestic transitions to democracy, therefore, are facilitated along these lines. Second, innovative techniques of norm control make the implementation of the respective human rights standards easier at the domestic level. The nullification of amnesty laws without the need for an additional domestic act helps to overcome national obstacles in implementation—for example, internal resistance—and contributes to giving maximum effect to the respective standards. The conventionality control disperses the impact of the Inter-American Court’s jurisprudence throughout the Americas. Thus, the *inter partes* effect of judgments—which, in view of the limited number of IACtHR judgments, could be an impediment to transformative impact—is overcome.

Overall, the Inter-American Court’s case law on amnesties has been well received in Latin American States, as shown in Peru, Chile, and Argentina. Domestic tribunals especially have given effect to the Inter-American Court’s jurisprudence and made themselves allies of the Court. Indeed, the references to the Court’s jurisprudence seem to support domestic tribunals in their fight against impunity and inadmissible amnesties at the domestic level, as it gives their decisions moral, political, and legal authority. Domestic tribunals are relieved from carrying the burden of dealing with past human rights violations alone. The Inter-American Court thus supports domestic judiciaries vis-à-vis the executive and possibly the legislative branch, strengthens the separation of powers, and furthers domestic checks and balances. Notably, the Inter-American Court’s amnesty jurisprudence is best received in relation to amnesty laws that were passed by the former executive branch responsible for or involved in human rights violations, and therefore lack internal domestic legitimacy.

In sum, the transformative impact of the Inter-American Human Rights System appears most lasting through its strengthening of domestic tribunals. This is not only of relevance for the question of how to deal with *past* human rights violations. A strong and independent domestic judiciary is also a firm promise for a peaceful and democratic society in the future, which is perhaps the most important and most durable impact of the ICCAL in Latin America.