

# Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes

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## INTRODUCTION

Until recently, immunity measures like amnesties were considered an acceptable part of promoting transitional justice in countries seeking to address past episodes of systematic violations of human rights. The politically sensitive need to broker peace between oppositional forces often outweighed the moral imperative of seeking to punish those responsible for perpetrating human rights atrocities. The “third wave of democratization” in Latin America during the 1980s contributed greatly to this trend, with the use of immunity measures in negotiated transitions becoming an important bargaining chip in brokering political impasse in South and Central America.<sup>1</sup>

Certainly, the Latin American experience has played a significant role in shaping the debates and direction of transitional justice in several respects. The consistent use of amnesties in the region contributed to the

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1. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 53 (2000).

growing acceptance of amnesties in the 1980s.<sup>2</sup> By the end of the Cold War, the transitional justice discourse in Latin America centered largely around the *truth v. justice* debate, which put at issue whether a political transition could or should include criminal trials. Political leaders of these countries often justified the use of amnesty in the name of peace, an argument that went largely unquestioned and resulted in a sort of a political balancing test that more often tipped in favor of assuring political stability over criminal justice in post-conflict or post-authoritarian settings. Nevertheless, to assure accountability, these countries often formed truth commissions to conduct investigations and to provide a mechanism for truth telling for the benefit of victim-survivors and society at large. As a result, Latin America helped popularize the truth commission model, reliance upon which grew as a way to compensate for compromised justice schemes. While at first truth commissions were believed to be a “second-best” option,<sup>3</sup> they soon became complementary and necessary measures for confronting past repressive and violent regimes through restorative justice.

Later, Latin America once again helped reshape the terms of the *truth v. justice* debate in the 1990s. With national justice largely foreclosed in transitional Latin American countries in the 1980s, many victim-survivors and their advocates resorted to international human rights enforcement bodies like the Inter-American Court of Human Rights (IACtHR) for a remedy. As a result, international human rights law jurisprudence, frequently discussed by learned jurists, strengthened recognition of individual rights while slowly chipping away at absolute state sovereignty. Although a state’s prerogative to use amnesties dates to antiquity,<sup>4</sup> the human rights movement suddenly planted serious

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2. See Naomi Roht-Arriaza, *Truth Commissions and Amnesties in Latin America: The Second Generation*, 92 AM. SOC’Y INT’L L. PROC. 313, 313–15 (1998) (offering a historical view of the Latin American experience with amnesties and its impact on the general acceptance of these immunity measures).

3. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2546 n.32 (1991) (“Whatever salutary effects it can produce, [a truth commission] is no substitute for . . . prosecutions. Indeed, to the extent that such an undertaking purports to replace criminal punishment . . . it diminishes the authority of the legal process . . .”). *But cf.* MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 88 (1998) (arguing that truth commissions are not “a second best alternative to prosecutions,” but instead can be a form better suited to meet the many goals pertinent to transitional politics).

4. TEITEL, *supra* note 1, at 58 (writing that amnesties were granted to nearly all participants in the Athenian Civil War in 403 B.C.). For a general discussion of amnesties, see Gwen K. Young, *All the Truth and as Much Justice as Possible*, 9 U.C. DAVIS J. INT’L L. & POL’Y 209 (2003) (presenting a definitional overview of amnesties).

questions about such immunity measures legitimacy through three main arguments: first, international law creates a state duty to investigate, prosecute, and punish those responsible for serious violations of human rights; second, international law also provides victims a fundamental right to justice (the “victims rights argument”); and third, post-conflict policy recognizes that criminal justice is good for democracy and the rule of law.<sup>5</sup> As a consequence, the *truth v. justice* question began to tip in favor of criminal trials because the rights of victims now factored into a balancing equation that once only considered the preferences of political leaders and elites.

Roughly at the same time as the development of human rights law, a parallel development in international criminal law also laid inroads to undermine the validity of amnesties. Specifically, the end of the Cold War permitted renewed attention to the use of international and hybrid tribunals for criminal prosecutions, a remedy left largely dormant since the Nuremberg trials in 1945. Jurisprudence emanating from these tribunals solidified the principle of individual criminal liability for egregious human rights violations, which previously was thought to trigger only liability based on the theory of the wrongful acts of states.

These streams of international human rights law and international criminal law together helped cause a paradigmatic shift. Today, amnesties are no longer assumed to be unconditionally lawful within an international legal framework.<sup>6</sup> Instead, many scholars now acknowledge that to be legitimate, amnesties must conform to legal norms. This has created a standard of “qualified amnesties” with customary and treaty law prohibiting bars to prosecution for war crimes, enumerated treaty crimes, and crimes against humanity. Yet, this discourse suggests that it is still possible for nations to resort to amnesties for other serious human rights violations.

With regard to this last point, this Article responds to an apparent gap in the scholarly literature which fails to merge the fields of human rights law and international criminal law—a step that would resolve the current debate as to whether *any* amnesty in transitional justice settings is lawful. More specifically, even though both fields are a subset of transitional justice in general, the discipline of international criminal law still supports the theory of “qualified amnesties” in transitional justice

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5. 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, 182 (2002).

6. See discussion *infra* Part II.

schemes, while international human rights law now stands for the proposition that no amnesty is lawful in those settings. This Article brings attention to this new development through a discussion of the *Barrios Altos* case, a seminal decision issued by the IACtHR in 2001.<sup>7</sup>

*Barrios Altos* arose out of a dispute concerning one amnesty law, promulgated in 1995 by former Peruvian President Alberto Fujimori, which extended immunity to all state agents responsible for serious human rights violations during Peru's internal armed conflict between 1980 and 2000. When Fujimori unexpectedly fled the country in 2000, the transitional government sought clarification from the IACtHR on the amnesty laws to determine whether its transitional justice experience could include criminal trials. The result was a prompt decision in which the IACtHR declared immunity measures such as amnesty laws to be contrary to state obligations under international human rights law, a holding that can be interpreted to outlaw all amnesties for acts that constitute human rights crimes. Yet recent scholarship, most notably from the international criminal law field, has ignored this decision or otherwise interpreted it overly narrowly.<sup>8</sup> This Article responds by offering a more in-depth understanding of the *Barrios Altos* decision in order to inform the ongoing academic debates on the evolving doctrine on amnesties in transitional justice schemes.

In addition, this Article seeks to reveal how an international human rights decision can dramatically impact state practice, thus also contributing to a pending question in international human rights law as to whether such jurisprudence is effective in increasing human rights protections. As a result of the IACtHR ruling, the Peruvian Truth and Reconciliation Commission (TRC) fully embraced the principle of criminal justice, seeking to conduct its own investigations to support state efforts to initiate criminal prosecutions. *Barrios Altos* dramatically altered the Peruvian transitional justice experience, eventually leading to prosecutions of police officers as well as military and civilian leaders, including Fujimori himself. As one of the more recent transitional justice experiences, the Peruvian experience offers an important look at how the concept of criminal justice may now figure as a central component of transitional justice schemes. Additionally, the *Barrios Altos* decision has also set a new precedent for the region, leading other Latin American countries to annul infamous amnesty laws of the past and finally initiate criminal trials. In light of these recent developments, this Article sug-

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7. *Barrios Altos Case*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

8. See discussion *infra* Part V.

gests that the *truth v. justice* dilemma may no longer exist. Instead, criminal justice must be done.

To develop this conclusion, Part I of this Article first offers an historical overview of the *truth v. justice* debate in the field of transitional justice, with a focus on amnesties. In particular, Part I examines the Latin American experience and how it shaped the terms of this debate that eventually pushed criminal justice to the sidelines of transitional justice. Part II discusses how a changing international legal context helped to contest the use of immunity measures and create the current standard of “qualified amnesties” through international human rights law and international criminal law. Part III then turns to the specific story of Peru in order to offer an historical example of how amnesties create a culture of impunity in national settings characterized by serious human rights violations. Part IV explains how Peru helped to reverse this trend of impunity as well as create a new standard in transitional justice schemes by resorting to the Inter-American System of Human Rights. Part V offers a systematic analysis of the *Barrios Altos* case in order to demonstrate how it may be interpreted to outlaw all amnesties, a conclusion also supported by subsequent state practice, which is explored in Part VI. The Article concludes by looking at the implications of this new legal development in regard to amnesties in order to encourage future research regarding the role of criminal justice in transitional justice schemes.

#### I. *TRUTH V. JUSTICE: THE CONTROVERSY OF AMNESTY WITHIN TRANSITIONAL JUSTICE SCHEMES*

This Part offers an historical look at the field of transitional justice. Despite its origins in principles of criminal justice, transitional justice evolved to exclude the use of criminal trials in the decades following World War II due to the widespread adoption of immunity measures, such as amnesties, in post-conflict and post-authoritarian countries, especially those in Latin America. This development gave rise to the *truth v. justice* debate, the evolution and terms of which will be discussed in order to illustrate how international law eventually moved towards bringing criminal justice back into transitional justice schemes.

The criminal justice origins of transitional justice run deep. In fact, Ruti Teitel traces the genealogy of transitional justice back to the criminal trials at Nuremburg from 1945 to 1949,<sup>9</sup> reminding us that the pub-

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9. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 70 (2003).

lic imagination and understanding of transitional justice often conjures up images of criminal trials and the punishment of the culprits of displaced regimes.<sup>10</sup> Certainly, the prosecutions of prominent members of Nazi Germany's economic, political, and military leadership set a new standard: state actors could be held criminally liable for state crimes.<sup>11</sup> Consequently, the Nuremberg trials set an international standard, inspiring the trials of perpetrators linked to World War II crimes in other countries.<sup>12</sup> Above all else, the Nuremberg trials contributed to the birth of the transitional justice field, to which the general fields of international criminal law and international human rights law arguably belong.<sup>13</sup>

Although precise definitions of the term "transitional justice" vary, the term ultimately rests on the search for justice in response to past episodes of widespread human rights violations, most often those associated with armed conflict, authoritarian regimes, and apartheid.<sup>14</sup> In these situations, trials can serve a clearly political purpose by laying the foundation for a transition that disavows the political norms of predecessors and works "to construct a new legal order."<sup>15</sup> In this sense, trials can draw a "thick line" between the past and present to prevent new cycles of violence and to help assure the future of a new democracy.<sup>16</sup> History, however, has shown time and again the difficulties countries face in try-

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10. TEITEL, *supra* note 1, at 27; *see also* Eric Blumenson, *National Amnesties and International Justice*, 2 EYES ON THE ICC 1, 4 (2005) (concurring by writing that "the duty to bring the worst criminals to justice is a deep sentiment, or an article of faith").

11. This precept now underscores the subject of international criminal law. *See* TEITEL, *supra* note 1, at 74. *See generally* ROBERT E. CONOT, *JUSTICE AT NUREMBERG* (1983); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992); Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551 (2006) (providing a detailed history of the history of the Nuremberg trials).

12. CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 10 (1996) (naming Italy, Japan, Austria, France, Belgium, Hungary, Poland, and Czechoslovakia as places where additional trials occurred).

13. *See* MINOW, *supra* note 3, at 27 (1998) (discussing the human rights movement arising out of Nuremberg); TEITEL, *supra* note 1, at 32 (drawing the connection between international criminal law and transitional justice).

14. *See* Louis Bickford, *Transitional Justice*, in *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY* 1045, 1045–46 (Dinah L. Shelton ed., 2005); Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2013 (1997) (noting the qualitative transition refers to a "bounded period, spanning two regimes").

15. TEITEL, *supra* note 1, at 30.

16. Juan E. Méndez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* 1, 7 (A. James McAdams ed., 1997).

ing to “close the books” on a past marred by widespread human rights violations in order to build a new legal and political order.<sup>17</sup>

Partly as a result of these problems, the initial enthusiasm for criminal justice generated by Nuremburg was short lived. Geopolitical changes that coincided with Nuremburg, namely the Cold War, made international trials less politically feasible and thereby also contributed to the decline of international criminal justice.<sup>18</sup> A Westphalian philosophy promoted a policy of noninterference that deferred to national sovereigns to decide the most appropriate means of achieving peace.<sup>19</sup> Accordingly, despite the millions of people victimized by brutal regimes since World War II, criminal prosecutions for such oppression in that period have been rare.<sup>20</sup>

#### A. *Amnesty in the Americas*

The third wave of democratization in Latin America during the 1980s contributed to the international tendency to accept that criminal justice could be compromised during delicate political transformations.<sup>21</sup> With the exception of Bolivia,<sup>22</sup> retroactive justice for state crimes in Latin

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17. See generally JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (2004).

18. For example, the regime changes in Southern Europe (Spain, Portugal, and Greece) following World War II took on a wholly local dimension and further undermined any assumption that criminal justice would be pursued. See NINO, *supra* note 12, at 16. See generally Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT'L L. 619, 629 (2005) (providing an overview of the concept of sovereignty).

19. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 75–76 (6th ed. 1998) (discussing the principle of sovereignty in international law). See generally Stéphane Beaulac, *The Westphalian Legal Orthodoxy—Myth or Reality?*, 2 J. HIST. INT'L L. 148 (2000) (discussing the history of the Westphalian doctrine).

20. See John Dugard, *Retrospective Justice: International Law and the South African Model*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES*, *supra* note 16, at 269, 276 (discussing a few of the rare cases of prosecution in Greece, Ethiopia, and Rwanda); Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 593–94 (1998) (discussing the rarity of criminal prosecutions since Nuremburg).

21. See Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 1–6 (1990).

22. Bolivia stands apart from its neighbors as one of the earliest transitional experiences in Latin America in which criminal trials for human rights abuses were held in a political transition from a military dictatorship. On April 21, 1993, after a seven-year trial, its supreme court convicted former Bolivian military dictator García Meza (1980–81) to thirty years in prison. It also convicted some of his top ministers and paramilitary members. See René Antonio Mayorga, *Democracy Dignified and an End to Impunity: Bolivia's Military Dictatorship on Trial*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES*, *supra* note 16, at 61, 61–63. This phase ended eighteen years of military rule (1964–82) due to what René Antonio



America became uncommon in this period due both to inaction and to the use of amnesties and pardons on a frequent basis.<sup>23</sup> Thus, the Latin American experience began to suggest a model of “truth and justice as far as possible.”<sup>24</sup>

The experience of Argentina, in particular, reveals how practical concerns outweighed principled ones when criminal trials put at risk the complex and delicate undertaking of political transition. In 1980, the Argentine military dictatorship agreed to hold national elections conditioned on the passage of amnesty laws.<sup>25</sup> The subsequently elected president, Raúl Alfonsín, however, created the National Commission on the Disappearance of Persons (CONADEP), which eventually led to criminal prosecutions of top military leaders.<sup>26</sup> Alfonsín’s efforts soon backfired when the military showed its dissatisfaction through a series of uprisings. In response, the president passed a series of laws including the *Ley de Punto Final* (Law of Full Stop), which established an end date to the trials, as well as the *Ley de Obediencia Debida* (Law of Due Obedience), which provided immunity to lower ranked, subordinate officers if they acted within the scope of duty.<sup>27</sup> Both laws were perceived as “undercover” amnesties that eventually frustrated national attempts to prosecute perpetrators of human rights crimes.<sup>28</sup>

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Mayorga terms the “broad societal demand for justice” coupled with the military’s weak and discredited status. *Id.* at 71.

23. NINO, *supra* note 12, at 39. For a discussion of amnesties and basic definitional terms, see generally Roderick O’Brien, *Amnesty and International Law*, 74 *NORDIC J. INT’L L.* 261 (2005).

24. ANDREW RIGBY, *JUSTICE AND RECONCILIATION: AFTER THE VIOLENCE* 63 (2001) (writing on the Latin American transitional justice experience).

25. The military, led by General Rafael Videla, overthrew civil socialist leader Juan Perón in 1973, but the military’s defeat in the war with Britain over the Malvinas Islands (Falklands) largely discredited them. See Carlos H. Acuña & Catalina Smulovitz, *Guarding the Guardians in Argentina: Some Lessons About the Risks and Benefits of Empowering the Courts*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES*, *supra* note 16, at 93, 101–02 (discussing the *Ley de Pacificación Nacional* (Law of National Pacification) that granted immunity to armed and police forces for crimes committed in context of the military repression between May 25, 1973, and June 17, 1982); Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 160 (Naomi Roht-Arriaza ed., 1995) (discussing Argentina’s amnesty laws).

26. See Acuña & Smulovitz, *supra* note 25, at 104.

27. *Id.* at 107–08.

28. See Luis Márquez Urtubey, *Non-Applicability of Statutes of Limitation for Crimes Committed in Argentina: Barrios Altos*, 11 *SW. J. L. & TRADE AM.* 109, 112 (2005) (providing a history of Argentina’s amnesty laws). When Carlos S. Menem became president in July 1989, he pardoned top generals and 277 military personnel to attempt to resolve growing internal tensions. Acuña & Smulovitz, *supra* note 25, at 109–10.

Notwithstanding its struggles to assure criminal justice, Argentina established a new model of transitional justice that looked to other mechanisms for confronting the past and helped make truth commissions an acceptable way to fill the gap left by compromised criminal justice.<sup>29</sup> By the end of the 1980s, truth commissions in Latin America became as commonplace as the amnesty laws that compelled their conception.<sup>30</sup>

By the time Chile underwent its transition to civil rule following the end of Augusto Pinochet's military dictatorship in 1990, victims there also faced seemingly absolute bars to criminal justice for crimes resulting from his repressive rule.<sup>31</sup> At the time, Pinochet still maintained power despite having been voted out of office,<sup>32</sup> and the courts remained reluctant to pursue investigations, especially since a sweeping amnesty law passed in 1978 covered all crimes committed by the armed forces from 1973 to 1978.<sup>33</sup> Pinochet's successor, President Patricio Aylwin, instead formed a truth commission to provide a "second-best option" and attempted "to serve a cause—the pursuit of retrospective justice—that is more effectively undertaken by the courts."<sup>34</sup> In doing so, Aylwin essentially adopted the position of "[f]ull disclosure of the truth, and justice to the extent possible."<sup>35</sup>

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29. Truth commissions vary from country to country but are usually official and temporary bodies created to investigate and publish historical accounts of past widespread violations of human rights. See generally PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* (2001) (providing a comprehensive account of truth commissions in over thirty countries since 1970).

30. See Emily W. Schabacker, *Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses*, 12 N.Y. INT'L L. REV. 1, 6–7 (1999).

31. In 1973, Pinochet overthrew socialist president Salvador Allende in a coup. See Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20 HUM. RTS. Q. 843, 846–49 (1998) (providing a historical account of events leading to Chile's amnesty laws).

32. For example, even though growing discontent had led to a referendum that voted Pinochet out of office in 1988, the 1980 Constitution allowed him to continue to hold power as commander in chief of the army until 1990. Jorge Correa Sutil, "No Victorious Army Has Ever Been Prosecuted . . .": *The Unsettled Story of Transitional Justice in Chile*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 16, at 123, 131–33. Pinochet also continued to hold a lifetime Senate seat after being voted out of office.

33. Rebecca Evans, *Pinochet in London—Pinochet in Chile: International and Domestic Politics in Human Rights Policy*, 28 HUM. RTS. Q. 207, 220–21 (2006) (describing Chile's amnesty laws); Sutil, *supra* note 32, at 127.

34. Sutil, *supra* note 32, at 134–35.

35. *Id.* at 133 (citing Aylwin's inaugural speech on March 12, 1990). There were attempts to challenge the amnesty laws based on international law, which were eventually rejected by the Chilean Supreme Court. *Id.* at 135–36; see also Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 919–20 (1994) (providing a historical account of the attempts to annul Chile's amnesty law).

Jorge Correa Sutil points to the continued power of the military to explain why Chile could only secure “a partial truth, a partial justice, and a partial healing of old wounds.”<sup>36</sup> Unlike “transition through rupture” or total collapse, Chile’s experience required negotiations with an existing military power base which ultimately resulted in pacification laws that limited the ability of politicians and courts to do justice.<sup>37</sup> The residual power of former regimes generally helped to assure impunity, especially where there were negotiations relating to their continued presence in local power structures. In these situations, rather than seeking full-scale criminal prosecutions against former regime members, the question became “how much and to what extent justice was possible.”<sup>38</sup>

By the 1990s, with amnesty laws established as common fare, the focus turned almost exclusively to truth commissions. Transitions in Central America often mirrored those in South America, resorting to immunity mechanisms to avoid criminal justice and relying almost exclusively on truth commissions to assure that the government provided some type of accountability for past wrongs.<sup>39</sup> The experiences in Latin America began to shape what would eventually be well-recognized as some of the fundamental dilemmas in the growing field of transitional justice and would help define the terms of the *truth v. justice* debate.<sup>40</sup>

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36. Sutil, *supra* note 32, at 149. The Commission on Truth and Reconciliation was instructed to clarify the truth in a “comprehensive” manner and recommend how to rehabilitate the victims. Working nine months in camera, the commission produced “The Rettig Report” (named after the commission’s chairman Raúl Rettig). See Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 LAW & SOC. INQUIRY 79, 84–86 (1995) (describing the work of the Commission on Truth and Reconciliation).

37. Mayorga, *supra* note 22, at 67.

38. Sutil, *supra* note 32, at 133.

39. For example, five days after El Salvador’s truth commission published its report in 1993 urging criminal accountability for the human rights violations caused during its twelve-year civil war, the government passed an amnesty law barring criminal investigations and trials. Santiago A. Canton, *Amnesty Laws*, in VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA 167, 169 (Mónica Ávila Paulette & Catherine A. Sunshine eds., Gretta K. Siebentritt trans., 2007). Similarly, the Guatemalan Historical Clarification Commission produced its final report, *Guatemala: Memoria del Silencio*, on February 25, 1999, but was prohibited from naming perpetrators or individualizing responsibility. Joanna R. Quinn & Mark Freeman, *Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa*, 25 HUM. RTS. Q. 1117, 1122 (2003). See generally Popkin & Roht-Arriaza, *supra* note 36, at 91–93 (describing the origins of Guatemala’s truth commission).

40. See Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 99 (2008).

### B. Promoting Truth Commissions over Criminal Justice

Pursuant to the Latin American experience, the “threshold dilemma” of transitional justice became choosing what kind of justice.<sup>41</sup> The original strong link of justice to criminal trials spearheaded by Nuremberg was weakened by an “an increased pragmatism in and politicization of the law.”<sup>42</sup> This process, however, was not without resistance. Even when state practice seemed to suggest the futility of any debate, a stronghold of justice advocates remained skeptical that *realpolitik* could once and for all terminate the discussion.<sup>43</sup> Their persuasion relied largely on legal arguments.<sup>44</sup>

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41. Teitel, *supra* note 14, at 2014 (discussing the function of law in political transformation). See generally Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20 LAW & SOC. INQUIRY 51 (1995) (positing that transitional regimes face political choices in how to respond to the crimes of their predecessors).

42. Teitel, *supra* note 9, at 70 (discussing the phases of transitional justice development).

43. Some reasons for prosecuting include discouraging future offenses, minimizing “self-help” vengeance, promoting reconciliation, respecting the rule of law, and strengthening a new democratic regime. See Alice H. Henkin, *Conference Report*, in ASPEN INST., STATE CRIMES: PUNISHMENT OR PARDON? 1, 3–4 (1989). As clearly stated by M. Cherif Bassiouni, “If peace is not intended to be a brief interlude between conflicts, then in order to avoid future conflict, it must encompass what justice is intended to accomplish: prevent, deter, punish, and rehabilitate.” M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, LAW & CONTEMP. PROBS., Autumn 1996, at 9, 13; see also Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT’L L. 283, 305–17 (2007) (summarizing the arguments for and against criminal prosecutions). For a fuller discussion of the debates, see generally Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002) (discussing the justice theories attributed to transitional justice); Richard L. Siegel, *Transitional Justice: A Decade of Debate and Experience*, 20 HUM. RTS. Q. 433 (1998) (outlining the terms of the *truth v. justice* debate).

44. Chronologists mark the 1988 Aspen Institute Conference in Colorado entitled “State Crimes: Punishment or Pardon” as the inaugurating event for this debate. See generally Alice H. Henkin, *State Crimes: Punishment or Pardon (Conference Report)*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 184 (Neil J. Kritz ed., 1995) (presenting a summary of the conference). The debate took on special focus through a scholarly exchange in the *Yale Law Journal* between Diane Orentlicher and Carlos S. Nino, who served as a legal advisor to Argentina’s President Alfonsín. See Orentlicher, *supra* note 3, at 2540 (arguing for a duty to prosecute “especially atrocious crimes”); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2639–40 (1991) (arguing that political contexts must be taken into account when designing an approach to criminal justice in transitions); Diane F. Orentlicher, *A Reply to Professor Nino*, 100 YALE L.J. 2641, 2641–42 (1991) (rebutting Nino’s interpretation of her viewpoint on the inflexibility of the positive duty to prosecute). In her authoritative first article, Orentlicher sets the legal parameters for a state’s duty to prosecute. Nino, in turn, perceives this as too rigid for the political realities of countries in transition and suggests that we need to be sympathetic to the factual circumstances of each country. Nino also notes that an “unrelenting” duty to prosecute may put leaders under pressure and make them look weak. NINO, *supra* note 12, at 187. This debate culminated in 1995 with the publication of Neil Kritz’s three-volume book presenting the wide array of opinions on the matter. See generally TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH

Nevertheless, the notion of justice began to take on a broader meaning, pushed in large part by a challenge to the binary approach to the matter of accountability that reduced the choice to trials or no trials. As Richard Goldstone, Justice of the Constitutional Court of South Africa, comments: “Certainly there is no one simple solution capable of addressing the complexities and subtleties inherent in a range of different factual situations. The peculiar history, politics, and social structure of a society will always inform the appropriate approach to this question in any given context.”<sup>45</sup> Part of this development favoring truth commissions without trials also related to the weakness of national courts in matters of criminal justice because “[c]ourts in newly constituted or re-emerging civilian regimes must contend with a legacy of a lack of independence, ties to the old regime, mistrust, fear and corruption, or the inexperience of newly appointed personnel.”<sup>46</sup> The perceived impossibility or impracticality of domestic trials led to their elimination altogether.

For that reason, Chilean human rights lawyer José Zalaquett has argued that “the real question is to adopt, for every specific situation, the measures that are both feasible and most conducive to the purpose of contributing to build or reconstruct a just order.”<sup>47</sup> In this stream of discussion, truth commissions were discussed as promoting “a different, possibly better, kind of justice than do criminal conviction and punishment—‘restorative’ justice.”<sup>48</sup> Soon, transitional justice literature began to examine more fully the validity of alternative justice mechanisms, such as truth commissions.<sup>49</sup> The argument was made that these mechanisms provided a better historical account of the past by revealing the

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FORMER REGIMES, *supra*.

45. Richard Goldstone, *Preface* to HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 9, 9 (Carla Hesse & Robert Post eds., 1999).

46. Roht-Arriaza & Gibson, *supra* note 31, at 844.

47. Naomi Roht-Arriaza, *The Need for Moral Reconstruction in the Wake of Past Human Rights Violations: An Interview with José Zalaquett*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA, *supra* note 45, at 195, 197; *see also* José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints*, 13 HAMLIN L. REV. 623, 628 (1990). The issue of particular historical and political contexts counsels that “true political reconstruction is always a matter of local initiative that does not lend itself to external compulsion . . .” Carla Hesse & Robert Post, *Introduction* to HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA, *supra* note 45, at 13, 19.

48. Kent Greenawalt, *Amnesty’s Justice*, in TRUTH v. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 189, 198 (Robert I. Rotberg & Dennis Thompson eds., 2000).

49. *See, e.g.*, Timothy Phillips & Mary Albon, *When Prosecution Is Not Possible: Alternative Means of Seeking Accountability for War Crimes*, in WAR CRIMES: THE LEGACY OF NUREMBERG 244 (Belinda Cooper ed., 1999).

patterns, causes, and context of abuses and by challenging the prevailing wisdom regarding former regimes.<sup>50</sup>

Transitional justice expanded to include questions concerning how to “heal” whole societies, with a restorative focus.<sup>51</sup> As Nigel Biggar explains, “Thinking of criminal justice primarily in terms not of retribution but of the vindication of victims significantly relaxes the tension between justice and the politics of making peace.”<sup>52</sup> His definition of justice folds other kinds of justice (restorative, reparative, historical) into a general category of justice, lessening the urgency of criminal trials. In this way, collecting victim testimonies, awarding reparations, and ensuring institutional reforms serve as a proxy for criminal justice.<sup>53</sup> Biggar poses the question: “Making peace or doing justice: must we choose?”<sup>54</sup> In other words, if all measures count equally toward the same overarching goal of peace and reconciliation, then the idea of choice becomes moot. Yet Biggar frames the perceived choice in terms of political demands to make peace and moral claims for justice, overlooking the fact that demands for justice also arise out of *legal* claims.<sup>55</sup>

This period of scholarly debate helped elevate the status of truth commissions from a “second-best” alternative to a mechanism at least as important as criminal justice in the transitional justice movement.<sup>56</sup> Yet in this phase, the movement often went too far to the other extreme. The celebration of truth commissions seemed to overshadow criminal

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50. See Harvey M. Weinstein & Eric Stover, *Introduction: Conflict, Justice and Reclamation, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 1, 13–14 (Eric Stover & Harvey M. Weinstein eds., 2004). See generally Lisa J. Laplante, *The Peruvian Truth Commission’s Historical Memory Project: Empowering Truth-Tellers to Confront Truth Deniers*, 6 J. HUM. RTS. 433 (2007) (providing an overview of the justifications for truth-telling exercises like a truth commission). It is noteworthy that while at the Aspen Institute conference there was no agreement on the obligation to punish, all participants agreed on the basic obligation to investigate the truth. Henkin, *supra* note 44, at 186.

51. Teitel, *supra* note 9, at 77.

52. Nigel Biggar, *Making Peace or Doing Justice: Must We Choose?*, in *BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT* 3, 16–17 (Nigel Biggar ed., 2003).

53. See *id.* at 11–13.

54. *Id.* at 3.

55. *Id.* at 13.

56. See generally Lisa J. Laplante & Kimberly Theidon, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 HUM. RTS. Q. 228 (2007) (discussing the heightened status of truth commissions in transitional justice); Charles Villa-Vicencio, *A Different Kind of Justice: The South African Truth and Reconciliation Commission*, 1 CONTEMP. JUST. REV. 407 (1999) (discussing favorably the truth commission model used by South Africa); Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 220 (2000) (advising against an absolute duty to prosecute).

trials, making them seem an almost bygone, antiquated feature of justice.<sup>57</sup> Martha Minow, a proponent of the restorative view of justice, described supporters of criminal justice as idealists who espouse “stirring but often shrill and impractical claims, such as the ‘duty to prosecute’” and as scholars who are remote from nations struggling with transitional justice.<sup>58</sup> Yet Minow’s account overlooks internal divisions within nations and the fact that local actors, especially victims-survivors, do not easily compromise their demands for criminal justice.<sup>59</sup> Indeed, ongoing local challenges to amnesty laws helped keep the embers of the debate slowly burning, ready to explode through an eventual resurgence of international criminal law.

### C. *Foreshadowing Change: South African Victim-Survivors Challenging Amnesties*

Experience on the ground, as documented by anthropologists, has shown that the theoretical debates often overlooked the demands of victim-survivors, whose hunger for trials remained even when elites compromised criminal justice. The events that unfolded around the creation of South Africa’s Truth and Reconciliation Commission in 1995 demonstrate this reality.<sup>60</sup> The South African experience not only helped make truth commissions a part of popular culture, but also simultaneously created the inference that amnesties are an acceptable feature of transitional justice.<sup>61</sup> Indeed, amnesty in exchange for truth constituted a

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57. See, e.g., Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118, 119–21 (2000) (providing a summary of the nine arguments against resorting to criminal prosecution following mass atrocities).

58. MINOW, *supra* note 3, at 28.

59. See Laplante & Theidon, *supra* note 56, at 241–44 (sharing ethnographic research on the resilient quest for criminal trials).

60. The South African Truth and Reconciliation Commission rose to such a high status that it made discussion of the topic mainstream and spawned perhaps more scholarly analysis than any other truth commission. See, e.g., Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective*, 63 MOD. L. REV. 1, 10–19 (2000) (discussing South Africa’s Truth Commission and amnesty laws); John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 277 (1998) (offering an overview of South Africa’s amnesty laws and their subsequent legal challenge); Sam Garkawe, *The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?*, 27 MELB. U. L. REV. 334 (2003) (discussing the amnesty process from the perspective of victims); Rosemary Nagy, *Violence, Amnesty and Transitional Law: “Private” Acts and “Public” Truth in South Africa*, 1 AFR. J. LEGAL STUD. 1, 3 (2004) (arguing that amnesty led to a “truncated” truth).

61. See Audrey R. Chapman & Hugo Van der Merwe, *Introduction: Assessing the South African Transitional Justice Model*, in TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER? 1, 8 (Audrey R. Chapman & Hugo Van der Merwe eds., 2008) (commenting that

central aspect of South Africa's 1995 Promotion of National Unity and Reconciliation Act, promising complete immunity to perpetrators of crimes "associated with a political objective . . . in the course of the conflicts of the past" but only if they offered "a full disclosure of all relevant facts."<sup>62</sup> The law permitted some of the country's most notorious perpetrators to escape justice and created an outcry, mostly among victims, even while it was applauded internationally as a model for future truth commissions.

Eventually this local disagreement led to a legal challenge of the Act based on both national and international law.<sup>63</sup> The South African Constitutional Court, though, dismissed the plaintiff's international law arguments.<sup>64</sup> It held that, in fact, the National Unity and Reconciliation Act was "compatible" with international law, and pointed to the Latin American experience to validate the use of amnesties in political transitions.<sup>65</sup> Although reluctantly concurring in the judgment, in his separate opinion Justice John Didcott explicitly recognized the compromises being asked from South Africa's citizens in upholding the constitutionality of South Africa's amnesty laws because he conceded that the amnesty laws denied the victims' their right to justice.<sup>66</sup>

Significantly, while victim-survivors rejected the decision and lobbied for full criminal justice, the press coverage and public reaction to the decision dismissed their concerns due to the hegemonic language of reconciliation.<sup>67</sup> Ultimately, the judgment served as a "watershed" in South Africa's transition as "a reconciliatory version of human rights talk triumphed" over one that put criminal justice front and center.<sup>68</sup> Ri-

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the South African truth commission "captured public attention throughout the world and provided the model for succeeding truth commissions"); Catherine Jenkins, *They Have Built a Legal System Without Punishment: Reflections on the Use of Amnesty in the South African Transition*, 64 TRANSFORMATION: CRITICAL PERSP. ON S. AFR. 27, 31 (2007) (noting that internationally "the policy of 'reconciliation' adopted in South Africa, of which the amnesty process is seen as a part, has commanded considerable respect").

62. Promotion of National Unity and Reconciliation Act 34 of 1995 s. 20(1), 20(7), available at <http://www.doj.gov.za/trc/legal/act9534.htm>.

63. The widow of Steven Biko, founder of the Black Consciousness Movement in South Africa and who died from torture in 1977, was the first to bring a case. See Hesse & Post, *supra* note 47, at 13–14.

64. See RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE 167–70* (2001) (providing a historical account of the South African Constitutional Court's ruling on the country's amnesty laws).

65. *Id.* at 169–70.

66. *Id.* at 172.

67. *Id.* at 171.

68. *Id.* at 172. But see Jonathan Klaaren & Howard Varney, *A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues Around Legislation for a Second Amnesty*, 117 S. AFR.



chard Wilson concludes, however, that “[t]he most damaging outcome of truth commissions is a result of their equating of human rights with reconciliation and amnesty.”<sup>69</sup>

Wilson speaks of “the large gap” between political reality and the survivors’ expectations of justice, since the vast majority of survivors preferred punishment.<sup>70</sup> Thus, unlike the passive view of victims presented by Biggar, Wilson introduces us to the idea of victims as protagonists. Transitional justice projects must consider the demands of victims and what they need for closure. These considerations put into question the legitimacy of amnesties.

Wilson discusses how the ambiguity of international law regarding the legitimacy of amnesties at the time of South Africa’s transition made the issue less clear. As Wilson states: “International criminal law is highly ambivalent on the question of amnesty, and the tension between national amnesties and international human rights treaties has a long history.”<sup>71</sup> Writing in 2001, Wilson points out that this ambiguity allows one, by “quoting selectively,” to “construct an argument to either justify or negate a national amnesty.”<sup>72</sup> At that time, the well-accepted doctrine of sovereign prerogative gave an individual’s right to justice far less weight than the social good of stability.<sup>73</sup> With great foresight, Wilson predicted that the “stand-off between ‘international retributionists’ and the ‘nationalist pragmatists’ over what international law definitively states on the question of amnesty is likely to shift in coming years,” especially in light of the increasing importance of the International Criminal Court (ICC).<sup>74</sup>

## II. A CHANGING GLOBAL CONTEXT: A LEGAL FRAMEWORK TO CHALLENGE AMNESTIES

As the new millennium neared, just as it seemed the *truth v. justice* debate tipped against criminal justice, the legitimacy of amnesty laws

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L.J. 572, 581–92 (2000) (offering a critical analysis of the Court’s decision).

69. WILSON, *supra* note 64, at 228.

70. *Id.* at 25.

71. *Id.*

72. *Id.* at 169.

73. *See id.* at 26.

74. *Id.* at 171. Other scholars and practitioners also speculated that the renewed international commitment to criminal justice would begin to change the terms of the *truth v. justice* debate. *See, e.g.*, Juan E. Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 256 (1997) (“Two or three years from now, analysts will have to reexamine everything said today about truth and justice in light of what these experiments produce.”).

took on “renewed importance” in a new international context.<sup>75</sup> Indeed, although successor regimes since antiquity have had to deal with the crimes of their predecessors and frequently resorted to amnesties, contemporary developments and globalization began to give this task “an international dimension” through the growth and recognition of both international human rights and international crimes.”<sup>76</sup> One sees two parallel movements that now seem to be converging, suggesting that criminal justice may once again be a solid pillar in the transitional justice paradigm. Today, a more solidified body of international law places new restrictions on local decisionmakers, suggesting that the choice that underscored the *truth v. justice* dilemma may be moot.<sup>77</sup> Indeed, the transitional justice pendulum has now swung back towards a focus on criminal trials, but this time embedded in legal not moral terms, thereby leaving less room for political considerations and manipulations. Most significantly, with the birth of this new legal union we can glimpse the impending demise of amnesty.

A. *International Criminal Law: Individual Accountability for Atrocities*

Clearer legal limits on sovereign prerogatives during political transitions began to form half a century after World War II through the incremental developments of international criminal law. Even though the Nuremberg legacy did not increase the frequency of criminal trials, it did spawn a growing body of treaty law expressly requiring criminal prosecutions.<sup>78</sup> Specific international crimes were codified in the Genocide Convention,<sup>79</sup> the Geneva Conventions of 1949,<sup>80</sup> Protocol I and II

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75. William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 467 (2001).

76. Dugard, *supra* note 20, at 269.

77. See Teitel, *supra* note 9, at 76.

78. See Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MICH. ST. U.-DETROIT C.L. J. INT'L L. 595, 600 (1999) (tracing the creation of treaties prohibiting genocide, torture, and war crimes to the Nuremberg principles).

79. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. EXEC. DOC. O, 81-1 (1949), 78 U.N.T.S. 277.

80. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention relative to the Protection of Civilian Persons in Time of War,

of 1977,<sup>81</sup> and the Convention Against Torture.<sup>82</sup> This new international criminal framework was strengthened further upon the creation of the international tribunals for Rwanda<sup>83</sup> and the former Yugoslavia,<sup>84</sup> and the establishment of the ICC.<sup>85</sup> These developments established the legal norm that the most egregious international crimes, including genocide, crimes against humanity, and war crimes, require punishment.<sup>86</sup>

Suddenly, the status of amnesties became suspect once again as scholars and practitioners speculated whether the ICC would respect national legislation that contravened the very essence of its subject matter jurisdiction.<sup>87</sup> The idea of immunity took a strong hit after the surprise arrest

Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. Certain acts are specified in the Geneva Conventions as “grave breaches.” First Geneva Convention, *supra*, arts. 49–50; Second Geneva Convention, *supra*, arts. 50–51; Third Geneva Convention, *supra*, arts. 129–30; Fourth Geneva Convention, *supra*, arts. 146–47. Common Article 3 of the Geneva Conventions applies to conflicts of a noninternational nature. *See, e.g.*, First Geneva Convention, *supra*, art. 3.

81. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. Protocol I also identifies acts which are classified as “grave breaches.” *See* Protocol I, *supra*, arts. 11, 85, 86.

82. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

83. *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing an international tribunal for Rwanda).

84. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (establishing an international tribunal for the former Yugoslavia).

85. On July 17, 1998, delegates to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome voted to adopt what is now called the “Rome Statute.” Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]; *see also* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (July 17, 1998).

86. Dugard, *supra* note 60, at 278 (discussing the significance of the international tribunals created in the 1990s).

87. Sang Wook Daniel Han, *The International Criminal Court and National Amnesty*, 12 AUCKLAND U. L. REV. 97, 97–98 (2006) (exploring the parameters of how the ICC would decide on domestic amnesties); Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT’L L. REV. 293, 296–99 (2004) (reviewing the debates over whether the ICC will respect national amnesties); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT’L L. 481, 483 (2003); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 522–27 (1999) (arguing that the ICC should respect national amnesty laws in some situations); Trumbull, *supra* note 43, at 286 (concluding that even if domestic amnesties have no binding effect on a third party’s ability to prosecute under the theory of universal jurisdiction, political reasons may cause one to defer to

of Pinochet in London in 1998 and the decision by the House of Lords to strip the former head of state of his immunity during extradition proceedings brought by a Spanish judge seeking to try Pinochet for human rights violations.<sup>88</sup> This decision also demonstrated that national amnesties have no legal effect in non-national, third country prosecutions.<sup>89</sup>

A growing international grassroots movement then began to challenge the general acquiescence to the “pervasive practice of impunity” that let those guilty of murder to go “literally, scot-free.”<sup>90</sup> The situation in Haiti became a quintessential example of amnesty failing to bring peace and deter future violence, further undermining the political rationale for amnesty.<sup>91</sup> Policy arguments then arose in favor of criminal justice.<sup>92</sup> The idea of choice became viewed by top scholars as fallacious given that “the attainment of peace is not necessarily to the exclusion of justice, because justice is frequently necessary to attain peace.”<sup>93</sup> Juan Méndez, now president of the International Center for Transitional Justice, wrote in 1997 that transitional governments face “one of the hardest choices” given the temptation to equate reconciliation with “forgive-and-forget policy.”<sup>94</sup> Nevertheless, he argued that wounds cannot be swept under the rug and warned against “tokenism and a false morality that only thinly disguises the perpetuation of impunity.”<sup>95</sup>

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immunity measures). The status of domestic immunity measures also arose before the international tribunal of the former Yugoslavia. See O'Brien, *supra* note 23, at 265–66.

88. Evans, *supra* note 33, at 209–11 (discussing the history of the extradition proceedings against Pinochet); Andreas O'Shea, *Pinochet and Beyond: The International Implications of Amnesty*, 16 S. AFR. J. HUM. RTS. 642, 643 (2000) (discussing the extradition proceedings against Pinochet and their implications for the legality of national amnesties and universal jurisdiction).

89. O'Shea, *supra* note 88, at 643.

90. Joyner, *supra* note 20, at 595; see also Jenkins, *supra* note 61, at 29 (discussing the “battle against impunity” that occurred with the status of amnesty in flux).

91. Haiti has experienced continuing cycles of violence and repression in the period since the twenty-nine year “Duvalier Dynasty” (referring to dictator Francois Duvalier, who fled to exile in 1986), due in part to its failure “to expose, let alone punish, the crimes of the past.” Kenneth Roth, *Human Rights in the Haitian Transition to Democracy*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA, *supra* note 45, at 93, 95–97.

92. “Redressing the wrongs committed through human rights violations is not only a legal obligation and a moral imperative imposed on governments. It also makes good political sense in the transition from dictatorship to democracy. In fact, the pursuit of retrospective justice is an urgent task of democratization, as it highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person.” Méndez, *supra* note 16, at 1.

93. Bassiouni, *supra* note 43, at 12; see also Dugard, *supra* note 20, at 285 (“Restoration of fidelity to the law is essential in a society which has been subjected to inhumanity in the name of the law.”).

94. Méndez, *supra* note 16, at 1.

95. *Id.*

The mantra of the movement was reflected in the preamble of the ICC's Rome Statute, which called for "an end to impunity."<sup>96</sup> The creation of the ICC has been credited by some with ushering in a "new order of international criminal responsibility" to address gross abuses of human rights and fill in the gaps of domestic legal systems.<sup>97</sup> Trials suddenly became "an essential component of reconciliation"<sup>98</sup> and amnesties were the tools for perpetrating impunity rather than reconciling warring parties.<sup>99</sup>

*B. Human Rights Law: The Right to Justice and the Duty to Prosecute*

One of the other significant challenges to amnesty arises out of the legal framework of international human rights law and the resulting "rights talk" which has made human rights dictum a global norm.<sup>100</sup> What was once a matter of only national politics and morality now must be grappled with in universal legal terms. It is important to remember that the political transitions in Latin America occurred before a strong and cohesive international legal human rights framework existed, and thus the choice of approaches was presented in terms of "justice v. democracy"—a logic of peace and war that omitted almost entirely a "logic of law."<sup>101</sup> The terms of the debate were thus limited to a false dichotomy based on a limited perception of reality. As Teitel states: "The observation that amnesty practices are often de facto associated with transitions is somehow turned into a normative statement about the relation of exercises of mercy to the liberal rule of law."<sup>102</sup>

In other words, because amnesty was what most national politicians opted for, it was assumed this was the only acceptable way to establish peace and the rule of law after years of lawlessness and widespread human rights abuses. State practice seemed to demonstrate that amnesties

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96. Rome Statute, *supra* note 85, pmbl.

97. See Newman, *supra* note 87, at 316.

98. Dugard, *supra* note 20, at 287.

99. Garth Meintjes & Juan E. Méndez, *Reconciling Amnesties with Universal Jurisdiction*, 2 INT'L L.F. 76, 76–77 (2000). William Schabas contends that the experience of Sierra Leone suggests that combatants do not necessarily need an amnesty to come forward, and some rebels will never be enticed to testify even with the promise of amnesty. William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145, 152–53 (2004).

100. See Jennifer L. Balint, *The Place of Law in Addressing Internal Regime Conflicts*, LAW & CONTEMP. PROBS., Autumn 1996, at 103, 104–05.

101. See Méndez, *supra* note 16, at 7–8.

102. TEITEL, *supra* note 1, at 55.

were not prohibited by international law.<sup>103</sup> Méndez recognizes, however, that until recently, many of these politicians could not count on “a stronger voice of support from the international community for the efforts [to prosecute].”<sup>104</sup>

Because human rights treaties are generally silent on the duty to guarantee criminal prosecutions,<sup>105</sup> they were once assumed to trigger state liability only where a state failed to protect the rights of individuals under its jurisdictional control. Liability, in turn, usually led to a declaratory judgment and sometimes to compensation and orders for reform.<sup>106</sup> As the *truth v. justice* debate began to take hold, however, human rights law evolved to include criminal prosecutions. One can see this influence, in particular, in the Inter-American System of Human Rights and its role in expanding international human rights obligations.<sup>107</sup> The Inter-American System traces its origins to the 1948 creation of the Organization of American States (OAS), an international organization comprised of member states from North, Central, and South America.<sup>108</sup> In 1959, the OAS established the IACHR to monitor and report on the human rights situations in member countries.<sup>109</sup> Ten years later, in 1969, the OAS created the American Convention on Human Rights.<sup>110</sup> When the American Convention entered into force in 1978,

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103. Michael P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 342–44 (2006) (arguing that state practice does not support the ban on amnesties).

104. Méndez, *supra* note 74, at 272.

105. Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, LAW & CONTEMP. PROBS., Autumn 1996, at 41, 48.

106. See Lisa J. Laplante, *Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention*, 22 NETH. Q. HUM. RTS. 347, 350 (2004).

107. For a more detailed account of the Inter-American System of Human Rights, see JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 2–7 (2003); 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, 361–64 (1994); Brian D. Tittmore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law*, 12 SW. J. L. & TRADE AM. 429 (2006).

108. For a discussion of the historical evolution of the Inter-American System, see THOMAS BUERGENTHAL, *PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS* 37–44 (4th ed. 1995); Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 31 (David J. Harris & Stephen Livingstone eds., 1998).

109. Statute of the Inter-American Commission on Human Rights, O.A.S. G.A. Res. 447, Inter-Am C.H.R., 9th Sess., OAS/Ser.L/V/I.4, rev. 8 (Oct. 1979), available at <http://www.cidh.oas.org/Basicos/English/Basic17.Statute%20of%20the%20Commission.htm>.

110. Organization of American States, American Convention on Human Rights, Nov. 22,

the IACtHR became the enforcement body for the treaty, with contentious jurisdiction to issue binding decisions involving human rights violations by member states.<sup>111</sup>

Significantly, the development of the Inter-American System coincided with the political transitions in Latin America discussed above in Part I. The Inter-American System generally took a hard stand against prior oppressive regimes. In the mid-1980s, however, the IACHR displayed caution regarding the obligations of “recent democracies” to investigate and initiate prosecutions of human rights violations of previous governments, stating that an international body could only make “minimal” contributions to the “sensitive and extremely delicate issue” of whether recent democracies should prosecute past abuses.<sup>112</sup> Undoubtedly, the IACHR’s hesitation reflected the relative youth of the human rights system and the lack of a solidified legal framework to support a more definitive position on the duty to investigate and prosecute human rights crimes.<sup>113</sup> However, the IACHR began to take a consistent position on the duty to prosecute once the IACtHR issued a landmark decision on the matter in the *Velásquez Rodríguez* case in 1988.<sup>114</sup> There, the IACtHR held that state parties have a duty to “ensure” the enumerated rights of the Convention, which, in turn

implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must *prevent, investigate and punish* any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages result-

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1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

111. See Victor Rodríguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593, 608–19 (2000) (providing a historical overview of the development of the IACtHR).

112. Inter-Am. Comm’n on Human Rights [IACHR], *Annual Report of the Inter-American Commission on Human Rights 1985–1986*, OEA/Ser.L/V/II.68, doc. 8, rev. 1, at ch. V (Sept. 26, 1986), available at <http://iachr.org/annualrep/85.86eng/chap.5.htm> [hereinafter *1985–1986 Annual Report*]. The Commission thus found that the response “must come from the national sectors which are themselves affected, and the urgent need for national reconciliation and social pacification must be reconciled with the ineluctable exigencies of an understanding of the truth and of justice.” *Id.*

113. See Scharf, *supra* note 105, at 51 (discussing how the evolution of the human rights normative framework would eventually lead to a change in the IACHR’s position).

114. *Velásquez Rodríguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

ing from the violation.<sup>115</sup>

Thus, if a state fails to investigate, prosecute, and punish perpetrators of human rights violations, it becomes liable.<sup>116</sup> Moving forward, the IACHR then consistently began to question the appropriateness of amnesties in Latin American political transitions through its reports on individual cases as well as through its annual and country reports.<sup>117</sup> The Commission took this position even when countries had created a truth commission, stating that these investigations and payments of compensation were “not enough.”<sup>118</sup>

In this way, the IACHR became one of the first international human rights monitoring bodies to find amnesty laws contrary to basic human

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115. *Id.* ¶ 166 (emphasis added). Several scholars argue that the *Velásquez Rodríguez* decision should not be read too broadly because the Court did not order criminal prosecutions in that particular case. See Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, LAW & CONTEMP. PROBS., Autumn 1996, at 197, 210 (questioning if this holding is “iron clad” because the Court did not order criminal investigations in that case); Scharf, *supra* note 105, at 50–51 (arguing that the Court’s ruling is not an absolute requirement because it did not order criminal investigations at the reparation stage); Trumbull, *supra* note 43, at 298–99 (adopting the view that the failure to order prosecution diminishes the weight of the case). However, the IACtHR repeatedly refers to this general holding in subsequent cases in which it does order criminal investigations, thus suggesting that the interpretation of these scholars may not be accurate. See Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States’ Duty to Punish Human Rights Violations and its Dangers*, 23 AM. U. INT’L L. REV. 195, 196–203 (2007).

116. See Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 513 (1990). The European Court of Human Rights arrived at this same conclusion in *Kurt v. Turkey*, 1998-III Eur. Ct. H.R. 1152 (1998), in which it held that states have a duty to investigate, prosecute, and punish human rights violations.

117. See, e.g., *Garay Hermsilla v. Chile*, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 105 (1996); *Consuelo v. Argentina*, Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. C.H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14 ¶ 50 (1992–93) (concluding that amnesty laws violate the judicial guarantees embodied in Articles 8 and 25 of the American Convention); *Mendoza v. Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Inter-Am. C.H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14 ¶ 54 (1992–93); *Massacre Las Hojas v. El Salvador*, Case 10.287, Inter-Am. C.H.R., Report No. 26/92, OEA/Ser.L/V/II.83, doc. 14, at 83 (1992–93) (declaring that amnesty laws in El Salvador contravene the American Convention); IACHR, *Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.83, doc. 31 (Mar. 12, 1993), available at <http://iachr.org/countryrep/Peru93eng/background.htm#f.%20Impunity> (“One element that has been particularly disturbing to the Commission is that up until 1990, no member of the security forces had been tried and punished for involvement in human rights violations.”); *1985–1986 Annual Report*, *supra* note 112, ch. IV, available at <http://www.cidh.oas.org/annualrep/85.86eng/chap.4.htm> (addressing political transitions in the region and attempting to strike a balance between peace and the state’s obligation to investigate).

118. *Garay Hermsilla*, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, ¶ 77.



rights principles.<sup>119</sup> Yet, because the IACHR's decisions are not binding, states often responded by either ignoring its recommendation, or providing the classic argument that the need to balance peace with justice justified the laws.<sup>120</sup> Nevertheless, these Inter-American System decisions helped build a bridge between the evolving field of international criminal justice and human rights law by recognizing that the principle of individual criminal responsibility is fundamental to the punishment of serious human rights crimes.<sup>121</sup> Essentially, a human rights violation not only triggered state responsibility, but could also constitute an international crime.<sup>122</sup> States cannot be brought to criminal trials for human rights violations, but the individuals who make up the state apparatus can.<sup>123</sup> This development directly challenged the unconditional prerogative of the sovereign to decide matters of criminal jurisdiction.<sup>124</sup> The choice of amnesty no longer depended solely on internal political considerations and "elite preferences" because legal rules now tied the hands of politicians in regime changes.<sup>125</sup>

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119. See Canton, *supra* note 39, at 170–71 (viewing the IACHR's decisions as among the first to reject amnesty laws). *But see* Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857, 865–70 (1995) (arguing that the IACHR did outright condemn amnesties but left open that if they adhered to certain requirements they would be acceptable). The United Nations has also issued strong opinions on blanket amnesties. See, e.g., U.N. Human Rights Comm. [UNHRC], *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 9, U.N. Doc. CCPR/C/79/Add.67 (July 25, 1996) (commenting on Peruvian amnesty law); UNHRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 153, U.N. Doc. CCPR/C/79/Add.46 (Apr. 5, 1995) (stating that Argentina's blanket amnesty laws are inconsistent with the International Covenant of Political and Civil Rights and expressing concern that these laws may create an "atmosphere of impunity" and violate victims' rights to redress); *Rodríguez v. Uruguay*, Comm'n No. 322/1988, Human Rights Comm., U.N. Doc. CCPR/C/51/D/322/1988, ¶ 12.2 (Aug. 9, 1994) (holding that Uruguay's amnesty laws impaired the right to an adequate remedy).

120. See Canton, *supra* note 39, at 177.

121. See Mirko Bagaric & John Morss, *In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights*, 29 SUFFOLK TRANSNAT'L L. REV. 157, 204–06 (2006) (examining the overlap and connection between international criminal law and human rights).

122. See LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 20, 50 (1992); Henrard, *supra* note 78, at 605–09 (discussing the concept of individual criminal responsibility for international crimes).

123. Joyner, *supra* note 20, at 607–08.

124. See Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 11–12 (1998).

125. See David Pion-Berlin, *To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, *supra* note 44, at 82, 82–84, 100; see also Méndez, *supra* note 16, at 3–8; Pasqualucci, *supra* note 107, at 345 (referring to the historical deference to national decisions to implement amnesty).

The rights of victim-survivors, such as the “right to truth” and the “right to an effective remedy” (which includes criminal investigations and prosecutions) now factor into the *truth v. justice* balancing equation.<sup>126</sup> Furthermore, the denial of these rights by a state will trigger new violations.<sup>127</sup> Thus, it is now understood that the state not only has a duty to pursue criminal prosecutions, but also a duty to uphold a victim’s right to a remedy.<sup>128</sup>

### C. *Current Affairs: Qualified Amnesties*

Despite the impressive inroads paved by the converging paths of international criminal law and international human rights, the resilience of amnesty remains. A majority of scholars and practitioners continue to defend the legitimacy of amnesties, although now in legal terms rather than practical and political ones. One sees this trend in a new line of scholarship seeking to establish guidelines, tests, and parameters for “legitimate” amnesties.<sup>129</sup> Thus, an inverse relation between interna-

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126. See Raquel Aldana-Pindell, *An Emerging Universality of Justiciable Victims’ Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes*, 26 HUM. RTS. Q. 605, 622–27 (2004) (exploring how criminal prosecutions are included as part of the right to remedy enjoyed by victims in the Inter-American System); Pasqualucci, *supra* note 107, at 349–59 (discussing the legal duty to ensure human rights by providing an “effective remedy” as recognized by the American Convention); Sherrie L. Russell-Brown, *Out of the Crooked Timber of Humanity: The Conflict Between South Africa’s Truth and Reconciliation Commission and International Human Rights Norms Regarding “Effective Remedies,”* 26 HASTINGS INT’L & COMP. L. REV. 227, 231–54 (2003) (providing an overview of the right to a remedy in international law).

127. See Aldana-Pindell, *supra* note 126, at 611. See generally DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 113–43 (2d ed. 1999) (discussing the state obligation to repair human rights violations).

128. See Roht-Arriaza, *supra* note 116, at 474–89. This general line of thinking originated with the Orentlicher-Nino debate. See *supra* note 44 (discussing the Orentlicher-Nino debate). This view was eventually adopted by the IACtHR. See *Villagrán Morales v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 99 (May 26, 2001) (holding that the duty to prosecute is separate from a state’s duty to make reparations).

129. See, e.g., Burke-White, *supra* note 75, at 468 (proposing that liberal international law theory could be used to accommodate the preferences of individuals and social actors in determining the validity of amnesty); Henrard, *supra* note 78, at 645–48 (discussing qualified amnesties that include selective prosecution); Newman, *supra* note 87, at 306–16 (exploring the accepted limits of amnesties); Ronald C. Slye, *The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights*, 22 WIS. INT’L L.J. 99, 121 (2004) (suggesting that the decision regarding who should be protected by amnesty and for how long will influence the legitimacy of an amnesty); Slye, *supra* note 5, at 239–47 (proposing situations when amnesties may be legitimate, including “compromise,” “corrective,” and “accountable” amnesties); Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INT’L SECURITY, Winter 2003/04, at 5, 7 (arguing that the “logic of consequences” should shape “strategies of justice”); Trumbull, *supra* note 43, at 319–26 (proposing a balancing test using the criteria of process, substance, and domestic and international

tional legal parameters and amnesties has emerged. As the legal rules regarding transitional justice have expanded, the breadth of amnesty provisions has been reduced. Consensus now rejects blanket amnesties barring all types of investigations.<sup>130</sup> The question is now: “What type of amnesty is acceptable in a given situation?”<sup>131</sup>

Part of the answer to this remaining question revolves around the paradox of legality in transitional justice settings: the rule of law depends on strictly observing issues of legality while putting on trial those who forsake the rule of law. Prosecutors in criminal trials must struggle to observe restrictions such as *nullem crimen sin lege*, which protects against ex post facto justice and punishment for acts not criminalized at the time of commission.<sup>132</sup> To counter this problem, it is now generally accepted that amnesties cannot be applied where treaties obligate states to prosecute or where customary law may be interpreted to compel prosecution.<sup>133</sup> Amnesties are unlawful for war crimes and treaty crimes, which are explicitly enumerated in the Geneva Conventions, the Genocide Convention, and the Torture Convention. Each of these conventions encapsulates the doctrine of *aut dedere aut judicare* (extradite or prosecute).<sup>134</sup> Recently, a new line of argument includes crimes

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circumstances to determine when amnesties are appropriate).

130. See Slye, *supra* note 5, at 191 (discussing the limits of blanket amnesties and the need for states to take action to address the past).

131. See Young, *supra* note 4, at 239 (presenting a legal framework to advise states on the proper scope of amnesty).

132. For a discussion of the concern about ex post facto issues in international criminal law, see Mark R. Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the “Elementary Dictates of Humanity,”* 22 BROOK. J. INT’L L. 111, 131–32 (1996).

133. See Cassel, *supra* note 115, at 207–21 (outlining the Inter-American System treaty law that specifically requires prosecution); Trumbull, *supra* note 43, at 287–91 (outlining the treaty and customary law bases for barring amnesty).

134. For a discussion of the doctrine of *aut dedere aut judicare* and the offenses to which it generally applies, see M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 3 (1995). On the treaty-based grounds for barring amnesty, see Joyner, *supra* note 20, at 597–607 and Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE*, *supra* note 25, at 24, 25–26 (discussing the rationales of *aut dedere aut judicare*). In 2000, the UN Secretary-General adopted the position that amnesties could not be granted for international crimes such as genocide, crimes against humanity, or other serious violations of international humanitarian law. The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 22, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000); see also The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 64(c), delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004) (rejecting amnesties for genocide, war crimes, and crimes against humanity). *But see* Scharf, *supra* note 103, at 360–63 (arguing that the duty to prosecute

against humanity among those for which amnesty is unavailable, even though crimes against humanity are not codified in any formal convention but rather are a part of customary international law.<sup>135</sup> Crimes that are part of customary international law that also reach the level of *jus cogens* come with the corresponding obligation to prosecute as an obligation *ergo omnes*.<sup>136</sup>

More recent examples of political transitions, even those in Latin America, have begun to demonstrate the new consensus that blanket amnesties are no longer permissible, further evidencing the growing restraint placed on national politics by international law. The direct impact of an emerging legal framework on amnesties is achieved through state practice as “state officials believe that they are under a legal obligation to hold criminals accountable, in some way, for their actions.”<sup>137</sup> States have thus begun to draft amnesty laws in compliance with international obligations.<sup>138</sup> Although some domestic courts ruled inconsistently on the permissibility of amnesties, those that recognized and incorporated international law tended to rule against their legality.<sup>139</sup> Writing in 1998, Naomi Roht-Arriaza and Lauren Gibson analyzed lower court decisions on amnesty laws in Chile, El Salvador, Guatemala, Honduras, Peru, South Africa, Argentina, and Hungary and concluded that “the trend has been from broader to more tailored, from sweeping to qualified, from laws with no reference to international law to those which explicitly try to stay within its strictures.”<sup>140</sup> They credit this trend to the “growing importance of a discourse about impunity and accountability on an international level.”<sup>141</sup>

Despite this evident evolution in state practice, a hard and fast contingent continues to advocate that some amnesties should remain in the “toolbox of conflict resolution” because of their usefulness for peace-

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is only required by treaty and not by customary law).

135. See M. Cherif Bassiouni, “Crimes Against Humanity”: *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT’L L. 457, 475 (1994); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, LAW & CONTEMP. PROBS., Autumn 1996, at 63 (arguing that states have an obligation to prosecute for inderogable rights).

136. See Roht-Arriaza, *supra* note 116, at 489–505 (discussing the customary law duty to prosecute).

137. Trumbull, *supra* note 43, at 301.

138. See Lynn Berat, *South Africa: Negotiating Change?*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 25, at 267, 280 (discussing South Africa’s “rejection of a blanket amnesty and declared intent to abide by international law”).

139. Roht-Arriaza & Gibson, *supra* note 31, at 870.

140. *Id.* at 884.

141. *Id.*; see also Robert E. Lutz, *A Piece of Peace: The Human Rights Accord and the Guatemalan Peace Process*, 2 SW. J. L. & TRADE AM. 183 (1995).

making.<sup>142</sup> Notwithstanding the breadth of academic writing to the contrary, one commentator has also observed that amnesties may not be clearly restricted by emerging international legal rules: “Despite the growing tension between the development of international criminal laws and institutions on the one hand, and state practice embracing amnesties on the other, there is surprisingly little international law that directly addresses the legitimacy of amnesties.”<sup>143</sup>

*D. Calls for Clarity: The Uncertain Future of Amnesties in Human Rights Protection*

Despite recent encroachments upon the validity of amnesties, the status of an outright prohibition on amnesties remains unclear. At question is whether amnesties may be applied to crimes that constitute serious human rights violations, but do not fall into the category of treaty crimes, war crimes, or crimes against humanity. Some argue that “[w]hile international human rights groups, following human rights interpretations of international criminal law, have been enthusiastic about a complete end to amnesties, there is room for substantial ongoing legal and philosophical analysis of the questions at stake.”<sup>144</sup>

Since there is no explicit ban on all amnesties at the moment, limits must be judicially prescribed.<sup>145</sup> In this vein, Michael Scharf in 1996 pointed out, “Once it is recognized that there is a gap in the international law requiring prosecution, two approaches are possible: one is to exploit the gap, the other is to attempt to fill it.”<sup>146</sup> Given the risk of the former, advocates now eagerly wait for an international authority to fill it. Charles Trumbull observes that given the deadlock among scholars, “the legality of amnesties for perpetrators of serious crimes under international law is in a state of transition and considerable uncertainty.”<sup>147</sup> He then writes: “The need for the international community to reach consensus on the validity of amnesties has become more acute in light of the controversial amnesties recently adopted by several countries.”<sup>148</sup>

142. Schabas, *supra* note 99, at 165–66.

143. Slye, *supra* note 5, at 179.

144. Newman, *supra* note 87, at 315.

145. See Young, *supra* note 4, at 232 (“No treaty provisions specifically prohibit amnesty.”).

146. Scharf, *supra* note 105, at 61.

147. Trumbull, *supra* note 43, at 285.

148. *Id.* at 286. There has been an attempt to create “soft law” through a consensus of academics, specifically by the drafting of the Princeton Principles on Universal Jurisdiction in 2001. PRINCETON UNIV. PROGRAM IN LAW & PUB. AFFAIRS, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001), reprinted in UNIVERSAL JURISDICTION 21 (Stephen Macedo ed., 2004) [hereinafter PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION]. After extensive debate, how-

### III. PERU: LEGALIZING IMPUNITY THROUGH AMNESTY

Peru represents a new stage in the development of the transitional justice paradigm. In its endeavor to address the past without providing impunity, it has included criminal justice in its transitional process from the beginning. Peru has set a new trend of state practice by specifically rejecting amnesty laws in its domestic political transition, and in doing so has helped resolve the pending question on the status of amnesties. It is important to contextualize any analysis of Peru's legal experience by first understanding its story—how it fell into authoritarianism and finally found its way out. Peru's unique history has been significantly influenced by the Inter-American System of Human Rights, which became a great ally of the local human rights movement prior to the country's transition. A symbiotic national-international relationship, which continues today, has ensured that, above all else, Peru fulfills its duty to protect and respect the right to justice.

This collaboration of sorts began over a decade ago during the height of Fujimori's authoritarian regime. Local victim-survivors and their advocates made "good use" of the international system to influence and support the formation of the TRC and the criminal trials that soon followed.<sup>149</sup> Ultimately, as will be discussed in more detail below, the investigations and consequent rulings of the IACHR and the IACtHR set the terms for Peru's approach to transitional justice, which fully embraced the principle of criminal justice.

#### A. *In the Name of National Security*

Perhaps one of the Inter-American System's greatest contributions to Peru's national criminal justice experience was its condemnation of Fujimori's regime through a series of cases submitted throughout the 1990s. These cases reached the Inter-American System because of the wholly ineffective recourse provided by the Peruvian domestic legal system.<sup>150</sup> Among these, the *Barrios Altos* and *La Cantuta* cases would particularly impact the criminal justice aspect of Peru's transitional jus-

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ever, the scholars were not able to agree on a per se rule regarding the legality of amnesty, deciding instead that "[a]mnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law." Trumbull, *supra* note 43, at 298 (quoting PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, *supra*, princ. 7).

149. Lisa J. Laplante, *Entwined Paths to Justice: The Inter-American Human Rights System and the Peruvian Truth Commission*, in PATHS TO INTERNATIONAL JUSTICE: SOCIAL AND LEGAL PERSPECTIVES 216, 237 (Marie-Bénédicte Dembour & Tobias Kelly eds., 2007).

150. *See id.* at 219.

tice experience.<sup>151</sup> Both cases revolved around an undercover death squad—a centerpiece of Fujimori’s national security apparatus.

Fujimori won the 1990 presidential election as a political unknown.<sup>152</sup> Over the following years, with the help of his right hand advisor Vladimir Montesinos, he took carefully calculated steps to gain steadily almost absolute executive power, justifying his newfound authority under the guise of fighting terrorism.<sup>153</sup> The previous administration of Alan García (1985-90) left a country devastated by both economic collapse<sup>154</sup> and a ten-year internal armed conflict with insurgent groups including the Communist Party of Peru-Shining Path (PCP-SL).<sup>155</sup> Fujimori capitalized on the deep unease and fear that saturated Peruvian society as a result of these circumstances by taking drastic measures to promote his free market economic plan and clamp down on political opponents.<sup>156</sup> With the support of the armed forces, Fujimori conducted an *autogolpe* (self-coup) on April 5, 1992, in which he shut down the bicameral Congress, dismantled the judiciary, and suspended the national constitution.<sup>157</sup> To assure enforcement of his new authori-

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151. Barrios Altos Case, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2(a) (Mar. 14, 2001); La Cantuta Case, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(18) (Nov. 29, 2006). For further discussion of these cases, see *infra* Part V.

152. CATHERINE M. CONAGHAN, FUJIMORI’S PERU: DECEPTION IN THE PUBLIC SPHERE 15–18 (2005) (giving a historical account of the 1990 Peruvian elections and Fujimori’s candidacy).

153. SALLY BOWEN & JANE HOLLIGAN, EL ESPÍA IMPERFECTO: LA TELARAÑA SINIESTRA DE VLADIMIRO MONTESINOS (2003) (offering a full account of the political, often illegal, influence of Montesinos on Fujimori).

154. See Eduardo Ferrero Costa, *Peru’s Presidential Coup*, 4 J. DEMOCRACY 28, 29 (1993) (describing how García’s policies led to spiraling foreign debt, an inflation rate that reached a rate of seven thousand percent and a gross national product drop of twelve percent).

155. A few years later, the insurgent group Tupac Amaru Revolutionary Movement joined the internal armed conflict. For more background on Peru’s internal armed conflict, see generally GUSTAVO GORRITI, THE SHINING PATH: A HISTORY OF THE MILLENNARIAN WAR IN PERU (Robin Kirk trans., Univ. N.C. Press 1999) (1990) (offering a journalist’s historical account of the strategy, actions, and challenges of the state and rebels during the war); Orin Starn, *Maoism in the Andes: The Communist Party of Peru-Shining Path and the Refusal of History*, 27 J. LATIN AM. STUD. 399 (1995).

156. See Jo-Marie Burt, “*Quien habla es terrorista*”: *The Political Use of Fear in Fujimori’s Peru*, 41 LATIN AM. RES. REV. 32, 47 (2006) [hereinafter Burt, *Quien habla*]; Jo-Marie Burt, *State Making Against Democracy: The Case of Fujimori’s Peru*, in POLITICS IN THE ANDES: IDENTITY, CONFLICT, REFORM 247, 255–57 (Jo-Marie Burt & Philip Mauceri eds., 2004) (describing the reconstitution of authoritarianism in response to political violence and high inflation in Peru).

157. Maxwell A. Cameron, *Latin American Autogolpes: Dangerous Undertows in the Third Wave of Democratization*, 19 THIRD WORLD Q. 219, 224, 228–29 (1998) [hereinafter Cameron, *Autogolpes*]; Maxwell A. Cameron, *Self-Coups: Peru, Guatemala, and Russia*, 9 J. DEMOCRACY 125, 127 (1998) [hereinafter Cameron, *Self-Coups*]. See generally CHARLES D. KENNEY, FUJIMORI’S COUP AND THE BREAKDOWN OF DEMOCRACY IN LATIN AMERICA (2004) (providing

tarian regime, he hand picked General Nicolás De Bari Hermoza-Ríos to be the Commander General of the Army and Head of the Joint Command<sup>158</sup> and gave the executive branch direct control over the *Servicio de Inteligencia Nacional* (SIN) by appointing Montesinos as its de facto executive chief.<sup>159</sup> SIN, in turn, created the death squad called *El Grupo Colina* (*Colina*).<sup>160</sup>

*Colina* consisted of thirty-two men and six women and worked clandestinely in collaboration with the Intelligence Services of the Armed Forces (SIE) under the direction of Army Majors Santiago Martín Rivas and Carlos Eliseo Pichilingüe-Guevara.<sup>161</sup> This clandestine group was formed to carry out “a State policy consisting in the identification, control and elimination of those persons suspected of belonging to insurgent groups or who [were] opposed to the government of former President Alberto Fujimori. It operated through the implementation of systematic indiscriminate extra-legal executions, selective killings, forced disappearances and tortures.”<sup>162</sup> Although the leader of Shining Path was captured on September 12, 1992, and the insurgent movement and violence declined, *Colina* continued to operate under the justifica-

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a comprehensive analysis of Fujimori’s self-coup).

158. See Cameron, *Autogolpes*, *supra* note 157, at 236.

159. General Julio Salazar-Monroe was SIN’s official director. Until this time, the SIN had withered under civilian rule and was a small, underfunded organization. Fujimori reinvigorated the office and it grew to employ thousands of agents and became “an indispensable part of the government’s political machine and an instrument for isolating, discrediting, and spying on opponents.” Roger Atwood, *Democratic Dictators: Authoritarian Politics in Peru from Leguía to Fujimori*, 21 SAIS REV. INT’L AFF. 155, 171 (2001). The power of the intelligence services was also increased by the appointment of Nélica Colán as attorney general. Colán “did little to defend citizens’ rights” in the wake of major abuses by the intelligence services and removed several judges who displayed an independent streak. Cameron, *Self-Coups*, *supra* note 157, at 130.

160. See Cameron, *Self-Coups*, *supra* note 157, at 127.

161. EFRAÍN RÚA, EL CRIMEN DE LA CANTUTA: LA DESAPARICIÓN Y MUERTE DE UN PROFESOR Y NUEVE ESTUDIANTES QUE ESTREMECIÓ AL PAÍS 119–20, 130 (2005).

162. La Cantuta Case, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(18) (Nov. 29, 2006). The IACtHR also referred to the findings of the Peruvian TRC: “The so-called ‘Colina Group,’ composed of members of the Army, is probably one of the groups specialized in forced disappearances and arbitrary executions most widely known . . . . In 1991, top military and political authorities ordered the officers of the intelligence operations division (AIO) belonging to the *Servicio de Inteligencia del Ejército* (SIE) (Army Intelligence Service) to create a squad reporting to the structure of the *Dirección de Inteligencia del Ejército Peruano* (DINTE), which was then known as ‘Colina Detachment.’ This group was in charge of operations especially designed to eliminate alleged subversives, sympathizers or collaborators of subversive organizations.” *Id.* ¶ 80(18) n.25 (quoting 6 COMISIÓN DE LA VERDAD Y RECONCILIACION [TRUTH & RECONCILIATION COMMISSION], INFORME FINAL [FINAL REPORT] 154 (2003) (Peru), available at <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VI/SECCION%20CUARTA-Crimenes%20y%20violaciones%20DDHH/FINAL-GOSTO/1.3.%20EJECUCIONES%20ARBITRARIAS.pdf>).



tion of heightened national security due to alleged terrorism.<sup>163</sup> As Peru's "political police," the death squad would go on to carry out some of Peru's most notorious massacres, including those at Barrios Altos and La Cantuta.<sup>164</sup>

### B. *The Massacres of Barrios Altos and La Cantuta*

Peruvian journalist and author Efraín Rúa describes the Barrios Altos massacre as *Colina's* "consecrating act"—one that would be a rite of passage for a small group of army officers who would go on to conduct some of Peru's most ruthless tragedies.<sup>165</sup> This nefarious story began on November 3, 1991, when neighbors of the poor Lima neighborhood of Barrios Altos held a *pollada* (fundraiser) to help replace faulty drains and piping that were making their children sick.<sup>166</sup> Around 11:30 p.m., two vehicles with sirens pulled up to the dwelling and six armed, masked men descended upon the party.<sup>167</sup> For the next few minutes, the men fired with silencers on the crowd, killing fifteen people, including an eight-year-old child who had run to his father's aid pleading for the killers to have mercy.<sup>168</sup> Four other people were seriously wounded, including one man who was paralyzed after being hit with twenty-seven bullets.<sup>169</sup> Information came forward that the Barrios Altos massacre was conducted by a government affiliated death squad as part of an anti-terrorism campaign.<sup>170</sup> On November 27, 1991, the Peruvian Congress created a committee to investigate the Barrios Altos massacre, but its efforts were thwarted by Fujimori's self-coup that dissolved Congress in

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163. See Audrey Kurth Cronin, *How al-Qaida Ends: The Decline and Demise of Terrorist Groups*, INT'L SECURITY, Summer 2006, at 7, 20 (arguing that the capture of Abimael Guzman led to the demise of Shining Path).

164. Burt, *Quien habla*, *supra* note 156, at 47–48. *Colina* was named after José Pablo Colina Gaige, a secret intelligence agent who had infiltrated PCP-SL and was killed in a "friendly fire" incident in 1984 by a state agent who had been ordered not to bring back detainees. RÚA, *supra* note 161, at 129.

165. RÚA, *supra* note 161, at 129.

166. *Id.* at 123.

167. Barrios Altos Case, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2(a) (Mar. 14, 2001). It was eventually revealed that the trucks had belonged to Fujimori's brother and the Vice-Minister of the Interior who later reported the trucks stolen. RÚA, *supra* note 161, at 127.

168. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2(b); RÚA, *supra* note 161, at 125.

169. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2(b); RÚA, *supra* note 161, at 125.

170. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2(d).

April 1992.<sup>171</sup> The issue of justice for Barrios Altos would not be revisited for another three years.

The next notorious act attributed to *Colina* allegedly occurred as revenge for one of Lima's worst acts of terrorism. On July 16, 1992, one hundred days after Fujimori's self-coup, two young men pulled a car up to a plaza in the center of the urban town Miraflores, one of the upper class boroughs of Lima. A security guard shot at them as they fled the scene. Seconds later, the trucks they had been driving exploded, destroying the surrounding Tarata apartment building, killing twenty-two people and seriously injuring two hundred more.<sup>172</sup> The next day, SIN received information that the fleeing culprits arrived bleeding at La Cantuta, formally known as the Universidad Enrique Guzmán y Valle.<sup>173</sup> Already, Peruvian universities suffered great tension because they were suspected of serving as feeding ground for new PCP-SL recruits, and as a result military stations had been installed on many school grounds including La Cantuta.<sup>174</sup>

On the day after the Tarata bombing, *Colina* members arrived at La Cantuta in the early morning hours, passing with the permission of the soldiers guarding the front entrance.<sup>175</sup> They barged into the dorms, pulled sleeping students from their beds, hit and threatened them, took some into the yard, and eventually loaded nine of them into their trucks.<sup>176</sup> They also took Professor Hugo Muñoz-Sánchez from his home in a hood, locking his wife and little boy in the bathroom.<sup>177</sup> The

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171. *Id.* ¶ 2(f).

172. RÚA, *supra* note 161, at 159.

173. *Id.* at 163.

174. The government had authorized the entry of the security forces to the universities through Decree-Law No. 726 of November 8, 1991. La Cantuta Case, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(10) (Nov. 29, 2006). The IACtHR referred to the Peruvian TRC's account of this situation: "At the beginning of 1991, the local TV released a video of a political-cultural ceremony held at 'La Cantuta' University that allowed speculating about the level of control that 'Sendero Luminoso' (Shinning Path [sic]) had in the University. On May 21, 1991, former President Alberto Fujimori visited the university causing the violent reaction of students that forced him to leave the campus, humiliated. The following day, military troops took control of the *Universidad Mayor de San Marcos* and of '*La Cantuta*' University, and 56 students were arrested. Among them there were three of the nine students that were subsequently subjected to extra-legal execution." *Id.* (quoting 7 COMISIÓN DE LA VERDAD Y RECONCILIACION [TRUTH & RECONCILIATION COMMISSION], *supra* note 162, at 234, available at <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.22.%20LA%20CANTUTA.pdf>).

175. See *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(12).

176. The abducted students were: Juan Mariños-Figueroa, Bertila Lozano-Torres, Roberto Teodoro-Espinoza, Marcelino Rosales-Cárdenas, Felipe Flores-Chipana, Luis Enrique Ortiz-Perea, Armando Amaro-Cóndor, Heráclides Pablo-Meza, and Dora Oyague-Fierro. *Id.* ¶ 80(15).

177. RÚA, *supra* note 161, at 18.

nine students and Professor Muñoz-Sánchez were driven to a nearby arid stretch of land in the district of Cieneguilla called the “*boca del diablo*” (devil’s mouth),<sup>178</sup> where they were executed by shots to the back of the head and then buried.<sup>179</sup> Some days later, *Colina* agents returned to burn and rebury the bodies in a new common grave in Huachipa.<sup>180</sup>

Over the following days and weeks, the families of the nine missing students and one professor began to learn of the event through friends, family, and newspaper headlines, starting a search for justice that continues today.<sup>181</sup> The families visited police stations, military barracks, and local municipalities, all of which denied knowledge of the events at La Cantuta. Antonia Pérez-Velásquez de Muñoz, wife of Hugo Muñoz-Sánchez, said it was as if “he had vanished off the face of the earth.”<sup>182</sup> They were not deterred by death threats or the resistance of people who suspected their loved ones of being terrorists.<sup>183</sup> The families, as well as the dean of La Cantuta, eventually filed three habeas corpus petitions, all of which were dismissed as groundless. The military, including Luis Salazar-Monroe and General Nicolás de Bari Hermoza-Ríos, denied knowledge of the attack and refused to provide information citing “national security reasons.”<sup>184</sup> The families also filed criminal complaints in July and August of 1992.<sup>185</sup>

On April 2, 1993, while the families unsuccessfully sought a legal remedy, Henry Pease-García, a progressive Peruvian Congressman, received an anonymous document from an army faction calling itself the “*León Dormido*” (Sleeping Lion) identifying the masterminds of the La Cantuta disappearances.<sup>186</sup> A congressional committee was formed to further investigate the case, but it faced considerable obstacles, including the military’s refusal to testify. Even when General Hermoza-Ríos eventually appeared before the committee on April 20, 1993, he denied that the army participated in the disappearances and, upon leaving, read a statement to the press accusing the congressional members of working “in collusion with the terrorists” and participating in “the orchestration

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178. *Id.*

179. *Id.* at 169–74.

180. *See La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 80(16), (31).

181. *See id.* ¶¶ 60(a)–(g), 61 (providing the testimonies of next of kin).

182. *Id.* ¶ 61(c).

183. *See id.* ¶ 60.

184. *Id.* ¶ 80(20)(ii)–(iii); *see also* RÚA, *supra* note 161, at 185–86.

185. *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(20). Antonia Pérez-Velásquez de Muñoz reported the disappearance of her husband to the Provincial Criminal Prosecutor’s Office of the Tenth Prosecutor’s Office on July 21, 1992. *Id.* ¶ 80(21).

186. *Id.* ¶ 80(25).

of a well-thought and planned campaign to impair the prestige and honor of the Peruvian Army.”<sup>187</sup> The next day, military tanks circulated throughout the capital city of Lima and stationed near the Congress building. General Hermoza-Ríos issued more statements regarding the “false” accusations constituting a systematic campaign to undermine the military’s ability to fight terrorism and forbade any officer from cooperating with the committee.<sup>188</sup>

In May 1993, Peruvian General Rodolfo Robles Espinoza, Commander General of the Third Military Region, publicly declared that he had reliable information that *Colina* was responsible for the La Cantuta murders, an act that forced him to go into exile in Argentina after thirty-seven years of service.<sup>189</sup> Soon after, in July 1993, journalists of the local newspaper *Sí* received a hand-drawn map that claimed to point to the buried bodies of the La Cantuta victims and a note that provided minute details of the clandestine graves.<sup>190</sup> This clue led to the discovery of the hidden graves and, under the supervision of prosecutor Victor Cubas-Villanueva, the recovery of burned bones and clothing, all recognized by the next of kin in attendance.<sup>191</sup> Keys were also found which opened the dormitory locker of one of the murdered students and the front door of another. This breakthrough led Congresswomen Gloria Helfer, who also worked on the special congressional committee, to remark: “The dead are talking, and they are saying the perpetrators are free and they are demanding justice.”<sup>192</sup>

### C. *The Pressure to Prosecute and the Battle of Jurisdiction*

In the quest to obtain justice through the courts, the families and their allies found the jurisdictional conflict between ordinary civilian criminal courts and military courts to be their greatest obstacle. For example, the Peruvian Attorney General ordered prosecutors to begin investigations into the murders on August 6, 1992.<sup>193</sup> The prosecutor’s office declined

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187. *Id.* ¶ 80(27); see also RÚA, *supra* note 161, at 205.

188. This military stand off finally came to a halt through international pressures, and Defense Minister Víctor Malca eventually brought the bravado display to a halt, but by then General Hermoza-Ríos had ordered a freeze on any testimony before the congressional committee. RÚA, *supra* note 161, at 206–12.

189. *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(17); RÚA, *supra* note 161, at 211–12.

190. *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(30); RÚA, *supra* note 161, at 228.

191. *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 80(30)–(31).

192. RÚA, *supra* note 161, at 238 (author’s translation).

193. *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(23).

jurisdiction, however, because the same facts were already being reviewed by the War Chamber of the Supreme Council of Military Justice (SCMJ), a decision eventually affirmed on appeal.<sup>194</sup> Other ongoing challenges included reluctant or uncooperative civil judges and the political harassment and replacement of prosecutors.<sup>195</sup> The military investigation opened in April 1993, but did not progress until the discovery of the clandestine graves, at which point the SCMJ Investigation Board admitted the complaint filed by the War Chamber Prosecutor.<sup>196</sup>

Rightly suspecting that the military's co-option of the criminal investigations was a subterfuge to halt justice, the families persisted with their civil claims. On December 15, 1993, they filed criminal complaints against Retired Army Captain Montesinos and Generals Hermoza-Ríos, Luis Pérez-Documet, Julio Salazar-Monroe, and Juan Rivero-Lazo as the masterminds of the La Cantuta crimes.<sup>197</sup> The same prosecutor who oversaw the exhumations of the clandestine graves, Cubas-Villanueva, also filed a criminal complaint, which included officers named in the SCMJ investigation, with a court in Lima on December 16, 1993.<sup>198</sup> The Lima court started proceedings the next day. The SCMJ then immediately challenged the ordinary court's jurisdiction.<sup>199</sup>

But for international pressure, the search for justice may have continued in this endless circle. The international community, however, made *La Cantuta* a *cause célèbre* and posed it as the final test of Fujimori's pledge of democracy and human rights after his self-coup.<sup>200</sup> Rising to the occasion made sense for Fujimori given his upcoming bid for reelection and his political need to unfreeze millions of dollars in U.S. aid, which was conditioned on "a satisfactory resolution" of the *La Cantuta*

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194. *Id.* ¶ 80(23).

195. *See id.* ¶ 136; RÚA, *supra* note 161, at 239.

196. *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(44). "On July 7, 1993, in Case No. 157-V-93, the SCMJ Investigation Board extended inquiry proceedings against Brigade General Juan Rivero-Lazo, Cavalry Colonel Federico Augusto Navarro-Pérez, Maj. Santiago Enrique Martín-Rivas, Maj. Carlos Pichilingüe-Guevara and Lt. Aquilino Portella-Nuñez and José Adolfo Velarde-Astete, on the grounds of the alleged commission of abuse of authority and crimes against life, body and health. On December 13, 1993, inquiry proceedings were extended against Infantry Lt. José Adolfo Valarde-Astete 'to be held responsible for' the offense of negligence . . ." *Id.* ¶ 80(43).

197. *Id.* ¶ 80(45).

198. *Id.* ¶¶ 80(46)–(47). Cubas-Villanueva soon encountered threats as well as attempts by the same judiciary trying to undermine him with fabricated disciplinary charges. *See id.* ¶ 80(49).

199. *Id.* ¶ 80(48).

200. *See* James Brooke, *Army Officers' Trials to Test Democracy in Peru*, N.Y. TIMES, Jan. 12, 1994, at A3.

case.<sup>201</sup> As would be later revealed later, he selected a group of officers to stand trial with the promise that they would later be pardoned and handsomely compensated for their sacrifice.<sup>202</sup> But the jurisdiction question still awaited final resolution. In the new quest to showcase justice, the administration pushed for a conclusion. The Criminal Chamber of the Peruvian Supreme Court issued a decision on the matter on February 3, 1994, but the decision was divided with two justices supporting the ordinary court jurisdiction and the other three supporting the military courts.<sup>203</sup> A vote of at least four was needed to approve jurisdiction.

In quick response, the Fujimori-backed Congress presented a bill on February 8, 1994, proposing that a conflict of jurisdiction issue be resolved by simple majority and secret ballot. The law was designed to be retroactive, thus allowing the previous three affirmative votes to count. The bill was approved the same day and signed into law by Fujimori the next day.<sup>204</sup> With the issue of jurisdiction now settled, the military trials proceeded on February 11, 1994.<sup>205</sup> The trials resulted in acquittals for some of the defendants on the more serious charges.<sup>206</sup> Five officers, however, were convicted on several major counts, including forced disappearances, and received prison terms of fifteen to twenty years.<sup>207</sup> On May 3, 1994, the SCMJ affirmed the decision.<sup>208</sup> The SCMJ War Chambers started proceedings against the alleged “intellectual perpetrators” of *La Cantuta*, including Army General Hermoza-Ríos, Brigade Army General Pérez-Document, and Retired Army Captain Montesinos, on the grounds they committed serious crimes, including forced disappearance, but ultimately decided to dismiss the case on August 15,

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201. *Id.* Rúa reports that the trials were first announced in the *New York Times* and not local newspapers, evidencing their intent to please an international audience. RÚA, *supra* note 161, at 242.

202. 7 COMISIÓN DE LA VERDAD Y RECONCILIACION [TRUTH & RECONCILIATION COMMISSION], *supra* note 162, at 241–43, available at <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.22.%20LA%20CANTUTA.pdf>; Ernesto Chávez, *Grupo Colina Amenaza y Fujimori los Amnistía*, CRÓNICA VIVA (Oct. 3, 2007) (Peru), at [http://www.cronicaviva.com.pe/index.php?option=com\\_content&task=view&id=18976&Itemid=86](http://www.cronicaviva.com.pe/index.php?option=com_content&task=view&id=18976&Itemid=86).

203. *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(50).

204. *Id.* ¶ 80(51) (discussing Law No. 26,291).

205. *Id.* ¶ 80(52).

206. *See id.* ¶ 80(54)(a)–(j).

207. *See id.* ¶ 80(54)(i)–(j).

208. *See id.* ¶ 80(55).

1994.<sup>209</sup> The SCMJ Review Chamber affirmed this decision on August 18, 1994, and closed the case permanently for lack of evidence.<sup>210</sup>

Fujimori's hope that these convictions would persuade critics that justice had been done was not borne out. As foreshadowed by Lourdes Flores, an oppositional member of Congress: "This process is not going to be considered closed because the competence of the military courts was defined through an unconstitutional law. Therefore, when democracy is fully recovered, it is very probable that either the Supreme Court or even political pressure will reopen this case."<sup>211</sup> Her prediction would come true, although not for another six years, and only after Fujimori managed to erode further the rule of law.

#### D. *A New Presidential Term and Amnesty Laws*

Fujimori won reelection by a landslide in April 1995 despite accusations of corruption.<sup>212</sup> Having seemingly laid to rest the scandal surrounding *Colina* and securing his continuation in office, Fujimori appeared to have guaranteed impunity. Any complacency, however, would soon be challenged by public prosecutor Ana Cecilia Magallanes, who opened criminal investigations in April 1995 against five army officials, including General Julio Salazar-Monroe, the head of the National Intelligence Service, for the massacre at Barrios Altos,<sup>213</sup> Judge Antonia Saquicuray of the Sixteenth Criminal Court of Lima initiated a formal investigation on April 19, 1995, yet when she tried to summon the accused to take their statements, the SCMJ issued a resolution barring her request because it conflicted with the SCMJ's jurisdiction.<sup>214</sup> Regardless, Judge Saquicuray pursued the investigation, and the military court filed a petition before the Supreme Court to resolve the jurisdictional issue.<sup>215</sup>

The Supreme Court never had a chance to deliberate on the issue, however, because Congress adopted Law No. 26,479 (the "Amnesty

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209. *Id.* ¶ 80(57). The military court did not accept the argument that the officers acted with the approval of high command. RÚA, *supra* note 161, at 264–65.

210. *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(57).

211. Nathaniel C. Nash, *9 Peruvian Military Men Are Sentenced in Killings*, N.Y. TIMES, Feb. 22, 1994, at A6.

212. See CONAGHAN, *supra* note 152, at 96–99 (describing the 1995 Peruvian elections). See generally Gregory D. Schmidt, *Delegative Democracy in Peru? Fujimori's 1995 Landslide and the Prospects for 2000*, 42 J. INTERAM. STUD. & WORLD AFF. 99 (2000).

213. Barrios Altos Case, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2(g) (Mar. 14, 2001).

214. *Id.* ¶ 2(h).

215. *Id.* ¶ 2(i).

Law”) in the early morning hours of June 14, 1995.<sup>216</sup> The next day the president immediately promulgated the law.<sup>217</sup> The law granted amnesty to “all members of the security forces and civilians who had been accused, investigated, prosecuted or convicted, or who were carrying out prison sentences, for human rights violations.”<sup>218</sup> The practical result was that the *La Cantuta* convictions were immediately annulled, the eight detained members of *Colina* were released, and all other human rights investigations, including the *Barrios Altos* case, were barred.<sup>219</sup> Despite this absolute ban on criminal investigations, Judge Saquicuray decided the next day that Article 1 of Law No. 26,479 was not applicable to *Barrios Altos* because it violated the Constitution and Peru’s obligations under the American Convention.<sup>220</sup> The defense lawyers for the accused in *Barrios Altos* appealed.<sup>221</sup> The Eleventh Criminal Chamber of the Lima Superior Court scheduled a hearing to review the law on July 3, 1995, but before the hearing could take place Congress adopted a second amnesty law which barred judicial review of Law No. 26,479 and made its application obligatory.<sup>222</sup> The law also extended immunity to all military, police, or civilian officials who might be the subject of indictments for human rights violations committed between 1980 and 1995.<sup>223</sup> In an about turn, the Eleventh Criminal Chamber of the Lima Superior Court overturned the lower court’s decision that the first amnesty law was unconstitutional and quashed the *Barrios Altos* investigation on July 14, 1995.<sup>224</sup> It also declared that the court was barred from reviewing the law due to the principle of separation of powers and ordered an investigation of Judge Saquicuray.<sup>225</sup> Eventually, the *Tribunal Constitucional*, Peru’s highest court, suggested in a 1997 opinion that

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216. *Id.* The law was passed without committee review or debate. *See id.* *See generally* Burke-White, *supra* note 75, at 485–89 (discussing the Peruvian amnesty law and legal challenges).

217. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2(i).

218. *Id.*

219. *See id.*; *La Cantuta Case*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 80(59)–(60) (Nov. 29, 2006).

220. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2(k). The Peruvian Constitution requires judges not to apply “those laws that they consider contrary to the provisions of the Constitution.” *Id.*

221. *Id.* ¶ 2(l).

222. *Id.* ¶ 2(m).

223. *Id.*

224. *Id.* ¶ 2(n).

225. *Id.*; *see also* Susana Villarán de la Puente, *Peru*, in *VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA*, *supra* note 39, at 116 (providing the author’s first-hand account of the court decision).



the amnesty laws were unconstitutional, but in subservience to the authoritarian regime avoided issuing a final sentence on the matter and declared that it lacked jurisdiction to hear the merits given that the second amnesty law barred judicial review.<sup>226</sup>

On July 28, 1995, when Fujimori was sworn into office for the second time, he asked for a minute of silence for all the victims, and then addressed the nation: “We must pacify our hearts, and forget the past and honor the memory of all of our deceased, because all of us, right or wrong, are Peruvians! The amnesty law is necessary to build peace, and so Peruvians must not look back but instead to the future.”<sup>227</sup>

#### *E. The Inter-American System of Human Rights and Fujimori’s Downfall*

Those who suffered under Fujimori’s regime were not ready to forget the experience so easily. Faced with domestic judicial remedies that were wholly inadequate, the victim-survivors began to take their claims to the IACHR with the help of human rights defenders. The human rights lawyers of the National Coordinator of Human Rights filed a petition against the government on June 30, 1995, for the issuance of the amnesty laws that obstructed a full and fair criminal investigation and trial of those responsible for the Barrios Altos massacre.<sup>228</sup> At that time, a petition for the La Cantuta massacre was already pending with the IACHR pursuant to a filing made on July 30, 1992, by Gisela Ortiz-Perea, Rosario Muñoz-Sánchez, Raida Córdor, José Oyague, and Bitalia Barrueta de Pablo based on the same concern regarding the futility of internal remedies.<sup>229</sup>

Indeed, a steady stream of petitions from Peruvians caught in Fujimori’s Machiavellian web began to flow through the doors of the IACHR, especially as local human rights organizations began to use this

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226. See Constitutional Court, Exp. No. 013-96-I/TC (Apr. 18 1997) (Peru); see also Roht-Arriaza & Gibson, *supra* note 31, at 878–79 (discussing the Peruvian Supreme Court’s rationale of “separation of powers” in declining jurisdiction).

227. RÚA, *supra* note 161, at 280.

228. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 4. The IACHR registered the case as No. 11.528 on August 28, 1995, and requested information from the state within ninety days. Subsequent petitions were submitted on behalf of the victims and next of kin over the following year, all of which were joined to the original petition. See *id.* ¶¶ 4–10.

229. See *La Cantuta Case*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 5 (Nov. 29, 2006). The case was registered as No. 11.045 by the IACHR. Eventually other petitions filed by the human rights organization, *Asociación Pro Derechos Humanos*, would be joined to it, and a session on the admissibility of the case occurred on March 11, 1999. *Id.* ¶¶ 5–8.

international forum to advance their local struggle.<sup>230</sup> The IACHR, in turn, began to present the most emblematic of these cases to the contentious jurisdiction of the IACtHR.<sup>231</sup> Soon after Fujimori's second election, the IACtHR issued landmark decisions concerning many of the abusive trademarks of Fujimori's regime, including forced disappearances, prison massacres, and the arbitrary and unjust imprisonment of people under the state's antiterrorist legislation.<sup>232</sup>

Fujimori's government came under heightened scrutiny as the decisions signaled a clear condemnation of its policies and practices for failing to uphold the American Convention. As already noted, Fujimori's government worried about the international community's opinion, in particular that of the United States, and thus it could not so easily ignore the international court. Peru thus began to adhere reluctantly and only partially to the Court's orders. After the Court began directly to question the government's national security laws, however, Fujimori withdrew from the Court's jurisdiction in July 1999, a decision declared invalid by the Court.<sup>233</sup> This defiant act put Peru under greater international scrutiny and contributed to the cascade of events that would cause Fujimori's downfall shortly after his fraudulent 2000 reelection.<sup>234</sup>

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230. For a fuller account of this history, see generally Laplante, *supra* note 149.

231. The Inter-American Commission filters cases to the Inter-American Court. Applicants do not have the right to bring a case directly to the IACtHR under the American Convention. See Pasqualucci, *supra* note 107, at 360–61.

232. See, e.g., Durand & Ugarte Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 68 (Aug. 16, 2000) (concerning the prison massacre at El Frontón); Cesti-Hurtado Case, 2000 Inter-Am. Ct. H.R. (ser. C) No. 56 (Sept. 29, 1999); Castillo-Páez Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 34 (Nov. 3, 1997) (concerning the forced disappearance of a university student); Loayza-Tamayo Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997) (dealing with arbitrary imprisonment and torture under antiterrorism law).

233. See Morse Tan, *Member State Compliance with the Judgments of the Inter-American Court of Human Rights*, 33 INT'L J. LEGAL INFO. 319, 322–25 (2005) (describing Fujimori's attempt to withdraw from the IACtHR). For the Court's rejection of this withdrawal, see also Ivcher-Bronstein Case, 2000 Inter-Am. Ct. H.R. (ser. C) No. 54 (Sept. 24, 1999).

234. The legitimacy of Fujimori's 2000 reelection was questioned even more so than his first reelection in 1995. In order to run for a third term, Fujimori solicited Congress to issue an interpretation of the Peruvian Constitution that permitted a third term. The climate of the elections also included political repression which led to condemnation from international observers sent from the OAS. See Press Release, Inter-American Commission on Human Rights, Report by the IACHR on the Situation of Human Rights in Peru (June 4, 2000), at <http://www.cidh.oas.org/Comunicados/English/2000/Press6-00.htm>. See generally Andrew F. Cooper & Thomas Legler, *The OAS in Peru: A Model for the Future?*, 12 J. DEMOCRACY 123 (2001) (providing a comprehensive narrative of the 2000 elections and discussing its legal flaws). For international press coverage, see, for example, Andres Oppenheimer, *Watchdog Group May Condemn Peru Election*, MIAMI HERALD, Mar. 25, 2000, at A3.

#### IV. A NEW PARADIGM: PERU'S POLITICAL TRANSITION WITHOUT AMNESTY

Soon after the 2000 Peruvian elections, Fujimori's regime came to an abrupt end due to corruption scandals. Hundreds of videos were uncovered showing Montesinos bribing the country's powerful elites (including those in media, business, and military), forcing Fujimori to call for new elections in which he pledged not to run.<sup>235</sup> In November 2000, before those elections took place, Fujimori travelled to Japan, faxed his resignation, and proceeded to take refuge for five years despite Peru's efforts to extradite him to stand trial for his abuses.<sup>236</sup> In this sudden political clearing, Peru initiated a process of transitional justice to address the human and institutional damage caused by the conflict.

In the same month that Fujimori became a fugitive, the transitional government led by Valentín Paniagua sought to legitimize itself by mending relations with the Inter-American System.<sup>237</sup> The government began a massive sweep to prosecute the individuals caught in Montesinos and Fujimori's intricate corruption scheme, and, as part of this new initiative, brought charges against the Supreme Court justices who dismissed the *La Cantuta* case for personal cover up and criminal association.<sup>238</sup> Peru rejoined the contentious jurisdiction of the IACtHR and began to comply with its previous judgments.<sup>239</sup> In February 2001, Peru sought to resolve a great number of the cases still being processed by the IACHR, including *La Cantuta*, through a "friendly settlement," in which the state promised not only to pay reparations to the victims and next of kin, but also to initiate investigations.<sup>240</sup> The transitional gov-

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235. See generally John McMillan & Pablo Zoido, *How to Subvert Democracy: Montesinos in Peru*, 18 J. ECON. PERSP. 69 (2004) (describing the events, including the secret videos, that led to Fujimori's downfall).

236. John R. Hamilton, *The Fall of Fujimori: A Diplomat's Perspective*, 30 FLETCHER FOREIGN WORLD AFF. 191, 191 (2006).

237. Laplante, *supra* note 149, at 222.

238. *La Cantuta Case*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 80(71)–(74) (Nov. 29, 2006). For a general discussion of the corruption trials, see Nelly Calderón Navarro, *Fighting Corruption: The Peruvian Experience*, 4 J. INT'L CRIM. JUST. 488 (2006) (describing the special criminal court created to try hundreds of Peruvians on charges of corruption).

239. Resolución Legislativa No. 27,401, Diario Oficial El Peruano No. 197,465 (Jan. 19, 2001) (Peru) (abrogating Legislative Resolution No. 27,152).

240. A friendly settlement is an agreement between the parties to settle the case without the Court deciding on its merits. Peru agreed to settle more than 165 cases, representing over half of its total cases then before the IACHR. See Joint Press Release, Inter-American Commission on Human Rights, Meeting with Representatives of the Government of Peru (Feb. 22, 2001), at <http://www.cidh.org/Comunicados/English/2001/Peru.htm>; Org. of Am. States, *Report of the Permanent Council on the Observations and Recommendations of the Member States on the 2001*

ernment realized that, in addition to these cases, there were thousands more that could lead to new petitions. It thus sought a more comprehensive and administrative means of addressing them, namely by way of a truth commission.

In December 2001, the transitional government created the Inter-Institutional Working Group, which ultimately led to the establishment of the TRC.<sup>241</sup> The Inter-Institutional Working Group envisioned that the TRC would address “events attributable to State agents, events attributable to individuals who acted with State agents’ consent, acquiescence or connivance, as well as those events that are attributable to subversive groups,” a focus eventually included in the mandate approved by executive decree.<sup>242</sup> In committing to criminal justice, however, the transitional government faced the immediate challenge of Fujimori’s 1995 amnesty laws. If future prosecution remained impossible, the TRC might fail to meet the expectations of victims. Moreover, if the amnesty laws forbade all types of investigation, the TRC’s investigations could also be thwarted by Fujimori’s supporters and the military because they still enjoyed substantial power. Aware that a domestic solution would be not be feasible in the short term, Peru looked to the Inter-American System for a resolution.

#### A. *Where the International Meets the National*

Recalling the failed attempt to defeat amnesty laws in South Africa, John Dugard points out that where national legal remedies proved in-

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*Annual Report of The Inter-American Commission on Human Rights*, OEA/Ser.G/CP/Doc.3612/02, at 21–22 (May 23, 2002), available at [http://scm.oas.org/doc\\_public/ENGLISH/HIST\\_02/CP09961E07.DOC](http://scm.oas.org/doc_public/ENGLISH/HIST_02/CP09961E07.DOC). See generally Patricia E. Standaert, *The Friendly Settlement of Human Rights Abuses in the Americas*, 9 DUKE J. COMP. & INT’L L. 519 (1999) (providing an explanation of the “friendly settlement” mechanism).

241. Participating in the deliberations were the Ministries of Justice, Interior, Defense, Promotion of Women and Human Development, as well as the People’s Ombudsman, the Peruvian Episcopal Conference, the Peruvian Evangelist Association, and the National Human Rights Coordinating Committee. See I COMISIÓN DE LA VERDAD Y RECONCILIACION [TRUTH & RECONCILIATION COMMISSION], *supra* note 162, at 22, available at <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20I/INTRODUCCION.pdf>.

242. *Id.* at 23 (“[T]anto los hechos imputables a agentes del Estado, a las personas que actuaron bajo su consentimiento, aquiescencia o complicidad, así como los imputables a los grupos subversivos.”) (author’s translation). The crimes to be investigated included: (a) murder and abduction; (b) forced disappearance; (c) torture and other severe injuries; (d) violation of collective rights of Andean Communities and Communities native to the country; and (e) other crimes and severe violations of the rights of persons. I COMISIÓN DE LA VERDAD Y RECONCILIACION [TRUTH & RECONCILIATION COMMISSION], *supra* note 162, at 195, available at <http://www.cverdad.org.pe/ifinal> (follow “Capítulo 4: La dimensión jurídica de los hechos” hyperlink under “Tomo I”).

adequate, human rights advocates in South Africa did not have recourse to international legal bodies in the way their counterparts in Latin America did as a result of those countries' membership in the Inter-American System.<sup>243</sup> Indeed, despite the state practice in Latin America of implementing amnesties, the Inter-American System consistently condemned this trend.<sup>244</sup> Before the fall of Fujimori's regime, the IACHR had an opportunity to deliberate on the *Barrios Altos* case and evidenced its consistent condemnation of amnesties. It adopted Report No. 28/00 after Peru failed to reach a friendly settlement, recommending that the state

annul any domestic, legislative or any other measure aimed at preventing the investigation, prosecution and punishment of those responsible for the assassinations and injuries resulting from the events known as the "Barrios Altos" operation. To this end, the State of Peru should abrogate Amnesty Laws Nos. 26,479 and 26,492.<sup>245</sup>

It further recommended that the state

conduct a serious, impartial and effective investigation into the facts, in order to identify those responsible for the assassinations and injuries in this case, and continue with the judicial prosecution of Julio Salazar Monroe, Santiago Martín Rivas, Nelson Carbajal García, Juan Sosa Saavedra and Hugo Coral Goycochea, and punish those responsible for these grave crimes, through the corresponding criminal procedure, in accordance with the law.<sup>246</sup>

Peru, however, refused to follow the recommendations and explained in a communication on May 9, 2000, that the amnesty laws were exceptional measures in response to terrorist violence, relying on the Peruvian Constitutional Court's ruling.<sup>247</sup> With no other recourse, the IACHR de-

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243. See Dugard, *supra* note 60, at 282–85.

244. See generally Cassel, *supra* note 115 (describing the OAS's reaction to amnesties in Latin American countries); Robert Kogod Goldman, *Amnesty Laws, International Law and the American Convention on Human Rights*, 6 LAW GROUP DOCKET, Summer 1989, at 1; Robert K. Goldman, *Uruguay: Amnesty Law in Violation of Human Rights Convention*, 49 REV. INT'L COMMISSION JURISTS 37 (1992).

245. *Barrios Altos Case*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 17 (Mar. 14, 2001) (quoting *Chumbipuma Aguirre et al. v. Peru*, Cases 11.528, 11.601, Inter-Am. C.H.R., Report No. 28/00, OEA/Ser./L/V/II.111, doc. 20 rev. (2000)).

246. *Id.* (quoting *Chumbipuma Aguirre et al. v. Peru*, Cases 11.528, 11.601, Inter-Am. C.H.R., Report No. 28/00, OEA/Ser./L/V/II.111, doc. 20 rev. (2000)).

247. *Id.* ¶ 18.

cided to submit the case to the IACtHR on May 10, 2000, despite Peru's alleged withdrawal from the Court's contentious jurisdiction.<sup>248</sup> In response to the Court's proceedings, representatives of the Peruvian Embassy in Costa Rica communicated with the Court's Secretariat on August 24, 2000, reminding the Court of Peru's withdrawal.<sup>249</sup>

Peru concluded that the immediate effect of this withdrawal upon deposit was that the IACtHR no longer had competence to hear an application against Peru due to lack of jurisdiction.<sup>250</sup> The Court responded by reminding Peru that the Court had already rejected the withdrawal in the *Ivcher Bronstein* and *Constitutional Court* cases,<sup>251</sup> and that in its opinion the "attitude of the State of Peru constitutes a clear failure to comply with Article 68(1) of the Convention, and also a violation of the basic principle *pacta sunt servanda*."<sup>252</sup> The case remained in limbo until Fujimori's regime fell, and Peru reinstated its recognition of the Court's contentious jurisdiction on January 23, 2001. This permitted the *Barrios Altos* case, and others, to go forward. In fact, with the time pressure of the TRC's pending formation, the Peruvian government sought to expedite the case and persuaded the Inter-American Commission to press the Court to speed its decision despite its fears that the IACtHR might depart from the Commission's own evolving jurisprudence against amnesties.<sup>253</sup>

### B. *The Barrios Altos Decision*

The IACtHR convened a public hearing on March 14, 2001, to hear the merits of the *Barrios Altos* case, during which Peru explained:

[T]he Government's strategy in the area of human rights is based on recognizing responsibilities, but, above all, on proposing integrated procedures for attending to the victims based on three fundamental elements: the right to truth, the right to justice and the right to obtain fair reparation.

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. . . [With regard to the] *Barrios Altos* case . . . substantial measures have been taken to ensure that criminal justice will

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248. *See id.* ¶ 19.

249. *Id.* ¶ 25.

250. *Id.*

251. *Id.* ¶ 27; *see also* *Ivcher-Bronstein Case*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 54 (Sept. 24, 1999); *Constitutional Court Case*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 55 (Sept. 24, 1999).

252. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 27 (citations omitted).

253. *See id.* ¶ 35. For a fuller account of this history see Laplante, *supra* note 149, at 222–23 (describing the Peruvian government's strategy in approaching the IACtHR).

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. . . . Consequently, the Government of Peru has suggested to the original petitioners, that is, the National Human Rights Coordinator, the possibility of advancing with friendly settlements, which entail effective solutions to this procedural obstacle . . . .<sup>254</sup>

Peru, then, set the tone of its transitional justice project to include criminal justice. It proposed, among other things, a “preliminary agenda” based on the following three points: “identification of mechanisms to fully clarify the facts on which the petition was based, including identification of the masterminds and perpetrators of the crime, the viability of criminal and administrative punishments for all those found responsible, and specific proposals and agreements on matters relating to reparations.”<sup>255</sup>

The state, perhaps betraying its own newfound eagerness to annul the previous government’s “mechanisms of impunity,” suggested “the parties should request the Inter-American Court to deliver the judgment on the merits immediately, establishing the international responsibility as determined by the Court and taking into account the brief on acquiescence that had been submitted.”<sup>256</sup> The IACHR, in turn, emphasized that the Court had

a special opportunity, a truly historic opportunity, to advance international human rights law, based on measures under domestic law that contribute to combat impunity, which is one of the evils of our hemisphere, to which this Court and . . . the Commission have accorded fundamental importance. I believe that this attitude of the Government of Peru gives us the opportunity to associate ourselves with the people of Peru, their Government and their civil society, to find creative solutions, which may subsequently be emulated and imitated throughout the hemisphere and beyond it.<sup>257</sup>

The Commission continued by pointing out that the case is “very serious and very sad,” because not only did the state act “unlawfully and

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254. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 35.

255. *Id.*

256. *Id.*

257. *Id.* ¶ 36.

clandestinely,” but it also deliberately imposed “legislative and judicial mechanisms to prevent the facts [surrounding the gruesome events at Barrios Altos] from being known.”<sup>258</sup> With the fortuitous change of conditions, the Commission characterized the circumstances as “ripe” for an international pronouncement that would provide Peru with an instrument “to destroy and remove the remaining obstacles in order to combat impunity in Peru.”<sup>259</sup>

One could sense the earnest desire of the IACHR to have the Court back the Commission’s own growing jurisprudence on the issue that did not enjoy the same binding effect as decisions of the Court. The gamble paid off, though, and that same day the Court issued its judgment stating that the self-amnesty laws were invalid.<sup>260</sup> The decision came a mere month before Peru’s transitional government concluded its negotiations regarding the TRC’s mandate.

### C. *The IACtHR’s Ruling and Interpretation*

The IACtHR did not have much to deliberate on after the state acquiesced to the claims of the petitioners, which meant the Court, pursuant to Article 52(2), only needed to decide the acceptability of this admission of responsibility.<sup>261</sup> It began with the question of whether Peru’s amnesty laws were compatible with the American Convention on Human Rights, and concluded with the now frequently cited opinion:

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.<sup>262</sup>

The Court explained that the amnesty laws prevented survivors and victims’ families from exercising their right to be heard by a judge, to receive judicial protection, and to obtain the investigation, capture, prosecution, and conviction of those responsible for the violations, as protected by Articles 8(1), 25, and 1(1) of the American Convention re-

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258. *Id.*

259. *Id.*

260. *Id.* ¶¶ 43–44.

261. *Id.* ¶ 37.

262. *Id.* ¶ 41.



spectively.<sup>263</sup> It further held that those rights should be read together with Articles 1(1) and 2 of the American Convention, which oblige State Parties 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 . . . .”<sup>264</sup> Furthermore, the Court clarified that the amnesty laws also contravene the obligation to adapt internal legislation to international human rights obligations, as embodied in Article 2 of the American Convention.<sup>265</sup> In this way, the Court held that “[s]elf-amnesty laws . . . are manifestly incompatible with the aims and spirit of the Convention . . . because [this type of law] 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.”<sup>266</sup> The laws thus “lack legal effect.”<sup>267</sup>

The Court turned lastly to the right to truth. The Court agreed with the IACHR that the right to truth is based on Articles 8 and 25 of the Convention:

[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.<sup>268</sup>

The IACHR had also argued that the right to truth was supported by Article 13(1), which provides the right to information, but the Court rested its opinion solely on Articles 8 and 25.<sup>269</sup> Arguably, the Court’s ruling contributes to the idea that truth and justice are not incompatible, but on the contrary inextricably linked. Its decision stands for the proposition that in a transitional justice framework, prosecutions become another indispensable tool for reaching the truth, a task formerly delegated to truth commissions alone.

While the *Barrios Altos* decision signaled a clear victory for both the transitional government and the IACHR, it was unclear whether the decision offered a general pronouncement or was only specific to the in-

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263. *Id.* ¶ 42.

264. *Id.* ¶ 43.

265. *See id.*

266. *Id.* ¶ 43.

267. *Id.* ¶ 44.

268. *Id.* ¶¶ 45–48.

269. *Id.*

vestigation in the *Barrios Altos* case. Several months after the decision, the IACHR, at the request of Peru, filed for a clarification of the “meaning and scope” of operative paragraph 4 of the *Barrios Altos* judgment in which the Court declared that “Amnesty Laws No. 26479 and No. 26492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect.”<sup>270</sup> The resulting interpretation confirmed that “the effects of the decision in the judgment on the merits of the *Barrios Altos* Cases are general in nature.”<sup>271</sup> The Court issued its judgment on September 3, 2001, just days before the TRC was scheduled to open its doors for operation, thus providing the TRC a green light not only to initiate its own investigations, but also to collaborate with the Attorney General’s office in bringing charges against specific perpetrators.<sup>272</sup>

#### V. INTERPRETING *BARRIOS ALTOS*: A BAR TO AMNESTY FOR HUMAN RIGHTS VIOLATIONS

Curiously, despite its potentially sweeping effect on the legitimacy of amnesties in political transitions, the IACtHR’s *Barrios Altos* decision has thus far received scant attention from academics, whether from the field of transitional justice or international criminal law. This Part describes the ways in which the *Barrios Altos* decision has so far been narrowly interpreted and responds with a counteranalysis, including an examination of subsequent IACtHR decisions, which suggests a much broader reading of this landmark decision. In particular, this Part argues that *Barrios Altos*: (1) applies to all amnesties and not just self-

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270. *Barrios Altos* Case, Interpretation of the Judgment of the Merits, 2002 Inter-Am. Ct. H.R. (ser. C) No. 83, ¶¶ 8, 16 (Sept. 3, 2001).

271. *Id.* ¶ 18. The IACHR, in its arguments on the matter, rightly pointed out that the Court already made this clear in paragraph 44 of its decision on the merits. *Id.* ¶ 14. There, the Court had pronounced: “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.” *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 44. The request for clarification may thus seem odd, except it could be understood as a desire to preempt any future debate on the matter. Arguably, it also permitted the Court to suggest that any amnesty law would be found incompatible, as is discussed in this Section.

272. In its final report, the TRC acknowledged the important precedent established by the Court. See HATUN WILLAKUY, VERSIÓN ABREVIADA DEL INFORME FINAL DE LA COMISIÓN DE LA VERDAD Y RECONCILIACIÓN [SUMMARY VERSION OF THE FINAL REPORT OF THE TRUTH & RECONCILIATION COMMISSION] 31–32 (2003) (Peru).

amnesties; (2) requires that criminal investigations not be substituted for other types of noncriminal investigations; and (3) applies to all serious human rights violations and not only crimes against humanity.

A. *Not Limited Only to Self-Amnesty Laws*

One reason for the narrow reading of the *Barrios Altos* decision may relate to the possible interpretation of the holding as applying only to “self-amnesties.”<sup>273</sup> A strict reading of the word “self” would imply that the Court’s ruling applies only to those laws adopted by the same government seeking immunity from criminal prosecution. This narrow interpretation would mean that amnesties promulgated by *subsequent* governments, especially if part of an internal peace negotiation process or transitional justice scheme, would be permissible. In addition, it would support the restorative justice view of the *truth v. justice* debate, which argues that alternative investigatory methods such as truth commissions fulfill the state’s obligation to “ensure” a victim’s human right to justice. Scharf adopted this position in 1996, prior to the 2001 *Barrios Altos* decision, but nevertheless set the distinction between “self” and all other amnesties that would later be applied to *Barrios Altos*.<sup>274</sup>

A close reading of both the Judgment on the Merits and the subsequent Interpretation of the Judgment, however, suggests a much broader interpretation that prohibits all amnesties, not just self-amnesties. This broader interpretation can be reached by reading the majority opinion together with the concurring opinions of both Judge A.A. Cançado Trindade, former president of the Court, and Judge Sergio García Ramírez, the Court’s current president. Judge Cançado Trindade, in a

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273. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 42–44 (emphasis added). While the court does not consistently use this term, it does appear in selected paragraphs in its decision on the merits. See, e.g., *id.* For a discussion of the different types of amnesties, see Young, *supra* note 4, at 216 (explaining that the three types include “self amnesty, amnesties granted to end political or military conflict, and amnesty in exchange for facts and information surrounding specific crimes”).

274. See Scharf, *supra* note 105, at 61 (“[I]t is likely that the . . . Inter-American Court of Human Rights would . . . agree that measures short of prosecution . . . would be adequate to discharge the duty to ensure human rights.”). Scharf repeated this argument in 2006, yet did not mention *Barrios Altos* or the subsequent rulings of the IACtHR that reinforce the general obligation to pursue criminal trials for human rights violations that do not necessarily fall within the strict criteria of being a crime found in a treaty. See Scharf, *supra* note 103, at 358. This limited interpretation is also adopted by Elizabeth Evenson. See Elizabeth M. Evenson, Note, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 COLUM. L. REV. 730, 750 n.127 (2004) (interpreting *Barrios Altos* as applicable only to “self-amnesty” laws).

concurring opinion longer than the majority's, elaborates his view that the *Barrios Altos* case represents

a new and great qualitative step forward in its case-law, to the effect of seeking to overcome an obstacle which the international organs of supervision of human rights have not yet succeeded to surpass: the impunity, with the resulting erosion of the confidence of the population in public institutions. Moreover, they meet an expectation which in our days is truly universal. It may be recalled, in this respect, that the main document adopted by the II World Conference of Human Rights (1993) urged the States to "abrogate legislation leading to impunity for those responsible for grave violations of human rights . . . and prosecute such violations . . ." <sup>275</sup>

Significantly, Judge Cançado Trindade refers to a bedrock principle of international law: that domestic laws may not be used to avoid international obligations.<sup>276</sup> He has also consistently written in other dissenting and concurring opinions that international law trumps national domestic law.<sup>277</sup> This interpretation means that any type of immunity measure, including amnesties, made at any time to obstruct human rights prosecutions (which are now considered a state duty due to the *Velásquez Rodríguez* decision) would be invalid.

Admittedly, Judge Cançado Trindade's concurring opinion in *Barrios Altos* may only be read as his alone. However, the IACtHR adopted this same position in its subsequent interpretation of *Barrios Altos*—an interpretation astutely requested by Peru. In its interpretation, the Court reiterated its position that the ruling on amnesties applies to all criminal cases arising out of Peru's internal armed conflict, not just *Barrios Altos*. The Court also referred to its case-law:

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275. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 4 (Cançado Trindade, J., concurring) (quoting World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 60, U.N. Doc. A/CONF.157/23 (July 12, 1993)) (referring to the criticisms of the "ignored amnesties" of the past).

276. Judge Cançado Trindade writes: "[These laws are] in flagrant incompatibility with the norms of protection of the International Law of Human Rights, bringing about violations de jure of the rights of the human person. The *corpus juris* of the International Law of Human Rights makes it clear that not everything that is lawful in the domestic legal order is so in the international legal order, and even more forcefully when superior values (such as truth and justice) are at stake. In reality, what came to be called laws of amnesty, and particularly the perverse modality of the so-called laws of self-amnesty, even if they are considered laws under a given domestic legal order, are not so in the ambit of the International Law of Human Rights." *Id.* ¶ 6.

277. *Id.* ¶¶ 7–9.

[T]he general obligation of the State, established in Article 2 of the Convention, includes the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of the said guarantees.

. . . . In international law, customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted and is supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that it embodies. This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of *effet utile*). This means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires. Such measures are only effective when the State adjusts its actions to the Convention's rules on protection.<sup>278</sup>

The Court's subsequent interpretation of its own decision in *Barrios Altos* can be read to extend its ruling to all amnesties, not just self-amnesties. This reading supports the other concurring opinion in *Barrios Altos* made by Judge García Ramírez who, also adhering to his previous concurring opinions, notes that one can distinguish between self-amnesty laws "promulgated by and for those in power," and those

that are the result of a peace process, have a democratic base and a reasonable scope, that preclude prosecution of 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.<sup>279</sup>

Significantly, he goes on to recognize "the advisability of encouraging civic harmony through amnesty laws that contribute to re-

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278. *Barrios Altos* Case, Interpretation of the Judgment on the Merits, 2002 Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 17 (Sept. 3, 2001) (citations omitted).

279. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 10 (García Ramírez, J., concurring).

establishing peace and opening new constructive stages in the life of a nation.”<sup>280</sup> Nonetheless, he reiterates the opinion of the “growing sector of doctrine and also the Inter-American Court” that “such forgive and forget provisions ‘cannot be permitted to cover up the most severe human rights violations, violations that constitute an utter disregard for the dignity of the human being and are repugnant to the conscience of humanity.’”<sup>281</sup> Judge García Ramírez also refers to the principle embodied in Articles 1(1) and 2 of the Convention that states may not “invoke ‘difficulties of a domestic nature’ to waive the obligation to investigate the facts that infringed the Convention and punish those who are found criminally responsible for them.”<sup>282</sup>

If there is any question as to the actual reach of the *Barrios Altos* decision, subsequent IACtHR rulings confirm the broader interpretation. For example, the *Bulacio* case reinforces the notion that domestic laws preventing prosecution of human rights violations, including amnesty laws, are barred.<sup>283</sup> In *Bulacio*, Argentina acknowledged responsibility for the death of a minor and accepted that it had violated the right to life and humane treatment.<sup>284</sup> Argentina also accepted responsibility for violating Articles 8 and 25 by failing to provide an effective remedy in the form of a prompt investigation and punishment of those responsible.<sup>285</sup> The IACtHR was left with the task of determining the appropriate reparations, including the duty to investigate the human rights violation.<sup>286</sup>

The IACtHR determined that the failure to investigate the case in Argentina had “been tolerated and allowed by the intervening judiciary bodies,” which acted as though their function was limited only to assuring due process in the form of a guaranteed defense at a trial.<sup>287</sup> In the

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280. *Id.* ¶ 11.

281. *Id.*

282. *Id.* ¶ 12.

283. *Bulacio* Case, 2004 Inter-Am. Ct. H.R. (ser. C) No. 100 (Sept. 18, 2004). This case involved a complaint brought against the state of Argentina for the death of a seventeen-year-old boy who was detained during a general roundup of adolescents before a rock concert and later beaten up by police. *Id.* ¶ 3. *See generally* Basch, *supra* note 115, at 207–16 (discussing *Bulacio* and its implications for the duty to prosecute doctrine).

284. *See Bulacio*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶¶ 25, 33.

285. *See id.* ¶ 33. For instance, the case against one police officer was delayed for several years largely due to the fact that “defense counsel for the accused filed a large number of diverse legal questions and remedies (requests for postponement, challenges, incidental pleas, objections, motions on lack of jurisdiction, requests for annulment, among others), which have not allowed the proceedings to progress toward their natural culmination, which has given rise to a plea for extinguishment of the criminal action.” *Bulacio*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 113.

286. *See id.* ¶¶ 34, 110.

287. *Id.* ¶ 114.

domestic case, the defense counsel was allowed to use delaying tactics which stalled the trial for several years and ultimately gave rise to a plea for extinguishment of the criminal case.<sup>288</sup> Relying on the *Barrios Altos* interpretation, the Court also held:

[E]xtinguishment provisions or any other domestic legal obstacle that attempts to impede the investigation and punishment of those responsible for human rights violations are inadmissible. The Court deems that the general obligations enshrined in Articles 1(1) and 2 of the American Convention require that the States Party adopt timely provisions of all types for no one to be denied the right to judicial protection, enshrined in Article 25 of the American Convention.<sup>289</sup>

The Court reiterated that Article 27 of the 1969 Vienna Convention on the Law of Treaties prohibits domestic legal rules, such as extinguishment provisions, from hindering the full application of decisions by international human rights bodies.<sup>290</sup> According to the Court: “If that were not the case, the rights enshrined in the American Convention would be devoid of effective protection. This understanding of the Court is in accordance with the language and the spirit of the Convention, as well as the general principles of law.”<sup>291</sup> The Court further explained that “a situation of grave impunity” existed in Argentina due to the fact that no one there had yet been convicted, despite the initiation of judicial proceedings nearly twelve years earlier.<sup>292</sup> The Court characterized “impunity” as

the overall lack of investigation, pursuit, capture, trial and conviction of those responsible for violations of rights protected under the American Convention, as the State has the obligation to combat said situation by all legal means within its power, as impunity fosters chronic recidivism of human rights violations and total defenselessness of the victims and of their next of kin.<sup>293</sup>

The Court reaffirmed its view that domestic immunity measures such as amnesty would impede the state’s duty to investigate and punish perpetrators of human rights violations in *Moiwana Community v. Suri-*

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288. *Id.* ¶ 113.

289. *Id.* ¶ 116 (citations omitted).

290. *Id.* ¶ 118. For a general discussion of the domestic law prohibition, see Henrard, *supra* note 78.

291. *Bulacio*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 117 (citation omitted).

292. *Id.* ¶ 119.

293. *Id.* ¶ 120 (citation omitted).

*name* in 2005.<sup>294</sup> There, the Court emphasized that Suriname's amnesty laws would deprive its people of the effective protections of the American Convention and ordered the laws to be repealed.<sup>295</sup>

The Court reiterated the "domestic law" prohibition against amnesties again in the *La Cantuta* decision in 2006. In that decision, the IACtHR said the Article 2 provision, which prohibits domestic laws from being used to avoid international legal obligations, "is universally valid and has been characterized in case law as an evident principle."<sup>296</sup> As a result, states must adjust their internal domestic laws to guarantee the rights enshrined in the Convention, and these laws must be effective pursuant to the *effet utile* principle.<sup>297</sup> While the Court in *La Cantuta* did not identify specific domestic measures that may require adjustment, it did offer two general measures which should be adopted: "(i) repealing rules and practices of any nature involving violations to the guarantees provided for in the Convention or disregarding the rights enshrined therein or hamper the exercise of such rights, and (ii) issuing rules and developing practices aimed at effectively observing said guarantees."<sup>298</sup> Thus, these general guidelines, if applied to the case of amnesty laws would require their being repealed.

#### B. *Other Investigations Cannot Substitute for Criminal Investigations*

A narrow reading of the *Barrios Altos* decision might interpret it to apply only to blanket amnesties that prohibit all forms of investigation.<sup>299</sup> Trumbull argues the Court may have left open the possibility that a state could satisfy its general obligation to afford accountability so long as it conducted some type of investigation, even if not pursuant to a criminal prosecution.<sup>300</sup> He also indicates in a footnote that Peru did

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294. *Moiwana Community Case*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 167 (June 15, 2005).

295. *See id.* ¶ 207.

296. *La Cantuta Case*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 170 (Nov. 29, 2006) (citation omitted).

297. *Id.* ¶ 171 (citations omitted).

298. *Id.* ¶ 172 (citations omitted).

299. Trumbull, *supra* note 43, at 300–01 (suggesting that blanket amnesties that bar all investigations are not lawful and that states must provide some form of accountability for human rights atrocities).

300. *Id.*; *see also* Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651, 657 (2003) (suggesting that the Court's holding may be interpreted to mean some form of investigation is necessary).



eventually conduct investigations through the TRC in the absence of criminal prosecutions, and implies that the IACtHR approved of this arrangement, supporting his view.<sup>301</sup>

Trumbull's interpretation may be refuted, though, by subsequent decisions of the IACtHR. For example, the Court reiterated the general prohibition on amnesties in *Cantoral-Huamaní and García-Santa Cruz* in 2007, four years after the TRC published its final report in 2003. In its decision the Court wrote:

The Court recalls that, when complying with its obligation to investigate and, if applicable, punish those responsible for the facts, the State must remove all the de facto and de jure obstacles, that impede the proper investigation of the events, and use all available means to expedite the investigation and the respective proceedings in order to avoid a repetition of such serious acts as those examined in the instant case. The State may not invoke any law or provision of domestic law to exempt itself from the obligation to investigate and, if applicable, punish those responsible for the acts against Saúl Cantoral-Huamaní and Consuelo García-Santa Cruz. In particular, the Court recalls that the State may not apply amnesty laws, or provisions relating to prescription, or other provisions that exclude responsibility, which prevent the investigation and punishment of those responsible.<sup>302</sup>

Significantly, in the *La Cantuta* decision in 2006, the IACtHR reinforced the state's duty to investigate and conduct criminal trials despite the fact that the Peruvian TRC had thoroughly investigated that case.<sup>303</sup> The Court thus does not accept the proposition that a truth commission investigation alone would satisfy the state's duty to investigate human rights crimes.

### C. *No Amnesties for Serious Human Rights Violations*

Currently, there are three categories of international crimes that have become accepted bars to amnesties: enumerated treaty crimes, crimes against humanity, and war crimes.<sup>304</sup> The *Barrios Altos* decision, reflecting an already expanding legal framework, suggests a fourth possi-

301. Trumbull, *supra* note 43, at 301 n.96 (quoting Wilson & Perlin, *supra* note 300, at 658–59).

302. Cantoral-Huamaní & García-Santa Cruz Case, 2008 Inter-Am. Ct. H.R. (ser. C) No. 167, ¶ 190 (July 10, 2007).

303. *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 157.

304. See discussion *supra* notes 144–46.

ble bar to amnesties for crimes that arise out of human rights violations, but which do not constitute an already recognized treaty crime nor necessarily rise to the level of crimes against humanity or war crimes. In this way, a serious violation that is *not* necessarily genocide nor torture and that did *not* occur during war and that was *not* part of a general and systematic pattern of human rights abuses would still trigger a state duty to prosecute, and thus bar immunity measures such as amnesties.<sup>305</sup>

In his concurring opinion, Judge Cançado Trindade also raised this issue, insisting that states have an international obligation to protect universally recognized, nonderogable rights such as the right to life and personal integrity.<sup>306</sup> He argued these rights are protected by the American Convention and “fall in the ambit of *jus cogens*.”<sup>307</sup> He went so far as to say that the adoption and application of amnesty laws is “an international illicit act” because those laws constitute a breach of a state’s responsibilities under the international law of human rights.<sup>308</sup> He put it plainly: “It ought to be stated and restated firmly, whenever necessary: in the domain of the International Law of Human Rights, the so-called ‘laws’ of self-amnesty are not truly laws: they are nothing but an aberration, an inadmissible affront to the juridical conscience of humanity.”<sup>309</sup>

Judge Cançado Trindade offers a novel argument on how to identify the list of crimes to which amnesty should not apply. He gives an historical account of the development and codification of humanitarian law, from the Martens Clause to the Geneva Conventions.<sup>310</sup> He contends that “however advanced the codification of the humanitarian norms might be, such codification can hardly be considered as truly complete,” and goes on to state:

The Martens clause . . . continues to serve as a warning against the assumption that whatever is not expressly prohibited by the

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305. Crimes against humanity are, in essence, human rights violations that are part of a “systematic and widespread” policy. For a discussion of how crimes against humanity are in fact human rights violations that rise to the level of systematic and widespread, see Tittmore, *supra* note 107, at 470.

306. *Barrios Altos* Case, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 10 (Mar. 14, 2001) (Trindade, J., concurring). For a discussion of nonderogable rights, see Henrard, *supra* note 78, at 613–16. For comments on the obligation to prosecute for human rights violations, see Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 LEIDEN J. INT’L L. 5, 14 (1994).

307. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 10 (Cançado Trindade, J., concurring).

308. *Id.* ¶ 11.

309. *Id.* ¶ 26.

310. Judge Cançado Trindade discusses the Martens Clause introduced at the I Peace Conference of the Hague in 1899, which influenced the later Geneva Conventions. *Id.* ¶¶ 22–23.

Conventions on International Humanitarian Law could be permitted; quite on the contrary, the Martens clause sustains the continuing applicability of the principles of the law of nations (*droit des gens*), the laws of humanity and the dictates (*exigencies*) of public conscience . . . .<sup>311</sup>

In other words, he directly challenges the idea that only those crimes explicitly codified in international law constitute absolute obligations of states, and thus cannot be subject to amnesty.

Judge García Ramírez, with perhaps more prosaic writing, also supported the perspective of his co-justice:

The principle, in international human rights law and in the most recent expressions of international criminal law, that the impunity of conduct that most gravely violates the essential legal rights protected by both forms of international law is inadmissible, is based on this reasoning. The codification of such conduct and the prosecution and punishment of the perpetrators—and other participants—is an obligation of the State, one that cannot be avoided by measures such as amnesty, prescription, admitting considerations that exclude incrimination, and others that could lead to the same results and establish the impunity of acts that gravely violate those primordial legal rights. Thus, extrajudicial executions, the forced disappearance of persons, genocide, torture, specific crimes against humanity *and certain very serious human rights violations* must be punished surely and effectively at the national and the international level.<sup>312</sup>

In sum, these concurring judges propose that human rights violations do not need to be systematic and widespread (and thus crimes against humanity) before amnesties that would interfere with a state's obligation to investigate, prosecute, and punish those violations will be prohibited.

Subsequent IACtHR decisions have continued to refine and build the jurisprudence on amnesties. These decisions reinforce the interpretation of *Barrios Altos* as barring amnesties for serious human rights violations.<sup>313</sup> For example, in *Bulacio* the Court does not rely on the argu-

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311. *Id.* ¶¶ 23–24.

312. *Barrios Altos*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 13 (García Ramírez, J., concurring) (emphasis added).

313. For example, in *Almonacid-Arellano v. Chile*, the Court specifically addressed the issue of the prohibition of amnesties for crimes against humanity. Instead of merely referring to the *Barrios Altos* decision, the Court made a special reading as if to expand the doctrine to extend to crimes against humanities as an obvious extension of human rights violations, since in reality they

ment that the violation occurred as part of a systematic and generalized pattern, and is thus a crime against humanity.<sup>314</sup> Significantly, the Court frames the duty to investigate, prosecute, and punish as part of reparations, and invokes criminal justice as part of the general right to know the truth—a right belonging as much to the individual petitioners as to Argentine society as a whole. In this way, it folds criminal justice into the idea of restorative justice.<sup>315</sup> This interpretation has also been extended by human rights lawyer Brian D. Tittmore, a former staff member in the General Secretariat of the OAS Secretariat for the IACHR, who writes that “the practice and jurisprudence of the inter-American human rights system has given rise to and reinforced international legal principles and standards governing the obligation of states to ensure individual accountability for serious human rights violations, including those infringements that would constitute crimes under international law.”<sup>316</sup>

## VI. STATE PRACTICE: REINFORCING THE INTERNATIONAL LEGAL BAN TO AMNESTIES IN DOMESTIC COURTS

This final Part explores how subsequent state practice in Latin America may offer additional persuasion as to the broad reach of the *Barrios Altos* decision. In response to *Barrios Altos*, many states have annulled their amnesty laws and initiated criminal trials. This is significant, for one, because patterns of state practice ultimately form the basis of customary international law. This phenomenon also supports this Article’s argument that *Barrios Altos* should be read broadly to prohibit all forms of amnesty for human rights violations.

The decisions of domestic courts in Latin America offer persuasive evidence for the broad interpretation of the *Barrios Altos* case. International law arises not only out of the decisions of international organs,

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run along a continuum. *Almonacid-Arellano Case*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 114 (Sept. 26, 2006) (“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.”).

314. One expert witness described the policy of “razzias” (the vernacular term for the police roundups) as “a more or less systematic policy,” but the Court nowhere else in the opinion made reference to the term “systematic.” *Bulacio Case*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 53 (Sept. 18, 2003).

315. *See id.* ¶¶ 110, 112 (citations omitted).

316. Tittmore, *supra* note 107, at 449. Significantly, Tittmore includes the category of “serious human rights violations” on the list of crimes over which international tribunals (including the ICC and the tribunals in Rwanda and the former Yugoslavia) have jurisdiction.

but also the application of those decisions in domestic legal systems.<sup>317</sup> Thus, “[o]ne measure of the impact of international law principles, but the most difficult to trace and document, is precisely how well they effectuate this indirect transfer into the national sphere.”<sup>318</sup> Others recognize the importance of observing state practice in order to begin carving out universal norms. Dugard writes that “it is difficult to identify mandatory rules of international law to govern the conduct of the successor regime. The best one can do is to identify trends that probably qualify as emergent norms. These norms appear from recent state practice.”<sup>319</sup>

Those who still adamantly argue that amnesties can only be prohibited for treaty crimes point to consistent state practice as evidence of a customary rule of international law in this regard.<sup>320</sup> Because states still apply amnesty, they argue, it must be permissible under international law.<sup>321</sup> Scharf, a strong proponent of this approach, argues, “Notwithstanding the chimerical conclusions of some scholars, there is scant evidence that a rule prohibiting amnesty or asylum in cases of crimes against humanity has ripened into a compulsory norm of customary international law.”<sup>322</sup> He explains that when “widespread practice” begins to conform to the proclamations of international bodies then, despite a “few instances of departure,” this practice can be called binding customary law.<sup>323</sup>

Heeding the call to monitor state practice, it is significant that state members of the Inter-American System have now begun to annul the same amnesty laws which initially established the general state practice that suggested they were legally permissible, and they do so relying on the *Barrios Altos* case. Moreover, these states are now pursuing criminal

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317. Roht-Arriaza & Gibson, *supra* note 31, at 844–45.

318. *Id.* at 845.

319. Dugard, *supra* note 60, at 280.

320. *See, e.g.*, Scharf, *supra* note 103, at 360 (“Customary international law, which is just as binding upon states as treaty law, arises from ‘a general and consistent practice of states followed by them from a sense of legal obligation’ referred to as *opinio juris*.”).

321. This camp of scholars disagrees with the argument that these countries may in fact be violating international law. *See* Scharf, *supra* note 105, at 61 (writing that despite some UN General Assembly resolutions and forceful arguments by legal scholars, “state practice does not yet support the existence of an obligation under international law to refrain from conferring amnesty for crimes against humanity”). For a list of states that have enacted amnesties following episodes of human rights violations, see Trumbull, *supra* note 43, at 294–97.

322. Scharf, *supra* note 103, at 360. Scharf makes this argument but omits discussion of the *Barrios Altos* decision in his article.

323. Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 *TEX. INT’L L.J.* 1, 41 (1996); *see also* Slye, *supra* note 5, at 175 (citing the increased use of amnesties and thus suggesting state practice).

trials against those responsible for human rights violations in past regimes. In Peru, for instance, the transitional justice experience was dramatically influenced by the *Barrios Altos* case, as already mentioned. On April 20, 2002, the Attorney General's Office of Peru issued a resolution to create a special prosecutor as part of its plan to implement the IACtHR's decision.<sup>324</sup> Soon after, Peru's Constitutional Court issued seminal decisions that referred to the *Barrios Altos* decision and served as precedent for all Peruvian courts.<sup>325</sup> Indeed, in one of these cases, the court corrected its own jurisprudence issued six years earlier on the issue of amnesty, framing its arguments within the terms of the right to truth.<sup>326</sup> Peru's highest court explained:

[I]t falls to the State to prosecute those responsible for crimes against humanity and, where necessary, to adopt restrictive laws to prevent, for example statutes of limitation for crimes against human rights. The application of such laws is conducive to the effectiveness of the legal system and is justified by the prevailing interests of the struggle against impunity. The objective, evidently, is to impede certain mechanisms in the criminal law system, which are applied for the repulsive purpose of securing impunity. This must be prevented and avoided, since it encourages criminals to repeat their behaviors, becomes a breeding ground for vengeance, and corrodes the underlying values of democratic society: truth and justice.<sup>327</sup>

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324. Resolución de la Fiscalía de la Nación No. 631-2002-MP-FN, Diario Oficial El Peruano No. 221,668 (Apr. 20, 2002) (Peru). The Attorney General issued a follow-up resolution on April 20, 2005, ordering prosecutors in all instances working on cases that were subject to the amnesty laws to request the trial or appellate court to enforce the international judgment. Resolución de la Fiscalía de la Nación No. 815-2005-MP-FN, Diario Oficial El Peruano (Apr. 20, 2005) (Peru).

325. Martín Rivas, Constitutional Court, Exp. No. 4587-2004-AA/TC (Nov. 29, 2005) (Peru); Vera Navarrete, Constitutional Court, Exp. No. 2798-04-HC/TC (Dec. 9, 2004) (Peru); Villegas Namuche, Constitutional Court, Exp. No. 2488-2002-HC/TC (Mar. 18, 2004) (Peru).

326. *Villegas Namuche*, Constitutional Court, Exp. No. 2488-2002-HC/TC, ¶¶ 8–20.

327. *Id.* ¶ 23 (“Asimismo, corresponde al Estado el enjuiciamiento de los responsables de crímenes de lesa humanidad y, si es necesario, la adopción de normas restrictivas para evitar, por ejemplo, la prescripción de los delitos que violenten gravemente los derechos humanos. La aplicación de estas normas permite la eficacia del sistema jurídico y se justifica por los intereses prevalentes de la lucha contra la impunidad. El objetivo, evidentemente, es impedir que ciertos mecanismos del ordenamiento penal se apliquen con el fin repulsivo de lograr la impunidad. Ésta debe ser siempre prevenida y evitada, puesto que anima a los criminales a la reiteración de sus conductas, sirve de caldo de cultivo a la venganza y corroe dos valores fundantes de la sociedad democrática: la verdad y la justicia.”) (author's translation).

The opinion, in effect, imbues the transitional justice formula promoted by the TRC with a new legality.<sup>328</sup> With the help of the Inter-American System, all procedural impediments to pursuing criminal justice as part of the Peruvian transitional justice project were eliminated.<sup>329</sup> The TRC's mandate established its remit to conduct a two-year investigation into the causes and consequences of the armed conflict.<sup>330</sup> The *Barrios Altos* case directly influenced Peru's decision to include the eventual possibility of criminal investigations and prosecutions in the TRC's mandate, even if the TRC itself could not conduct such trials.

Throughout its two-year investigation, the TRC purposefully conducted its operations in a manner that would support state investigations, even creating a special criminal investigation unit to prepare cases to present to the state.<sup>331</sup> Even before it presented its final report in August 2003, the TRC held a ceremony to transfer for investigation the first case to the Public Ministry to symbolize its commitment to criminal prosecutions. The TRC later transferred an additional forty-three of the most emblematic cases of human rights violations and recommended prompt criminal investigations and prosecutions in hundreds of others.<sup>332</sup> In addition, its final report included chapters on the most important cases arising out of the twenty-year internal armed conflict, in-

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328. Significantly, the status of the *Barrios Altos* decision in national law gained more clarity during the proceedings of the *La Cantuta* case before the IACtHR. While the Commission and representatives of the victims argued that the state should take positive steps to annul the amnesty law, the state responded by saying it was not necessary, naming various other measures taken by the state. See *La Cantuta Case*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 164 (Nov. 29, 2006). The state argued that "the granting of amnesty has no practical effects in the domestic legal system." *Id.* The state, however, added that "in the event the Court held a different view, it should state precisely what such measure would be, since this is not a simple issue concerning domestic law. Under the current Constitution, not only are human rights treaties part of the domestic law, but also any interpretation made by the organs created by such treaties constitute mandatory criteria by which the rights in the country are to be interpreted. Therefore, in the State's opinion, such legal framework would be sufficient in the current state of affairs." *Id.*

329. See generally Eduardo González Cueva, *The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 70 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006). By contrast, in South Africa, victims could not resort to an international tribunal when they lost their challenge against amnesty laws before the highest national court. See Roht-Arriaza & Gibson, *supra* note 31, at 856–57 (describing the frustrated attempts of South Africans to contest the amnesty laws).

330. See 1 COMISIÓN DE LA VERDAD Y RECONCILIACION [TRUTH & RECONCILIATION COMMISSION], *supra* note 162, at 26, available at <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20I/INTRODUCCION.pdf>.

331. See Cueva, *supra* note 329, at 78–79.

332. During its investigations, the TRC began to present some of its criminal investigations to the Attorney General's office (author's personal observations from field work).

cluding *Barrios Altos*<sup>333</sup> and *La Cantuta*.<sup>334</sup> Thus, now, some five years after the TRC published its final report in 2003, national public prosecutors across the country have opened hundreds of criminal investigations into alleged extrajudicial killings and disappearances, some of which rose to the level of massacres and all of which occurred during the country's twenty-year internal armed conflict between state agents and insurgent groups.

Meanwhile, many of the criminal investigations into the cases arising out of the friendly settlement reached between Peru and the IACHR were underway as the TRC prepared its final report. The report looked at the incidents at Barrios Altos and La Cantuta as part of a general investigation of *Colina*. Also, on October 16, 2001, the Peruvian Military Council responded to the IACTHR ruling in *Barrios Altos* by declaring "null and void" the Supreme Court judgment issued on June 16, 1995, which extended amnesty to the army officials charged with the Barrios Altos massacre.<sup>335</sup> At the same time, the civil courts obtained jurisdiction over these cases.<sup>336</sup> As a result, some fifty-six persons were indicted, including a military general and a top intelligence advisor to Fujimori. Proceedings against *Colina* agents were also reinitiated in the *La Cantuta* case, running concurrently with the TRC and resulting in convictions on April 8, 2008.<sup>337</sup> In August 2007, the special court for anti-corruption, which also handles human rights, opened proceedings against persons involved in La Cantuta, including Luis Augusto Pérez

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333. 7 COMISIÓN DE LA VERDAD Y RECONCILIACION [TRUTH & RECONCILIATION COMMISSION], *supra* note 162, at 475, available at <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.45%20BARRIOS%20ALTOS.pdf>.

334. *Id.* at 233, available at <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20VII/Casos%20Ilustrativos-UIE/2.22.%20LA%20CANTUTA.pdf>.

335. La Cantuta Case, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(63) (Nov. 29, 2006). The Peruvian officers included: Brigade Army General Juan Rivero-Lazo, Army Colonel Eliseo Pichilingue-Guevara, Army Captain José Adolfo Velarde-Astete, Army Lieutenant Aquilino Portella-Núñez, Army Third-Rank Technicians Julio Chuqui-Aguirre, Nelson Rogelio Carbajal-García, Jesús Antonio Sosa-Saavedra, and retired Army Lieutenant Aquilino Portella-Núñez. *Id.* The October 16, 2001, ruling allowed the perpetrators to return to the procedural status they held before the amnesty laws took effect and allowed the judgment of May 3, 1994, to be served. *Id.*

336. See Resolución Administrativa No. 170-2004-CE-PJ, Diario Oficial El Peruano (Sept 30, 2004) (Peru).

337. The former head of SIN, General Julio Salazar-Monroe, was sentenced to thirty-five years in prison for his role in the La Cantuta disappearances, and three of his subordinates received fifteen-year sentences for the same offenses. Press Release, Human Rights Watch, Peru: Salazar Conviction Step on Road to Justice (Apr. 9, 2008), available at <http://www.hrw.org/english/docs/2008/04/09/peru18489.htm>.



Document, General Hermosa-Ríos, Montesinos, and José Velarde As-tete.<sup>338</sup>

The TRC's explicit commitment to criminal justice prompted public prosecutors in the sixteen provinces most affected by the war to open investigations into hundreds of human rights cases.<sup>339</sup> For example, a prosecutor in the Andean highlands of Ayacucho, where the greatest brunt of political violence occurred, initiated investigations and prosecutions in some three hundred cases of human rights violations after going into rural communities to interview victims. She named former president Alan García among the suspected perpetrators in the case of Accomarca, charging him with genocide (García was president from 1995–1990 and was newly elected in 2006). Thus, beginning in 2005, the provincial and central criminal courts have issued a handful of significant judgments, some of which include substantial prison sentences for military and police officers. Perhaps most significantly, top leaders—including Fujimori—have been facing trials for crimes arising out of human rights violations. These historical cases are resulting in judicial decisions on human rights law which ultimately contribute both to national and international criminal law jurisprudence.

One of the most important events in this evolving criminal justice movement was the successful extradition of Fujimori in September 2007, after six years of proceedings, first with Japan and then with Chile. Fujimori faces charges of both corruption and human rights, the latter including the incidents of Barrios Altos and La Cantuta. Fujimori's trial for the human rights charges began on December 10, 2007. On April 7, 2009, he was found guilty on all human rights charges and sentenced to twenty-five years in prison; Fujimori has declared he will appeal his conviction.<sup>340</sup>

The *Barrios Altos* precedent has begun to show its impact in Latin America, beyond just Peru where it applied directly. For example, on June 14, 2005, the Argentine Supreme Court of Justice found the Due Obedience and Full Stop laws were unconstitutional because they vio-

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338. REPÚBLICA DEL PERÚ [REPUBLIC OF PERU], DEFENSORÍA DEL PUEBLO [OMBUDSMAN], EL ESTADO FRENTE A LAS VÍCTIMAS DE LA VIOLENCIA. ¿HACIA DÓNDE VAMOS EN POLÍTICAS DE REPARACIÓN Y JUSTICIA? [THE STATE WITH REGARD TO VICTIMS OF VIOLENCE: HOW FAR WILL WE GO WITH REPARATION AND JUSTICE POLICY?] 99 n.31 (2007) (Peru), available at <http://www.defensoria.gob.pe/inform-defensoriales.php>.

339. COORDINADORA NACIONAL DE DERECHOS HUMANOS [NATIONAL COORDINATOR OF HUMAN RIGHTS], INFORME ANUAL 2007 [ANNUAL REPORT 2007], at 22 (2008) (Peru), available at [http://www.dhperu.org/documentos/informe/85fa9b\\_cap1.pdf](http://www.dhperu.org/documentos/informe/85fa9b_cap1.pdf).

340. Simon Romero, *Peru's Ex-President Convicted of Rights Abuses*, N.Y. TIMES, Apr. 8, 2009, at A6, available at <http://www.nytimes.com/2009/04/08/world/americas/08fujimori.html>.

lated the country's international legal obligations.<sup>341</sup> Part of the Argentine court's reasoning rested on the *Barrios Altos* decision, which it interpreted as providing a general bar against all amnesties that prevent criminal accountability for serious human rights violations.<sup>342</sup> Almost thirty years after the amnesty laws halted criminal justice in Argentina, the influence of the ruling can be seen as national prosecutors open criminal prosecutions against almost three hundred military officers who benefited from earlier amnesty laws.<sup>343</sup>

The Court relied on international law, including the IACHR's decision on Argentina's Full Stop and Full Obedience laws and *Barrios Altos*, in its decision. The Court specifically interpreted these decisions to apply beyond just self-amnesty laws, and thus resolved any doubt on the illegality of Argentina's immunity laws.<sup>344</sup> In addition, the Court made reference to the IACHR's general position that it is "practically irrelevant" that amnesties are enacted by democratic bodies based on the demands of national reconciliation because these laws still violate the American Convention and the duty to prosecute as established in the *Velásquez Rodríguez* ruling.<sup>345</sup> Significantly, the Argentine justices referred specifically to Judge García Ramírez's concurring judgment in *Barrios Altos* in which he argued the decision should be extended to all amnesties despite their possible beneficial effects in reestablishing peace.<sup>346</sup>

One can also see renewed efforts to pursue criminal justice in Chile, especially in the wake of the Pinochet case which reinvigorated local efforts to assure criminal prosecutions for the human rights violations of that country's dirty war.<sup>347</sup> When Pinochet returned to Chile, the Chilean Congress lifted the former leader's parliamentary immunity to allow criminal proceedings to be initiated against him.<sup>348</sup> The parliament also presented a bill to annul Chile's twenty-year-old amnesty laws to enable criminal proceedings against other suspected human rights violators—

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341. Corte Suprema de Justicia [CSJN], 14/6/2005, "Julio Héctor Simón," Colección Oficial de Fallos (2005-328-2056) (Arg.), available at <http://www.acnur.org/biblioteca/pdf/3560.pdf>.

342. *Id.* ¶ 24. For a discussion on this issue, see Tittmore, *supra* note 107, at 449–54 (providing an account of Argentina's recent judicial decisions on the amnesty laws enacted in its political transition).

343. Canton, *supra* note 39, at 167.

344. CSJN, 14/6/2005, "Julio Héctor Simón," Fallos (2005-328-2056), ¶ 25 (Arg.). For a discussion of Argentina's reliance on *Barrios Altos*, see Urtubey, *supra* note 28, at 122.

345. CSJN, 14/6/2005, "Julio Héctor Simón," Fallos (2005-328-2056), ¶¶ 25–27 (Arg.).

346. *Id.* ¶ 27.

347. See Evans, *supra* note 33, at 210.

348. *Id.*

the measure was up for a vote at the time of publication.<sup>349</sup> In addition, the Supreme Court of Chile ruled on the inapplicability of Chile's amnesty laws and statutes of limitations in investigations on forced disappearances.<sup>350</sup> Chile, along with Spain and South Africa, has also renewed efforts to bring perpetrators to justice, providing that "despite explicit efforts to leave the past behind, the contentious issue of human rights refuses to remain buried."<sup>351</sup>

These renewed campaigns for criminal justice suggest that those who pointed to these same countries as examples "that truth could substitute for justice" to argue that state practice supported amnesties, overlooked the resilience of the "thirst for justice."<sup>352</sup> Indeed, local victims eventually began to force a sea change in state behavior and put into question some of the once accepted tenets of the *truth v. justice* debate through their diligent use of international legal recourse. Essentially, the maxim appears today to be truth and then later justice. Justice may be delayed but nonetheless the principle of criminal justice remains in the equation.<sup>353</sup> Moreover, it seems a new stage in the transitional justice field is moving away from the *truth v. justice* debate, which poses the options in binary terms of choosing between trials or truth commissions (i.e., either/or), and instead expanding to the view that transitional justice encompasses both options (i.e., and/also). Indeed, Peru's clear deviance from the truth commission model set in South Africa could divert the international trend, making the South African experience suddenly an isolated exception.<sup>354</sup>

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349. Agenda de Derechos Humanos para el Bicentenario [Human Rights Agenda for the Bicentennial], Comisión del Constitución del Senado Aprueba Derogación de Amnistía [Senate Constitutional Commission Approves Amnesty Derogation] (Dec. 18, 2008), at <http://adhb.wordpress.com/2008/12/18/comision-del-constitucion-del-senado-aprueba-derogacion-de-amnistia/> (Chile).

350. Miguel Angel Sandoval Rodríguez Case, Corte Suprema de Chile (Nov. 17, 2004), available at <http://www.derechos.org/nizkor/chile/doc/krassnoff.html> (referring to Chilean Decree Law No. 2191 of 1978).

351. Evans, *supra* note 33, at 208; see also David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 ETHICS & INT'L AFF. 43, 53 (1999); Margaret Popkin & Nehal Bhutta, *Latin American Amnesties in Comparative Perspective: Can the Past be Buried?*, 13 ETHICS & INT'L AFF. 99, 111 (1999).

352. Roht-Arriaza, *supra* note 2, at 313.

353. See MARGUERITE FEITLOWITZ, *A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE* 193 (1998) (discussing Argentina's "Scilingo Effect" of confessions coming two decades after junta rule ended).

354. See Jenkins, *supra* note 61, at 46 (noting South Africa's exceptional experience based on the exchange of amnesty for confessions); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185 (2001) (discussing the experiences of countries opting for criminal trials).

The more current trend is to see countries opting for both truth commissions and criminal prosecutions.<sup>355</sup> For example, upon revoking a blanket amnesty offered in peace negotiations, Sierra Leone eventually annulled that law and formed a Special Court at the same time it created a Truth Commission in 2002.<sup>356</sup> Now, almost two decades after the *truth v. justice* debate gained momentum, consensus suggests that truth commissions and criminal trials are “mutually reinforcing and complementary,” rather than options which create tensions, tradeoffs, and dilemmas.<sup>357</sup>

Certainly the new global context, aided by judicial pronouncements like *Barrios Altos*, greatly influences the international community’s attitude towards amnesties, which also influences the pressure on national leaders to pursue criminal justice.<sup>358</sup> In this vein, political scientist Elin Skaar found that in thirty Latin American and African countries that underwent transition after the mid-1970s, the government’s human rights policy rested largely on the “relative strength” of the public’s demand for truth and justice balanced with the outgoing regime’s demand for amnesty and impunity.<sup>359</sup>

#### CONCLUSION

The IACtHR offered the international community a holding in *Barrios Altos* that if read broadly could cause monumental changes in transitional justice schemes. Yet, despite my inclination to refute narrow readings of the Inter-American decision, I at the same time must acknowledge one significant factor that could nevertheless continue to limit the reach of *Barrios Altos*. In particular, the steadily growing framework of international law has created new dilemmas and concerns regarding the lack of uniformity in a system that has no overarching court or legislature to unify laws and practice. Indeed, the IACtHR is a

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355. Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT’L L. 952, 954 (2001) (writing on the development of truth commissions into a “justice-supportive machinery”).

356. See Schabas, *supra* note 99, at 157–61. The Special Court went on further to test the validity of the amnesty laws finding that a state may not create amnesties to protect offenders from prosecution for crimes that amount to an international crime subject to international jurisdiction. *Id.* at 161.

357. Leebaw, *supra* note 40, at 103.

358. See generally Naomi Roht-Arriaza, *Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 25, at 57.

359. Elin Skaar, *Truth Commissions, Trials—or Nothing? Policy Options in Democratic Transitions*, 20 THIRD WORLD. Q. 1109, 1124 (1999).

regional tribunal, whose holding technically is only binding on OAS members, and then only to those who have signed the American Convention.

Thus, we are left with the question whether the *Barrios Altos* precedent signifies a new evolution in the general field of international law for all countries, or alternatively only for the region of Latin America. Is it a watershed in combating international impunity, or just one more example of the type of fragmentation in international criminal law that Gerhard Hafner views as the “erratic blocks and elements” of an “‘unorganized system’ full of intra-systematic tensions, contradictions and frictions”?<sup>360</sup> It will be important to watch whether the *Barrios Altos* decision begins to serve as persuasive authority in other regions and settings in order to assess its full impact.

Regardless of its reach, the implications of the outlawing of amnesties in transitional justice settings, even if contained in Latin America, generate new questions in the field. One recent line of inquiry looks at how international criminal law is being “nationalized” and again how this creates issues of “fragmentation” in terms of the substance and application of international legal norms. For instance, in holding human rights trials while respecting the principles of legality, which law do states apply? In the case of Peru, which only recently codified extrajudicial execution close to the end of Fujimori’s regime in 1998, it is applying common criminal codes of homicide. How does this choice of law contribute or undermine the developing norms of international criminal law, or does it even matter? Will evolving state practice and jurisprudence result in difficult contradictions and inconsistencies, or will it slowly evolve into a uniform system?

Finally, if the trend points toward inclusion of national criminal trials in transitional justice settings, what will be the implications for the now broader goals of these schemes in terms of restorative justice? Will national reconciliation be undermined? Will national trials perhaps be compromised by inexperienced, weak, or corrupt courts, and will political realities only increase victim-survivors’ distrust and disappointment? Or alternatively, will a new legality inspire more creative ways of upholding the principle of criminal justice while carving out exceptions such as plea bargaining and prosecutorial discretion?

These are only a few of the questions that arise when contemplating a new phase in the development of transitional justice. While the binary

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360. Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT’L L. 849, 850 (2004).

nature of the *truth v. justice* debate perhaps simplified the conversation by providing two options, we now enter a more complex and nuanced territory that may test the social and political limits of a new legality that limits the possibility of choice.