Law and Politics in a Trustee Court: Amnesty Laws and the Inter-American System

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Abstract

In a series of decisions starting in 2001, the Inter-American Court of Human Rights (IACtHR) has ruled that amnesty laws that create impunity for serious violations of human rights violate the American Convention on Human Rights and other treaties. In addition, the IACtHR has, in some of its decisions, taken the extraordinary step of nullifying national amnesty laws. We argue that the work of the Inter-American Court and its partner institution, the Inter-American Commission on Human Rights, can be understood as that of trustees. Our central claim is that the Commission and the Court will try to expand the fulfillment of human rights in the Americas but that they modulate their decisions in light of the domestic politico-legal context in respondent states. The Commission controls the timing of when cases arrive at the Court, and the Court controls the scope of final decisions. We offer a set of propositions regarding the timing of decisions, the scope of decisions (narrow versus expansive), and the degree to which decisions follow the Court’s existing jurisprudence. The analysis of all fourteen of the Court’s amnesty decisions is generally consistent with our propositions.
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In a series of decisions on amnesty laws, the Inter-American Court of Human Rights (IACtHR) has exercised a prerogative that not even the European Court of Human Rights possesses: to nullify national legislation. In doing so, the Court has not behaved like a judicial agent that carries out the wishes of its state principals (Carrubba, Gabel, & Hankla, 2008; Garrett, Kelemen, & Schulz, 1998). The states parties to the American Convention on Human Rights (ACHR) did not include in the treaty a prohibition on amnesties, nor did they confer upon the Court the authority to override domestic laws. In deciding on national amnesty laws, the Commission and the Court confront politically sensitive arrangements that states are likely to view as internal political matters, shielded by sovereignty from outside review. On issues of such sensitivity to member states, an agent court could be expected to defer to the states or avoid adjudicating altogether.

Instead, the Inter-American Court has behaved like a trustee court (Stone Sweet & Brunell, 2013, p. 62), exercising a fiduciary responsibility not directly to the member states and their immediate preferences but rather to the norms and values of the inter-American human rights regime. We argue that though the Inter-American System is a trustee system, the Commission and the Court nevertheless take into account the domestic political and legal contexts of the member states. They do so in order to maintain their legitimacy and the acceptance of – even if not full compliance with – their decisions. Our main claim is that the Commission and the Court have calibrated their amnesty decisions, in timing and in substance, in light of the domestic contexts of respondent states.
In the following sections we define trustee courts and assess the Inter-American System against the definition. We then offer a set of hypotheses regarding judicial decision-making in the Inter-American System. The hypotheses refer to the timing of decisions, the scope of decisions (narrow versus expansive), and the degree to which decisions follow the Court’s existing jurisprudence. The Inter-American System’s two-step process, we argue, equips both the Commission and the Court with tools that allow them to modulate their decisions in light of their perceptions of national politico-legal contexts. The Commission has substantial control over the timing of decisions and the Court has the final word on the scope of decisions.

Finally, we explore the hypotheses in light of the Commission and Court decisions in all 14 cases that take note of national amnesty laws. The behavior of the Commission and the Court in these 14 cases is broadly consistent with our hypotheses. The analysis supports our argument that the Inter-American Court is a trustee court that takes into account both the domestic politico-legal context in a respondent state and its own prior jurisprudence.

**Trustee courts**

Trustee courts exercise authority by delegation, but it is “fiduciary” not “agency” delegation (Majone, 2001). In agency delegation, principals want agents who will do what they (the principals) themselves would do. The key challenge is that the agent’s interests inevitably diverge from those of the principal, and the principal can never fully supervise the agent, creating “agency slack.” Fiduciary delegation means conferring authority on trustees to
manage an asset or a regime (a “trust”) in the best interests of the beneficiaries, regardless of the immediate interests or preferences of those who established the trusteeship.

Put differently, delegation to an agent is fundamentally about reducing “decision-making costs” for the principals, who cannot possibly administer every detail under their authority. Trustee (fiduciary) delegation is essentially about enhancing the credibility of commitments made by the principals. States (and other kinds of principals) set up agency delegation in order to govern those who are subject to the principals’ authority. States create trustees in order to govern themselves. “A trustee, then, possesses legal authority to govern the principals in light of priorities -- legal commitments -- to which the latter have agreed” (Stone Sweet & Keller, 2008, p. 9). Trustee courts are particularly appropriate in human rights, a domain in which states commit to constrain their own behavior (to refrain from abuses). In human rights, traditional inter-state enforcement mechanisms like reciprocity and retaliation are virtually meaningless, as states can hardly threaten to violate the Convention against Torture (for example) in response to another state’s violations. In other words, the commitment problems connected with safeguarding basic rights are particularly acute, and states have established international trustee courts to help deal with that challenge (Stone Sweet & Keller, 2008, p. 9).

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

The Inter-American Court of Human Rights is part of a system that also includes the Inter-American Commission on Human Rights. Together, the Commission and the Court are custodians of the American Convention on Human Rights (ACHR), in that they receive and adjudicate claims from persons and groups alleging the violation of Convention-protected rights. The Commission is the body that receives individual petitions. Once it has determined that a petition meets admissibility requirements, the Commission gathers information and requests a response from the state accused of violating Convention rights. The Commission can then broker a friendly settlement between the petitioner and respondent state, publish a report with its findings, and, if the state response is inadequate, refer the case to the Inter-American Court. Once it has received an application from the Commission, the Court reaches a decision on the merits of the claim and publishes its decision. The Court can find a state responsible for violations and require compensation and other remedies (Pasqualucci, 2003, pp. 6-7). In the following sections, we show that the Commission and the Court exhibit the key features of trustee arrangements.

1. Institutional independence

Agency delegation implies the need for principals to monitor and control the agents, but fiduciary delegation requires the opposite – that the trustee be independent of the principals (Majone, 2001, p. 103). The trustee must enjoy independence from the principals because the trustee may be required to judge or regulate the conduct of the principals (the states) themselves. Institutional independence is tied to the procedures for
appointing and removing judges; the length of judges’ terms; salaries; funding for court operations; control over operational rules; and the difficulty with which political bodies can alter the court’s powers or jurisdiction. Both the Commission and the Court enjoy considerable, if not complete, institutional independence.

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

The seven judges of the Court are elected to six-year terms, renewable once, by the states parties to the American Convention. Any state party may nominate candidates, whose state of nationality must be a member of the OAS but need not have ratified the American Convention or accepted the Inter-American Court’s jurisdiction. All of the judges but the President of the Court serve on a part-time basis, as the Court sits in session for a
few weeks, several times each year (Pasqualucci, 2003, pp. 10-11). Because the judges serve part-time, they do not depend on Court salaries. Judges are paid an honorarium during the time they are present for sittings of the Court, though they are not compensated for the time they spend studying cases and preparing for sessions (Pasqualucci, 2003, p. 23).

With respect to funding, both the Commission and the Court are in a paradoxical situation. Both organizations are under-funded, which translates into fewer personnel and resources for investigating and processing claims. The Organization of American States does not adequately fund either body, but contributions from other sources allow them to carry out their duties. For instance, in 2013, the funds received by the Commission totaled $11,100,700, of which 44 percent came from the OAS. The balance came from individual states (some OAS members but also eight European countries and the EU) and various organizations, including Save the Children (Sweden), UNAIDS, UNICEF, and UNHCR (Inter-American Commission on Human Rights, 2013). The Court’s total 2013 budget was $4,509,323, of which 59 percent came from the OAS. Donors contributed the balance, including various foundations, international organizations, and states (both regional and European) (Inter-American Court of Human Rights, 2014). Though both the Commission and the Court need greater resources, they are not entirely dependent financially on the states that are subject to their jurisdiction. Furthermore, to exert political pressure on the Commission and Court through their OAS budgets, a majority of the members would have to agree to do so. In financial terms, then, the Inter-American system moderately independent – it is neither fully secure in its funding nor fully dependent.

Perhaps most important, supranational courts are more independent the more
difficult it is for the member states to rein them in (Alter & Helfer, 2010, p. 567). States can constrain an international court by controlling its operational rules and by constricting its overall powers. At the operational level, both the Court and the Commission are authorized by the American Convention on Human Rights to create and to modify their own Rules of Procedure (Arts. 39, 60). This power enhances the independence of the two bodies, as the states parties could only gain control over the rules of procedure by amending the Convention (Burgorgue-Larsen & Úbeda de Torres, 2011, p. 36). Similarly, the states parties to the American Convention would find it exceedingly difficult to curtail the authority or the jurisdiction of the Commission and the Court. The Commission could only see its powers reduced through amendment of the OAS Charter, which requires a two-thirds vote of the states, and amendment of the American Convention on Human Rights, which also requires ratification by two-thirds of the States Parties (Charter of the Organization of American States, Arts. 140, 142; American Convention on Human Rights, Art. 76). To reduce the powers of the Court, the states parties would likewise have to muster a two-thirds majority to ratify amendments to the Convention.

2. Compulsory jurisdiction

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

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

The number of petitions received by the Commission has grown dramatically since the early 1990s; see figure 1. Only a fraction of the petitions filed at the Commission eventually reach the Court. Still, the IACtHR has received a steady, if modest, flow of cases; see figure 2. The number of cases referred to the Court rose markedly after 2001. The average number of cases referred by the Commission to the Court from 1991 through 2001 was 3.3 per year; for 2002-2012, the average was 13.0 per year. The difference was that before 2002, the Commission had discretion as to whether or not it would send a case to the Court. The Commission’s Rules of Procedure were amended in May 2001 so as to
reduce that discretion and specify criteria for referral of cases. The new rules require a case to be submitted to the Court when: (1) the state in question has accepted the jurisdiction of the Court; (2) the state has not implemented the recommendations of the Commission’s report; and (3) an absolute majority of the seven Commission members does not offer a reasoned objection to referral (Burgorgue-Larsen & Úbeda de Torres, 2011, pp. 36-37). The steady if not massive flow of cases has by now allowed the IACtHR to develop a substantial jurisprudence across a broad spectrum of topics (Burgorgue-Larsen & Úbeda de Torres, 2011).

Figure 1: Petitions received by the Commission

![Graph showing the number of petitions received by the Commission from 1991 to 2012.]

3. Judicial supremacy

The decisions of a trustee court must be authoritative. That is, the trustee court must have the last word on interpretation of the relevant instruments and its decisions must be virtually immune to being overridden by the member states. “By definition, a trustee court possesses final authority to determine the scope and content of the law, and the principals have reduced means of overruling judicial determinations that they may find objectionable” (Stone Sweet and Keller 2008, 9). The Statute of the Inter-American Court states that it is “an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights” (Art. 1). Article 67 of the
American Convention further stipulates that "[t]he judgment of the Court shall be final and not subject to appeal." Finally, the Court has affirmed in its jurisprudence that it is "the ultimate interpreter of the American Convention" (*Almonacid-Arellano v. Chile*, Judgment, 26 September 2006, para. 124).

**Judicial decision-making in trustee courts**

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

We suggest that the attitudinal model can be applied to the Inter-American System only in an adapted form. The Commissioners and judges do not arrive with political attitudes based on a left-right (liberal-conservative) ideological spectrum. Rather, their judicial “attitude” is grounded in their role as trustees of the Inter-American System of human rights, including the American Convention on Human Rights and other regional human rights treaties. The trustee role conception leads to two assumptions about the judicial preferences of the Commission and the Court. First, both Commissioners and judges will prefer to apply the American Convention expansively, that is, in the way that allows the greatest scope for Convention rights and freedoms. Commissioners and judges will therefore tend, as an underlying preference, to favor interpretations that extend rights protections to additional situations and categories of persons. The professional background of both commissioners and judges suggests that they are oriented toward fulfilling and expanding Convention rights. All of the current (May 2014) Commissioners have prior professional human rights experience, in NGOs, academia, legal practice, or government service. Six of the seven current IACtHR judges have professional human rights experience, and the seventh has high-level experience in constitutional law.¹

We have argued that, in general, the Commission and the Court prefer to rule expansively, extending the reach of human rights law. The strategic model suggests that the Commission and the Court will nevertheless take into account the interests and

preferences of member state governments and other domestic actors. The issue is not that the member states are likely collectively to reverse Court decisions or restrict Commission’s and the Court’s powers or jurisdiction. As explained above, the obstacles to collective member state action to curtail the authority of the Commission or the Court are virtually insurmountable. The Commission and the Court have an incentive to consider the likely reactions of governments and other domestic actors for two reasons.

First, states that are dissatisfied with the Court’s decisions can withdraw from the Court’s jurisdiction. In fact, states can denounce the American Convention altogether. Only two states have withdrawn, and only one of the withdrawals was motivated by displeasure with the Court. Trinidad and Tobago did so in 1998 in order to retain the death penalty. Venezuela withdrew from the Convention in 2012, criticizing the Commission and the Court for their decisions with respect to cases arising out of a coup attempt against President Hugo Chávez in April 2002 and a broad work stoppage of December 2003 (Venezuela, 2012). A large number of withdrawals would clearly undermine the Court (and the entire Inter-American System), but it is difficult to imagine circumstances in which either (a) a large number of states withdraw in reaction to separate rulings against them, or (b) a large number of states is sufficiently incensed by a ruling against another state that they all withdraw.

Second, as the strategic model suggests, the Commission and the Court depend on other actors to implement their recommendations (the Commission) and rulings (the Court). Some degree of non-compliance with Court decisions is inevitable, but constant and pervasive non-compliance would erode the Court’s legitimacy and effectiveness. The Commission (which requests rulings from the Court) and the Court will therefore take into
account domestic factors that would indicate the likelihood that their decisions will be accepted and complied with in the respondent state. Put differently, supranational courts will be more effective when their judges cultivate an awareness of domestic audiences and constituencies (Alter & Helfer, 2010, p. 565; Cavallaro & Brewer, 2008, p. 770; Helfer & Slaughter, 1997). In the analysis below, we take two developments as indicating broad support among domestic groups for ending impunity: opposition parties have won political power, and transitional justice mechanisms (truth commissions and prosecutions) have been undertaken. In some instances, Court’s decisions on amnesty laws clearly aligned with the efforts of national courts, legislatures, and civil society to end impunity and were welcomed by public opinion and news media (Binder, 2012, p. 1227).

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

We have argued that the Commission and the Court, though preferring to rule expansively and follow precedent, will take into account domestic contexts in respondent states, both because states retain the ability to withdraw from the Convention and because the Court relies on domestic actors to comply with and implement its decisions. The Commission and the Court, in other words, constantly face decisions about how assertively to act.

We propose that the Commission and the Court modulate their actions along two dimensions, timing and scope. The first dimension is largely in the hands of the Commission and the second is mostly in the hands of the Court.

1. Timing
Timing refers to how quickly a case moves from petition to resolution. We suggest that the Commission can delay publishing a decision in a case or submitting it to the Court in order to await a more favorable domestic context in the respondent state. The Commission’s process makes some delays inevitable, as states fail to respond and friendly settlement negotiations drag on. Ideally, when the Commission finds that a state has violated a Convention right, the state will agree to halt the abuse, compensate the victim(s) appropriately, and institute measures to prevent further violations. If the Commission and the state party reach such an agreement, the case is concluded. In other words, the Commission process will naturally lead in many cases to an extended period of exchanges and negotiations and the Commission will often allow time for such an outcome to develop.

But the Commission may also allow the timeframe to expand for more strategic reasons. The Commission will prefer a Court decision that has the best chance of being implemented by the state party. In some cases, therefore, the Commission will have an incentive to wait until the domestic context in the respondent state is favorable, before submitting an application to the Court. Indicators of a more favorable domestic context include:

(a) alternance in power (opposition parties have replaced those in power when the human rights violations occurred); and

(b) the creation of domestic transitional justice mechanisms, like truth commissions and prosecutions.

Both alternance in power and transitional justice mechanisms indicate that the domestic transition has been consolidated to some degree, and therefore that an Inter-American
ruling on the amnesty law would be less likely to revive political conflicts or endanger a fragile transition.

The upshot is that the Commission can delay referring cases to the Court until the domestic context in the respondent state appears more favorable. As a result, the Court is likely to receive cases in which the Commission has already waited for a favorable domestic context, and therefore the Court will have little strategic incentive to wait.

2. Scope

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

1. *Specific:* the decision states that the amnesty law must not be an obstacle to the investigation and prosecution of those responsible for the violations *in the present case.*

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

3. *Expansive:* the decision nullifies the amnesty law itself.

The Court, like the Commission, will take into account the domestic political context of the respondent state. The Court will therefore be more likely to rule assertively (a broad or expansive decision) if there are indications that the domestic transition has been consolidated and stabilized. More specifically, the Court is more likely to issue a judgment that is either broad or expansive if parties that opposed the rights-violating regime have won at least one election in the respondent state (alternance has occurred).

We would offer a similar argument regarding transitional justice mechanisms (that expansive rulings would be more likely after transitional justice processes have begun in the respondent state), but in every amnesty decision that we could find, transitional justice processes had taken place before the Court ruled. Still, the Court can distinguish differences in the role that transitional justice mechanisms play in the domestic context. In several Latin American countries, transitional justice processes – usually including truth commissions and sometimes including prosecutions – were part of, or followed after,
transitions from authoritarian rule to democratic rule. Brazil, Chile, Peru, and Uruguay are in this group. We label this path to transitional justice “organic.” In El Salvador and Guatemala, however, truth commissions were sponsored by the United Nations as part of peace settlements concluding long civil wars. We denote this path to transitional justice “external.” In the cases of external transitional justice, the existence of (for example) a truth commission does not indicate broad public or elite support for accountability.

For example, the United Nations sponsored peace negotiations that led to the January 1992 agreement ending the 12-year civil war in El Salvador. A Commission on the Truth for El Salvador was created as part of the accords (Cuéllar Martínez, 2007, p. 43; Schifter & Schwartz, 2012). But the 1993 Truth Commission report was not widely disseminated and President Alfredo Cristiani publicly dismissed it in his official response in March 1993, declaring that the country must “erase, eliminate, and forget the past in its entirety.” He called for a “general and absolute amnesty, to turn that painful page of our history and seek a better future for our country” (quoted in Cuéllar Martínez 2007, 43). Within days, President Cristiani pushed through the sweeping General Amnesty for Peace Consolidation (Legislative Decree No. 486). The new law overrode the earlier and more limited National Reconciliation Law of 1992 as it did not exclude human rights violations from the amnesty. The idea of a general amnesty was broadly accepted by the public and even by the main opposition party – the Farabundo Martí National Liberation Front (FMLN) – itself (Collins, 2010, p. 170). More broadly, “[i]n contrast to the elites of other countries, many members of [the] Salvadoran elites view the amnesty as something positive, and still more consider it necessary” (Popkin & Bhuta, 1999, p. 8).
The Guatemalan amnesty – like El Salvador’s – was implemented under peace negotiations led by the United Nations. The peace agreement included an amnesty law, the Law of National Reconciliation (LNR). In 1997 the Commission for Historical Clarification (CHC) was formed under the guidance of the United Nations to report on human rights abuses that occurred during the civil war; it published a final report in 1999. But the government dismissed the recommendations of the CHC and the president of Guatemala published a paid notice in the newspapers stating that the report’s “historical interpretation around the internal armed conflict was a contribution to a task that was just beginning and which was highly controversial” (Simón, 2003, p. 190). Civil society support for accountability was also weaker in Guatemala than it was in El Salvador, perhaps in part because repression during the civil war had been so severe that “it eliminated or silenced the human rights movement” (Sikkink, 2011, p. 81).

Our expectation regarding the possible effect of transitional justice on Court decisions is that the Court is likely to rule more narrowly when transitional justice mechanisms were externally driven (El Salvador and Guatemala) and more expansively when transitional justice was a more organic part of the transition to democracy.

In deciding amnesty cases, the Court will also take into account the origins and nature of the amnesty law. There have been three types of amnesties in the Americas. Self-amnesties are laws decreed by the rights-violating regime before leaving power. The goal of self-amnesties is to preclude post-transition investigations and prosecutions of officials who participated in human rights abuses. Examples include the 1978 amnesty law put in place by the military government of August Pinochet in Chile and the amnesty decreed by the government of Alberto Fujimori in Peru in 1995. A second type of amnesty is one that
is *negotiated* between the rights-abusing government and the opposition in order to make possible a transition toward democratic governance. The rights abusing government insists on amnesty for its members and agents as a condition for leaving power, and the opposition groups or parties agree in order to achieve a democratic transition and for the sake of post-transition stability. Such transitions are often called “pacted” or “negotiated.” The only instance of a negotiated amnesty among the cases in our analysis is the one implemented in Uruguay in 1985 and confirmed in two subsequent referenda (1989 and 2009).

The third type of transition is enacted as part of a civil war peace settlement. A civil war amnesty resembles a negotiated amnesty in that it is part of a settlement ending a national crisis but is unlike a negotiated amnesty in that it does not imply or require that the regime in power (and responsible for the human rights violations) leave power. Civil war settlements can also bear the imprimatur of an outside party that has helped to mediate the end of the civil war, including the amnesty. In both of the *civil war amnesties* included in this study (El Salvador in 1993 and Guatemala in 1996), the amnesty laws were part of peace settlements brokered by the United Nations.

We argue that the Court will take into account the nature of the amnesty laws and their current (at the time of the Court’s decision) role in domestic politics. Self-amnesties will be seen as the least legitimate and therefore the Court’s decisions will be the most assertive in scope (broad or expansive). The Court, however, will be more cautious with negotiated amnesties, implemented as part of a negotiated democratic transition or civil war settlement. Such amnesties can be seen by domestic actors on both sides of the former conflict as crucial to maintaining domestic peace and stability. Decisions in these instances
are more likely to be specific to the case. The Court might be especially reluctant to condemn amnesties implemented as part of peace arrangements brokered by the United Nations. However, with the passage of time, if there is evidence that the political power of the rights-abusing groups or parties has diminished (alternance in power, transitional justice mechanisms) then the Court could conclude that the negotiated amnesties are no longer crucial to domestic order and stability and a more expansive decision may be possible.

3. Precedent

Judges will prefer to decide new cases in a way that is consistent with past rulings, to the extent possible. Though there is no rule of *stare decisis* in international courts – decisions are binding only for the case at hand and with respect to the parties to it – judges inherently favor consistency. It is vital to judges’ legitimacy that those under their jurisdiction see that like cases are decided alike. Consistency allows judges to void the perception that they decide cases arbitrarily, or in accordance with personal or political interests. Judges are therefore motivated to provide precedent-based reasons for their decisions (Shapiro, 1972, 1981). In fact, as Stone Sweet and Keller argue, no court can have an influence on its legal and political context without (among other characteristics) a “minimally robust conception of precedent” (Stone Sweet & Keller, 2008, p. 8). The ECtHR, for instance, “relies on precedent-based rationales” in order to guide the arguments of claimants and states, to provide rationales for its rulings, and to encourage state compliance with decisions (Stone Sweet & Keller, 2008, p. 14).
We assume that the Inter-American Court will prefer to rule consistently with its own prior decisions, but that this preference will not always lead to a ratcheting jurisprudence in which each decision is at least as expansive as the one before it. Rather, the Court will rule less assertively than precedent might suggest when domestic contexts indicate a need for restraint. Thus, though past decisions do not establish binding precedent, once the Court has established a legal norm or principle, it is likely to apply it in subsequent cases, absent compelling reasons that would distinguish a case from its predecessors.

To summarize, our arguments lead to a set of propositions on now the Commission and the Court are likely to act with respect to cases involving national amnesty laws:

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

**Proposition 2 (timing):** The Commission is more likely to submit an application to the Court if the domestic political context is favorable to prosecuting past rights abuses, specifically, if one or both of the following has occurred:

- **Proposition 2a (timing):** an alternance in power, or

- **Proposition 2b (timing):** domestic transitional justice mechanisms.

**Proposition 3 (scope):** The Court is likely to rule more expansively on an amnesty question if the respondent state has experienced an alternance in power.
Proposition 4 (scope): The Court is likely to rule more narrowly when the transitional justice process in the respondent state was externally driven and more expansively when transitional justice was an organic part of the national transition.

Proposition 5 (scope): The Court is likely to rule more narrowly on negotiated amnesties and more expansively on self-amnesties.

Proposition 6 (precedent): Decisions will be at least as expansive as immediately preceding ones, unless the domestic politico-legal context appears significantly less favorable.

The Commission, the Court, and the amnesty cases

In this section, we compare our propositions to the empirical record through an overview of the 14 cases in which the Court addressed a respondent state’s amnesty law in the context of alleged grave violations of Convention rights. In each of the 14 cases, state actors were accused of violations of basic physical integrity rights through enforced disappearances, illegal detentions, or extra-judicial killings. In each case, the respondent state had failed to investigate the alleged crimes, prosecute those responsible, and provide to the families an accounting of the whereabouts and fate of the victims.²

Table 1 presents a summary of the timing of the referral of cases by the Commission to the Court. The table reports the number of cases that are consistent with our propositions, as a proportion of the relevant cases. The number of relevant cases for each proposition is less than 14. For example, Proposition 1 (cases are submitted after transitions) is irrelevant in the eight cases in which the original petition was submitted to

² We exclude the case of Castillo Páez v. Peru because the Commission submitted it to the Court before the government of Peru enacted the amnesty law, so the amnesty did not figure in the charges nor the decision.
the Commission after the transition had already occurred. The table displays a half value (.5). The half value refers to the Barrios Altos case from Peru. The Commission referred Barrios Altos to the Court as the transition from the authoritarian regime of Alberto

Fujimori was unfolding. The data in the table is consistent with our timing propositions: the Commission tends to refer cases to the Court after political transitions, alternance in power, and transitional justice processes have occurred.

Table 1: Timing and the Inter-American Commission

<table>
<thead>
<tr>
<th>Commission submitted case to Court:</th>
<th>Number / Possible</th>
</tr>
</thead>
<tbody>
<tr>
<td>After transition from crisis (Proposition 1)</td>
<td>5.5 / 6</td>
</tr>
<tr>
<td>After alternance in power (Proposition 2a)</td>
<td>7.5 / 12</td>
</tr>
<tr>
<td>After transitional justice (Proposition 2b)</td>
<td>11.5 / 12</td>
</tr>
</tbody>
</table>

Note: Two cases (Almonacid Arellano v. Chile and Moiwana Community v. Suriname) are irrelevant to propositions 2a and 2b (alternance of governing parties and transitional justice mechanisms) because the Commission received the petition in each case after both alternance and transitional justice had already taken place.

Table 2 summarizes the scope of the Court’s rulings in amnesty cases with respect to prior alternance in power. Consistent with Proposition 3, the Court rules more expansively in cases when the respondent state has already undergone alternance in power, that is, when opposition parties have won at least one post-transition national election. In fact, in all four instances in which alternance in power had not occurred, the Court’s decision with respect to amnesty was narrow, ruling only that the amnesty law could not be used to impede investigation and prosecution of the rights violations.
Proposition 4 suggested that the Court would rule more expansively when transitional justice processes were organic (domestically driven) and more narrowly when transitional justice was imposed by outside actors (in El Salvador and Guatemala, the U.N.-led peace settlements). The information in table 3 is consistent with that surmise. The Court may have been more reluctant to rule assertively on the Salvadoran and Guatemalan amnesty laws because the transitional justice processes that had taken place clearly did not reflect broad national support for ending impunity. In fact, the parties that were tied to the human rights violations remained in power and rejected the truth commission reports.

Table 2: Scope of Court decision with and without prior alternance

<table>
<thead>
<tr>
<th>Court ruling after alternance in power?</th>
<th>Specific</th>
<th>Broad</th>
<th>Expansive</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Yes</td>
<td>2</td>
<td>2</td>
<td>5</td>
</tr>
</tbody>
</table>

Note: Excludes Castillo Páez because the case was submitted to the Court before the amnesty law and Contreras because the Court ruled that the amnesty law had not been applied in that case.
Table 3: Scope of Court decisions after organic and external transitional justice

<table>
<thead>
<tr>
<th>Court ruling after . . .</th>
<th>Specific</th>
<th>Broad</th>
<th>Expansive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organic transitional justice</td>
<td>0</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>External transitional justice</td>
<td>5</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>

Note: "Organic" includes TJ processes in Brazil, Chile, Peru, and Uruguay. "External" includes El Salvador and Guatemala.

Figure 3 depicts relationships that are relevant to Propositions 5 and 6, concerning the types of amnesties and the role of precedent. We hypothesized that the Court would be inclined to rule expansively on self-amnesties and more narrowly on negotiated amnesties. The Court would be more inclined to grant some deference to negotiated amnesties on legitimacy grounds and on political grounds. Amnesties imposed by outgoing rights violators to shield themselves from accountability are clearly less legitimate than amnesties that have been accepted, through bargaining, by a broader range of groups and actors. Negotiated amnesties are also more likely to be part of delicate bargains that bring about transitions from authoritarian rule. If ending amnesty could destabilize post-transition political arrangements, the Court would be more likely to rule more narrowly.

The picture in figure 3 is consistent with Proposition 5. The Court has ruled more expansively on self-amnesties than it has on negotiated amnesties (the blue line (negotiated amnesties) is always above the red line (self-amnesties)). All of the decisions on self-amnesties are either broad or expansive. The pattern is also consistent with Proposition 6, as – with only one exception – every decision is at least as expansive in scope
as the immediately preceding one. The sole exception is the decision in the *Almonacid* case from Chile.

**Figure 3: Scope of Court decisions by type of amnesty and flow of jurisprudence**

![Diagram showing the scope of Court decisions by type of amnesty and flow of jurisprudence](image_url)

Though the Court’s amnesty decision-making is broadly congruent with our expectations regarding amnesty types and precedent, three cases merit a closer look: *Massacre El Mozote, Almonacid Arellano v. Chile*, and *Gelman v. Uruguay*. In *Massacre El Mozote*, the Court for the first time issued a broad decision in a case involving a negotiated (civil war) amnesty. Its previous decisions in similar cases had all been specific. But the political context in *El Mozote* differed from those of its predecessors in one key way: El Salvador had in the interim experienced an alternance in power. In March 2003 the
opposition party, FMLN, became the largest single party in the National Assembly. Some of the party leaders took a critical stance against the amnesty laws (Collins 2010, 171). The victory of the FMLN candidate Mauricio Funes in the presidential election of 2009 marked a turning point in El Salvador’s government stance towards human rights violations. During a ceremony to commemorate the eighteenth anniversary of the signature of the Peace Accords in El Salvador, President Funes accepted the state’s responsibility for the massacre at El Mozote. The government acknowledged its obligation to clarify the facts and to prosecute those responsible and recognized that it had to adapt its domestic laws (El Mozote v. El Salvador, Judgment, 25 October 2012, para.19). Finally, on 16 January 2012 the President gave a speech in El Mozote in which he acknowledged the numerous acts of brutality and human rights violations committed and apologized on behalf of the State of El Salvador. The repeal of the amnesty laws seemed a possibility for the first time. The Court issued its decision in *El Mozote* the following October, ruling that the amnesty could not impede the investigation and prosecution of those responsible for the massacre in *El Mozote* or in any similar case. The decision in *El Mozote* is thus consistent with Proposition 3 – the Court issued a broad amnesty ruling on a negotiated (civil war) amnesty only after the respondent country had undergone an alternance in power.

The decision in *Almonacid Arellano* diverged from the ruling in its most similar predecessor, *Barrios Altos v. Peru*. In *Barrios Altos*, the Court had issued the most expansive ruling possible regarding a national amnesty law: not only did the Court rule that the amnesty provisions enacted in Peru under Fujimori were “incompatible with the American Convention” but also that they lacked “legal effect” (*Barrios Altos*, Judgment, 14 March 2001, para. 51). Chile’s amnesty law was, like Peru’s, a self-amnesty. Yet five years after
the *Barrios Altos* judgment, the Court issued a less assertive decision in *Almonacid*, ruling that Chile’s amnesty law could not be used to obstruct investigation and prosecution of the crimes committed in *Almonacid* or in any similar case. Our proposition 6 suggested that each decision would be at least as expansive as the one before. Why, then, was the decision in *Almonacid* less expansive than the one in *Barrios Altos*? The explanation lies in the domestic political context of Chile and the state’s arguments regarding its amnesty law in *Almonacid*. In its application to the Court, the Commission noted that the case represented “an opportunity to develop Inter-American jurisprudence on the incompatibility of self-amnesty laws with the Convention” (Comisión Interamericana de Derechos Humanos, 2005, p. para. 4). The Commission asked the Court to apply the criteria developed in *Barrios Altos*, declare that the Chilean amnesty law “lacked legal effects,” and order Chile to repeal the self-amnesty law (Comisión Interamericana de Derechos Humanos, 2005, p. para. 4 and 7). Chile, however, in its submissions to the Court, vigorously opposed any ruling on the legality of the amnesty law. Chile emphasized three key points.

First, Chile pointed out that its Human Rights Program, within the Interior Ministry, was created to assist victims of human rights abuses and their families to gain access to justice. The Human Rights Program, in its work before Chilean courts, had without exception opposed the application of the amnesty law to claims brought by victims or their families (Chile, 2005, pp. 10-11). Second, the submissions argued that Chilean courts had consistently refused to allow the amnesty law to block human rights claims from victims of the military regime. In fact, the Supreme Court had voided all decisions dismissing claims on the basis of the amnesty law (Chile, 2005, pp. 16-17). The jurisprudence of Chilean
courts had led to the “juridical inefficacy” of the amnesty law, which had not posed an obstacle to the investigation of claims of human rights abuses, or to the prosecution and punishment of those responsible (Chile, 2005, p. 14; M. d. R. E. Chile, 2006, pp. 18, 21-26). The bottom line was that “the judicial and practical effects of the Decree Law have been annulled” (Chile, 2005, p. 10).

Finally, Chile connected its own progress in eliminating the effects of the amnesty law to the broader “frame of a process of permanent evolution . . . that has advanced as the Chilean transition to democracy has also been consolidating” (Chile, 2005, p. 10). In other words, Chile’s domestic efforts to nullify the effects of the amnesty law, without actually removing it from the books, were part of the country’s democratic transition, which the Court should not tinker with.

The Court would also be aware that two Chilean truth commissions had already completed their work, most recently in 2003. In addition, recent governments of Chile, all from the center-left Concertación, had also demonstrated a strong commitment to justice and reparations for the families of the victims of the military regime. The Court could reasonably conclude that its objective – to render the amnesty law inoperable – was in fact being achieved in good faith by domestic Chilean means. The Court could, then, accede to Chile’s vigorous request that it not rule directly on the amnesty law and, instead, reaffirm that the law could not be applied to the Almonacid case or others like it. This would explain why the scope of the decision in Almonacid was not as expansive as the ruling in Barrios Altos. That Almonacid was seen as an exception is also evidenced by the Court’s decision in the same year (2006) in another case from Peru, La Cantuta, in which the Court reaffirmed its decision in Barrios Altos nullifying Peru’s amnesty.
Gelman v. Uruguay is unique in that it is the sole case in which the amnesty in question was part of a negotiated political transition. The Court ruled expansively in Gelman, in line with its jurisprudence in the self-amnesty cases but more aggressively than it had ruled in the civil war negotiated amnesties. Not only was the Uruguayan amnesty part of the 1985 negotiated transition from authoritarian rule to democracy, the amnesty law had been approved by Uruguayan voters in two national referenda held twenty years apart, in 1989 and 2009. Why, then, did the Court void Uruguay's amnesty law, intervening in what could be seen as part of a delicate political bargain underlying the country’s transition to democracy? The answer, we suggest, is that the Court had reasons to conclude that Uruguay's transition was no longer very delicate and that there could be broad domestic support for nullifying the amnesty.

When the Court received the Gelman case in January 2010, Uruguay was marking the twenty-fifth year since its democratic transition. The maturing of Uruguay's democracy could also be seen in the 2004 victory of the Frente Amplio in national elections, the first alternance in power since the transition. Partido Colorado governments from 1985 to 2005 had “sponsored policies of silence and oblivion . . . calling for forgetting past divisions” (Lessa, 2012, p. 130). The Frente Amplio government of President Tabaré Vásquez immediately undertook measures to end impunity, and the election of a second Frente Amplio president, José Mujica, in 2009 indicated that those policies would continue. In addition, Uruguayan courts seemed more inclined than previously to pursue human rights cases from the authoritarian years. In October 2009, the Supreme Court of Justice declared key portions of the amnesty law unconstitutional and ruled it inapplicable to the case at hand. A year later, the Supreme Court of Justice issued another ruling reiterating the
unconstitutionality of the Expiry Law (Gelman v. Uruguay, Judgment, 24 February 2011, para. 150). And in February 2011 the Supreme Court declared the amnesty law void for twenty-five additional cases (Buriano, 2011, p. 24). During this same period, former
dictator Jose María Bordaberry was convicted (March 2010) for the 1976 assassination of
two Uruguayan legislators, nine disappearances, and attacking the constitution (Lessa 2012).

Despite the 2009 referendum that failed to revoke the amnesty law, the Inter-
American Court in 2010 could see in Uruguay’s domestic context numerous reasons why
the time might be right to nullify that law. In addition, the Court’s most recent amnesty
decision was its 2010 ruling in Gomes Lund v. Brazil, in which the Court nullified Brazil’s
self-amnesty as incompatible with the American Convention. In these circumstances, the
Court might well have seen Gelman as more similar to the Brazilian case than to the Central
American civil war amnesty cases, in which it had ruled (up to that point) narrowly.

Conclusion

Trustee courts, like the Inter-American Court of Human Rights, serve not the immediate
preferences of member-state principals but rather the norms and purposes of the
underlying regime. We began with the assumption that the Inter-American Commission
and the Inter-American Court both see their fundamental mission as expanding the
fulfillment of human rights in the Americas. But we also argued that the Commission and
the Court – like other courts – take into account their political environment, both to
maintain their own legitimacy and to enhance the likelihood of broad acceptance of their
judgments. Specifically, we proposed that, though their preference would always be to rule
as expansively as possible in support of human rights, the Commission and the Court can modulate the timing of their actions and the scope of their decisions (respectively) in light of the domestic context in respondent states. Actors in the Inter-American System will be inclined to uphold rights by nullifying amnesty laws, but will also consider that such laws are often entangled in delicate domestic political conflicts and compromises.

The evidence is generally consistent with our propositions regarding the timing of Commission decisions to send cases to the Court. The Commission submitted amnesty cases to the Court after domestic transitions had taken place in five (and a half, with Barrios Altos being a borderline case) out of six instances, and after domestic transitional justice processes in 11.5 out of twelve. The evidence was weaker with respect to alternance in power: in 7.5 out of twelve cases, referral to the Court came after opposition parties had won at least one election. Of the four cases referred to the Court before alternance had occurred, three were from Guatemala and one was from El Salvador – all in contexts in which the parties associated with the violations were firmly entrenched in power. In all four cases, the Court ruled narrowly.

With respect to the scope of final decisions, the Court also behaved as if it were taking into account domestic politico-legal contexts, as expected. The Court had a strong tendency to rule more expansively in cases when the respondent state had already undergone an alternance in power and in states where the transitional justice process was organic (domestically driven rather than instigated by the United Nations). The Court also made a clear distinction between self-amnesties and negotiated amnesties. In all but one (four out of five) of the self-amnesty cases, the decision was expansive, and the exception was broad. In five of the six (civil war) negotiated amnesties, the decision was specific, and
the exception – the last of the decisions – was broad, after an alternance had taken place in El Salvador.

Finally, we argued that the Court decisions would tend to be at least as expansive as the immediately preceding one. This was true within categories of cases (self-amnesties vs. negotiated civil war amnesties) with only one exception, the Almonacid case, in which Chile argued vigorously that through administrative and judicial means it had already rendered the amnesty law ineffectual.

To be clear: we have not argued that the Commission and the Court explicitly or consciously make decisions on the basis of politics rather than law. Rather, we have argued: (1) that both the Commission and the Court act on the basis of their commitment to expanding the reach of human rights law in the Americas, and (2) that they can adjust the timing and scope of their decisions in light of domestic contexts in the respondent states. We do not claim that the Commissioners and the judges of the Court in fact made decisions on the basis of the considerations examined in this study. Nor do we argue that the Commission and the Court are always correct in their assessments of domestic politico-legal contexts. In fact, given significant resistance in Brazil and Uruguay to IACtHR decisions nullifying amnesty laws, the Court may have overestimated the readiness of the domestic environment for such rulings. Or it read the domestic contexts accurately and decided it was time to push the jurisprudence anyway. Country-specific research could help answer those questions.

We claim only that, whatever the decision-making processes in the two institutions, the historical record is broadly consistent with our arguments. It remains to be seen if this pattern of behavior characterizes substantive legal domains beyond amnesty laws.
References


